two of the three members of an interviewing panel recommended parole[77], but the Commissioner of the INS declined to follow the recommendation based on his uncontested disciplinary record during his detention.[78] Mayet Palma filed a petition for habeas corpus, which was granted by the District Court on December 29, 1981.[79] He was ordered released to a family member in New York the following day. That judgement was stayed pending an expedited appeal to the Fourth Circuit Court of Appeals.[80]

On appeal, the Court held that Mayet Palma had not been denied due process under the Fifth Amendment, so his continued detention was not arbitrary or an abuse of the Attorney General's discretion. Because he was excludable, he did not have the same constitutional rights as someone who had actually been admitted to the U.S. Therefore, "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.[81] So, if Congress delegated authority to the Attorney General to parole immigrants into the U.S., whatever process by which he chose to do so should be given great deference and deemed to be due process. The Court also reversed an argument accepted by the District Court below in stating that, although Congress had not "expressly granted the Attorney General authority to detain an excluded alien indefinitely, it [had] not expressly denied this authority" either, even when the when it was impossible to return them to their home country and the Attorney General found them ineligible for parole.[82] This mean the Attorney General had "implicit authority to detain rather than parole"

[77] To be recommended for parole, the panel must determine that "(1) the detainee is presently a nonviolent person, (2) he is likely to remain nonviolent, and (3) he is unlikely to commit any criminal offenses following his release." *Id.* at 102.
[78] In the approximately 18 months he was detained, Mayet Palma set ten fires, assaulted prison staff and other inmates, threatened staff members with a razor blade, stollen clothes from other inmates, and received a poor psychiatric evaluation. *Id.*
[79] *Id.* at 103.
[80] *Id.*
[81] *Knauff v. Shaughnessy,* 338 U.S. 537, 544 (1950).
[82] *Palma v. Verdeyen* at 104.

an excluded individual who was unable to be returned to their country of origin, and there was no abuse of discretion.[83]

Mayet Palma's writ of habeas corpus was revoked.

Alexis Barrera-Echavarria: Discretion vs. Punishment

Alexis Barrera-Echavarria was incarcerated in Cuba on account of a theft charge in December 1979. While awaiting trial, he was "sent" to the U.S. as part of the Mariel boatlift, arriving in Florida on May 29, 1980.[84] He was paroled into the U.S. a few months later. In March 1983, he pleaded guilty to two counts of armed robbery with a firearm and a state court ordered him to serve two concurrent 230-day jail sentences.[85] He later served two years in Florida state prison for burglary and petit theft.[86] INS subsequently revoked his parole, and he was transferred to the Atlanta Penitentiary where he was detained with hundreds of other Cuban refugees.[87] In 1985, he was deemed excludable and ordered to be deported as a result of his criminal history in Cuba, but the Cuban government refused to readmit any of the Marielitos.[88] No third country would take them either.[89]

Under another new set of administrative procedures known as the Cuban Review Plan,[90] INS was required to reevaluate parole possibilities for each Cuban detainee annually. Barrera-Echavarria was denied release several times before he was briefly paroled in 1992, when he stayed at a halfway house in Los Angeles for six months.[91] His parole was revoked again after he allegedly sexually assaulted another resident at the halfway house, though the criminal charges

[83] *Palma v. Verdeyen* at 105.
[84] *Barrera-Echavarria v. Rison,* 44 F.3d 1441, 1442 (9th Cir. 1995).
[85] *Id.* at 1444.
[86] *Id.* at 1443.
[87] *Id.* at 1444.
[88] *Id.* at 1443.
[89] *Id.*
[90] 8 C.F.R. § 212.12-13.
[91] *Id.* at 1444.

were later dropped.[92] Aside from this six-month period, Barrera-Echavarria was detained in a number of high security federal prisons for over 8 years, "subject to all of the deprivations inflicted by law on those found guilty of federal crimes," surrounded by dangerous convicted felons.[93]

In 1993, Judge David Kenyon of the U.S. District Court for the Central District of California, granted Barrera-Echevarria's petition for a writ of habeas corpus, finding that his prolonged detention had become a form of punishment in violation of the constitution.[94] The grant was upheld by a panel of the Ninth Circuit Court of Appeals in March 1994.[95] The Court agreed that all of the restrictions on Barrera-Echavarria's liberty as a person detained in a federal prison – his inability to move freely, to spend time with people he chose, to eat what he wanted, and so on – was in excess of a normal deprivation by the government such that his confinement was punishment.[96] Like Judge Shoob in Atlanta, the Panel also rejected the entry fiction: "The deprivation has gone on for over eight years. It can no longer be fictionally characterized as exclusion from the country. It is imprisonment within the country. We need not draw the line exactly as to when attempted exclusion becomes imprisonment. Over eight years of prison are too many. Over eight years of such deprivations constitutes punishment."[97] The Panel acknowledged that the government has a duty of protection, but, as Barrera-Echavarria had not been convicted of a crime since 1985, continuing to detain him betrayed that duty: "It is dangerous for everyone's liberty to suppose that the government has a duty and a right to protect

[92] *Id.*
[93] *Barrera-Echavarria v. Rison,* 21 F.3d 314, 316 (9th Cir. 1994).
[94] *Id.* at 317.
[95] *Id.* at 319.
[96] *Id.* at 317.
[97] *Id.*

its citizens by the indefinite imprisonment of persons that the government *thinks* are dangerous."[98]

Because of the lack of diplomatic relations with Cuba at the time, there was no way for Barrera-Echavarria to actually be deported from the U.S., so despite his annual review for parole, his detention was indefinite in effect. However, the government argued that if excludable noncitizens who were unable to be returned to their country had to be released on parole, that would incentivize dictators to send their "undesirables" to the U.S., knowing that we would have to find a place for them here.[99] The Panel found this unpersuasive as well, simply writing it off as a false premise and a highly unlikely outcome if the single petitioner in this case was granted habeas relief.[100]

In sum, the Panel for the Ninth Circuit upheld the grant of a writ of habeas corpus because, "It is illegitimate to rely on a record of parole denials to prove unfitness for freedom when the basis of such denials is insufficient to justify punitive imprisonment…It is absurd to analyze as a reward for Cuba the release from indefinite imprisonment of a stranger on our shores. It is sophistry to say incarceration for over eight years in penitentiaries is preventative, not punitive."[101]

But Barrera-Echavarria's plight does not end there. The government moved for rehearing en banc, which was granted on September 9, 1994.[102] The full Court for the Ninth Circuit reversed the Panel decision on several grounds. First, because Congress had amended portions of the relevant statute between 1980 and 1995 without amending the provision about the Attorney General's parole discretion, it reasoned that Congress agreed with the agency's interpretation of

[98] *Id.* at 318.
[99] *Id.*
[100] *Id.*
[101] *Id.* at 319.
[102] *Barrera-Echavarria v. Rison,* 35 F.3d 436 (9th Cir. 1994).

the statute. Furthermore, "[b]ecause the Attorney General's construction of the relevant statutory provisions [over the last 14 years] is reasonable and Congress has not acted to restrict detention authority despite being well aware of executive practice, we have little difficulty concluding that Barrera's continued detention is authorized by statute.[103] Congress must have intended that detention be the "default" choice for excludable immigrants and parole be just a discretionary exception because that is what the Attorney General had done for years without any correction from Congress.

The full Court also reinforced the existence of the entry fiction, holding that because Barrera-Echavarria was excludable and was never technically admitted into the U.S., he had no constitutional right to parole and "no right to be free from detention pending his deportation."[104] Therefore, the punishment argument relied on by the Panel was inapplicable and irrelevant.[105] And finally, Barrera-Echavarria's detention is not permanent or indefinite because his case is reviewed annually in accordance with the updated Cuban Review Plan to determine whether he meets the criteria for granting parole.[106] So, even though there is no practical means of returning him to Cuba, his detention is not considered indefinite, and is therefore well within the confines of the limited rights afforded to excludable immigrants, and his petition for habeas corpus should be denied.[107]

Conclusion

In 1986, the Supreme Court finally weighed in – they denied a petition for certiorari in the case of Garcia-Mir and the other Cuban detainees in the Atlanta Penitentiary, effectively affirming the validity and constitutionality of indefinitely detaining excludable immigrants.[108]

[103] *Barrera-Echavarria v. Rison,* 44 F.3d 1441, 1445 (9th Cir. 1995).
[104] *Id.* at 1448.
[105] *Id.*
[106] *Id.* at 1450.
[107] *Id.*
[108] *Ferrer-Mazorra v. Meese,* 479 U.S. 889 (1986).

Some determined advocates kept petitioning various courts for the release of the detained Mariel Cubans. Some tried new approaches and created novel legal theories after more time had passed, as in the case of Barrera-Echavarria. Few cases were successful.

In recent years, the plight of the indefinitely detained Mariel Cubans has been overshadowed by other habeas cases brought by immigrants and noncitizens, such as *Zadvydas v. Davis*[109] and the Guantanamo Bay prisoner litigation. But these immigrants – these *people* – who were invited into the United States "with an open heart and open arms" by the President himself were imprisoned for *years of their lives* simply because they lacked proper documentation when they arrived on our shores. Their stories should never be forgotten.

[109] 533 U.S. 678 (2001).

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Writing Sample

This writing sample is a motion in opposition to suppression of a defendant's statement in a mock criminal case. The motion was written as part of a seminar-style class at the University of Minnesota Law School called Criminal Procedure: Adjudication.

In this motion, I researched and analyzed statutes and case law to support a recommendation that the mock Court deny a defendant's motion to suppress his statement to law enforcement. This sample represents my best work.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,
Plaintiff Case No. **CR-YR 1-MJ-104**

vs.

DALE COOK,
Defendant.

MOTION IN OPPOSITION TO SUPPRESSION OF DEFENDANT'S STATEMENT

Defendant Dale Cook has moved to suppress his statements made in a custodial interview with FBI Special Agent Dana Folk on December 3, YR-1, due to the amount of time that elapsed between his arrest and his presentment before a Magistrate Judge. However, Defendant was not held for the purpose of a "secret interrogation" in violation of the longstanding *McNabb-Mallory* rule, nor was the delay between arrest and presentment unreasonable in violation of Federal Rule of Criminal Procedure 5(a). Therefore, Defendant's motion to suppress should be denied.

FACTS

Mr. Dale Cook (Defendant) was arrested in his home on the Red Lake Indian Reservation on December 1, YR-1 after Red Lake Police Officer J.D. Parker witnessed him shoot and kill his spouse, Morgan Cook. Compl. Aff. of Probable Cause. Both Defendant and Morgan Cook are enrolled members of the Red Lake Band of Chippewa Indians. Cook Indictment. Officer Parker transported Defendant to the Red Lake Detention Center at 9:45pm that evening. Red Lake PD CAPRS, Supp. 1.

The following morning, December 2, YR-1, Officer Parker attempted to interview Defendant at the detention center at 8:00am. *Id,* Supp. 2. Officer Parker advised Defendant of his *Miranda* rights, Defendant chose to remain silent, and Officer Parker left him alone "to think"

until approximately 11:00am. *Id,* Supp. 2. Defendant again remained silent and was subsequently left alone until his lunch arrived at approximately 12:30pm. *Id,* Supp. 2. As the location of the murder places it under the Major Crimes Act, Sergeant Belieu and Officer Parker called Special Agent Dana Folk of the FBI at 1:15pm. Agent Folk agreed to come interview Defendant but advised that, given the four hour drive from Minneapolis to Red Lake, she would not be available until the next morning. *Id,* Supp. 2. Defendant thus spent another night at the Red Lake Detention Center.

On December 3, YR-1, Special Agent Folk arrived to interview Defendant at 8:00am. Cook FD-302. Agent Folk again advised Defendant of his *Miranda* rights. Defendant quickly waived his rights and immediately started talking before any questions were asked. *Id.* Defendant freely answered Agent Folk's follow-up questions and even "appeared anxious to talk". *Id.* The interview concluded just before 9:00am. *Id.* The nearest Magistrate Judge, located thirty minutes away in Bemidji, had a prior commitment at 10:00am, so law enforcement decided to transport Defendant to the next-closest Magistrate Judge in Minneapolis for an initial hearing. *Id.* After the four-hour drive, Defendant appeared before U.S. Magistrate Judge Becky Thorsen in Minneapolis at 3:30pm on December 3, YR-1. Cook Initial Appearance Mins.

Defendant has subsequently been indicted for second degree murder and domestic assault of Morgan Cook in violation of Title 18 United States Code, Sections 1153, 1111, and 113. Cook Indictment.

ARGUMENT

I. Defendant was presented to a Magistrate Judge without unreasonable delay.

Federal Rule of Criminal Procedure 5(a) states: "A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge…unless a

statute provides otherwise." Fed. R. Crim. P. 5(a)(1)(A). Under the doctrine commonly referred to as the *McNabb-Mallory* rule, confessions made while a defendant is detained in violation of the prompt presentment requirement are typically inadmissible. *United States v. Casillas*, 792 F.3d 929 (8th Cir. 2015). Congress further limited this rule in 1968 by enacting 18 U.S.C. § 3501(c). In effect, this means that if a confession occurs more than six hours into detention but before presentment, "the court must decide whether delaying that long was unreasonable or unnecessary under the *McNabb-Mallory* cases, and if it was, the confession is to be suppressed." *Corley v. United States,* 556 U.S. 303, 322, 129 S. Ct. 1558, 173 L. Ed. 2d 443 (2009).

There is no dispute that Defendant Cook's statement was not given within the first six hours of his detention, nor was it given after his initial appearance before a magistrate judge. Therefore, this court must determine whether the delay between arrest and presentment in this case was reasonable in order to determine if the statement is admissible.

II. The nights Defendant spent in detention did not result in unreasonable delay.

Several Circuits have adopted the general rule that overnight delays are typically reasonable if a magistrate judge is not available. *See United States v. Van Poyck,* 77 F.3d 285 (9th Cir. 1996) (stating that overnight delays have regularly been found reasonable); *United States v. Marrero,* 450 F.2d 373 (2d Cir. 1971) (overnight delays are not sinister, so they are not inherently unreasonable); *United States v. McCormick,* 468 F.2d 68 (10th Cir. 1972) (absence of magistrate overnight did not result in unreasonable delay).

Defendant was arrested late at night on December 1, YR-1. No magistrate judge was readily available to see him for an initial appearance after he was detained at 9:45pm that night. It was both reasonable and in line with standard practice to wait until normal business hours to present Defendant to the court. Similarly, since the delay caused by waiting for Federal Agent Folk to

arrive was also reasonable (as explained below), the second night that Defendant spent in detention should be considered reasonable.

III. Accommodating the travel needs of a federal agent was reasonable and did not result in unnecessary delay of presentment.

While the Major Crimes Act gives federal authorities jurisdiction over offenses committed by or against native peoples in Indian Country, it is well known and widely accepted that local law enforcement may begin investigating such crimes before calling in the FBI. The Red Lake Police Department began investigating Morgan Cook's murder just hours after her death by allowing Officer Parker to interview Defendant. At 8:00am on December 2, YR-1, Officer Parker advised Defendant of his *Miranda* rights and attempted to ask him some questions, which Defendant chose not to answer. Officers then left Defendant alone for a time to consider whether he would like to provide a statement or hire an attorney, which is also in line with standard police interview procedure.

Shortly after noon, local law enforcement took the next step in the investigation of contacting the FBI. At that time, they were told that no agents would be able to speak with Defendant until the following morning due to the time it takes to travel from Minneapolis to Red Lake (approx.. four hours by car). Agent Folk arrived late than evening and conducted the interview with Defendant first thing the next morning.

Defendant argues that local law enforcement could have proceeded with presentment the afternoon of December 2, YR-1 while they waited for Agent Folk to arrive. While it is possible that local law enforcement *could* have taken this step, it is not unreasonable that they instead chose to wait for Agent Folk to arrive. Because of the federal nature of the crime and jurisdiction in this case, Red Lake Police believed a federal agent should write the complaint required to

initiate presentment – something she could not do before arriving in Red Lake. Local law enforcement made a judgement call to wait for assistance from the FBI which did result in a slightly longer delay in presentment. However, this decision did not result in unnecessary delay.

IV. The delay in transporting Defendant to the nearest available magistrate judge in Minneapolis was reasonable.

Agent Folk arrived at the Red Lake Detention Center as soon as possible – 8:00am on December 3, YR-1. She met briefly with Defendant, at which time he was read and waived *Miranda* and provided a voluntary statement. Agent Folk and Red Lake Police then immediately prepared to present Defendant before a magistrate judge. When they called ahead to the Bemidji Courthouse, they learned that the part-time magistrate judge there had a prior engagement that morning at 10:00am. As it was already after 9:00am by this point, law enforcement worried that they wouldn't be able to make it to the Courthouse in time to be seen by the magistrate judge before his next appointment. Thus, they decided to take Defendant to the next-closest magistrate judge located in Minneapolis.

Courts have generally recognized that the time and distance it takes to reach the nearest magistrate judge should not be considered an unreasonable delay. *E.g., United States v. Boche-Perez,* 755 F.3d 327 (5th Cir. 2014). It takes approximately four hours to drive from Red Lake to Minneapolis. There is no faster route, nor is there a magistrate judge located closer to Red Lake than Minneapolis (other than in Bemidji). Agent Folk quickly wrote the complaint alleging that Defendant had murdered Morgan Cook, then drove him to Minneapolis. Defendant's initial appearance took place at 3:30pm that afternoon, which was the earliest possible opportunity given travel time and the availability of the local magistrate judge, the Honorable Becky

Thorsen. Given that there was no closer magistrate judge who could see Defendant any sooner, transporting Defendant to Minneapolis did not result in unreasonable delay.

V. Defendant's statement was given knowingly and voluntarily after he was properly apprised of his rights.

At the earliest opportunity, Special Agent Folk met with Defendant who, after again being advised of his rights, immediately started speaking about Morgan Cook's murder before Agent Folk could ask even a single question. Indeed, Agent Folk noted in her report that Defendant "appeared anxious to speak" with her and that he "spoke freely." Cook FD-302. As this was the second time in as many days that Defendant had been advised of his *Miranda* rights, it is clear that he knowingly chose to waive them when he provided this statement, especially after he exercised his right to silence just the day before. There can be no doubt that Defendant's statement was completely voluntary.

Additionally, there was no attempt by law enforcement to coerce a confession from Defendant by hiding him away or secretly interrogating him – the basic principles underlying the *McNabb-Mallory* rule. A series of unavoidable circumstances arose that caused the delay in presentment. There was not collusion by law enforcement to detain Defendant in order to get him to confess. The delay was simply a reasonable, unavoidable set of circumstances that arose following Morgan Cook's murder, which had no bearing on the voluntariness of Defendant's statement to Special Agent Folk.

CONCLUSION

While the time between Defendant's arrest and presentment was longer than the typical safe-harbor six hour rule under *McNabb-Mallory*, the delay was not unreasonable. More than half of the total time Defendant spent in detention occurred overnight when court business is

almost never conducted. The other swath of time was simply a result of the distance between the remote location of the Red Lake Reservation where the murder occurred and the regional FBI headquarters and the nearest available magistrate judge. None of these unforeseen and unintentional circumstances diminish the fact that Defendant gave a voluntary statement to law enforcement before he was promptly presented before a magistrate judge without unreasonable delay.

WHEREFORE, Plaintiff requests this Court DENY Defendant's motion to suppress his statement to Special Agent Dana Folk.

Respectfully submitted,

/s/ *Mallorie Sckerl*

Mallorie Sckerl (Bar ###)
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Applicant Details

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Contact Phone Number	**8319175217**

Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**July 2021**
JD/LLB From	**Stanford University Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011**
Date of JD/LLB	**June 10, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

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

Specialized Work Experience

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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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July 31, 2023

The Honorable James O. Browning
U.S. District Court for the District of New Mexico
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W.
Albuquerque, NM 87102

Dear Judge Browning:

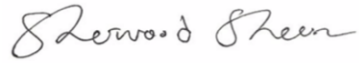
I am a third-year student at Stanford Law School and write to apply to be your law clerk in 2025-26. I apply to you again after hearing from your former clerk, Kevin Homiak, about how vital his clerkship experience was for growing as a trial lawyer.

I want to clerk in the District of New Mexico because my girlfriend, who is a Latina woman, and I enjoy living amongst Hispanic and Latino Americans.

I was born in South Korea and grew up in Kansas on a temporary visa. Eight years ago, I decided to enlist in the U.S. Army to become the first American citizen in my family. My path to law school involved a tremendous amount of luck, and I take my studies seriously because I am mindful of my friends with similar backgrounds who cannot freely pursue their careers for lack of U.S. citizenship.

I have enclosed my resume, law school and undergraduate transcript, writing samples, and list of recommenders and references. I welcome the opportunity to discuss my qualifications further and thank you for your consideration.

Sincerely,



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EDUCATION

Stanford Law School Stanford, CA
Juris Doctor Candidate, expected June 2024
Activities: Asian and Pacific Islander Law Students Association; Stanford Law School Effective Altruism; Older and Wiser Law Students; Stanford Law Veterans Organization

Vanderbilt Law School Nashville, TN
Juris Doctor Candidate, August 2021 – May 2022
Honors: Scholastic Excellence Award for Property (highest grade in class)
Activities: Law Students for Veterans Affairs (1L Rep); Vanderbilt Law Futbol Club (Captain)

The University of Chicago Chicago, IL
Bachelor of Arts, *cum laude,* in Philosophy, June 2021
Activities: Veteran Scholars League (a student organization dedicated to supporting military veterans and their communities)

EXPERIENCE

Wheeler Trigg O'Donnell LLP Denver, CO
Summer Associate June – July 2023; May – July 2022

- Wrote an entire motion to dismiss that included: (1) an aiding and abetting breach of fiduciary duty claim, and (2) a derivative claim for legal malpractice.
- Prepared presentation on Federal Rule of Evidence 702 for American College of Trial Lawyers.
- Analyzed Colorado's economic loss rule's effect on pre-contractual intentional fraud claim.
- Researched case law for cert petition to reinstate midwife's nursing license and to urge the Colorado Supreme Court to recognize separate standard of care governs midwives' practice when they practice in freestanding birth centers.

U.S. Army Medical Department Activity (MEDDAC) Fort Sill, OK
Health Care Specialist September 2018 – September 2019

- Opened the base's clinic at 5 am daily. Performed triage for all soldier-patients.
- Met individually with twenty soldiers to diagnose their issues and addressed any that fell within a medic's scope of practice.
- Discussed plans of care and learned doctors' decision-making process. Carried out their medical orders (e.g., suturing, administering medications) or observed their operations.

2nd Infantry Division, U.S. Army Camp Casey, Korea
Combat Medic and Translator June 2016 – August 2018

- Participated in four joint exercises (two months long each) with the Korean Army as the primary translator for Brigade-level commanders.
- Conducted monthly emergency response and medical evacuation training for Korean Army medics and the U.S. Infantrymen.
- Participated in routine (twice a month) field exercises near or at the Thirty-Eighth Parallel.

ADDITIONAL INFORMATION

Language: Korean (fluent)
Interests: Listening to Chopin's nocturnes; reading the prose of Márquez and Saul Bellow

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Name : Sheen,Sherwood
Student ID : 06638192

Print Date: 07/24/2023

-------- Academic Program --------

Program : Law JD
09/26/2022 : Law (JD)
Plan
Status Active in Program

-------- Transfer Credits --------

Applied Toward Law JD
Transfer Credit from VANDERBILT LAW SCHOOL
Quarter Units Posted: 40.00

Total Quarter Units Posted:

Allowable Transfer Credit subject to restrictions.

-------- Beginning of Academic Record --------

2022-2023 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	2002	CRIMINAL PROCEDURE: INVESTIGATION	4.00	4.00	P	
Instructor:		Weisberg, Robert				
LAW	4005	INTRODUCTION TO INTELLECTUAL PROPERTY	4.00	4.00	P	
Instructor:		Ouellette, Lisa Larrimore				
LAW	7828	TRIAL ADVOCACY WORKSHOP	5.00	5.00	MP	
Instructor:		Kim, Sallie Owens, Traci Peters, Sara M				

LAW TERM UNTS: 13.00 LAW CUM UNTS: 13.00

2022-2023 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	1013	CORPORATIONS	4.00	4.00	P	
Instructor:		Milhaupt, Curtis				
LAW	4018	INTELLECTUAL PROPERTY: INTERNATIONAL AND COMPARATIVE COPYRIGHT	2.00	2.00	P	
Instructor:		Goldstein, Paul L				
LAW	7019	EMPLOYMENT DISCRIMINATION	3.00	3.00	P	
Instructor:		Ford, Richard				
LAW	7038	REMEDIES	3.00	3.00	P	
Instructor:		Lemley, Mark Alan				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 25.00

2022-2023 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	1001	ANTITRUST	4.00	0.00		
Instructor:		Van Schewick, Barbara				
LAW	2403	FEDERAL COURTS	4.00	4.00	P	
Instructor:		Fisher, Jeffrey				
LAW	5013	INTERNATIONAL LAW	4.00	4.00	P	
Instructor:		Weiner, Allen S.				

Completed Spring 2023 Free Speech/Professional Norms Curriculum

LAW TERM UNTS: 8.00 LAW CUM UNTS: 33.00

END OF TRANSCRIPT

Information must be kept confidential and must not be disclosed to other parties without written consent of the student.
Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

Page 1 of 1

UNOFFICIAL DOCUMENT ISSUED TO STUDENT – NOT OFFICIAL

Name : Sherwood Sheen
Student # : 000755322
Birth Date : 01/29

Institution Info: Vanderbilt University

Academic Program(s)

Law J.D.
Law Major

Law Academic Record (4.0 Grade System)

2021 Fall

LAW	6010	**Civil Procedure**	4.00	**A-**	14.80
Instructor:		Suzanna Sherry			
LAW	6020	**Contracts**	4.00	**A-**	14.80
Instructor:		Michael Bressman			
LAW	6040	**Legal Writing I**	2.00	**B**	6.00
Instructor:		Jennifer Swezey Mackenzie Cerwick Amy Enix			
LAW	6060	**Life of the Law**	1.00	**P**	0.00
Instructor:		Timothy Meyer Sara Mayeux			
LAW	6090	**Torts**	4.00	**A-**	14.80
Instructor:		Edward Cheng Samantha Smith			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	15.00	14.00	50.40	3.600
CUMULATIVE:	15.00	14.00	50.40	3.600

2022 Spring

LAW	6030	**Criminal Law**	3.00	**A-**	11.10
Instructor:		Nancy King			
LAW	6050	**Legal Writing II**	2.00	**B-**	5.40
Instructor:		Mackenzie Cerwick Amy Enix			
LAW	6070	**Property**	4.00	**A+**	17.20
Instructor:		Daniel Sharfstein			
LAW	6080	**Regulatory State**	4.00	**A-**	14.80
Instructor:		Edward Rubin			
LAW	7078	**Constitutional Law I**	3.00	**A-**	11.10
Instructor:		Timothy Meyer			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	16.00	16.00	59.60	3.725
CUMULATIVE:	31.00	30.00	110.00	3.666

---------- NO ENTRIES BELOW THIS LINE ----------

UNOFFICIAL TRANSCRIPT

Date: 08/23/2022

THE UNIVERSITY OF CHICAGO

Name: Sherwood Sheen
Student ID: 12232684

Undergraduate

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 08/27/2021
Degree Honors: cum laude
Philosophy (B.A.)

Academic Program History

Program: The College
Start Quarter: Autumn 2019
Current Status: Completed Program
Philosophy (B.A.)

Transfer Credits

Transfer Credit from University of Kansas
Applied Toward Bachelor's Degree

	Earned
Totals:	1500

Beginning of Undergraduate Record

Autumn 2019

Course		Description	Attempted	Earned	Grade
BIOS	10130	Core Biology	100	100	B+
PHSC	11600	Physics for Future Presidents: Fundamental Concepts and Applications	100	100	B+
SOSC	13110	Social Science Inquiry: Formal Theory I	100	100	A-

Winter 2020

Course		Description	Attempted	Earned	Grade
PHIL	21214	The Philosophy of Art	100	100	A
PHIL	21423	Introduction to Marx	100	100	A
PHSC	11700	Physics for Future Presidents: Energy and Sustainability	100	100	A
SOSC	13210	Social Science Inquiry: Formal Theory II	100	100	A-

Spring 2020

Course		Description	Attempted	Earned	Grade
BIOS	12121	Physiology in Extreme Environments	100	100	A
HIST	13700	America in World Civilization-III	100	100	A-
PHIL	27000	History of Philosophy III: Kant and the 19th Century	100	100	A
SOSC	13310	Social Science Inquiry: Formal Theory III	100	100	A
STAT	10001	Collaborative Learning in Statistics 20000	0	0	P
STAT	20000	Elementary Statistics	100	100	A

"COVID-19: A global health emergency beginning in March of 2020 necessitated a move to remote teaching and learning. While learning objectives remained unchanged, assessment methods and student performance may have been impacted."

Summer 2020

Course		Description	Attempted	Earned	Grade
PHIL	20100	Elementary Logic	100	100	P

Autumn 2020

Course		Description	Attempted	Earned	Grade
BIOS	12117	The 3.5 Billion Year History of the Human Body	100	100	A
FNDL	26803	Claire Denis	100	100	P
HIST	13500	America In World Civilization I	100	100	A
PHIL	21506	Memory and Unity of a Person	100	100	P
PHIL	29908	Free Will	100	100	A-

Winter 2021

Course		Description	Attempted	Earned	Grade
CRWR	10206	Beginning Fiction Workshop	100	100	A
PHIL	21499	Philosophy and Philanthropy	100	100	A-
PHIL	25405	Feminist Political Philosophy	100	100	A-
PHIL	26000	History of Philosophy II: Medieval and Early Modern Philosophy	100	100	A

Spring 2021

Course		Description	Attempted	Earned	Grade
ECON	19100	Economics for Everyone: Macro	100	100	A
LLSO	24102	Environmental Politics	100	100	A
LLSO	29066	Economics in the Twentieth Century	100	100	A-
PHIL	23000	Introduction to Metaphysics and Epistemology	100	100	A

Summer 2021

Course		Description	Attempted	Earned	Grade
ECON	10000	Principles of Microeconomics	100	100	P

Undergraduate Career Totals

Cumulative GPA:	3.847	Cumulative Totals	2700	2700

Milestones

Language Competency
Status: Completed
Program: Bachelor's Degree
Date Completed: 10/07/2019
Milestone Level: Language Competency

UNOFFICIAL TRANSCRIPT

Date Issued: 09/14/2021

THE UNIVERSITY OF CHICAGO

Name: Sherwood Sheen
Student ID: 12232684

Undergraduate

Date Attempted: 10/07/2019 Completed
Filed Petition

End of Undergraduate

UNOFFICIAL TRANSCRIPT

Date Issued: 09/14/2021

July 31, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

It is my great pleasure to write in enthusiastic support of Sherwood Sheen's application for a judicial clerkship. Sherwood was my student last spring in first-year Property at Vanderbilt Law School. He received the top score out of fifty-three students. He has since transferred to Stanford, where he seems to be thriving. In classroom discussion, conversations during office hours, and in outside enrichment activities that I organized with my Property students, I got to know Sherwood well. He stood apart from a very strong peer group with his brilliant legal mind, deep intellectual creativity and curiosity, and a mature perspective that comes from a singular set of life experiences. He has the talent, focus, and resilience to be a stellar law clerk.

From the first day of class to the last, Sherwood was a pleasure to teach. He burrowed into knotty sets of facts with gusto, drew sophisticated and creative connections among cases and doctrines, and explored with boundless enthusiasm the various theoretical approaches to property law that guided the course. Every time he spoke, he raised the quality of our discussion. He not only drew other students in and inspired them to participate more actively, but he also modeled the best kind of student engagement. His exam was a tour de force, a full ten percent higher than the next highest score. While many students were thrown by the long "issue spotter" question, which was built around a California statute allowing affordable housing uses to nullify covenants, Sherwood wrote a crisp response that identified every issue big and small, provided thickly textured analysis, and constructed compelling legal arguments. For a policy question based on recent case involving gas pipelines running through a neighborhood in Memphis that had been founded after the Civil War by Black army veterans and their families, Sherwood showed an impressive ability to connect big theoretical concepts driving property law with fine-grained questions of justice and economic efficiency. In my fifteen years at Vanderbilt, I have given A plusses maybe five times. Sherwood well earned his grade. I have taught and/or worked with top students at Berkeley, Chicago, Columbia, Harvard, NYU, Stanford, and Yale, and Sherwood is easily their equal. He will be a law clerk whom a judge can trust to handle the most complex and delicate cases with superior skill, sensitivity, and judgment.

Throughout the spring term, I organized screenings of films about property as well as a reading group focusing on By the Sea, a novel by the recent Nobel laureate Abdulrazak Gurnah that turns on a decades-long feud between two families that started with competing claims to land and an action to foreclose on a mortgage. Sherwood was a marvelous participant, suggesting films for our screenings and reading the novel with a sharp critical eye and making terrifically insightful comments. Outside of our class meetings, Sherwood began hosting classmates for additional movie nights. His classmates adored him. One referred to him with great fondness as "the awesome Sherwood."

The joy, energy, and thoughtfulness with which Sherwood approaches his legal studies reflect an usual path that time and again required him to work incredibly hard over years to realize his dreams. As a thirteen-year-old, he moved with his mother from Korea to Kansas. He named himself Sherwood after reading and admiring the grit and resolve of characters in Sherwood Anderson's novels. In conversation, he told me a story about his early years in the U.S. that exemplify his path to success: When he first moved to Kansas, he loved basketball, but his teammates initially wouldn't pass the ball to the new kid. Knowing that he was just as good a player as anyone else, he could have grown frustrated and bitter and given up. Instead, he reasoned that if he got the ball first, it wouldn't matter whether his teammates passed it to him or not. So he worked on his ball handling and playmaking skills, and within a few years, he was his high school team's starting point guard.

After two years as an acting student in the theater program at the University of Kansas, he joined the army to gain U.S. citizenship. He spent four years in military service, becoming a combat medic and serving as the primary translator for Brigade-level commanders in months-long military exercises with the Korean Army. He found the experience difficult—it was not something he had ever set out to do—but finished his service knowing he was capable of accomplishing anything. After the Army, he finished college as a philosophy student at the University of Chicago, earning terrific grades. It is a profound understatement when I say that Sherwood has the discipline, direction, and heart to be an extraordinary law clerk as well as an extraordinary lawyer.

Sherwood's intellectual gifts are matched by his marvelous personal qualities. Spring 1L term at Vanderbilt is a pressure cooker. The courses are difficult. The grading curve is strict (certainly stricter than Stanford's), and many students lose perspective. Sherwood, by contrast, approached the semester with as much maturity as anyone I've ever taught. He remained serene, read widely, and maintained a high level of enthusiasm for learning the law. Speaking as someone who clerked for one year in the Ninth Circuit and two more in the District of Massachusetts, I am confident that Sherwood will be a true joy to have in chambers—wonderful at his job, a gem of a colleague, and fun to talk to. I give him my highest recommendation, with no reservations. If you have any questions or would like to talk more about Sherwood, please do not hesitate to email me at daniel.sharfstein@vanderbilt.edu or call me at 615-322-1890.

Sincerely,

Daniel J. Sharfsterin

Daniel Sharfstein - daniel.sharfstein@vanderbilt.edu - 615-322-1890

Dick and Martha Lansden Professor Law and Professor of History

Daniel Sharfstein - daniel.sharfstein@vanderbilt.edu - 615-322-1890

Lisa Larrimore Ouellette
Deane F. Johnson Professor of Law
Senior Fellow, Stanford Institute for Economic Policy Research (SIEPR)
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Crown Quadrangle
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ouellette@law.stanford.edu
650 721.2928

July 31, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I'm delighted to write in support of Sherwood Sheen's application for a clerkship in your chambers. Sherwood transferred to Stanford Law after excelling in his first year at Vanderbilt. As a student in my intellectual property class during his 2L year, he consistently demonstrated his diligence, intellectual curiosity, and enthusiasm. But what really makes Sherwood's application stand out is a unique life story, including studying acting at the University of Kansas, serving as a U.S. Army combat medic and translator in South Korea, and returning to the University of Chicago for a philosophy degree before starting law school. He has a dedication and drive lacking in less mature students while still standing out for his sunny disposition. You will encounter few clerkship applicants as memorable as Sherwood.

I had the opportunity to teach Sherwood in one of his first Stanford classes, my fall 2022 intellectual property class, as he was still getting his footing on a new campus. IP is a challenging class, with extensive readings covering five areas of IP—trade secrets, utility patents, design patents, copyrights, and trademarks. Students not only must be prepared for when I call on them to discuss the readings, but also must complete multiple-choice review quizzes during class and online assignments to acquaint them with practical aspects of searching for different forms of IP. Sherwood was always ready to engage at a high level when I called on him, and he frequently stopped by my office hours to probe the contours of the doctrine we covered. He was also one of the top ten performers in the class on the multiple-choice review questions.

I tested my IP students with a blind-graded, eight-hour exam with two complex issue-spotters covering every area of IP we had covered. Sherwood's response was quite strong—he demonstrated a very solid understanding of the doctrinal material as well as excellent judgment about which issues to spend time on. I was sorry that our rigid grading curve placed him just below the Honors/Pass cutoff. Unlike other top law schools with facially similar grading systems, Stanford Law School uses a strict curve, with an inflexible cap on the percentage of students who can receive an Honors grade. If I had been allowed to award just a few more Honors grades, one would have gone to Sherwood.

Sherwood's strong academic performance is all the more impressive given his wide-ranging extracurricular activities. In addition, his gregarious personality makes him a pleasure to spend time with, and I am confident that he will be a collegial and conscientious clerk. Our discussions during office hours covered far more than IP doctrines. In particular, as noted above, the most remarkable aspect of Sherwood's file is his fascinating background. He moved from Seoul, Korea to Lawrence, Kansas at age twelve, and he initially started at the University of Kansas taking theater classes like Shakespeare Soliloquies. He left college early to take advantage of an offer of U.S. citizenship in exchange for four years of service in the U.S. Army, leading to his service as a combat medic in Korea, which was also where he first met an Ivy League graduate who expanded his views of educational possibilities and got him interested in law school. As preparation for law school, he chose to study philosophy at the University of Chicago to learn more about how arguments are constructed and deconstructed, and the resulting rigor in his thinking was apparent from his analysis of IP doctrines.

In short, I highly recommend interviewing Sherwood—I think you will enjoy the conversation. Please do not hesitate to contact me if you have further questions; I am available by email at ouellette@law.stanford.edu or by phone at 650-721-2928.

Sincerely,

/s/ Lisa Larrimore Ouellette

Mark A. Lemley
William H. Neukom Professor of Law
Director, Program in Law, Science & Technology
559 Nathan Abbott Way
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mlemley@law.stanford.edu

July 31, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I write to recommend Sherwood Sheen for a clerkship in your chambers.

Sherwood transferred from Vanderbilt Law School to Stanford after his first year. He was a student in my Remedies class this winter, and impressed me with his helpful comments in class and his good humor. While he did not earn an Honors grade in my class, he still performed well in the class. [Stanford, unlike Harvard and Yale, strictly limits the number of Honors grades we can give.]

Sherwood brings a level of maturity most law students lack. He has served in the U.S. Army overseas, as a combat medic and a translator in Korea. He delayed going to college for several years to serve. He is also an actor and a writer of fiction. Not surprisingly, his writing flows well. He uses short, crisp sentences that tell a story, whether he is writing fiction or a legal brief. He is a friendly and outgoing person and will dive enthusiastically into research projects. These skills will stand him in good stead as a law clerk.

Please don’t hesitate to contact me if you have any questions.

Sincerely,

/s/ Mark A. Lemley

StanfordLawSchool

JENNY S. MARTINEZ
Richard E. Lang Professor of Law and Dean

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 723-4455
Fax 650 723-4669
jmartinez@law.stanford.edu

Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes "Pass" (P) as the default grade for typically strong work in which the student has mastered the subject, and "Honors" (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

H	Honors	Exceptional work, significantly superior to the average performance at the school.
P	Pass	Representing successful mastery of the course material.
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory.
F	Fail	Representing work that does not show minimally adequate mastery of the material.
L	Pass	Student has passed the class. Exact grade yet to be reported.
I	Incomplete	
N	Continuing Course	
[blank]		Grading deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading deadline has passed. Grade has yet to be reported.

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

Page 2

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

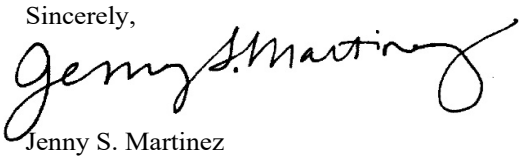
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

SHERWOOD SHEEN

300 Glenwood Circle Apt. 280, Monterey, CA 93940 | (831) 917-5217 | ssheen@stanford.edu

WRITING SAMPLE

This writing sample is a motion to dismiss that I drafted when I was a summer law clerk at Wheeler Trigg O'Donnell. In this motion, I argue (1) that Colorado's strict privity rule bars a non-client's aiding and abetting claim against a law firm, and (2) that a non-client cannot derivatively sue his corporation's law firm for legal malpractice. My supervising attorney helped me select the order of my arguments in the beginning. But I performed all the research, and this work is entirely my own. I redacted parties' names and am submitting the writing sample with the permission of Wheeler Trigg O'Donnell.

Defendant Jacobs LLP ("Jacobs") moves to dismiss Plaintiff's Complaint under C.R.C.P. 12(b)(5), because Plaintiff—a non-client—does not allege facts sufficient to permit him to sue someone else's lawyer, either individually or derivatively.

INTRODUCTION

In 2019, Plaintiff Ernest Hemingway co-founded a recruiting company with a former friend, Defendant William Faulkner. Over the years, the company—Defendant Mile High City, LLC. ("MHC")—grew and its needs changed. Accordingly, as is common for many start-ups, Mr. Faulkner (in his role as President) explored ways to change and improve the corporate organization and management structure. On behalf of the company, Mr. Faulkner hired Jacobs to facilitate those changes and draft the appropriate documents.

Plaintiff knew Mr. Faulkner was making structural changes to the company, but Plaintiff didn't ask questions, and he didn't ask to participate in the process. When Jacobs sent Plaintiff documents to sign in connection with the changes, Plaintiff signed each and every one, though he contends he did so without reading them. (*See* Compl. ¶¶ 39, 41.)

A year later, Mr. Faulkner terminated Plaintiff's employment and attempted to buy-out his interest. Only then did Plaintiff complain, for the first time, about the documents he agreed to. Plaintiff now seeks to undo those agreements, bringing claims against Mr. Hancock for allegedly duping him in connection with the changes. But Plaintiff goes one step further and blames Jacobs as well for not advising him about the many contract documents he signed. Recognizing that he (as a non-client) cannot sue Jacobs directly for breach of fiduciary duty or malpractice, he asserts an individual claim against Jacobs for aiding and abetting breach of fiduciary duty, as well as a derivative claim for malpractice putatively on behalf of MHC.

Neither of Plaintiff's claims is sustainable under Colorado law. First, his claim for aiding and abetting breach of fiduciary duty fails because the Colorado Supreme Court has never allowed a non-client to pursue an aiding and abetting claim against a lawyer. Moreover, even if the claim was cognizable in Colorado, Plaintiff did not plausibly allege the essential elements. Second, Plaintiff's purported derivative claim is flawed because it is based on Plaintiff's personal grievances and individual harms—not any alleged damage suffered by MHC. Plaintiff did not, and cannot, identify any damage to MHC from Jacobs's work on the corporate restructuring, as he must do to allege a derivative claim on MHC's behalf. That pleading deficiency is fatal. Further, Plaintiff cannot meet the other statutory requirements for bringing a derivative lawsuit.

For all of these reasons, the Court should dismiss, with prejudice, the two claims against MHC.

RELEVANT BACKGROUND[1]

In 2019, Plaintiff and Mr. Faulkner co-founded MHC as 50-50 owners. (Compl. ¶ 1.) MHC is a contract staffing, recruiting, and placement firm. Plaintiff's work at MHC was "on active recruiting and producing," while Mr. Faulkner's focus was on sales and marketing. (*Id.* ¶ 21.) "Over time—particularly after he became President in February 2020—Mr. Hancock took on greater management responsibility, including oversight and control over all accounting and financials for the company." (*Id.*) Sometime after taking on the role as President, Mr. Faulkner hired Jacobs to serve as outside corporate counsel to MHC. (*Id.* ¶ 25.)

In September 2021, Plaintiff verbally agreed to transfer a 1% ownership interest to Mr. Faulkner so that Mr. Faulkner could qualify for admission to the board of directors for a nonprofit

[1] For the purposes of this motion to dismiss, Jacobs does not admit the truth of Plaintiff's allegations in the Complaint, summarized here and in the section "Plaintiff's Specific Allegations Against Jacobs." Jacobs only assumes, as it must for a Rule 12(b)(5) motion, the truth of well-pleaded factual allegations.

organization. (*Id.* ¶¶ 29-30.) In December 2021, Mr. Faulkner told Plaintiff he was working with Jacobs on converting MHC from an S-Corp to an LLC (the "Conversion"). (*Id.* ¶ 35.) To effectuate the Conversion, on December 21 and 31, 2021, Jacobs emailed six documents to Plaintiff for his electronic signature. (*Id.* ¶¶ 39, 41) Plaintiff signed all six documents "**without reading them**." (*Id.*) The Conversion reduced Plaintiff's ownership interest in MHC to 30%, and it gave Mr. Faulkner more control over MHC. (*See id.* ¶¶ 44, 47-51.)

In January 2023, Mr. Faulkner terminated Plaintiff's employment with MHC and presented a confidential release and separation agreement, and a membership interest redemption agreement. (*See id.* ¶ 53-54.) Plaintiff signed the release, but he took the redemption agreement home to review. (*Id.* ¶¶ 54, 56.) Plaintiff claims that, upon reviewing the redemption agreement, he learned that his ownership interest had been reduced during the Conversion. (*Id.* ¶ 57.) Thereafter, Plaintiff rescinded his signature on the separation agreement and claimed it was signed under duress. (*Id.* ¶ 58.) Plaintiff then demanded various documents to evaluate the redemption agreement, but he never signed it, and the dispute between Plaintiff and MHC became intractable. (*See id.* ¶¶ 60-62.)

Plaintiff now claims Mr. Faulkner fraudulently induced the 1% transfer and the Conversion. (*Id.* ¶¶ 33, 76, 84.) Plaintiff claims Mr. Faulkner misrepresented, concealed, and made false representations about the reasons for the Conversion, and claims Jacobs should have personally consulted with him and explained various details about the Conversion. (*See id.* ¶¶ 42-44, 52.) Plaintiff also claims Mr. Faulkner falsified meeting minutes about the Conversion, and forged Plaintiff's signature on two such minutes. (*See id.* ¶¶ 67-68, 71-73, 52.)

As to Jacobs, Plaintiff asserts two claims: (i) a direct claim for aiding and abetting breach of fiduciary duty (Claim 4); and (ii) a derivative claim for legal malpractice, putatively asserted on behalf of PEG. (*Id.* ¶¶ 99-113.)

PLAINTIFF'S SPECIFIC ALLEGATIONS AGAINST JACOBS

1. Jacobs never communicated with Plaintiff about corporate affairs or governance, took direction solely from Mr. Faulkner, and failed to include Mr. Hemingway in meetings or calls about MHC. (*See id.* ¶¶ 26-28.)

2. Jacobs failed to discuss with Plaintiff the 1% ownership change he had verbally agreed to. (*See id.* ¶ 34.)

3. At the sole direction of Mr. Faulkner, Jacobs prepared corporate documents for the Conversion, which had the effect of reducing Plaintiff's ownership in and control of PEG, and emailed those documents to Plaintiff for his signature. (*See id.* ¶¶ 39, 41, 103.)

4. Jacobs did not "consult" with Plaintiff, or "facilitate or hold any meetings for discussions" with Plaintiff about the "drafting, purpose, or effect" of the documents for the Conversion. (*See id.* ¶¶ 40, 42-44, 52, 102.)

5. Jacobs prepared the confidential release and separation agreement, and the membership interest redemption agreement. (*See id.* ¶ 54 (pleaded on information and belief).)

6. Jacobs knew Mr. Faulkner owed a fiduciary duty to explain the Conversion to Plaintiff, and Jacobs took no steps to ensure Mr. Faulkner fulfilled that duty (*See id.* ¶¶ 101-02.)

7. Jacobs "knowingly participated in and gave substantial assistance to Mr. Faulkner's breach of fiduciary duties." (*See id.* ¶ 104.)

8. Jacobs breached the standard of care owed to MHC by failing to follow MHC's bylaws; failing to communicate and discuss corporate governance matters, including the Conversion, with both plaintiff and Mr. Faulkner; and, failing to ensure both Plaintiff and Mr. Faulkner understood the consequences of the Conversion. (*See id.* ¶ 111-12.)

9. Jacobs had a conflict of interest in representing MHC and MHC Holdings Co., a holding company created during the Conversion, and breached the standard of care by representing both without adequate disclosure and a conflict of waiver. (*See id.* ¶¶ 44-45, 112 (pleaded, in part, on information and belief).)

LEGAL STANDARD

Rule 12(b)(5) empowers a defendant to "test the formal sufficiency of the complaint." *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). In 2016, the Colorado Supreme Court adopted the federal plausibility standard: "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Warne v. Hall*, 2016 CO 50, ¶ 1 (Colo. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *id.* ¶ 24 (adopting standard). Under this standard, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* ¶ 9 (quoting *Iqbal*, 556 U.S. at 679). The Colorado Supreme Court adopted this more rigorous pleading standard because it "identified a growing need, and effort in our rules, to expedite the litigation process and avoid unnecessary expense, especially with respect to discovery," and it further recognized "the effectiveness of the 'plausibility standard' in weeding out groundless complaints at the pleading stage." *Id.* ¶ 19.

ARGUMENT

I. PLAINTIFF FAILS TO STATE A CLAIM FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY—CLAIM 5

A. The Strict Privity Rule Bars Plaintiff's Aiding and Abetting Claim

Plaintiff tries to do indirectly, through an aiding and abetting claim, what the Colorado Supreme Court has held he cannot do directly: sue someone else's lawyer. But the Colorado Supreme Court has never permitted an attorney to be held liable to a non-client for aiding and abetting another's tort. Although the Court previously granted a petition for certiorari to consider

this issue, it ultimately reversed the case on other grounds, and reserved the aiding and abetting issue for another day. *Alexander v. Anstine*, 152 P.3d 497, 503 (Colo. 2007) ("[O]n the facts of this case the attorneys cannot be liable on [the plaintiff's] aiding and abetting claim. We save for another day the question of whether an attorney can ever be liable for aiding and abetting a breach of fiduciary duty to a non-client.").

That day effectively came in 2016, when the Supreme Court reaffirmed that attorney liability to non-clients is strictly limited for public policy reasons. *Baker v. Wood, Ris & Hames*, 2016 CO 5, ¶ 2. This holding—the strict privity rule—means that "where non-clients . . . are concerned, an attorney's liability is generally limited to the narrow set of circumstances in which the attorney has committed fraud or a malicious or tortious act, including negligent misrepresentation." *Id*. This "narrow set of circumstances" do not include any exceptions for aiding and abetting liability. This Court should refuse to create a new exception here. *See, e.g.*, *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 407 (Tex. App. 2005) (in states adopting strict privity rule, "[a]bsent any allegation that [the defendant law firm] committed an independent tortious act or misrepresentation, we decline [the plaintiff's] invitation to expand Texas law to allow a non-client to bring a cause of action for 'aiding and abetting' a breach of fiduciary duty, based upon the rendition of legal advice to an alleged tortfeasor client. The trial court thus did not err in dismissing this claim.").[2]

[2] At least one court in the District of Colorado has permitted a non-client to pursue an aiding and abetting claim against a lawyer. *See, e.g.*, *Gallan v. Bloom Bus. Jets, LLC*, 480 F. Supp. 3d 1173 (D. Colo. 2020). However, in *Gallan*, the lawyer did not argue, and the court did not consider, whether an aiding and abetting claim against a lawyer is cognizable under Colorado law. *See id*. at 1184. Without any analysis of *Baker* or the strict privity rule, this case should have no persuasive value for a Colorado District Court.

B. Plaintiff Did Not Plausibly Plead the Elements for an Aiding and Abetting Claim

Even if the Colorado Supreme Court were to recognize a claim against lawyers for aiding and abetting, Plaintiff's claim would still fail because he did not plausibly allege essential elements. To establish liability for aiding and abetting, a plaintiff must show, among other things, that the defendant knowingly participated in the underlying tort, and gave substantial assistance to the tortfeasor. *Nelson v. Elway*, 971 P.2d 245, 249-50 (Colo. App. 1998). Here, the aiding and abetting claim fails because Plaintiff did not plausibly allege either of these elements.

1. Routine legal services are not "substantial assistance."

Those courts recognizing aiding and abetting claims against lawyers agree that allegations involving routine legal services cannot support a claim for aiding and abetting. Instead, for aiding and abetting liability to exist, the attorney must have committed the alleged tortious acts ***independent*** of his representation of the client. *See, e.g.*, *Learning Annex, LP. v. Blank Rome LLP*, 966 N.Y.S.2d 78, 79 (N.Y. App. Div. 2013) (allegations that a defendant merely "provided routine legal services to the alleged fraudsters" are "insufficient to establish a claim for aiding and abetting fraud" (applying New York law)); *Maness v. Star-Kist Foods, Inc.*, 7 F.3d 704, 709 (8th Cir. 1993) ("[A]n attorney who acts within the scope of the attorney-client relationship will not be liable to third persons for actions arising out of his professional relationship unless the attorney exceeds the scope of his employment or acts for personal gain." (applying Minnesota law)); *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 189 (Minn. 1999) (holding that the "substantial assistance" element of aiding and abetting requires "more than the provision of routine professional services"); *In re Cascade Int'l Sec. Litig.*, 840 F. Supp. 1558, 1566 (S.D. Fla. 1993) ("In addition, Plaintiffs have failed to demonstrate the existence of any 'substantial assistance' on the part of [the defendant law firms] as required by the aiding and abetting cause of action. . . .

Plaintiffs have failed to allege any activities on the part of [the law firms] that constituted anything more than acting as scriveners for their clients or conducting activities that make up the 'daily grist of the mill.'").

Were the rule otherwise, every lawyer would potentially become an aider and abettor. *Abrams v. McGuireWoods LLP*, 518 B.R. 491, 503-04 (N.D. Ind. 2014) ("[T]he general rule is that, in cases involving business professionals like lawyers, substantial assistance means something more than the provision of routine professional services. If the law were otherwise, it would be nearly impossible for an attorney, no matter how scrupulous, to avoid liability for a client's misdeeds." (internal citations and quotation marks omitted)).

In this case, Plaintiff does not allege Jacobs acted for its own personal benefit, or that it presented false or misleading information in the documents it prepared. (*See generally* Compl.) Instead, Plaintiff alleges that "Jacobs took direction from Mr. Faulkner solely and exclusively," and simply "prepared conversion documents that had the effect of" reducing Plaintiff's ownership in, and control of, MHC. (Compl. ¶ 103.) As noted above, in jurisdictions allowing aiding and abetting claims against lawyers, taking direction from a client and drafting corporate documents does not amount to "substantial assistance." But that is all that Plaintiff alleges here.

Plaintiff also alleges that Jacobs "took no steps to ensure that Mr. Faulkner had fulfilled his fiduciary duties," and "did not facilitate or hold any meetings or discussions with Mr. Hemingway . . . to disclose all pertinent facts surrounding the proposed conversion." (*Id.* ¶ 102.) However, absent a duty to do so, failing to explain or disclose "all pertinent facts"—in documents Plaintiff signed without reading—does not constitute substantial assistance. *See, e.g.*, *In re Sharp Int'l. Corp.*, 403 F.3d 43, 49 (2d Cir. 2005) ("The mere inaction of an alleged aider and abettor constitutes substantial assistance ***only if*** the defendant owes a fiduciary duty directly to the

plaintiff." (emphasis added)). Critically, Plaintiff does not allege any duties flowing from Jacobs to Plaintiff, nor could he. *See Allen v. Steele*, 252 P.3d 476, 482 (Colo. 2011) ("[I]n Colorado, attorneys do not owe a duty of reasonable care to non-clients." (internal quotation marks and citation omitted)). The best Plaintiff can offer is that "Jacobs knew that Mr. Faulkner owed Mr. Hemmingway a fiduciary duty to fully disclose all material facts." (Compl. ¶ 101.) But knowing Mr. Faulkner had a duty to disclose is not the same as Jacobs having a duty to disclose. Without any such duty, allegations about Jacobs's failure to act cannot amount to "substantial assistance." *See, e.g.*, *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 910 N.E.2d 976, 981 (N.Y. 2009) (dismissing aiding and abetting claim against law firm where investors failed to allege any "legal duty obligating [the law firm] to make affirmative disclosures to plaintiffs under the circumstances of this case").

2. Plaintiff's allegations of actual knowledge are conclusory.

In addition, Plaintiff's aiding and abetting claim fails because the Complaint does not plausibly allege facts showing that Jacobs had actual knowledge of Mr. Faulkner's alleged breaches. Instead, all Plaintiff can offer are conclusory allegations of knowledge, based (presumably) on Jacobs's representation of MHC. (*See* Compl. ¶ 101 (knowledge of duties owed by Mr. Faulkner), ¶ 104 (knowledge of breaches by Mr. Faulkner).) That is not enough. *See Nat'l Westminster Bank USA v. Weksel*, 511 N.Y.S.2d 626, 630 (N.Y. App. Div. 1987) ("[T]he fact of legal representation, even as to transactions allegedly the subject of subsequent misrepresentation, does not itself support the inference of the high degree of scienter necessary to extend fraud liability on an aiding and abetting theory."). Likewise, generalized allegations that a lawyer structured an allegedly fraudulent transaction, without supporting detail, fail to create a reasonable inference of actual knowledge. *See Roni LLC v. Arfa*, 897 N.Y.S.2d 421, 422 (N.Y. App. Div.

2010) (applying the principle to dismiss claim for aiding and abetting fraud based on failure to plead the lawyer's knowledge), *aff'd*, 935 N.E.2d 791 (N.Y. 2010); *see also Glob. Mins & Metals Corp. v. Holme*, 824 N.Y.S.2d 210, 217 (N.Y. App. Div. 2006) ("Actual knowledge, as opposed to merely constructive knowledge, is required and a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty.").

Finally, the bare allegation that Jacobs "knowingly participated in . . . Mr. Faulkner's breach of fiduciary duties," (Compl. ¶ 104), is deficient under the *Warne* plausibility standard. *See, e.g.*, *Ruybalid v. Bd. of Cty. Comm'rs of Las Animas Cty.*, 2017 COA 113, ¶ 21 (affirming dismissal because complaint merely "parroted the statutory language," made allegations in "a conclusory fashion," and was "bereft of any supporting factual allegations").

II. PLAINTIFF FAILS TO STATE A DERIVATIVE CLAIM FOR LEGAL MALPRACTICE—CLAIM 6

As with the flawed aiding and abetting claim, Plaintiff recognizes he cannot sue Jacobs directly. Instead, Plaintiff takes another "end around" on the strict privity rule and asserts a derivative malpractice claim on behalf of MHC. This claim fails because Plaintiff identified only individual damages as a result of the alleged malpractice; Plaintiff did not plausibly allege any damages suffered by MHC, which is a critical requirement to maintaining a derivative action. Further, Plaintiff failed to comply with clear statutory prerequisites to filing a derivative lawsuit on behalf of an LLC.

A. Plaintiff Did Not Plausibly Plead Damage to MHC, and He Cannot Use a Derivative Claim to Recover Individual Damages

Like corporate shareholders, in an LLC, there are two ways to redress alleged harm to a member: derivative and direct claims. To determine whether a claim is derivative or direct, the

Court must analyze "who suffered the alleged harm," and "who would receive the benefit of any remedy." *Young v. Bush*, 2012 COA 47, ¶ 61 (internal quotation marks and citation omitted). It is axiomatic that a derivative claim involves allegations of "harm to the corporation," while a direct claim involves injury by the shareholder or member that are "separate and distinct from that of the corporation." *Tisch v. Tisch*, 2019 COA 41, ¶ 55; *see also Wilson v. Con'l Dev. Co.*, 112 F. Supp. 2d 648, 661 (W.D. Mich. 1999) ("[I]t is axiomatic that a derivative claim must be one belonging to the corporation, not the shareholder himself."), *aff'd*, 234 F.3d 1271 (6th Cir. 2000).

Here, Plaintiff alleges various breaches by Jacobs, but he does not allege how these breaches damaged MHC. (*See* Compl. ¶ 112-13.) The only injury alleged with specificity is that Plaintiff—by signing documents without reading them—"gave up control and a 20% ownership interest in the company." (*See id.* ¶ 112, at (7); *see also id.* at p.20, ¶¶ (A), (B).) But loss of control and a reduced ownership interest are injuries that are "separate and distinct from that of other shareholders." *See River Mgmt. Corp. v. Lodge Props. Inc.*, 829 P.2d 398, 403 (Colo. App. 1991). Those alleged damages—if recoverable at all—should be pursued through Plaintiff's other claims. (*See, e.g.*, Compl. ¶¶ 75-98.)

Plaintiff's other allegations of damage to MHC are nothing but recitals. (*See* Compl. ¶ 113 ("As a direct and proximate result of Jacobs's breaches of its duty of care, MHC Inc. and its shareholders have suffered damages . . . ."); *see also id.* at p.20, ¶ (D).) These generic allegations of damage are the type of "unchallengeably conclusory allegations" that are insufficient under the *Warne* plausibility standard. 2016 CO 50, ¶ 27.

At bottom, a derivative suit is "an extraordinary remedy." *Bell v. Arnold*, 487 P.2d 545, 547 (1971). Because Plaintiff failed to plausibly allege any damage suffered by PEG, the Court should dismiss the derivative claim for legal malpractice. *See Wilson*, 112 F. Supp. 2d at 661

(dismissing derivative claim because the "body of the count . . . does not purport to assert a claim for injury to the [corporation] itself").

B. Plaintiff Failed to Comply with the Statutory Prerequisites for Commencing a Derivative Claim

The Colorado General Assembly placed firm boundaries on a member's ability to assert derivative claims on behalf of an LLC. *See* C.R.S. §§ 7-80-713 to -719; *see also* C.R.C.P. 23.1. The statutory procedures are not merely suggestions; the legislature established them to provide an essential gatekeeping function. *See Caley Invs. v. Lowe Fam. Assocs., Ltd.*, 754 P.2d 793, 796 (Colo. App. 1988) (requiring strict compliance with the statutory procedures for commencing a derivative action); *Thomas v. Rahmani-Azar*, 217 P.3d 945, 949 (Colo. App. 2009) ("[D]erivative claims are not a commodity to be prosecuted seriatim as long as there is any willing shareholder willing to jump into the breach." (internal quotation marks and citation omitted)).

As a threshold matter, "No member shall commence a derivative proceeding . . . unless: (a) A written demand has been made upon the limited liability company to take suitable action; and (b) Thirty days have expired from the date the demand was made . . . ." C.R.S. § 7-80-714. Plaintiff concedes he didn't provide MHC with a demand, but claims the requirement should be excused as futile. (*See* Compl. ¶ 110.)

Demand may be excused when the people who can direct an entity to sue are the "very persons alleged to have committed the wrongs." *Neusteter v. District Court*, 675 P.2d 1, 7 (Colo. 1984). Thus, shareholders may be excused from making demand upon a company to assert derivative claims against all of its officers and directors, where the effect of the demand would be to ask the officers and directors to approve a derivative lawsuit against themselves. *See Hirsch v. Jones Intercable, Inc.*, 984 P.2d 629, 636 (Colo. 1999) ("[A]ll of the directors allegedly were

directly involved in approving the challenged action in which they all were inherently interested. As in *Neusteter*, the futility of demanding that they sue themselves is patent."). Here, however, the party Plaintiff is attempting to have MHC sue for malpractice—Jacobs—is not the party that would be determining whether to bring the suit. There is no reason why the demand requirement should be excused when a shareholder attempts to derivatively sue a third party, such as a law firm.

The demand requirement is not a mere suggestion. Rather, it is "a rule of substantive right designed to give a corporation the opportunity to rectify an alleged wrong without litigation." *Kenney v. Koenig*, 426 F. Supp. 2d 1175, 1181 (D. Colo. 2006). Excusing Plaintiff's failure to make a demand "would defeat the purpose of the rule to encourage the corporation itself . . . to sue for redress of corporate claims." *Ireland v. Wynkoop*, 539 P.2d 1349, 1361 (Colo. App. 1975). The Court should reject Plaintiff's general allegations of futility, and dismiss the derivative claim for failing to comply with the demand requirements of § 7-80-714 and C.R.C.P. 23.1. *See Ireland*, 539 P.2d at 1361 (dismissing derivative claims because failure to make the demand could not be excused).

C. Alternatively, the Court Should Stay the Derivative Claim Pending an Independent Determination That It Is in the Best Interest of MHC

The purpose of demand under § 7-80-714 is to allow the LLC an opportunity to investigate and evaluate the derivative claims, and determine whether the company should sue. Even if demand is made, and 30 days lapse before a derivative suit is filed, because of the importance of that investigation, the Court may stay proceedings "[f]or the purpose of allowing the limited liability company time to undertake an inquiry into the allegations made . . . ." C.R.S. § 7-80-715. The express purpose of that review is to allow for a determination about whether the derivative action is "in the best interests of the limited liability company." *Id.* § 7-80-716(1).

For this gatekeeping function to be effective, the person(s) tasked with the investigation and determination should be independent. *See id*. In situations involving closely-held LLCs, the determination of whether a derivative claim should be prosecuted may be submitted to "a panel of one or more persons appointed by the court upon motion filed with the court by the limited liability company for such purposes." C.R.S. § 7-80-716(2)(b).

Therefore, if the Court denies Jacobs's motion to dismiss the derivative claim for failure to state a claim, or for failure to serve a demand, the Court should give MHC an opportunity to file a motion to stay and motion for appointment of an independent panel.

CONCLUSION

Jacobs respectfully requests the Court to dismiss Plaintiff's claims against the firm (Claims 5 and 6), with prejudice, and award Jacobs its reasonable attorneys' fees incurred in defending the action under C.R.S. § 13-17-201.

SHERWOOD SHEEN

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WRITING SAMPLE I

The first writing sample is a memorandum that I drafted as an assignment when I was a summer law clerk at Wheeler Trigg O'Donnell. The assignment required me to answer whether Colorado Rule of Evidence 408 bars the plaintiff's settlement demand letter when the letter acknowledged that the plaintiff had no legal remedy. I performed all the research, and this work is entirely my own. I am submitting the writing sample with the permission of Wheeler Trigg O'Donnell LLP.

Admissibility of a Plaintiff's Settlement Demand Letter

You asked me to research whether we can use Plaintiff's settlement demand letter as an exhibit to our motion for summary judgment or whether Federal Rule of Evidence 408 bars us from doing so. In short, we can use Plaintiff's settlement demand by 1) invoking the "knowledge and intent" exception to Rule 408, 2) relying on the court's discretion to consider the evidence for a limited purpose, and 3) reasoning that considering the plaintiff's demand letter does not violate the public policy underlying Rule 408.

ANALYSIS

1. **Rule 408 does not apply when proving the plaintiff's knowledge and intent.**

Rule 408 does not impose an absolute ban on the admission of statements made during settlement negotiations. *Sw. Nurseries, LLC v. Florists Mut. Inc.*, 266 F. Supp. 2d 1253, 1257 (D. Colo. 2003). Rather, a party's statement during settlement negotiations is inadmissible only if offered to "prove or disprove the validity or amount of a disputed claim"; it is admissible "for another purpose," such as proving the plaintiff's knowledge and intent. *Id*. (citing *Bankcard Am. v. Universal Bankcard Sys.*, 203 F.3d 477, 484 (7th Cir. 2000)).

In *Bankcard America*, the plaintiff "seduced" the defendant into violating the contract by misleading the defendant to believe that it would not enforce applicable time limitations. 203 F.3d at 484. When the defendant then violated the contract during the prohibited one-year period, the plaintiff sued for breach of contract and argued that its statement during the settlement negotiations was inadmissible under Rule 408. *Id*. The Seventh Circuit disagreed, holding that the settlement discussion was offered not to prove liability but to explain how the defendant came to believe a settlement had been reached. *Id*. In other words, the statement was offered for the purpose of establishing the defendant's knowledge.

Likewise, here, we would be using the settlement demand letter to prove that Plaintiff's attorney knew that Plaintiff did not have a legally viable claim and yet pursued it anyway. The fact that a statement detrimental to Plaintiff's theory for liability "happened to come up during settlement" negotiations should not bar us from moving to dismiss claims he knows have no basis. *Id.*; *see also Carolina Indus. Prods. Inc. v. Learjet, Inc.*, 168 F. Supp. 2d 1225, 1229 (D. Kan. 2001) (holding that statements during settlement negotiations are admissible in a suit asserting a claim for equitable estoppel).

We should also invoke the fairness argument adopted in *Bankcard America* and urge the court to engage in the balancing test employed by the Seventh Circuit. 203 F.3d at 484. The court reasoned that the defendant's need to use the evidence to explain its conduct outweighed "any potential for discouraging future settlements and did nothing to undermine the purpose and spirit of Rule 408." *Id*. Similarly, we can argue that our need to show that Plaintiff did not bother to find out whether he has a claim outweighs any potential for undermining the purpose behind Rule 408.

Even if Rule 408 did not bar the statement, a trial court could declare it inadmissible under Rule 403 by "weighing the probative value of the proffered evidence against its potential for unfair prejudice to the objecting party." *Sw. Nurseries*, 266 F. Supp. 2d at 1259. In fact, the court in *Southwest Nurseries* barred the evidence using both Rules 408 and 403. *Id*. The court reasoned that admitting a settlement offer must be followed by an explanation of the "negotiation strategies and the thought processes of the settlement participants," which would lead to jury confusion and unfair prejudice to the objecting party. *Id. But see K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1155 (10th Cir. 1985) (holding that "the exclusion of relevant evidence under Rule 403 is an extraordinary remedy to be used sparingly" and

affirming the lower court's decision to admit the evidence because it "[was] helpful [to the jury], and was not just a narrative of [the plaintiff]").

2. Trial courts can exercise broad discretion to admit otherwise inadmissible evidence for a more limited purpose.

A trial court can admit statements made during settlement negotiations to show that before filing an action, the plaintiff knew he had no claim. *See Am. Guarantee & Liab. Ins. Co. v. King*, 97 P.3d 161, 170 (Colo. App. 2003). In *American Guarantee*, the appellant argued that the trial court erred when it admitted the statement of the mediator that the appellant's subrogation interest did not extend to a medical malpractice action. *Id.* at 169. In affirming, the Colorado Court of Appeals held that the trial court properly admitted the mediator's opinion because it used the opinion only to determine whether the appellant "violat[ed] its duty to investigate in good faith [of its legal claim]." *Id*. at 170. The court further noted that "mediation communications enjoy greater protection than settlement communications under [Rule] 408." *Id.* at 169.

Here, we should argue that Plaintiff's statement about the "Captain of the Ship" liability is admissible for the limited purpose of showing that Plaintiff knew he had no claim before filing the action. Similar to the plaintiff in *American Guarantee*, who knew that he did not have a medical malpractice claim because the mediator told him so, the demand letter shows Plaintiff here knew, or should have known, that he could only hold the surgeon liable under the Captain of the Ship doctrine and yet still sued the perfusionist. Because Plaintiff's statement shows that he knew he had no right to relief, the Court should admit the statement under *American Guarantee*.

When the issue is in doubt, however, a court can "exclude evidence of compromises or

compromise offers." *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1364 (10th Cir. 1987). But the *Bradbury* court did not find the issue in doubt because "the issue [revolving around the contested evidence] was briefed and decided in limine before trial, [and] [t]here [was] an on-the-record designation of the purposes for which the evidence is admissible." *Id.* at 1365. This means that if we make it very clear how the evidence fits into the "specific elements of [our] defenses," the court will not be in doubt. *Id.*

3. Admitting Plaintiff's statement about the Captain of the Ship doctrine will not undermine the policy underlying Rule 408.

To decide whether Rule 408 bars the contested evidence, courts typically begin their analysis with the policy underlying Rule 408. For example, *Southwest Nurseries* stated that "[Rule 408] reflects public policy in favor of non-litigious solutions to disputes." 266 F. Supp. 2d at 1259. So, we must persuade the court that admitting the plaintiff's settlement demand letter will not undermine that policy.

Here, barring a *defendant's* offer of settlement is consistent with this policy because allowing a plaintiff to use the offer as evidence of liability discourages defendants from making offers and resolving disputes outside of a court. In contrast, barring a *plaintiffs'* settlement demand does not discourage injured parties from settling disputes outside of court. This is because a plaintiff's position does not change from settlement to litigation. During settlement, a plaintiff demands payment; during litigation, a plaintiff continues to demand payment. The opposite is true for a defendant. By offering to make a payment during settlement, a defendant acts as if he were liable—the opposite position in litigation. If the jury were permitted to consider the defendant's settlement offer, the jury would infer that the defendant is liable.

Admitting Plaintiff's statement about the Captain of the Ship liability doctrine does not

undermine Rule 408's policy because Plaintiff is demanding damages in both the settlement and litigation stages. Because admitting Plaintiff's statement does not create any inconsistency in position, it does not place Plaintiff at a disadvantage during litigation and does not discourage potential litigants from settling their claims outside of a court.

Applicant Details

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Applicant Education

BA/BS From	**University of California-San Diego**
Date of BA/BS	**March 2021**
JD/LLB From	**University of California, Berkeley School of Law** **https://www.law.berkeley.edu/careers/**
Date of JD/LLB	**May 8, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**California Law Review** **Berkeley Journal of Entertainment and Sports Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

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

Specialized Work Experience

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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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July 27, 2023

The Honorable James O. Browning
United States District Court
District of New Mexico
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I am writing to apply for a clerkship in your chambers for the 2025 term. I am currently a rising 3L at the University of California, Berkeley, School of Law and plan to work in Willkie Farr & Gallagher's Litigation Department – with a focus on Investigations & Enforcement – following graduation. As an aspiring civil litigator, I hope to clerk because a clerkship provides unparalleled training in the type of legal writing and advocacy I want to apply throughout my career. Additionally, I spoke with Taylor Graham – one of your clerks – and have heard about what a rewarding experience working with you would be.

I believe I would be a strong addition to your chambers. For instance, in my time at Berkeley Law, I was selected to serve as an associate editor and podcast editor on the *California Law Review*. The former position has enhanced my legal editing skills, and the latter position requires me to work closely with authors to script interviews that tackle legal scholarship in a concise, digestible way. As podcast editor, I have learned how to both synthesize complicated topics on the fly and also develop legal scholarship into a form that is accessible to the general public. This experience has made me a more empathetic, flexible, and capable writer and future lawyer.

My resume, law school and undergraduate transcripts, and writing sample are submitted with this application. My recommenders, Professor David B. Oppenheimer, Professor Lindsay Saffouri, Professor Seth Hill, and Alex Weingarten, and their contact information are included with this application. Thank you for your time and consideration in reviewing my application materials.

Respectfully,

Georgiana Soo

GEORGIANA SOO

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EDUCATION

UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW, Berkeley, CA
J.D. Candidate, May 2024
Activities: *California Law Review*, *Berkeley Journal of Entertainment and Sports Law*, Alternative Dispute and Resolution Competition Team, Halloum Negotiations Competition Director, Written and Oral Advocacy Tutor, Asian Pacific American Law Students Association

UNIVERSITY OF CALIFORNIA, SAN DIEGO, La Jolla, CA
B.A., *magna cum laude*, in Political Science, Specialization in Public Law, Mar. 2021
Honors: Provost Honors (awarded for a quarter GPA of 3.5 or above), all quarters
Excellence in Undergraduate Research (awarded for writing the best freshman thesis paper), 2019
Thesis: "Assessing the Impact of Social Media on Congressional Polarization" (awarded High Honors)

EXPERIENCE

SENIOR DISTRICT JUDGE EDWARD M. CHEN, SAN FRANCISCO, CA — Expected Aug. 2023
Judicial Extern

UC BERKELEY SCHOOL OF LAW, Berkeley, CA — Sept. 2022 – Present
Research Assistant to Professor David Oppenheimer
Compiling studies on the history of affirmative action in the United States and evolving views on legal diversity.

WILLKIE FARR & GALLAGHER LLP, Los Angeles, CA — May 2022 – July 2022, May 2023 – Present
Summer Associate
Working for the office's Litigation Department. Conducted research for a commercial litigation trial in the S.D. Cal and a white collar criminal trial in the N.D. Ill. Assisted in declaration drafting and timeline building for a pro bono tenants' rights case based on the City of Los Angeles' new tenant anti-harassment ordinance.

CALIFORNIA ASYLUM REPRESENTATION CLINIC, Berkeley, CA — Sept. 2021 – Present
Student Advocate
Interviewing political asylum-seekers. Drafting I-589, declaration forms. Researching immigration requirements and legal thresholds for sex-based persecution under an attorney supervisor.

UC SAN DIEGO POLITICAL SCIENCE DEPARTMENT, La Jolla, CA — Jan. 2020 – June 2020
Research Assistant to Research Fellow Kathryn Baragwanth-Vogel (Jan. 2020 – June 2020)
Studied the level of influence heavily-regulated sectors exert in Brazilian government via lobbyists and campaign donations. Coded research findings to produce datasets used to visualize and model government trends.
Research Assistant to Postdoctoral Research Associate Huchen Liu (Jan. 2020 – May 2020)
Studied the extent to which politicians retain their policy stances when they leave government to become lobbyists, and how as a result, special interest groups are advantaged in the political process.

U.S. SENATOR DIANNE FEINSTEIN, San Diego, CA — Sept. 2019 – Dec. 2019
Legislative Intern
Compiled political reports to keep Senator apprised on local issues and replied to calls and letters from constituents. Reviewed lobbyist proposals, interviewed subject experts, and drafted policy papers on the city's civic engagement.

ADDITIONAL INFORMATION

Languages: Mandarin (fluent); Taiwanese (academic proficiency)
Interests: Cheering for the Dodgers, playing the New York Times crossword, training my Border Collie

Berkeley Law
University of California
Office of the Registrar

Georgiana Soo
Student ID: 3037257100
Admit Term: 2021 Fall

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Page 1 of 2

Academic Program History
Major: Law (JD)

2021 Fall

Course		Description	Units	Law Units	Grade
LAW	200F	Civil Procedure David Oppenheimer	5.0	5.0	P
LAW	201	Torts Daniel Farber	4.0	4.0	P
LAW	202.1A	Legal Research and Writing Kerry Kumabe	3.0	3.0	CR
LAW	230	Criminal Law Jonathan Simon	4.0	4.0	P

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	16.0	16.0

2022 Spring

Course		Description	Units	Law Units	Grade
LAW	202.1B	Written and Oral Advocacy **Units Count Toward Experiential Requirement** Kerry Kumabe	2.0	2.0	H
LAW	202F	Contracts Prasad Krishnamurthy	4.0	4.0	P
LAW	220.6	Constitutional Law **Fulfills Constitutional Law Requirement** Erwin Chemerinsky	4.0	4.0	P
LAW	275.3	Intellectual Property Law Peter Menell	4.0	4.0	P

	Units	Law Units
Term Totals	14.0	14.0
Cumulative Totals	30.0	30.0

2022 Fall

Course		Description	Units	Law Units	Grade
LAW	210	Legal Profession **Fulfills Professional Responsibility Requirement** David Jargiello	2.0	2.0	P
LAW	226.8	Strat Con Lit Prop Rgts&Ec Lib John Groen	1.0	1.0	CR
LAW	226.8A	Strat Con Litigation Practicum **Units Count Toward Experiential Requirement** John Groen	2.0	2.0	CR
LAW	245.9	Intl Business Negotiations **Units Count Toward Experiential Requirement** Jay Finkelstein Joe Sorenson	3.0	3.0	H
LAW	250	Business Associations Frank Partnoy	4.0	4.0	H
LAW	276.76	Life Sci & Innov Workshop I **Fulfills 1 of 2 Writing Requirements** Allison Schmitt Peter Menell	2.0	2.0	H

	Units	Law Units
Term Totals	14.0	14.0
Cumulative Totals	44.0	44.0

2023 Spring

Course		Description	Units	Law Units	Grade
LAW	207.5	Advanced Legal Writing **Fulfills 1 of 2 Writing Requirements** Lindsay Saffouri	3.0	3.0	P
LAW	223	Administrative Law Kenneth Bamberger	4.0	4.0	P
LAW	241	Evidence Burt Neuborne	4.0	4.0	H
LAW	276.77	Life Sci & Innov Workshop II **Fulfills 1 of 2 Writing Requirements** Allison Schmitt Peter Menell	2.0	2.0	P
LAW	295.3S	ADR Competition Natalie Winters	1.0	1.0	CR
LAW	297	Self-Tutorial Sem David Oppenheimer	2.0	2.0	CR

	Units	Law Units
Term Totals	16.0	16.0

Carol Rachwald, Registrar

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Berkeley Law
University of California
Office of the Registrar

Georgiana Soo
Student ID: 3037257100
Admit Term: 2021 Fall

Printed: 2023-07-07 11:58
Page 2 of 2

Cumulative Totals	60.0	60.0

2023 Fall

Course		Description	Units	Law Units	Grade
LAW	207.51	Adv Legal Writ: Transnatl Lit	3.0	3.0	
		Fulfills 1 of 2 Writing Requirements			
		Emily Berry			
LAW	244.8	Mediation	3.0	3.0	
		Units Count Toward Experiential Requirement			
		Darshan Brach			
LAW	245.11	Pretrial Civ Written Discovery	3.0	3.0	
		Units Count Toward Experiential Requirement			
		Alisa Givental			
LAW	245.4	Drfing&Negot Sports Contracts	3.0	3.0	
		Units Count Toward Experiential Requirement			
		Richard Brand			
LAW	258	Estates and Trusts	3.0	3.0	
		Kristen Holmquist			

	Units	Law Units
Term Totals	0.0	0.0
Cumulative Totals	60.0	60.0

Carol Rachwald, Registrar

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University of California
Berkeley Law
270 Simon Hall
Berkeley, CA 94720-7220
510-642-2278

KEY TO GRADES

1. Grades for Academic Years 1970 to present:

HH	–	High Honors	CR	–	Credit
H	–	Honors	NP	–	Not Pass
P	–	Pass	I	–	Incomplete
PC	–	Pass Conditional or Substandard Pass (1997-98 to present)	IP	–	In Progress
NC	–	No Credit	NR	–	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: https://www.law.berkeley.edu/careers/for-employers/grading-policy/

Transcript questions should be referred to the Registrar.

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UC San Diego

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UC San Diego

TRANSCRIPT OF ACADEMIC RECORD

PARCHMENT ID: 37562083
STUDENT NAME: Soo , Georgiana Grace
SOCIAL SECURITY NUMBER: ***-**-1333

IDENTIFICATION NUMBER: A15-41-8260
DATE AND TIME PRINTED: 01/18/2022 16:40:09
PAGE 1 OF 1

STUDENT LEVEL : Undergraduate
COLLEGE : Thurgood Marshall (frmly Third)
DEPARTMENT(S) : Political Science
MAJOR(S) : Political Sci/Public Law

----------UCSD DEGREES AWARDED----------

AWARD: Bachelor of Arts CONFERRED: 03/20/21
TERM: Winter Qtr 2021
COLLEGE: Thurgood Marshall (frmly Third)
DEPT: Political Science
MAJOR: Political Sci/Public Law
HONORS: Magna Cum Laude/High Distinct
Degree Awarded with GPA of 3.882

----------TRANSFER CREDIT----------

Advanced Placement Credit ATTENDED: 05/15 - 05/18
TRANSFER CREDIT: 56.00

----------ACADEMIC EVENTS----------

UC ENTRLVL WRITNG REQT SATISFD 09/22/18
AMER HIST& INST REQT SATISFIED 12/07/18

----------COURSE INFORMATION----------

Fall Qtr 2018 Undergraduate

DOC	1	Diversity	4.00	A-	14.80
POLI	11D	Intro/Poli Sci:Compar Politics	4.00	A-	14.80
POLI	12D	Intro/Poli Sci:Int'l Relations	4.00	A-	14.80
SOCI	87	Freshman Seminar	1.00	P	0.00
TMC	1	First Year Experience	2.00	P	0.00

TERM CREDITS PASSED : 15.00 TERM GPA CREDITS : 12.00
TERM GRADE POINTS : 44.40 TERM GPA : 3.70
TERM HONORS : Provost Honors

Winter Qtr 2019 Undergraduate

DOC	2	Justice	6.00	A-	22.20
POLI	30D	Political Inquiry	4.00	A+	16.00
POLI	104B	Civil Liberties-Fundmntl Rghts	4.00	A-	14.80
TDHT	22	Theatre 1500-1900	4.00	A	16.00

TERM CREDITS PASSED : 18.00 TERM GPA CREDITS : 18.00
TERM GRADE POINTS : 69.00 TERM GPA : 3.83
TERM HONORS : Provost Honors

Spring Qtr 2019 Undergraduate

DOC	3	Imagination	6.00	A-	22.20
POLI	10D	Intro/Poli Sci:Amer Politics	4.00	A+	16.00
POLI	104D	Judicial Politics	4.00	A-	14.80
POLI	110C	Politcl Thought/Kant-Nietzsche	4.00	A	16.00

TERM CREDITS PASSED : 18.00 TERM GPA CREDITS : 18.00
TERM GRADE POINTS : 69.00 TERM GPA : 3.83
TERM HONORS : Provost Honors

Fall Qtr 2019 Undergraduate

PHIL	167	Contemporary Political Phil	4.00	A-	14.80
POLI	104A	Supreme Court & Constitution	4.00	A	16.00
POLI	199	Independent Study	4.00	P	0.00

TERM CREDITS PASSED : 12.00 TERM GPA CREDITS : 8.00
TERM GRADE POINTS : 30.80 TERM GPA : 3.85

Winter Qtr 2020 Undergraduate

BILD	3	Organismic&Evolutionary Biol	4.00	P	0.00
HILD	11	East Asia & the West,1279-1911	4.00	A	16.00
POLI	118	Game Theory/Political Science	4.00	A+	16.00
POLI	198RA	Research Apprenticeship	4.00	P	0.00

TERM CREDITS PASSED : 16.00 TERM GPA CREDITS : 8.00
TERM GRADE POINTS : 32.00 TERM GPA : 4.00

Spring Qtr 2020 Undergraduate

HIEU	140	EuroWomen/Gender 1800-present	4.00	A+	16.00
LATI	50	Introduction to Latin America	4.00	A+	16.00
POLI	100M	Political Psychology	4.00	A+	16.00
POLI	198RA	Research Apprenticeship	4.00	P	0.00
POLI	199	Independent Study	4.00	P	0.00

TERM CREDITS PASSED : 20.00 TERM GPA CREDITS : 12.00
TERM GRADE POINTS : 48.00 TERM GPA : 4.00
TERM HONORS : Provost Honors

Fall Qtr 2020 Undergraduate

PHIL	166	Classics/Political Philosophy	4.00	A	16.00
PHYS	5	Stars and Black Holes	4.00	P	0.00
POLI	104J	Introduction/Legal Reasoning	4.00	A+	16.00
POLI	191A	Senr Hon Sem:Frontier/POLI I	4.00	A	16.00

TERM CREDITS PASSED : 16.00 TERM GPA CREDITS : 12.00
TERM GRADE POINTS : 48.00 TERM GPA : 4.00
TERM HONORS : Provost Honors

Winter Qtr 2021 Undergraduate

POLI	110B	Sovereigns,Subj & Modern State	4.00	P	0.00
POLI	191B	Senr Hon Sem:Frontier/POLI II	4.00	A	16.00
SIO	90	Undergraduate Seminar	1.00	P	0.00

TERM CREDITS PASSED : 9.00 TERM GPA CREDITS : 4.00
TERM GRADE POINTS : 16.00 TERM GPA : 4.00

----------SUMMARY----------

GRADE OPTION	UC-CRDTS ATTM	UC-CRDTS COMPL	CRDTS PSSD	UC-GPA CRDTS	UC-GRADE POINTS	UC-GPA
Letter	92.00	92.00	92.00	92.00	357.20	3.882
P/NP	32.00	32.00	88.00	0.00	0.00	0.000
TOTAL	124.00	124.00	180.00	92.00	357.20	3.882

----------End of Student Level----------
----------End of Transcript----------

This official university transcript is certified to be a correct transcript of record. Student in good standing unless otherwise indicated.

Transcript void if altered.

Cindy Lyons
University Registrar
Enrollment Management

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CREDITS: All credits are in quarter units. Cumulative summaries on this record may reflect adjustments for repeated courses and/or other adjustments made in accordance with UC San Diego academic policies.

TRANSFER CREDIT: Only UC San Diego courses and courses taken under official UC San Diego exchange programs with other institutions appear on the transcript. Only grades earned at UC San Diego, at other UC campuses and under the Education Abroad Program are included in the grade point average. All exchange program and transfer credit is included in credits completed.

GRADE INTERPRETATION: Plus (+) and minus (-) grading was approved for use beginning with courses taken in Fall Quarter 1983. The grade of A+, when awarded, represents extraordinary achievement, but does not receive grade point credit beyond that received for the grade of A.

Grade		Grade Points Per Unit
A+, A, A-	Excellent	4.0, 4.0, 3.7
B+, B, B-	Good	3.3, 3.0, 2.7
C+, C, C-	Fair	2.3, 2.0, 1.7
D	Poor (barely passing)	1.0
F	Fail	0.0
E*	Incomplete	**
I	Incomplete	**
IP	In Progress	**
NP	Not Passing (below C-, undergraduates only)	**
NR***	Grade not reported by Instructor	**
P	Passing (C- or better, undergraduates only)	**
S	Satisfactory (B- or better, graduates only)	**
U	Unsatisfactory (below B-, graduates only)	**
W	Withdrew after 4th week of instruction or after second meeting of some laboratory courses	**
Blank	Grade not reported by Instructor	

* Not used after Spring Quarter 1975
** Not included in grade point average
*** Not used after Winter Quarter 1991

School of Medicine and School of Pharmacy & Pharmaceutical Sciences Grades

H/P/F grading system effective Fall, 1986.

H	Honors	NH	Near Honors
P	Pass	S	Satisfactory
F	Fail	U	Unsatisfactory

DEGREE REQUIREMENTS: Undergraduate students must complete a minimum of 180 quarter units with a grade point average of C or better (2.0), satisfy the University of California requirements in American History and Institutions, Diversity, Equity and Inclusion course, and UC Entry Level Writing Requirement (formerly Subject A), satisfy the respective college General Education requirements, and satisfy all requirements for the major. Graduate students must complete their respective degree programs with a grade point average of B (3.0) or better.

COURSE NUMBERS:

Lower Division
1-99 Designed for freshmen and sophomores.

Upper Division
100-199 Designed for juniors and seniors.

Professional
300-399 Designed for teachers or prospective teachers.

Graduate
200-299 Designed for graduate students.
400-499 Rady School of Management.
500-599 For graduate students only.

School of Global Policy and Strategy
(Formerly Graduate School of International Relations & Pacific Studies)
200-295 Courses satisfying Ph.D. requirements.
400-495 Courses satisfying MPIA requirements.

School of Medicine
200-219 Required core courses in years 1 and 2.
220-244 Required core courses in years 1 and 2, effective Fall 2010.
220-295 Departmental pre-clinical electives.
296 Departmental basic science independent study.
299 Independent Study Project.
400-495 Core and elective clerkships in years 3 and 4.
496 Departmental Independent Study.

School of Pharmacy and Pharmaceutical Sciences
200-299 Courses satisfying Pharm.D. requirements.

UNDERGRADUATES:

Honors: Effective Fall Quarter 1978, 14% of graduating seniors who complete at least 80 A-F graded units are eligible for College Honors. Normally, the top 2% are eligible for summa cum laude, the next 4% for magna cum laude, and the remaining 8% for cum laude. Departmental Honors may be awarded to graduating seniors if they complete a special course of study. Provost Honors are awarded quarterly to students who complete 12 or more A-F graded units with a term grade point average of 3.5 or higher.

Physical Education Courses: Through Fall 1994 credit was awarded for all P.E. courses, but only 3 units of activity courses count toward graduation.

Remedial Courses: Remedial courses completed at UC San Diego count as workload credit toward the satisfaction of the minimum progress requirement and eligibility for financial aid, they are included in the cumulative summaries under UC-CRDTS ATTM and UC-CRDTS COMPL. Remedial courses are not applied toward graduation requirements, and the units are excluded from the CRDTS PSSD and UC-GPA CRDTS summaries.

UNIVERSITY OF CALIFORNIA SAN DIEGO
Office of the Registrar, 9500 Gilman Drive
La Jolla, California 92093-0022
(858) 534-3144 FAX (858) 534-5723
http://registrar.ucsd.edu

Repeat Policy: A student may repeat only those courses for which a grade of D, F, NP, U, or W is recorded on the transcript. Repetition of courses for which a grade of C- or higher was awarded is prohibited, unless the course has been specifically approved by the Academic Senate as repeatable for credit.

The first sixteen units of courses that have been repeated by an undergraduate student and for which the student received a D, F, NP, or U are not used in the cumulative grade-point calculations on the student's transcript.

When present, a repeat code indicates that the student's cumulative summary data has been adjusted in accordance with UC San Diego academic policies on repeated courses. Repeat codes appear at the far right of the course following the grade and grade points earned.

Example: MATH 10A Calculus 4.0 F 0.00 **F1**

REPEAT CODE DESCRIPTIONS:

D1	Repeated D - Removed from GPA
D2	Repeat of D - Removed from Units Passed
DA	Additional Repeated D - Removed from GPA & Units Passed
DX	Repeat of D in Excess of 16 units
F1	Repeated F - Removed from GPA
F2	Repeat of F - Grade A - D Received
FA	Additional Repeated F - Removed from GPA
FF	Repeat of F - Grade F Received
FX	Repeat of F in excess of 16 units - Credit Given
FY	Repeat of F in excess of 16 units - No Credit Given
N1	Repeated NP
N2	Repeat of NP - Grade P Received
NA	Additional Repeated NP
NN	Repeat of NP - Grade NP Received
NX	Repeat of NP in Excess of 16 units - Credit Given
NY	Repeat of NP in Excess of 16 units - No Credit Given
OF[1]	Repeat of D/F - Original Course Deleted - F Received
OL[1]	Repeat of D/F - Original Course Deleted - A - D Received
ON[1]	Repeat of NP - Original Course Deleted - NP Received
OP[1]	Repeat of NP - Original Course Deleted - P Received
RF	Repeatable for Credit - F Received
RL	Repeatable for Credit - A - D Received
RN	Repeatable for Credit - NP Received
RP	Repeatable for Credit - P Received
TC	Repeat of Transfer Credit - No Credit Given
UC	UCSD D/F/NP - Repeated at Other UC Campus (Approved)
UF	Repeat of Course from Other UC - F Received
UL	Repeat of Course from Other UC - A - D Received
UN	Repeat of Course from Other UC - NP Received
UP	Repeat of Course from Other UC - P Received
XC	Repeat in Excess of Course Approval
ZC	No Credit - Repeat of C-/Better or P
**	Manually Adjusted Credit

[1] This policy was valid for courses repeated prior to Fall 1975.

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July 31, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I write to enthusiastically recommend the candidacy of Georgiana Soo for a position as a Judicial Clerk. Ms. Soo is one of the most talented law students I have ever had the pleasure of working with as a summer clerk. I have zero doubt that she be a valuable addition to your chambers.

I had the good fortune of working with Ms. Soo for two consecutive summers. In that time, I have been impressed by her research and writing skills but more importantly by her intuition for the practice of law. As cliched as this might sound, Ms. Soo "gets it." She consistently demonstrated a grasp of the practical application of the law to facts and was able to distill complicated issues to their core in a fashion that demonstrated impressive analytical skills. Georgiana is equally comfortable discussing esoteric points of law as she is musing about public relations strategy concerning high profile litigations being handled in our office.

Aside from her legal acumen, Ms. Soo assumed a leadership role within our summer program. Given her experience with us from a prior summer, her colleagues within the summer class looked to Ms. Soo to provide guidance. Georgiana played this role with aplomb, eager to help her colleagues by making introductions or suggesting access to resources that could improve their opportunities. Similarly, she ingratiated herself into the office more generally. Ms. Soo played a meaningful role in several important briefs during her summers with the Firm. Moreover, she did not allow her youth or inexperience become an impediment that interfered with seeking and obtaining consequential experience.

I have been involved with summer associate programs for more than 20 years, including previous stints as the Hiring Partner and Summer Associate Work Flow Coordinator at prior firms. In that time I have worked with over 100 summer clerks. I can confidently state that Ms. Soo is one of the 5 most talented summer clerks that I have ever had the opportunity to work with. My only reluctance is writing this recommendation is that it will delay her start with us at Willkie.

Kindest Professional Regards,

- Alex Weingarten

Managing Partner, Willkie Farr & Gallagher LLP - Los Angeles Office

Alex Weingarten - aweingarten@willkie.com - 310-270-5737

July 26, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Re: Georgiana Soo

Dear Judge Browning:

I am very happy to recommend my former student and research assistant Georgiana Soo for a clerkship. She is a good student, a lucid writer with good research skills, and a successful and energetic participant in a number of pro bono and legal scholarship activities. And, she strikes me as a deeply thoughtful person.

In my Fall 2021 Civil Procedure class, Georgiana was an active participant in class discussions. Her questions in the classroom demonstrated a keen interest in how legal rules actually work on the ground, and revealed a careful reading of the cases and texts. Her Civil Procedure exam was well written and insightful. She missed earning an honors grade by only a few points, finishing in the top half of a very talented group of students. Overall, her first year grades were fine, though not stellar, and half of her second year grades fell in the honors category.

Given the academic demands of law school and the challenge of being a student during the pandemic, it would be reasonable to expect our students to be buried in their books. But outside of class Georgiana is an active and future leader of the California Asylum Representation Project -- one of our human rights pro bono projects, a member of our ADR competition team, and an editor on both our flagship *California Law Review* and our *Berkeley Journal of Entertainment and Sports Law*.

In her second year (2022-23) Georgiana worked for me as a research assistant. She helped me with an in-depth examination of the role played by Harriet Taylor Mill in the writings of her husband John Stuart Mill, a mater of great controversy among historians. The topic was important to a study I'm completing on John Stuart Mill's contribution to our understanding of the importance of diversity. Georgiana's work was careful and thorough. I came to rely on her with great confidence. We met every week or two to discuss the research. She was a good thought partner, eager to help and non-defensive when I suggested additional avenues to pursue. I'd be happy to continue to employ her.

In sum, Georgiana Soo is making her mark at Berkeley Law as a strong student, and a leader/participant in important scholarly, community, and service learning activities. I am happy to recommend her to you.

Please feel free to contact me regarding this recommendation. I can be reached by email at doppenheimer@law.berkeley.edu or by phone (cell) at 510/326-3865.

Sincerely,

David B. Oppenheimer
Clinical Professor of Law

UC San Diego

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SANTA BARBARA · SANTA CRUZ

DEPARTMENT OF POLITICAL SCIENCE
SOCIAL SCIENCES BUILDING, #301
LA JOLLA, CALIFORNIA 92093-0521

PROFESSOR SETH HILL
PHONE: (858) 534-3341
EMAIL: sjhill@ucsd.edu
August 2, 2023

Letter of reference for **Georgiana Soo**

To Whom It May Concern:

I write in recommendation for Georgiana Soo's Law Clerkship Application. I served as Ms Soo's senior honors thesis advisor at the University of California San Diego and so am in a strong position to evaluate her academic qualifications.

This letter is easy to write. Ms Soo was one of the best undergraduates I have worked with at UCSD. Writing an honors thesis is a difficult task because most students have not spent multiple quarters creating their own independent research. Ms Soo excelled in all aspects of constructing and writing her research on social media and congressional polarization. As always with these projects, she encountered multiple setbacks and roadblocks to her project. I have advised many students and find it informative to see how they respond to these challenges. Ms Soo always took them in stride and worked to develop alternatives to her original plans. Her independence and diligence is extraordinary.

I'm sure the Court desires clerks with professionalism. Ms Soo always exhibited that in our interactions. I have no reservations about her ability to serve as a valuable, timely, professional, and diligent clerk of the Court.

I am also in some position to judge her broader academic performance at UCSD because I have reviewed many transcripts of UCSD undergraduates. Graduating magna cum laude and achieving Provost Honors every quarter while enrolled is clear evidence of her care and aptitude. Writing both a freshman and senior thesis is rare. It is clear this is a fantastic student. And, of course, gaining admission to incredible law schools such as Berkeley reinforces all of my observations.

I heartily recommend her application.

Please do not hesitate to contact me if I can provide anything further.

Sincerely,

Seth J. Hill
Professor of Political Science
sjhill@ucsd.edu

GEORGIANA SOO – WRITING SAMPLE

This opposition brief is based on a hypothetical fact pattern from my Advanced Legal Research and Writing Course. The assignment required that I respond to a motion for summary judgment, arguing that the plaintiffs did establish a prima facie case of disparate impact under Title VII of the Civil Rights Act. The research, analysis, and writing are substantially my own. Where indicated, portions of this memo have been eliminated for purposes of brevity. I would be happy to provide the complete brief upon request.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

(Omitted)

II. STATEMENT OF FACTS

(Omitted)

III. ARGUMENT

A. Summary Judgment Standard

(Omitted)

B. This Court should deny Defendants' motion for summary judgment because there is a genuine dispute of material fact as to whether Defendants' English-only policy violates Title VII of the Civil Rights Act.

In 1964, Congress passed Title VII of the Civil Rights Act to outlaw discrimination based on "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). By enacting this statute, Congress intended to protect marginalized groups from oppressive, discriminatory behavior, especially given the country's long history of segregation and racism. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

Courts use a three-step, burden-shifting process to determine disparate impact claims under Title VII. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-04 (1973); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). First, the plaintiff must establish a prima facie case of disparate impact. *Albemarle*, 422 U.S. at 425. Plaintiffs achieve this by identifying an employment practice or policy that has a significant adverse effect on a protected group. *Id.* Second, once this standard is met, the responsibility shifts to the defendant to show that the policy or practice is directly related to the job and a clear business necessity. *McDonnell Douglas Corp.*, 411 U.S. at 802. Third, only if the defendant manages to meet this standard does the burden shift back to the plaintiff, who must merely present a less discriminatory alternative that would just as effectively accomplish the disputed policy's stated goals. *Albemarle*, 422 U.S. at 425.

In the present case, Plaintiff defeats summary judgment at each stage of the burden-shifting process. First, Plaintiff establishes a prima facie case because a reasonable jury could conclude that the policy adversely affects the privilege of speaking and work environment for Navajo employees. Second, Defendants have failed to conclusively show that the policy is a business necessity, as it does nothing to enhance employee harmony, proper supervision, and customer service. Finally, a reasonable juror could find that less discriminatory alternatives achieve the same effect as the present rule.

1. Plaintiff establishes a prima facie case because there is evidence that the English-only policy has a significant adverse impact on the terms, conditions, or privileges of employment for Navajo employees.

To establish a prima facie case of discriminatory impact, a plaintiff must set forth a facially neutral employment practice that has a significantly discriminatory, adverse impact on a protected group in such a way that the general population is not similarly affected. *Connecticut v. Teal*, 457 U.S. 440, 446 (1982). The Ninth Circuit has acknowledged that an English-only policy can cause significant adverse effects by infringing on the privilege of conversing or exacerbating the level of hostility for protected employees. *Garcia v. Spun Steak Co*., 998 F.2d 1480, 1486 (1993). Here, there is overwhelming evidence that Canyon Burger's English-only policy causes significant adverse effects on Navajo employees under both these themes. *See id*.

a. The English-only policy violates the privilege of conversing because it punishes unconscious verbal slips that Navajo workers cannot avoid.

Although employers may place some limitations on privileges of employment, courts have historically looked to balance this discretion against the employee's right to enjoy these privileges. *Id.* at 1488. Conversing on the job is one of many privileges of employment, and Title VII thus protects against rules that significantly impact this privilege. *Id*. at 1487. An English-only policy has a significant adverse effect on the privilege of conversing if protected employees cannot comply with it, and if it punishes

minor, unconscious slips that are especially hard to avoid for individuals who use English as a second language. *Id.* Additionally, whether or not an employee can comply with such rules is a question of fact. *Id*.

Defendants rely on *Spun Steak*, where the Ninth Circuit held that the language policy in question did not have a significant adverse effect on the privilege of conversing because most of the Spanish-speaking employees were technically bilingual and could, in theory, comply with the rule. *Id.* at 1487. Notably, the defendant, a meat production facility, implemented the policy in such a way as to allow for minor slips of the tongue. *Id.* The employees never alleged that the defendants oppressively enforced the policy, and it was unclear that any employees had such "limited proficiency" in English that using English would infringe on their privilege of speaking. *Id.* Additionally, employees worked individually at a conveyor belt and were not expected to frequently interact with other Spanish speakers during work hours. *Id*. In sum, the bilingual employees were not adversely impacted because they could speak English to an adequate degree, and inadvertent mistakes were not punished. *Id*. at 1483.

However, our case is much more analogous to *Equal Emp't Opportunity Comm'n v. Premier Operator Servs., Inc. (Premier)*, where the court found that an English-only policy caused a disparate impact. 113 F. Supp. 2d 1066 (N.D. Tex. 2000). In *Premier*, the court determined that a language policy that broadly prohibited the use of Spanish at work, including during breaks and personal times, coupled with the threat of termination made nonobservance not "simply a matter of individual preference." *Id.* The defendant, a long-distance call operator, informed Hispanic employees that their jobs might be lost if they did not comply with the company's English-only rule. *Id*. at 1070. The court noted that the employees were susceptible to "code switching," a practice that constitutes swapping between a primary and secondary language and cannot be simply "turned off" on a whim. *Id.* In this instance, the employees would code-switch because they were

required to speak Spanish to Spanish-speaking customers and worked "shoulder to shoulder" with Spanish co-workers throughout the day, making it nearly impossible to cease Spanish usage. *Id*. at 1069. Thus, although the employees were bilingual, the policy caused harm because it severely punished protected employees for conduct beyond their control. *Id*. at 1070.

In the present case, Defendants' English-only policy significantly infringes on Navajo employees' privilege of speaking for several reasons. First, there is a question of fact as to just how bilingual the Navajo employees are. For instance, Suzanne Begay noted that she and her fellow employees refused to sign the policy because they all speak Navajo natively and work more efficiently in their native language. *See* Begay Decl. ¶ 6. It can take them twice as long to explain something in English as opposed to when they use Navajo. *See id*. Additionally, they often accidentally substitute English with Navajo words while speaking in the former. *See id*. at ¶ 7. This is unlike the employees in *Spun Steak*, whose trilingual fluency was not questioned by the court. *See* 998 F.2d at 1487.

Second, even if the Court finds that the Navajo employees are bilingual, they are prone to code-switching. Defendants claim Canyon Burger's employees all speak English and can readily comply with the policy. *See* Wilson Decl. ¶ 6. However, like in *Premier*, the Navajo workers in this case are exposed to circumstances that encourage using Navajo. *See* 113 F. Supp. 2d at 1070; Begay Decl. ¶ 3. Bilingual speakers are more likely to code switch when speaking informally with members of the same cultural group. *See* Redstone Decl. ¶ 7. In this case, Defendant Sean Wilson concedes that more than half of the restaurant's customers and ninety percent of its employees are Navajo and thus speak Navajo fluently. *See* Wilson Decl. ¶ 5. Contrast this to *Spun Steak,* where employees worked independently and did not frequently experience settings that subjected them to using Spanish, if at all. *See* 998 F.2d at 1483. Thus, the policy is difficult to comply with,

given the frequency with which the Navajo employees interact with other Navajo speakers, including the clientele. *See* Wilson Decl. ¶ 6.

Third, contrary to Defendants' claims, there is proof that Defendants strictly enforce the policy. *See* Defendant's Motion for Summary Judgment ("Def.'s Mot.") at 7. While it may be fair to say that none of the affected employees speak "such little English" as to be unable to use English at work, the policy's enforcement punishes even the most minor, accidental use of Navajo. *See Spun Steak*, 998 F.2d at 1488; Wilson Decl. ¶ 16. The record shows that an employee was actually questioned and written up for their inadvertent use of Navajo when blurting out a warning to customers approaching a wet, slippery surface. *See* Wilson Decl. ¶ 16. While Defendants argue that one should utter safety warnings in English to make all employees and customers aware, the inadvertent nature of the employee's actions, not the content of the employee's words, demonstrate that inadvertent non-compliance is severely punished under the policy. *See* Def.'s Mot. at 9.[1] Additionally, the Wilsons admit that the written policy provides no exception that permits the employees to speak non-English during their personal break times. *See* Wilson Decl. ¶ 14. This type of enforcement is comparable to *Premier*'s, where the court categorized the rule as "oppressive monitoring" for barring employees from speaking Spanish during even personal moments at breaks. *See* 113 F. Supp. 2d at 1075. The record also shows that employees who refused to sign off on the restrictive policy were

[1] Defendants cite a number of cases that have adopted the so-called "ability to comply" standard. Def.'s Mot. at 8, 9. However, the present case is distinguishable from all of the referenced cases because it is unclear that the Navajo employees at Canyon Burger are bilingual and can comply; they do not speak English fluently and communicating in English takes twice as long as in Navajo. *See* Begay Decl. ¶ 6. In contrast, the plaintiffs in the cited cases all undoubtedly speak English fluently and simply opt not to use English. *See*, *e.g.*, *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987) (finding that the employee's disparate impact claim had no merit because it was obvious the employee was bilingual); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980) (finding that a language policy did not disparately impact a plaintiff with unquestioned English fluency); *Kania v. Archdiocese of Philadelphia*, 14 F. Supp. 2d 730 (E.D. Pa. 1998) (noting that the plaintiff admitted to being bilingual and could therefore readily comply with the English-only rule); *Long v. First Union Corp. of Virginia*, 894 F. Supp. 933, 941 (E.D. Va. 1995) (finding that all the plaintiffs were bilingual and could just as easily use English instead of Spanish); *Gonzalez v. Salvation Army*, 1991 U.S. Dist. LEXIS 21692 (M.D. Fla. 1991) (noting that the plaintiff was hired for her job because of her bilingual language capabilities and therefore had the ability to comply and use English).

terminated, and those who did sign the policy did so out of a fear of losing their jobs. *See* Wilson Decl. ¶ 15; Begay Decl. ¶ 5. The Defendants argue that the existence of only one incident—reprimanding the employee for the wet floor warning—proves that policy has not been enforced in such a way as to penalize minor slips of the tongue. *See* Def.'s Mot. at 9; Wilson Decl. ¶¶ 16, 17. However, this argument lacks merit given that Defendants suspended the policy pending this lawsuit. *See* Wilson Decl. ¶ 17. Because of the uncertain bilingualism of the employees, the likelihood of code-switching, and the policy's strict enforcement, a reasonable juror would find the policy violates the privilege of conversing.

b. The policy creates a hostile working environment because it lacks a legitimate purpose and Defendants harshly enforce it against Navajo workers.

When an English-only policy causes employees to feel some form of burden or threat that affects the conditions of employment, there is proof of a hostile work environment. *Spun Steak*, 998 F.2d at 1499-89. Further, the less the apparent justification for mandating a language, the more reasonable it is to infer hostility towards employees whose ethnic group or nationality favors another language. *Maldonado v. City of Altus*, 433 F.3d 1294, 1305 (10th Cir. 2006). Thus, when a policy lacks a clear purpose or is strictly enforced, it is likely to create a hostile workplace. *Id*.

Defendants cite *Spun Steak*, where the Ninth Circuit held that the English-only policy did not produce a hostile work environment. 998 F.2d at 1489. Specifically, the court reached this conclusion because there was no evidence—only "conclusory statements—that the workplace was more negative. *Id*. Because the employer also proved that the policy mitigated employee tension, the court determined that one-sided conclusory statements were not enough to establish a hostile working environment. *Id*.

Defendants rely on *Maldonado* and *Premier Operator* to support their arguments, but both cases actually support Plaintiff. Def.'s Mot. at 10. In *Maldonado*, the plaintiffs

testified that they had experienced actual "ethnic taunting" after the defendant established the language rule. 433 F.3d at 1304. In addition, because the justification for the policy was quite weak, it was reasonable to assume hostility towards employees who might favor another language. *Id*. at 1305. Therefore, the amount of evidence presented by the plaintiffs was sufficient to establish a prima facie case of disparate impact. *Id*. In *Premier*, the defendant enforced its disputed language policy at all times during work hours unless an employee was interfacing with a Spanish-speaking customer. 113 F. Supp. 2d at 1075. Spanish-speaking employees felt pressured by the looming threat of termination, even if they were conversing during their personal lunch or break times. *Id.* The court held that the defendant's blanket application of the policy, coupled with the threat of termination if employees did not follow the rule, fostered a stressful, negative workplace. *Id*. at 1070.

Here, the Defendants' English-only policy creates a hostile working environment for a number of reasons. First, Navajo employees have shown that they were punished for not complying with a policy that Defendants inconsistently applied to different groups. Defendants terminated four Navajo employees who refused to sign the policy because they were concerned about its fairness. *See* Begay Decl. ¶ 6; Wilson Decl. ¶ 15. Additionally, both parties agree that a Navajo employee was subject to punishment after accidentally warning a customer of a soft drink spill in Navajo. *See* Begay Decl. ¶ 10; Wilson Decl. ¶ 16. These undisputed facts are a far cry from the "conclusory statements" that the *Spun Steak* court determined were insufficient proof of a hostile working environment. *See* 998 F.2d at 1489.

Second, Defendants selectively enforce the policy in a way that is reminiscent of historical methods of persecution against the Navajo. *See* Begay Decl. ¶ 8. The Navajo people have historically been oppressed and forcibly assimilated into the English-speaking hegemony; the American government forbade them from speaking their native language while other groups were not similarly restricted. Jackson Decl. ¶ 4. While

Defendants permit Russian speakers to use Russian with no restrictions, they chastise Navajo workers for using Navajo, even when the workers mean to warn customers in the act of service. Begay Decl. ¶ 8. Additionally, the Wilsons originally had signs posted in the restaurant, kitchen, and break room that read "Please, No Navajo," which they removed a month later for no apparent reason. Wilson Decl. ¶ 7. In light of this troubling history, Canyon Burger's actions make it more reasonable to infer that the policy is hostile towards a specific group of employees. *See Maldonado*, 433 F.3d at 1305.

Third, like the English-only policy in *Premier*, Defendants' policy is pervasive and affects all workplace aspects at all times for Navajo employees. *See* 113 F. Supp. 2d at 1069, 1075; Begay Decl. ¶ 5. Notably, Defendant Sean Wilson admits that the written language policy provided no exception permitting employees to speak non-English languages, even during breaks. Wilson Decl. ¶ 14. While Defendants argue that their rule is not enforced in a "draconian manner," and point to only one employee being reprimanded as proof, this argument is unconvincing because all dissenting employees were terminated and the policy was suspended pending this lawsuit. *See* Begay Decl. ¶ 5.

For the reasons stated above, a reasonable juror could find that the English-only policy contributed to a hostile working environment at Canyon Burger.

2. The Wilsons cannot conclusively show that the policy serves an established business necessity because they fail to prove that it enhances employee retention, supervision, and customer service.

Contrary to Defendants' insinuations, Congress enacted Title VII to protect employees by banning discriminatory policies outright; employers are simply given a chance to justify their rule by proving a manifest relationship to employment. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). In line with this employee-friendly intent, the Ninth Circuit held that for an employer to invoke the business necessity exception, the rule must effectively carry out the alleged business purpose and be so compelling as

to outweigh the rule's discriminatory impact. *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*, 838 F.2d 1031, 1041 (9th Cir. 1988), vacated as moot, 490 U.S. 1016 (1989).[2]

Despite Defendants' claims, the policy has not contributed to any legitimate business needs because it diminishes workplace harmony and has not enhanced employee retention, supervision, or customer service.

a. The policy detracts from the work environment because it creates a sense of alienation and increased tension among Navajo workers.

A language rule is necessary to improve workplace harmony only where there is probative evidence that employees are using the non-English language to isolate co-workers. *Id*. at 1042. If the policy creates more tension, it is not a business necessity. *Id*.

In *Gutierrez*, the Ninth Circuit held that the employers' English-only policy did not promote racial harmony among court clerks and exacerbated racial tension. *Id*. The employer argued that Spanish-speaking employees used Spanish inappropriately to belittle non-Spanish-speaking employees. *Id*. However, the Ninth Circuit found that the defendant failed to support this claim; there were actually indications that non-Spanish-speaking employees had begun making racially discriminatory remarks against Spanish speakers after the policy was enacted. *Id*. Therefore, after considering the lack of evidence and the policy's adverse impact, it was clear that the policy's detrimental effects far outweighed any positive effects. *Id*.

Here, Defendants' policy similarly fails to prevent a hostile working environment and instead foments it. Defendants argue that they instituted an English-only policy to relieve tension after Navajo employees used Navajo to harass their co-workers. Wilson

[2] *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.* was vacated as moot because the plaintiff-appellee incorrectly sued the defendants-appellants. 838 F.2d 1031, 1041 (9th Cir. 1988). When relying on *Gutierrez*, other cases have explained that it was vacated for the aforementioned reason. *See Garcia v. Spun Steak*, 998 F.2d 1480, 1487 (9th Cir. 1993); *see also Kania v. Archdiocese of Philadelphia*, 14 F. Supp. 2d 730, 735 (E.D. Pa. 1988). However, vacated cases are often still persuasive. Additionally, because *Gutierrez* is the only existing Ninth Circuit case that addresses an English-only policy subject to the business necessity defense, it is particularly helpful to use in the present issue.

Decl. ¶ 10. However, like *Gutierrez*, there is no proof that the Navajo language was causing discord. *See* 838 F.2d at 1042. Instead, as Lily Pierce reported in her deposition, the sexual comments towards her stopped after Sean Wilson spoke with them, not after the rule was implemented. *See* Pierce Dep. 3:23-25. Additionally, Defendants only applied the rule to Navajo workers, effectively targeting them as a group. *See* Begay Decl. ¶ 8. Despite Defendants' claims that the policy was English-only, it was in actuality No-Navajo, as it was enforced when Navajo was used but not when Russian was used, thus creating a sense of isolation for Navajo employees. *See id*.

Our case is therefore distinguishable from *Long v. First Union Corp. of Virginia*, where the court upheld the defendant bank's English-only policy because substantial evidence demonstrated that the bank implemented the rule to stop Spanish-speaking employees from isolating members of other ethnic groups. 894 F. Supp. 933, 942 (E.D. Va. 1995). Unlike in *Long*, where the plaintiffs admitted to using Spanish so non-Spanish-speakers would not understand them, Navajo has never been used at Canyon Burger to exclude other ethnic groups. *See id.*; Begay Decl. ¶ 8. Rather, the sexual harassment incident was between Navajo workers and thus an issue of offensive word choice, not language choice. *See* Wilson Decl. ¶ 9.

Because Defendants cannot prove that the policy has improved the workplace environment and there is overwhelming evidence that the opposite has actually occurred, the rule does not contribute to any important business interest.

b. The policy does not improve customer service because some Navajo workers are not client-facing, and using Navajo with Navajo-speaking customers is actually preferable.

English-only rules are allowed when using English is central to job performance. *See EEOC v. Sephora USA, LLC*, 419 F. Supp. 2d 408, 417 (S.D.N.Y. 2005).

Defendants rely on two Southern District of New York cases to support their argument. *See* Def.'s Mot. at 14. In *Sephora*, the court found that it was reasonable to require salespeople to speak in a language that customers understand because there is an effect on the "helpfulness, politeness, and approachability" of the workers. 419 F. Supp. 2d at 417. Because promoting customer service would impact sales, requiring workers to use English with English-speaking customers was a business necessity. *Id*. In *Pacheco*, the court held that in order to maintain an image of respect and avoid the impression that a patient was being made fun of in a foreign language, it was fair to require employees to speak English when treating hospital patients. 593 F. Supp. 2d at 622. Because patients' comfort was inherently tied to a hospital's aims, a language policy was justifiable. *Id*.

Neither case controls here. Unlike *Sephora* and *Pacheco*, some Navajo workers at Canyon Burger do not even interact with customers. *See* 419 F. Supp. 2d at 417; 593 F. Supp. 2d at 622; Begay Decl. ¶ 7. In fact, the four individuals who were fired for refusing to sign the policy worked in the kitchen and not in a customer service capacity; their Navajo usage would not have impacted clients in any way. *See* Begay Decl. ¶ 7. Additionally, the policy does not improve Navajo workers' performance but detracts from it. *See id.* at ¶ 6. Native Navajo workers report that they work more efficiently in Navajo, and explaining something in English can take twice as long. *See id.*

Because the Wilsons' rule targets workers that do not interact with customers and negatively impacts workers' job performance, it is not a justifiable business necessity.

c. The policy does not enhance the Wilsons' ability to supervise their employees, particularly when Navajo usage is necessary.

Supervision does not justify an English-only policy where the policy fails to enable supervisors who speak only English to evaluate the information being communicated by employees more effectively. *Gutierrez*, 838 F.2d at 1041.

In *Gutierrez*, the Ninth Circuit ruled that a municipal court's English-only rule "in no way" enabled supervisors to more effectively evaluate the accuracy of information communicated to the non-English-speaking public by bilingual employees. *Id.* at 1043. The Ninth Circuit held that it would be illogical to expect employees hired for the purpose of speaking Spanish to the non-English-speaking public in order to facilitate the public's understanding to suddenly use English for the sake of purported accuracy. *Id*.

Defendants argue that they have a business interest in monitoring employee communications to stop offensive speech. *See* Def.'s Mot. at 15; Wilson Decl. ¶ 9. However, the English-only policy allows workers to use Navajo with customers that only understand Navajo. Wilson Decl. at ¶ 13. Thus, like in *Gutierrez*, it would still be impossible for the Wilsons to supervise these types of conversations, and the record shows that the Wilsons hired Navajo workers precisely for their bilingual ability. *See* 838 F.2d at 1043; Begay Decl. ¶ 8. In the same vein, Defendants' reliance on *Gonzalez* is misguided because the English-only policy in *Gonzalez* addressed the heart of the issue by allowing supervisors to know what was said in the work area at all times. *See* 1991 WL 1009376 at 2. The policy, which allows Navajo usage to further the Wilsons' pecuniary interest and therefore defeats supervisors' abilities to understand everything being said, cannot hope to replicate the *Gonzalez* policy's efficacy. *See id*; Wilson Decl. ¶ 13.

Therefore, because the English-only rule does not actually further the Wilsons' ability to effectively supervise their employees, it cannot be a business necessity.

3. Less discriminatory alternatives like addressing individual employees accused of harassment or using existing Navajo-speaking shift supervisors achieve the same desired effect as the present rule.

If the Court finds Defendants have established a valid business necessity defense, the plaintiff must simply present a less discriminatory alternative that would just as equally accomplish the policy's stated goals. *Albemarle*, 422 U.S. at 425.

In *Breiner v. Nevada Dep't of Corr.*, the Ninth Circuit found that less discriminatory alternatives to the contested policy existed. 610 F.3d 1202, 1205 (9th Cir. 2010). The defendant, the Nevada Department of Corrections (NDOC), instituted a policy of only hiring female officers at a women's prison, which it claimed would eliminate risky behavior between male guards and female inmates. *Id*. The Ninth Circuit found that the NDOC had not explored alternative approaches, such as enhanced training for supervisors and front-line guards at the prison, and they would likely be viable methods of achieving the same goal without impeding male employees' opportunities. *Id*. at 1216.

Like in *Breiner*, the Wilsons have failed to explore alternatives that would just as effectively achieve their aims. *See id.* For instance, the Wilsons claim they cannot ban offensive speech, as they would be unable to monitor offensive speech in Navajo. *See* Def.'s Mot. at 15. However, their policy, which allows employees to use Navajo with Navajo-speaking clients, similarly does not allow the English-speaking Wilsons to monitor conversations. *See* Begay Decl. ¶ 5. A clear solution would be to address employees accused of harassment individually; Wilson did this with the employees who harassed Pierce and solved the issue. *See* Pierce Dep. 3:23-25. Also, while the Wilsons claim that hiring bilingual supervisors is not viable, they already employ Navajo-speaking managers. Def.'s Mot. at 17. It is not inconceivable to ask existing bilingual supervisors to supervise employees. In fact, the Ninth Circuit recommends this. *See Gutierrez*, 838 F.2d at 1043. Thus, while Defendants cite *Fitzpatrick v. City of Atlanta*, this comparison is flawed. *See* 2 F.3d 1112 (11th Cir. 1993); Def.'s Mot. at 16. In *Fitzpatrick*, the plaintiff failed because the alternatives proposed did not equally serve the employer's demonstrated business needs. 2 F.3d 1112 (11th Cir. 1993). The present alternatives proposed achieve the Wilsons' purported goals in the same way the language policy does, and these alternatives are backed by previous court recommendations. *See Gutierrez*, 838 F.2d at 1043.

For these reasons, it is clear that Defendants have not explored alternatives that would just as effectively serve their business needs.

IV. CONCLUSION

(Omitted)

Georgiana Soo – Writing Sample

This writing sample is a case note that considers the impact of *PennEast Pipeline Co., LLC v. New Jersey, et al.*, 594 U.S. __ (2021) on the scope of judicial review. This note was part of my successful application for membership onto the *California Law Review*. Per the rules of the write-on competition, I composed it over the course of nine days at the end of my first year, using only a limited set of sources chosen by the competition's organizers. It has not been subject to outside review or editing.

***PennEast*: An Overreach of Judicial Review?**

The history of the United States and the Constitution has long been influenced by English common law.[1] Since the founding of the country, a significant amount of its legal foundations can be traced back to the old English feudal system, and these traditions have largely informed American jurisprudence.[2] One of the concepts that has endured—and now poses a fundamental issue—is that of eminent domain. Defined as "the power of the sovereign to take property" for its own use,[3] eminent domain serves as a relatively extensive form of power for the ruling body to seize private property under the nebulous reason of furthering the general public interest. Understandably, the English system—while influential—is not a mirror-image of the American governing structure. Thus, while some concepts may translate well, eminent domain's transition into the United States' legal

[1] See Scott Leary, *Constitutional Law – Sovereign Immunity – Under the Commerce Power, Congress Can Revoke State Sovereign Immunity Through Environmental Legislation*, 59 Miss. L. J. 773 (1989).
[2] See *id.*
[3] See Jennifer Danis & Michael Bloom, *Taking From States: Sovereign Immunity's Preclusive Effect on Private Takings of State Land*, 32 Stan. L. & Pol'y Rev. 59, 64 (2021).

affairs runs into the obvious issue of the power struggle between states and the federal government.

Unlike England, the United States' establishment of states—which have long served as de-facto mini countries themselves, with their own rules and governing traditions—ostensibly leads to the question of how to place eminent domain in the schism between maintaining states' sovereign legitimacy and the core roots of federalism. This question is not a new one. Extensive academic literature exists that wrestles with this very issue. Some scholars have analyzed and argued for the federalism platform, claiming that states have waived their sovereign immunity by the very nature of ratifying the Constitution.[4] Others have instead argued that early supporters of state sovereignty ratified the Constitution with the idea that states were to be treated in the same way foreign nations were, given the Constitution's occasional referencing of the states as "nations."[5] Even still, others have simply referred to the necessity of protecting "states' dignity," on the simple basis that this is a central aspect to the "American experience."[6]

This variety of arguments is reflected in the Court's differing opinions in *PennEast Pipeline Co., LLC v. New Jersey et al.*, where the majority found that state sovereign immunity was effectively overridden by acts empowered

[4] See Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493, 581 (2006); Zachary J. H. Wright, *Siting Natural Gas Pipelines Post-PennEast: The New Power of State-Held Conservation* Easements, 10 Ariz. J. of Env't L. 296, 307 (2020).
[5] Berger, *supra* note 4, at 546
[6] *Id.* at 545

by eminent domain. The dissent argued instead that the Commerce Clause could not be used to preclude states from invoking sovereign immunity, and that because the legislation in question was passed pursuant to the Commerce Clause, it was appropriate to apply this analysis. However, the various opinions are not the most pressing issue. The argument over the eminent domain and state sovereignty reveals a greater problem created by the *PennEast* decision, and both the majority and dissents miss the more crucial issue at hand.

By taking this case in the first place and empowering itself with the authority to determine the extent of Congress' power to delegate federal eminent domain power to select private parties, the Court overstepped its constitutional limits and weakened the balance of powers intended by the Framers. And, in an increasingly politicized era of jurisprudence in the United States, extended judicial review like the aforementioned is dangerous.

In 1938, using its powers under the Commerce Clause, Congress passed the Natural Gas Act in order to regulate the market surrounding natural gas across state lines.[7] In doing so, it empowered the Federal Power Commission to oversee the execution of the act, and the commission outlined a standard for building interstate pipelines.[8] Specifically, it decided that a private company would need to obtain a certificate indicating some

[7] *PennEast Pipeline Co., LLC v. New Jersey*, No. 19-1039, at 7 (U.S. Jun. 29, 2021).
[8] *Id.*

proof of present or future public interest in the construction project.[9] However, the act did not specify a means with which certificate holders could then gain the necessary property rights for construction, and companies faced the inability to access eminent domain powers under states.[10] Essentially, certificate holders merely had the ability to build in name alone, and they lacked the means or supplies to actually commence. In order to fix this issue, Congress amended the Natural Gas Act, empowering these companies to instead gain access to federal eminent domain power.[11] Because these certificate holders could instead use federal eminent domain power instead of the limited eminent domain power of states, the certificates graduated from useless licenses to effective, meaningful authorities.

This amendment was the central controversy when PennEast Pipeline Co., having obtained a certificate, looked to acquire land parcels in New Jersey via the exercise of the federal eminent domain power and subsequently filed complaints to immediately take control of desired property.[12] While other issues—like considerations regarding conservation and ecology efforts—were raised, New Jersey's main argument in its move to dismiss PennEast's complaints was grounded in that of sovereign immunity.[13] The lower courts took opposing views to the case. The District

[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at 9
[13] *Id.* at 10

Court ruled for PennEast on the grounds that New Jersey could not plead immunity to the all-controlling power of federal eminent domain.[14] On appeal, the Third Circuit instead reasoned that "Congress cannot abrogate state sovereign immunity in the absence of an 'unmistakably clear' statement."[15]

The Supreme Court reversed and remanded. Writing for the majority, Chief Justice Roberts argued that the issue was whether the federal government had the constitutional right to confer authority to private entities in a way that conflicts with a state interest. In a long-winded summary of judicial history and tradition, Chief Justice Roberts pointed to longstanding precedent that the federal government has consistently held the power of eminent domain and appropriately delegated this power to private entities.[16] Additionally, he noted that state property has not historically been able to argue for successful immunity against the federal eminent domain power.[17]

Chief Justice Roberts then considered New Jersey's argument that sovereign immunity protects States from being dragged into condemnation actions and suits.[18] He noted that while immunity from suits is a "fundamental aspect of the sovereignty which the States" enjoy, states can

[14] *Id.*
[15] *Id.*
[16] *Id.* at 12-16
[17] *Id.* at 15
[18] *Id.* at 18

be sued if they have "consented to suit."[19] In this instance, once again diving deep into the history books, Chief Justice Roberts points to consent in the form of the states' consenting to federal eminent domain power during the Constitutional Convention.[20] Essentially, he argues that the states understood that their ratification of the Constitution in the days of the Framers also empowered the federal government to assert control when it suited the public interest.

Justice Barrett authored the primary dissent, with Justice Gorsuch fully joining and additionally writing a separate dissent. Justice Barrett's dissent rejected the majority's contention that there could be a consensual waiver of states' sovereign immunity under the National Gas Act because Congress invoked their powers under the Commerce Clause.[21] Justice Gorsuch's dissent added to this, outlining two distinct variations of sovereign immunity for states that were applicable in this case.[22]

Justice Barrett found a clear fault in the majority opinion. She followed an apparently logical analysis, tracing the validity—or invalidity—of Congress' power to the question of where it was derived from. In identifying the Commerce Clause as the justification for Congress' actions, which pertained to the regulation of interstate commerce, she wrote that it was

[19] *Id*. at 20
[20] *Id*.
[21] *Id*. at 33
[22] *Id*. at 29

simply court precedent that this power did not permit the legislative branch to encroach on the states' right to sovereign immunity.[23] Additionally, she reasoned that while the majority effectively sidestepped a real analysis of *Seminole Tribe of Florida v. Florida*, a proper application of the case would prove that the Court had historically ruled that Congress could not abrogate state sovereign immunity.[24]

Fully joining Justice Barrett's dissent, Justice Gorsuch went even further with his analysis. In addition to the Commerce Clause consideration, he further parsed what sorts of immunity states could invoke.[25] Specifically, he outlined "Eleventh Amendment immunity" as an "ironclad rule" for certain diversity suits.[26] Applying a civil procedure argument to his dissent, Justice Gorsuch argued that the Eleventh Amendment bars suits on the basis of lacking subject-matter jurisdiction, where federal judicial power cannot control in suits filed against states by a diverse set of plaintiffs.[27]

Chief Justice Roberts' and Justice Barrett's analyses, while riveting, are somewhat ironic. For all the historical precedent and deference to the Constitution that they apply, they fail to consider the implications of issuing a decision that perhaps falls outside the scope of the ideal checks and balances framework. And Justice Gorsuch's analysis, though ultimately

[23] *Id.* at 33
[24] *Id.* at 34
[25] *Id.* at 29
[26] *Id.* at 30
[27] *Id.* at 31

focused on a specific jurisdiction issue, touches upon a crucial consideration. That is, does the Court have the requisite authority?

Perhaps, when analyzing the Court's ruling in *PennEast*, the inclination is to weigh the eminent domain issue against state sovereignty and find the appropriate balance or solution. This would certainly be a valid inquiry and, as mentioned above, many scholars have engaged in such a consideration. However, *PennEast* highlights a fundamental tension that the Court often engages with: authoring opinions rooted in the Constitution yet taking judicial review too far.

The concept of judicial review has long been established. *Marbury v. Madison* exists as the landmark case in which the Supreme Court set forth a precedent that it could declare the acts of Congress and the President unconstitutional. However, while this has undoubtedly served to equalize the playing field between the three branches, an argument can be made that the Court is sitting on a slippery slope and slowly sliding towards a dictatorial application of its powers on its executive and legislative counterparts.

In considering the crux of the *PennEast* problem, the primary concern is whether the National Gas Act, an act passed by the legislative branch, has the requisite authority to apply the federal government's eminent domain power. Essentially, the judicial branch is weighing whether a decision made by the legislative branch, which applies powers vested in the executive

branch, is valid. This sequence seems contrary to the very logic Chief Justice Roberts applies. As outlined earlier, the majority opinion rests heavily in the application in the intent and mindset of the states during the foundational days of the nation. Chief Justice Roberts refers constantly to the states being subject to the federal eminent domain power when they willingly consented to the Constitution's ratification during "the founding."[28] However, if this is the case, the states also consented to a ratification of a Constitution that they perceived to have no provision which granted courts the power to negate the will of the people.

Perhaps even more striking is that Congress specifically amended the Natural Gas Act after its evident uselessness, and it did so with the intent of crafting an effective method of furthering the public interest. Specifically, the case notes that "Congress acted to remedy this defect" when, in 1947, it opted to amend the act to provide certificate holders with the ability invoke the federal eminent domain power.[29] The intent is clear. When Congress amends anything, it does so to either change the meaning of the legislation in question or further refine it. Here, in an open-faced effort to advance its aims, Congress instituted an amendment to vest private entities with the requisite power to carry out construction. The Court's attempt to decide

[28] *Id.* at 6
[29] *Id.* at 8

whether or not the federal government is fundamentally allowed to do this is an encroachment of the balance of powers.

This line of reasoning may seem somewhat bizarre. After all, *Marbury v. Madison* has long been treated as a basis for judicial review, and there have been minimal efforts to question its legitimacy. Indeed, the Supreme Court's ability to review the acts of the legislative and executive branch do bring about a sort of checks and balances that, while not explicitly outlined in the Constitution, serves to preserve the general tenets of democracy. However, issues arise when the Court begins to take an increasingly activist approach to judicial review, which has been proven in its historical decision regarding issues of eminent domain. For instance, in *Kelo v. City of New London*,[30] the Court held that an individual's private property—ordinarily put to private use—could be confiscated with the intent to simply hand it over to another entity for a separate private use.[31] In so ordering, the Court expanded the natural interpretation of "public use," such that the phrase was now broad enough to cover generally approved economic-redevelopment plans.[32] This decision effectively widened what might fall into

[30] See Fiona Steele, *Third Circuit Halts Interstate Pipeline Construction in PennEast Pipeline Stats and Environmentalists Find an Ally in Sovereign Immunity*, 65 Vill. L. Rev. 917 (2020) (citing *Kelo v. City of New London*, 546 U.S. 469 (2005)).
[31] See Shawn Welch, *Looking Beyond the Supreme Court's Eminent Domain Decision in PennEast* (2021)
[32] See Gerald Korngold, *Governmental Conservation Easements: A Means to Advance Efficiency, Freedom from Coercion, Flexibility and Democracy*, 78 Brook. L. Rev. 467, 491 (2013).

the eminent domain criteria, and it further empowered an already powerful governmental tool that remains controversial and debatable.

In any normal circumstance, the Court's decision to remain passive or become activist is entirely their prerogative. However, in the current socio-political climate, a Supreme Court that aggressively oversteps its powers is particularly concerning.

In recent years, the judicial branch has become increasingly politicized. While it was once seen as a body of impartiality—effectively insulated from the whims of the divisive two-party system—the Supreme Court has grown more involved as a means to specific political ends. Consider, for instance, the current hot button topic of abortion. While a number of justices originally pledged to uphold the precedent set in *Roe v. Wade*, recent developments have revealed a court that has been willing to be activist to achieve more conservative ends. Regardless of ideological preference, the fundamental concern is the dangerous precedent set when a court, comprised of nine unelected justices, acts as the arm to execute the will of specific political agendas and does so in a way that breaches the balance of powers originally envisioned by the Framers. The Court's decision to take the *PennEast* case and author an opinion setting explicit boundaries on the extent of Congress's ability to delegate the federal eminent domain power is concerning. More importantly, there is something inherently flawed when the legislative branch stops using their constitutionally delegated

powers to enact laws via bipartisan compromise and instead looks to a nine-member court to shape political policy.

Ultimately, *PennEast* is a valuable case that illuminates a central problem with the judicial branch's potential overreach in the 21st century. While eminent domain and state sovereignty issues exist and prove to be robust points of debate, the looming issue is that of the governmental branches hijacking the powers of their counterparts. In his dissent, Justice Gorsuch noted via a civil procedure approach that there was perhaps lacking jurisdiction to try the *PennEast* case. While the reasoning is entirely unrelated, the thrust of the argument remains relevant. *PennEast*'s primary effect rests not in the content of the decision but in the questionable authority for making the decision, and it sets a dangerous precedent for an activist judicial branch acting more politician than mediator.

Applicant Details

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Applicant Education

BA/BS From	**Florida State University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Oklahoma College of Law** **http://law.ou.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**30%**
Law Review/Journal	**Yes**
Journal(s)	**Oil and Gas, Natural Resources, and Energy Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

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

Specialized Work Experience

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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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8/1/2023

Judge Browning:

I am writing to apply for a 2024-2025 clerkship with your chambers. I am now a 3L at the University of Oklahoma College of Law.

I love researching and writing about novel legal issues. As far as I can tell, clerking for you would be the best opportunity in the world because a federal docket contains almost every type of case there is.

I would do great work as a federal clerk. I am an Articles Editor for the Oklahoma Oil and Gas, Natural Resources, and Energy Journal, so I will be editing my peers' work during the 2023–2024 schoolyear. I am also in the top 30% of my class. During my internships, I have drafted over twenty argumentative motions and other papers, including a brief that was argued at the Oklahoma Supreme Court. This number will continue to grow as I work during the coming fall and spring. I've researched and written memoranda on all sorts of topics, from defenses to criminal charges to the viability of a nuisance claim arising from dog barking. My supervising attorneys rely on my work because I make sure it's correct and clearly written. Nevertheless, when I write, I like to focus not just on accuracy and clarity, but also conciseness. Every sentence is more words that the reader needs to slog through, so I keep wordiness to a minimum.

I am confident that my educational and professional experience will make me an asset. Please let me know if we can schedule an interview. I want this clerkship, and I will work hard for you if I get it.

Respectfully,
Daniel Zonas

Daniel Zonas

(239) 250-2578 - danielzonas@yahoo.com

Education

University of Oklahoma College of Law *2021–2024*

- GPA: 9.339/12.0 (Equivalent to 3.4/4.0)
- Rank: 59 of 201 (Top 30%)
- Dean's Honor Roll (Fall 2021, Spring 2023)
- Articles Editor for the Oil and Gas, Natural Resources, and Energy Journal
- Amicus Society Public Interest Fellow, over 250 pro-bono hours

Florida State University *2021*

- B.A. in Philosophy

Professional Experience

Jason Waddell, PLLC **Oklahoma City, OK**
Law Clerk *Summer–Fall 2023*

- Drafted a brief in support of an application for writs of prohibition and mandamus regarding a district court order enforcing overbroad subpoenas duces tecum.
- Prepared over twenty pleadings, motions, and other papers, including a motion for summary judgment for a breach of contract claim, a motion to strike improper summary judgment affidavits, and a response to a motion to dismiss in a dog bite case.
- Wrote an opening statement outline for an insurance bad faith case.
- Took notes during five depositions, four hearings, and a client consultation.

Mazaheri Law Firm **Oklahoma City, OK**
Law Clerk *Spring–Summer 2023*

- Prepared a response to a position statement for a Title VII retaliation claim.
- Prepared over five research memoranda, including analysis of the legality of a tipping policy, defenses for a reckless conduct charge, and venue for a property dispute.
- Drafted seven divorce decrees and an antenuptial agreement.
- Drafted three discovery requests and two discovery responses.
- Drafted over twelve demand letters and EEOC charges.
- Met with clients regarding discovery responses and an antenuptial agreement.

Oklahoma County District Attorney's Office **Oklahoma City, OK**
Law Clerk *Summer 2022*

- Facilitated Diversion Court proceedings by providing participant status reports.
- Managed restitution for Diversion Court participants by contacting victims.
- Observed over twenty trials, hearings, and arraignments.
- Drafted a motion to dismiss for the Felonies Team.

Schwartz & Zonas **Naples, FL**
Receptionist *Summer 2018, Summer 2019*

- Handled client intake for personal injury and criminal defense attorneys.
- Filed insurance claims, retrieved accident reports, and answered the phone.

The University of Oklahoma College of Law

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Grade	Points
A+	12
A	11
A-	10
B+	9
B	8
B-	7
C+	6
C	5
C-	4
D+	3
D	2
D-	1
F	0

THE UNIVERSITY OF OKLAHOMA COLLEGE OF LAW UNOFFICIAL TRANSCRIPT

Zonas, Daniel Patrick
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Course	Dept	No.	Hours	Grade
Fall 2021				
Legal Foundations	LAW	6100	1	S
Property	LAW	5234	4	B+
Torts	LAW	5144	4	A-
Research/Writing & Analysis I	LAW	5123	3	B+
Civil Procedure I	LAW	5103	3	B+
GPH: 14	GPS: 130	HA: 15	HE: 15	GPA: 9.286
Spring 2022				
Criminal Law	LAW	5223	3	B+
Civil Procedure II	LAW	5203	3	A-
Intro to Brief Writing	LAW	5201	1	B+
Constitutional Law	LAW	5134	4	B
Oral Advocacy	LAW	5301	1	B
Contracts	LAW	5114	4	B
GPH: 16	GPS: 138	HA: 16	HE: 16	GPA: 8.625
Summer 2022				
Extern Placement	LAW	6400	3	S
Issues in Professionalism	LAW	6400	2	S
GPH: 0	GPS: 0	HA: 5	HE: 5	GPA: 0.000
Fall 2022				
Evidence	LAW	5314	4	A
Trademarks	LAW	6223	3	A-
Oil and Gas	LAW	6540	3	B
Professional Responsibility	LAW	5323	3	B+
ONE J	LAW	6331	1	S
GPH: 13	GPS: 125	HA: 14	HE: 14	GPA: 9.615
Spring 2023				
Family Law	LAW	5443	3	B+
Secured Transactions	LAW	5750	3	A-
Torts II	LAW	6100	2	B+
Oil and Gas Contracts and Tax	LAW	6550	3	A
Tort Law/Communications Media	LAW	6700	2	A
GPH: 13	GPS: 130	HA: 13	HE: 13	GPA: 10.000
Fall 2023				
Crim Pro: Investigation	LAW	5303	3	

Income Taxation of Individuals	LAW	5463	3	
Civil Pretrial Litigation	LAW	5530	3	
Unincorporated Entitities	LAW	5733	3	
Workers' Compensation	LAW	6100	2	
Trial Techniques	LAW	6410	3	
GPH:	GPS:	HA:	HE:	GPA:

	GPH	GPS	HA	HE	GPA
OU CUM:	56	523	63	63	9.339

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