No.

IN THE

Supreme Court of the United States

EILEEN L. ZELL,

Petitioner,

v.

KATHERINE M. KLINGELHAFER, ESQ.;
FROST BROWN TODD, LLC;
PATRICIA D. LAUB, ESQ.; SHANNAH J. MORRIS, ESQ.;
JOSEPH J. DEHNER, ESQ.; DOUGLAS A. BOZELL,
ESQ.; JEFFREY G. RUPERT, ESQ.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This is a legal-malpractice case filed against the Respondent Frost Brown Todd ("FBT") law firm and several of FBT's attorneys by their former client (Petitioner Eileen Zell), who is currently being represented by her son (the undersigned Jonathan Zell).[1]

The question presented in this *cert*. petition is:

Whether the following actions of the district and appellate courts below represented concrete evidence of ***actual bias*** that violates due process of law:

1. Due to Petitioner's refusal to accept the six-figure settlement offer that the district court judge ***personally*** negotiated from Respondent FBT during the *ex parte* meetings the judge held with FBT and its counsel during the parties' Settlement Conference and the judge's ***vehemently*** stated disapproval on the record of the undersigned Petitioner's son's (Jonathan Zell's) intention — unless FBT increased its settlement offer — to publicize the facts of the instant case via a website that could ***harm FBT's reputation***, the judge apparently gave FBT the green light to commit perjury at trial and to ***frame*** the undersigned for FBT's own legal malpractice.

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[1] Both Frost Brown Todd individually and all the Respondents collectively will be referred to herein as "FBT"; Petitioner Eileen Zell will be referred to as "my mother," "Petitioner," or "MRS. ZELL"; and Jonathan Zell will be referred to as "I," "me," "the undersigned," "MRS. ZELL's son," or "MR. ZELL." MRS. ZELL's pleadings in the instant case before the 6th Circuit will be identified with the designation "6th Cir." All "Trial Exhibits" are those of MRS. ZELL.

2. After Respondent Jeffrey Rupert ("RUPERT"), Rupert's associate, Respondent Katherine Klingelhafer ("KLINGELHAFER"), and two other FBT attorney-witnesses, Respondent Shannah Morris ("MORRIS") and Aaron Bernay ("BERNAY"), gave blatant, ***obvious***, and wholesale perjured testimony at trial — which testimony was directly contradicted by everything else in the almost four-year history of the case, including (according to the undisputed testimony of Petitioner's expert witness) even commonsense as well as the district court's own prior rulings (which should have constituted the law of the case) — the district court still based its findings of fact directly on those obviously-perjured testimonies.

3. The district court denied Petitioner's request to recall (only) RUPERT to the witness stand despite Petitioner's having been "sandbagged" and "ambushed" at trial by the surprise perjuries of RUPERT, KLINGELHAFER, MORRIS, and BERNAY. (*See* p. 94 of 6th Cir. *Opening Brief*.)

4. The district court denied Petitioner's *Motion for a New Trial Based on FBT's Perjury* without addressing any of the voluminous documentary evidence or the district court's own prior rulings (representing the law of the case) — both of which clearly demonstrated FBT's perjury.

5. The district court denied Petitioner's request for oral argument on Petitioner's *Motion for a New Trial Based on FBT's Perjury* — an oral argument that would have exposed both FBT's perjurious testimony and the district court's biased decision for all to see.

6. The Sixth Circuit denied Petitioner's appeal without addressing any of the voluminous documentary evidence demonstrating the perjurious testimony of FBT on which the district court had based its decision or even addressing the district court's own prior contradictory rulings (which should have constituted the law of the case).

7. The Sixth Circuit denied Petitioner's request for oral argument (which was opposed by FBT) — an oral argument that would have exposed both FBT's perjurious testimony and the district court's biased decision for all to see, and thus would have interfered with the Sixth Circuit's intention to cover up both FBT's and the district court's misconduct.

8. The Sixth Circuit denied Petitioner's appeal ***before*** the stated date that the panel was supposed to ***begin*** reviewing that appeal, thereby preventing Petitioner from filing a motion to challenge the denial of her prior request for oral argument. (*See* 6th Cir. *Petition for Rehearing* (Apps. G at 73-74 & H.)

9. The Sixth Circuit denied Petitioner's timely petition for rehearing and rehearing en banc despite Petitioner's proven allegations of wholesale perjury by FBT and of bias by both the district court and the appellate-court panel.

10. The district court and the Sixth Circuit did all of the above to cover up the perjury of a politically-prominent local law firm (Respondent FBT) and to ***frame*** the undersigned Petitioner's son (Jonathan Zell) for FBT's own legal malpractice in accordance with the extra-legal principle of "Too Big to Lose."

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PETITION FOR A WRIT OF CERTIORARI

I Accuse!

The undersigned (Petitioner's son) is an Ivy League graduate and attorney who has been in good standing and never been disciplined since my first bar admission 35 years ago. I have worked for two New York State Supreme Court Justices, a U.S. Senator, as a Special Assistant to the U.S. Attorney for the So. District of Ohio, and currently as the Co-Executive Director of a *pro bono* legal-services organization led by a former federal appellate court judge. Finally, I have never taken even a single penny in attorney's fees from a private law client in my life.

Yet, in the spirit of the writer Émile Zola, who criticized the unlawful conviction of Alfred Dreyfus in what became known as the "Dreyfus Affair," I accuse U.S. District Court Judge Algenon Marbley (my former work colleague and former friend) and a panel of the Cincinnati-based U.S. Court of Appeals for the Sixth Circuit of blatantly, ***obviously,*** and corruptly "fixing" Petitioner Eileen Zell's (my own mother's) legal-malpractice case against the Cincinnati-headquartered law firm of Frost Brown Todd ("FBT") to cover up FBT's ***obvious*** perjury at trial and to ***frame*** me (the undersigned) for FBT's own legal malpractice in violation of due process of law.

FBT has previously bragged that it "could control the federal courts [in the Sixth Circuit]" — which, from the instant case, appears to be ***true***. This came to light in another federal lawsuit as shown below:

From the Trial Transcript in *Rennick v. Champion Int'l Corp.*, Case No. C-1-84-1487 (S.D. Ohio 1988). *See* Exhibit 1 (Doc 1-1) at Page 175 to Complaint filed in *Carr v. Sessions*, Case No. 1:18-cv-00356 (D.D.C. 2018)

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FROST BROWN TODD ATTORNEY RANDY FREKING:

Q: Mr. Lampley, the meeting I had with you and the other witnesses last week, who else was in the meeting when I told you that I [meaning Frost Brown Todd] controlled the Federal Courts?

WITNESS ALLEN LAMPLEY:

A: You said you [meaning Frost Brown Todd] had people in higher places that could control the Federal Courts.

FROST BROWN TODD ATTORNEY RANDY FREKING:

Q: I have places, I have people?

WITNESS ALLEN LAMPLEY:

A: You have people, you are associated with people in the higher places that can control the Federal Courts....

Besides risking my law license to make these accusations, I have also created a website at *http://OccupyTheFranklinCountyCourts.com*, where I am offering over $100,000.00 to someone who can disprove my accusations of perjury and case-fixing.

Although the issue in the instant case — the framing of an innocent person by both a prominent law firm and the federal courts to cover up the law firm's perjury and legal malpractice — does not involve the deprivation of anyone's liberty as did the Dreyfus Affair, the official corruption implicated in both are one and the same.

Therefore, if this Court does not grant this *cert.* petition, I will spend the rest of my life turning the instant case into the "Zell Affair" by recruiting former federal judges to serve as unofficial "Special Masters" to confirm the travesy of justice that occurred in this case. This case will then become "Exhibit 1" in the larger public debate, recently begun by President Donald Trump, questioning the very legitimacy of our judicial system.

On the other hand, if the Court does grant this petition, I guarantee FBT will settle this case — with an offer Petitioner could not refuse — so fast your heads will spin. In other words, this Court could right an injustice while at the same time not unduely embarrassing the judges in question. However, the lower courts would still get the message that this Court will no longer protect them when they demonstrate actual bias by corruptly "fixing" court cases and framing innocent people to protect the powerful.

The District Judge's Motive

Perhaps the first order of business should be an explanation of why such a well-respected jurist as District Court Judge Algenon Marbley (my former work colleague and former friend) would have wanted to corruptly "fix" my mother's case. An explanation can be gleaned from even the limited amount of evidence that is on the record from the Settlement Conference that Judge Marbley personally conducted on January 4, 2017 — which included numerous *ex parte* private meetings between Judge Marbley and each of the parties and/or their counsel.[2]

To begin with, during his *ex parte* meetings with FBT and its counsel, Judge Marbley personally negotiated a six-figure settlement offer from FBT. In the beginning of the litigation, this settlement amount would have been ***more*** than enough. However, after almost four years of litigation, that amount just covered the attorneys' fees (none of which went to me) that my mother had paid in this case.

At the end of the Settlement Conference, Judge Marbley stated on the record that the sole sticking point preventing the parties from settling the case was that FBT had required:

> Mrs. Zell and her attorney, her son, Jonathan Zell, to sign a non-disparagement

[2] Because Judge Marbley never sought or obtained either Petitioner's or her counsel's consent to the Judge's *ex parte* meetings with the FBT representative and FBT's counsel, those meetings appear to have violated Rule 2.9 (A)(4) of the A.B.A. *Model Code of Judicial Conduct*.

> clause, a confidentiality agreement.… Mrs. Zell has agreed to sign off on the settlement agreement. Her attorney, however, has not agreed.

Transcript of Settlement Conference Proceedings, ECF 226, Page ID # 6389, lines 1-14. (By the way, Judge Marbley's above statement was not accurate. What actually happened is that ***both*** my mother and I had refused to sign off on FBT's settlement unless ***either*** the dollar amount were increased ***or*** I were not required to sign a confidentiality agreement.)

Everyone present at the Settlement Conference knew that FBT's settlement offer would simply repay my mother's attorneys' fees in the instant case and that, for this reason, I intended to create a website publicizing FBT's malpractice in this case — which a confidentiality agreement would have prevented — in an attempt to augment that settlement amount and make my mother whole (if necessary, even after the case had settled). This was suggested in the transcript of my deposition (which FBT filed with the district court on Aug. 4, 2014). *See* Transcript of Videotape Deposition of Jonathan R. Zell, ECF 81-1, Page ID # 1298, line 23 to Page ID # 1299, lines 4-19; Page ID # 1301, lines 3-11; Page ID # 1303, lines 18-20; Page ID # 1304, lines 23-24; Page ID # 1305, lines 15-16; Page ID # 1306, lines 3-4.

As everyone at the Settlement Conference also knew, this is why I would not sign a confidentiality agreement ***unless*** FBT significantly increased its settlement offer to my mother. However, Judge Marbley did ***not*** approve of my plan ***to embarass FBT*** by publicizing FBT's malpractice in the instant

case on a website, and the Judge accused me of wanting to get my pound of flesh from FBT.

After yelling and screaming throughout the day (until he became hoarse) at my mother and me to accept this settlement offer, Judge Marbley tried to warn me that he wouldn't be free at the upcoming bench trial to rule against FBT, which he called "an institution" (apparently meaning FBT was too big to lose). But, unfortunately, I didn't heed Judge Marbley's warning or realize that, if the Judge didn't want me to publicize FBT's ***settlement*** on a website, then he certainly wouldn't want me to publicize a ***victory in court*** over FBT (which the Judge, of course, had the power to prevent).

Judge Marbley also stated on the record:

> I think that this was an unfortunate decision on the part of counsel for the plaintiff because the only reason that this case does not get settled is that he does not want to sign a non-disparagement clause with respect to Frost Brown. And I don't think that that is an appropriate basis.

Transcript of Settlement Conference Proceedings, ECF 226, Page ID # 6391, lines 2-7.

For this reason, Judge Marbley then stated that he was going *sua sponte* to conduct an investigation to determine whether or not I had a conflict of interest in representing my mother in this case and:

> [I]n the event that the Court determines that there is some conflict with Jonathan Zell representing Mrs. Eileen Zell, then … Mr. Jonathan Zell cannot represent his mother at trial.

Id., ECF 226, Page ID # 6390, lines 16-19.

On February 6, 2017, Judge Marbley issued an *Opinion & Order* reporting back on the results of

> the Court's *sua sponte* inquiry regarding the propriety of Jonathan Zell's ("Mr. Zell") continued representation of his mother, Eileen Zell ("Mrs. Zell"), in the above-captioned case[.]

Opinion & Order, ECF 187, Page ID # 4230.

Without explaining what it was, Judge Marbley found there to be an actual conflict of interest:

> Based on the events that transpired in the confidential settlement conference, the Court finds that Mr. Zell, in representing Mrs. Zell, is operating under a conflict of interest.
>
> ***
>
> [However, i]f Mrs. Zell executes this written, informed consent, Mr. Zell may continue to represent her in this case.

Id., ECF 187, Page ID # 4232 and 4234.

MRS. ZELL then gave Judge Marbley a written informed consent agreement. *See Informed Consent Agreement to Attorney Representation*, ECF 188-1.

Due to Petitioner's refusal to accept the six-figure settlement offer that Judge Marbley had personally negotiated from FBT during the *ex parte* meetings the Judge had held with FBT and its counsel during the parties' Settlement Conference and Judge Marbley's disapproval of the undersigned Petitioner's son's (Jonathan Zell's) intention — unless FBT increased its settlement offer — ***to embarass FBT*** by publicizing FBT's malpractice in the instant case on a website, Judge Marbley then apparently gave FBT the green light to commit perjury at the trial.

This is because, as will be shown below, the perjury at trial of Respondents RUPERT, KLINGELHAFER, and MORRIS as well as of FBT attorney BERNAY was ***obvious***, blatant, and clearly coached (by FBT's loss-prevention counsel Matthew Blickensderfer). For their identical — but falsified — version of the facts was ***completely different*** from what the parties had pleaded during the preceding four years of this case, what Judge Marbley had found in his previous *Opinion & Order* on an identical issue (i.e., that FBT — and not the undersigned — was the ***source*** of the allegedly-negligent legal advice given to Petitioner), and what (as MRS. ZELL's expert witness later testified at the trial) the emails to and from the FBT attorneys clearly and explicitly showed. Nonetheless, Judge Marbley adopted FBT's perjurious testimony as his own findings of fact, and then proceeded to base his entire decision squarely on that ***obvious*** perjury.

After Judge Marbley's decision, MRS. ZELL filed a 63-page *Motion for a New Trial Based on FBT's Perjury* (ECF 211) and a 76-page reply brief (ECF 217) proving the ***obvious*** and wholesale perjuries of RUPERT, KLINGELHAFER, MORRIS, and BERNAY. However, in order to avoid suborning its clients' perjuries, the law firm representing FBT ***declined to dispute*** any of those allegations of perjury in its response (ECF 215) to this motion. Nevertheless, Judge Marbley ignored all of the voluminous (and undisputed) evidence of perjury and denied the *Motion for a New Trial* without even the oral argument that MRS. ZELL had requested.

OPINIONS BELOW

The Sixth Circuit panel's opinion dated Sept. 24, 2018 (App. A) affirming the district court's decision granting Respondents' *Rule 52(c) Motion for a Judgment on Partial Findings* is reported at *Zell v. Klingelhafer*, No. 17-3534, 2018 WL 4566867 (6th Cir. Sept. 24, 2018).

The district court's decision dated January 8, 2018 (App. B) denying Petitioner's *Motion for a New Trial Based on FBT's Perjury* is reported at *Zell v. Klingelhafer*, *et al.*, Case No. 13-CV-458, 2018 WL 334386 (S.D. Ohio Jan. 8, 2018).

The district court's *Judgment in a Civil Case* dated April 21, 2017 (App. C) granting FBT's *Rule 52(c) Motion* is unreported.

The district court's findings of fact, conclusions of law, and decision issued on April 14, 2018 (App. D)

granting FBT's *Rule 52(c) Motion* is unreported.

The district court's decision dated Dec. 23, 2014 (App. E) granting the undersigned Petitioner's son's (Jonathan Zell's) *Motion for Summary Judgment on FBT's Third-Party Complaint* is reported at *Zell v. Klingelhafer*, No. 2:13-CV-00458, 2014 WL 7341041 (S.D. Ohio Dec. 23, 2014).

The Sixth Circuit's order dated Oct. 31, 2018 (App. F) denying Petitioner's timely *Petition for Rehearing and Rehearing En Banc* is unreported.

JURISDICTION

The Court of Appeals for the Sixth Circuit entered judgment on Sept. 24, 2018. By order dated Oct. 31, 2018, the Sixth Circuit denied Petitioner's timely petition for rehearing and rehearing en banc. The district court below had subject-matter jurisdiction over this action based on diversity of citizenship and a controversy exceeding $75,000 pursuant to 28 U.S.C. § 1332(a)(2). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

> No person shall ... be deprived of life, liberty, or property, without due process of law....

U.S. Const. amend. V.

INTRODUCTION

The issue of judicial partisanship — recently raised by no less than the President of the United States and disputed by no less than the Chief Justice of the United States Supreme Court — has been much in the news these days.[3]

Determining whether the courts are "impartial[] and non-partisan[]" and, thus, even "legitima[te]," *see Mistretta v. United States*, 488 U.S. 361, 407 (1989), however, takes more than mere rhetoric. For example, both scholarly research and public opinion largely support the President's position, while the courts and the organized bar fall in line behind the Chief Justice.

But what is missing from this discussion are the historical facts, such as the nearly 100-year history of Jim Crow in the Deep South. There, state-court actions were essentially legalized lynchings and, while the federal courts occasionally stepped in to correct procedural flaws, their "too little-too late" approach merely delayed the inevitable.

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[3] "After the president responded to an administration loss in a lower court by criticizing the judge who issued it, calling him an 'Obama judge,' Chief Justice Roberts issued a sharp public statement. He insisted, ***against the weight of substantial evidence***, that 'we do not have Obama judges or Trump judges, Bush judges or Clinton judges.'" Adam Liptak, *As Supreme Court Tips Right, Chief Justice Steers to Center,* N.Y. Times (Dec. 24, 2018), at A1 (emphasis added).

Take, for example, the 1949 case of the "Groveland Four," pardoned just this month by the State of Florida. After this Court overturned two of the men's convictions, the local sheriff then shot the men at point-blank range. One died, while the other was retried and sentenced to death by an all-white jury. Further appeals were in vain.[4]

More recently — as in the instant case — the legalized lynchings of African-Americans in criminal cases in the South have been replaced by analogous injustices to all races in civil cases nationwide. As a recent magazine article noted:

> [A] broken system leads too many judges to call balls for one side and strikes for another.

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[4] Although the Groveland Four were represented by none other than the great Thurgood Marshall, once the case was over he seems to have been content to let history bury this travesty of justice. In contrast, as one of his co-counsels (Alex Akerman, Jr.) later wrote in a letter to the *Orlando Morning Sentinel*:

> Someday, God willing, the true facts of the Groveland case will be unearthed and brought to light. It is my firm belief that when this occasion does arise that even your editorial writers will no longer condemn but will respect me for my activities in this case.

Gary Corsair, *The Groveland Four: The Sad Saga of a Legal Lynching* vii (2004).

These are also the undersigned's sentiments exactly in the instant case.

Andrew Cohen, *When the "Umpire" Is Playing for the Other Team*, The Atlantic Monthly (Oct. 9, 2012).

Thus, the unwritten law of the land — and this is backed up by scholarly research — now seems to have become "Too Big to Lose" — which has taken its place next to "Too Big to Jail"[5] and "Too Big to Fail."[6]

For example, as a major study of election cases has shown, judges often rule in favor of the political party that put them in office. *See generally* Michael S. Kang and Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 Stanford Law Rev. 1411 (2016). And, as the authors of that study have stated:

> There is little reason to believe that partisanship influences judges ***only*** in election cases. It could be that our work here exposes just the tip of the proverbial iceberg. If judges are influenced, consciously or not, by loyalty to their party in election cases, they are likely tempted to do so in other types of cases as well, even if it is methodologically difficult to isolate partisanship as cleanly there.

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[5] Maureen Dowd, *Too Rich to Jail*, N.Y Times (Nov. 17, 2018), at SR9.

[6] Andrew Ross Sorkin, *Too Big to Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial System — and Themselves* (2010).

See id. at 1452 (original emphasis).

Even though they have lifetime tenure, federal judges are not immune to partisanship. For, "while judicial independence may sometimes free a judge from unwanted political pressure, those structures do nothing to prevent an insulated judge from indulging her or his own political preferences or private agendas." *See* Howard Gillman, *Judicial Independence Through the Lens of* Bush v. Gore*: Four Lessons from Political Science*, 64 Ohio St. L.J. 249, 264 (2003).

Indeed, as a study of eleven U.S. courts of appeal has shown, federal judges are every bit as partisan as their state-court counterparts, who have to stand for re-election. *See generally* Corey Rayburn Yung, *Beyond Ideology: An Empirical Study of Partisanship and Independence in the Federal Courts*, 80 Geo. Wash. L. Rev. 505, 508 (2012). Criticizing both judges who came to the bench after private-law practice and those who came after government service, this study found that ***only*** formerly full-time law professors displayed a relative lack of partisanship because their personal interests more often dovetailed with rendering a legally-correct decision. *See id*. at 509.

So, once a judge decides to corruptly "fix" a case, how does the judge do it? As then-Northwestern University Law School Professor Anthony D'Amato (the undersigned's former mentor) has explained, the most egregious method that judges use to "fix" a case is to misstate the facts of the case so as to arrive at the desired conclusion:

> If the ***facts*** of a case conclusively prove that a certain thing did not happen ..., then the facts have to be changed in order to achieve a judge's desired results.

Anthony D'Amato, *The Ultimate Injustice: When a Court Misstates the Facts*, 11 Cardozo L. Rev. 1313, 1347 (1990) (original emphasis).

Moreover, as nationally-renown legal scholar and law professor Monroe Freedman pointed out in a 1989 speech to the Federal Circuit Judicial Conference, this dishonest practice of judicial decision-making is very widespread:

> Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules.

Id. at 1345.

Immediately following Professor Freedman's speech, a judge sitting next to him said (apropos of the passage above quoted), "You don't know the half of it!" *Id*. at 1346.

This led Professor D'Amato to conclude:

> [W]e should also ask ourselves what kind of a judiciary system this society has produced where judges can misstate the facts of a case and then proceed to apply the law to those fictitious facts. Can any person be safe in court if this practice is allowed to continue? If judges can listen to the evidence and then tell a contrary story, what remains of justice? The vaunted security we have in a free country and a just legal system turns to quicksand. Our case may be factually proven, legally required, and morally compelled, but we can still lose if the judge changes the facts. And if we complain — no matter how loudly — higher courts will not be interested in reviewing a "factual" controversy, and the legal community, as well as the general public, will assume that the facts were those stated by the judge....[6]

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[6] Petitioner is well aware that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S.Ct. Rule 10. For this reason, this present petition omits a discussion of the numerous errors of law contained in the lower courts' decisions — except for those that were specifically used to frame the undersigned Petitioner's son (such as the violation of "the law of the case" doctrine represented by the district court's prior contradictory rulings related to FBT's *Third-Party Complaint* against the undersigned). While Petitioner is asking this Court to review that manifest error of law as well as the lower courts' fabricated factual findings, it is not to look for mere error but instead to ***find*** in those errors concrete evidence of the lower courts' actual bias in favor of FBT and against Petitioner (and her son).

Id.

No one can deny that a judge's ***wholesale lying*** about the facts of a case in order to arrive at a predetermined conclusion demonstrates actual bias. Indeed, judges who purposefully misstate the facts of a case and then base their decision on that misstatement are engaged in quintessential case-fixing because their decision was determined by something ***other*** than the merits of the case.

Now, we are ***not*** talking about innocent, negligent, or even reckless mistatements of fact as where an apellate court, for example, erroneously assumes that something happened at trial that did not in fact happen or where, although the error might have been intentional, at least the motive was pure, such as not allowing the guilty to escape punishment. *See, e.g*. Albert W. Alschuler, *How Frank Easterbrook Kept George Ryan in Prison*, 50 Val. U. L. Rev. 7 (2015).

Instead, as occurred in the instant case, we are talking only about errors in judicial decisions that are so obvious — such as calling up, "down"; calling black, "white"; just making stuff up — that nothing other than bias could possibly explain these errors — or where (as also occurred in the instant case) the judges' motive was to ***frame*** an innocent person and let the guilty — but politically-powerful — party off the hook.

Worse, in the instant case, both the district and appellate courts then made certain that their obviously fabricated facts would be ***hidden*** by denying Petitioner's requests for oral argument on her *Motion*

for a New Trial Based on FBT's Perjury and again in her appeal — both of which were done in the knowledge that the judges' favored side would ***lose*** if the issues were aired publicly.

APPLICABLE LAW

To begin with, as there should be, there is a heavy "presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Indeed, only in the most ***exceptional*** circumstances is there concrete evidence available to demonstrate that a judge is actually biased against a litigant. But here, in the instant case, such evidence of actual bias is present in spades.

Most of this Court's jurisprudence on the issue of judicial bias has focused on the question of whether that bias must be ***actual*** — or if the mere ***appearance of bias*** is sufficient to offend due process.

There is, of course, no question that actual bias is unconstitutional. As this Court held in *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 883 (2009): "[A]ctual bias, if disclosed, no doubt would be grounds for appropriate relief." *See also Withrow*, 421 U.S. at 47 ("a biased decisionmaker [is] constitutionally unacceptable"); *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam) ("[t]rial before 'an unbiased judge' is essential to due process") (citation omitted); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972) (a "neutral and detached judge" is an essential component of due process).

Putting meat on the concept of "actual bias," this Court held in *Republican Party of Minnesota v. White*, 536 U.S. 765, 776 (2002), that due process "guarantee[s] a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." *See also Caperton*, 556 U.S. at 876 (quoting *In re Murchison*, 349 U. S. 133, 136 (1955)) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'").

This is because:

> "Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order."

Caperton, 556 U.S. at 889 (quoting *Republican Party of Minnesota v. White*, 536 U.S. at 793 (KENNEDY, J., concurring)). *See also Mistretta*, 488 U.S. at 407 ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship"); *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 212 (2008) (KENNEDY, J., concurring) ("The rule of law ... presupposes ... the absolute probity of its judges.").

On the other hand, this Court has also held that "any tribunal permitted by law to try cases and controversies not only must be unbiased, but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968).

Moreover, there are even "circumstances" and "objective standards" that give rise to a presumption or reasonable probability of bias sufficient to establish a due process violation. *See Peters v. Kiff*, 407 U.S. 493, 502 (1972) ("even if there is no showing of actual bias in the tribunal, ... due process is denied by circumstances that create the likelihood or the appearance of bias"); *Caperton*, 556 U.S. at 883 (citations omitted) ("the Due Process Clause has been implemented by objective standards that do not require proof of actual bias").

So, while Petitioner is alleging ***actual bias*** in the instant case, even the mere appearance of bias would be sufficient to establish a due process violation.

STATEMENT OF THE CASE

I. The Underlying Ohio Action

In 2000, MRS. ZELL loaned $90,000 — due 12/31/2001 — to her Missouri-based nephew Michael Mindlin and others (the "debtors"). The debtors gave MRS. ZELL a repayment agreement and a Promissory Note ("Note"), both signed in Missouri. In early 2009, MRS. ZELL retained FBT to collect on the now-delinquent loan. After the debtors sued MRS. ZELL in October 2010 in *Mindlin v. Zell* (the "Ohio

action"), FBT represented MRS. ZELL in that case. FBT ended up billing MRS. ZELL $73,857.80 on the less than $90,000 claim. *See* ¶¶ 5-6 of 9/2/2014 *Jonathan Zell Affidavit* (ECF 86-3, Page ID # 1586).

Since MRS. ZELL's son — the undersigned Jonathan Zell (MR. ZELL) — was a non-practicing attorney with zero trial experience and no access to online legal research, he did not have the ability to represent his mother. However, to reduce MRS. ZELL's attorney's fees — and subject to FBT's oversight and review — MR. ZELL voluntarily assisted FBT with the writing tasks of assembling the facts and putting FBT's legal research into the first draft of MRS. ZELL's pleadings and briefs. *See* 3/17/2014 *Eileen Zell Affidavit* (ECF 50-1, Page ID # 593-596); 3/17/2014 *Jonathan Zell Affidavit* (ECF 50-2, Page ID # 600-603); Trial Transcript (ECF 222, Page ID # 6187-6190); Emails (ECF 50-2, Page ID # 608, 628, 634-643). *See also* emails and testimony cited in § VI.C of 6th Cir. *Opening Brief*.

The FBT attorneys and MR. ZELL communicated almost exclusively via email. Their emails clearly showed that the FBT attorneys did all of the legal research — which turned out to be fatally flawed and focused almost exclusively on the statute of limitations ("SOL") governing MRS. ZELL's Note. MR. ZELL then used the FBT attorneys' research to prepare multiple drafts of MRS. ZELL's pleadings for the FBT attorneys' review, correction, and filing in court. *See* Emails in Parts V to XIII of 6th Cir. *Separate Appendix*.

For example, on 11/30/2010, MR. ZELL wrote to MORRIS:

> [B]y having you do the actual courtroom work, we can all be confident that my mother has fully competent counsel. Furthermore, my overseeing the litigation in the way an outside counsel might should ***theoretically*** help my mother's case.
>
> ... I would like to have an arrangement whereby you are the one representing my mother in court, yet I am free to suggest strategy to you based on my intimacy with the facts[.]

Email (ECF 50-2, Page ID 641) (original emphasis).

Then, on 6/29/2011, MR. ZELL wrote to RUPERT:

> I do not have access to legal research on the Internet … so you are right that the drafts I give to you will always be lacking such research. In the past, both you and Shannah Morris have simply added the relevant case law where necessary to my drafts. However, if instead you would like to send me the relevant cases and have me weave them into my drafts by myself as a way to further minimize my mother's legal fees, then I am certainly willing to try that.

Email (ECF 50-2, Page ID # 637).

Throughout the trial-court proceedings in the Ohio action, MR. ZELL repeatedly sent emails to the FBT attorneys asking whether Ohio's ***already-***

expired six-year SOL — or Missouri's ***not-yet-expired*** SOL — would apply to his mother's Note. For example, as soon as the debtors filed suit against MRS. ZELL, MR. ZELL asked MORRIS this question and later, when RUPERT replaced MORRIS as lead counsel on MRS. ZELL's case, MR. ZELL asked RUPERT.

Citing BERNAY's legal research (based on *Standard Agencies v. Russell*, 100 Ohio App. 140, 135 N.E.2d 896 (Ohio 2d Dist. App. 1954)), MORRIS told MR. ZELL that Missouri's unexpired SOL would apply. Citing KLINGELHAFER's research (based on the *Restatement of the Law 2d, Conflict of Laws*), RUPERT told MR. ZELL the same thing. As a result, MRS. ZELL turned down the debtors' substantial settlement offers and retained FBT to defend her in the Ohio action and collect on her Note.

However, as it turned out, all four of the FBT attorneys were wrong. For, according to the principle of *lex loci* (the law of the forum), the court in the Ohio action would apply Ohio's SOL to the Note. For that reason, the Ohio courts held that MRS. ZELL's Note was time-barred.

For the almost four years prior to the trial in the instant case, none of the above facts had ever been ***questioned***. The above facts had also been litigated by the parties and ***accepted by the district court*** in its 12/23/2014 decision (App. E) dismissing FBT's *Third-Party Complaint* against MR. ZELL.

As demonstrated below, Judge Marbley found that FBT had represented MRS. ZELL in the Ohio action; FBT was responsible for litigating her case; MR. ZELL merely assisted FBT; FBT advised MRS. ZELL (through MR. ZELL) on the key SOL issue; FBT advised MRS. ZELL erroneously on this issue (by using the substantive choice-of-law rules instead of the procedural ones, such as would govern a SOL); and FBT's erroneous advice on the SOL then overcame MR. ZELL's doubts on the matter:

> According to Plaintiff, Mr. Zell's role generally was to oversee the work of outside counsel and advise her about matters as necessary. Plaintiff asserts that Mr. Zell has served as a "conduit" between herself and outside counsel when she has hired outside counsel for matters related to the loan.
>
> Specifically, as related to the $90,000 loan at issue, Mr. Zell assisted Plaintiff by: ... selecting FBT, the law firm employing the Defendants in this case, as the firm tasked ... [with] representing Plaintiff in the litigation related to the underlying action; assisting Plaintiff ... by "consult[ing]" with FBT and "continu[ing] to give [Plaintiff] extensive advice" regarding the loan; and generally assisting FBT in preparation of Plaintiff's case.
>
> ***

> On the statute of limitations issue, Mr. Zell presents evidence of correspondence between himself and the Defendants in which he questions Defendants' statute of limitations analysis and expresses doubt as to whether Defendants properly considered the issue. Moreover, Mr. Zell presents correspondence indicating that ***Plaintiff's … belief that the Missouri statute of limitations would apply was based on a review of Defendants' recommendation and reasoning, as opposed to any independent research or investigation conducted by Plaintiff or by Mr. Zell.***

App. E at 52, 53, and 58-59 n. 2 (citations omitted) (emphasis added).

Furthermore, on the eve of trial, Judge Marbley held in his *Plenary Order* dated 4/3/2017:

> Regarding whether Defendants may argue the contributory negligence of Jonathan Zell, the Court notes that it has previously granted summary judgment for Mr. Zell on Defendants' third-party complaint for contribution and indemnification. (Doc. 121.) Defendants may not re-raise issues that have already been decided by the Court.

ECF 192, Page ID # 4312.

II. FBT's False Testimony in this Case

However, despite Judge Marbley's order prohibiting FBT from blaming the undersigned for FBT's malpractice on the SOL issue, this is exactly what FBT did at the trial.

Specifically, at the trial, FBT falsely claimed ***for the very first time*** after almost four years of litigation that (1) it had ***oral*** agreements with MRS. ZELL and her son Jonathan whereby supposedly the son (a non-practicing lawyer with no access to online legal research) was responsible for doing all the legal research in MRS. ZELL's underlying case, with FBT's four litigators relegated to the role of merely advising the son; and (2) at no time during the entire trial-court proceedings in the underlying case did any FBT attorney ***ever*** research the key issue of which SOL governed MRS. ZELL's Note.

Those constituted the two Big Lies in the FBT attorneys' testimonies.

A. Disproving FBT's Big Lie # 1

On 7/5/2011, the debtors filed a *Motion for Summary Judgment* in the Ohio action based on the expiration of Ohio's SOL. From 7/5/2011 to 8/15/2011, RUPERT, KLINGELHAFER, and MR. ZELL were all working together in preparing MRS. ZELL's response to the debtors' summary-judgment motion on the SOL and MRS. ZELL's own summary-judgment motion.

As MRS. ZELL's expert witness (James Leickly) testified at the trial in the instant case (ECF 220, Page ID # 5929-5936), RUPERT's 7/14/2011 email (Trial Exhibit P-120) — to which RUPERT's and KLINGELHAFER's 7/13/2011 emails were attached — clearly showed RUPERT and KLINGELHAFER researching the SOL applicable to MRS. ZELL's Note.

However, the problem was — not being aware of the principle of *lex loci* (the law of the forum) — RUPERT and KLINGELHAFER did their research using the ***wrong*** choice-of-law rules. Instead of using the rules for ***procedural***-law issues — such as the SOL — they used the rules for ***substantive***-law issues. Then, as a result of this error, RUPERT and KLINGELHAFER erroneously advised MRS. ZELL (via MR. ZELL) that Missouri's unexpired SOL applied to her Note.

Similarly, Mr. Leickly also testified that, immediately after MRS. ZELL was sued in the Ohio action, MORRIS' and BERNAY'S emails clearly showed that MORRIS and BERNAY had made this same error, too. Instead of using the rules for ***procedural***-law issues — such as the SOL — they also used the rules for ***substantive***-law issues. Then, as a result of this error, MORRIS and BERNAY erroneously advised MRS. ZELL (via MR. ZELL) that Missouri's unexpired SOL applied to her Note.

However, in an attempt to hide their error, RUPERT and KLINGELHAFER falsely testified at trial in the instant case that they had ***purposefully*** researched the substantive choice-of-law rules rather

than the procedural ones; that MR. ZELL had supposedly asked them to do this; and that they had not questioned MR. ZELL's illogical request.

Apparently to be consistent with RUPERT and KLINGELHAFER, MORRIS and BERNAY also falsely testified that they, too, had researched the substantive — rather than procedural — choice-of-law rules on ***purpose*** rather than by mistake.

Of course, all of their testimonies flatly contradicted the finding in Judge Marbley's prior order dismissing FBT's *Third-Party Complaint*. There, it will be recalled, Judge Marbley found that:

> Plaintiff's [meaning MRS. ZELL's] … belief that the Missouri statute of limitations would apply was based on a review of Defendants' recommendation and reasoning, as opposed to any independent research or investigation conducted by Plaintiff or by Mr. Zell.

However, what made RUPERT's and KLINGELHAFER's perjuries even ***more*** obvious than those of MORRIS and BERNAY was the former were claiming to have ***purposefully*** avoided researching the procedural choice-of-law (i.e., SOL) rules in connection with MRS. ZELL's response to the debtors' summary-judgment motion ***on the SOL issue!***

As a result, using the substantive choice-of-law rules to rebut the SOL defense in the debtors' summary-judgment motion — which is what MRS. ZELL's *Memorandum in Opposition* (Trial Exhibit P-

278 in Part II of 6th Cir. *Separate Appendix*) to the debtors' summary-judgment motion then attempted to do — would have been total insanity if it had been done on ***purpose***.

Yet, that's what RUPERT and KLINGELHAFER testified to at the trial, and what Judge Marbley then uncritically accepted and incorporated into his *Findings of Fact and Conclusions of Law*. If there could ever be a more obvious example of perjury, the undersigned cannot imagine it.

A typical example showing how RUPERT and KLINGELHAFER were not only allowed to make obviously-false statements with impunity at the trial, but also how Judge Marbley then incorporated those obviously-false statements into his findings of fact:

- On 7/5/2011, the debtors filed a *Motion for Summary Judgment* (Trial Exhibit P-276) based on Ohio's expired SOL in the underlying Ohio action.

- On 7/5/2011, referring to the debtors' motion, MR. ZELL sent an email to RUPERT stating: "[I]f your research suggests that we might have a statute-of-limitations problem (i.e.,that Ohio law applies), please let me know and my mother will then reconsider the idea of a settlement." (ECF 135-4, Page ID # 3303-3304; Trial Exhibit E, *a.k.a.*, P-12 (ECF 199, Page ID # 4460)).

See Trial Transcript (ECF 219, Page # 5515-5518).

- On 7/11/2011, RUPERT sent an email (Trial Exhibit P-116) to KLINGELHAFER, ***attaching MR. ZELL's 7/5/11 email.***

- On 7/13/2011, KLINGELHAFER sent RUPERT a research memo containing MR. ZELL's requested SOL research on MRS. ZELL's Note, which RUPERT then forwarded to MR. ZELL. (Trial Exhibit P-49 in Part XII of 6th Cir. *Separate Appendix*.)

- On 7/14/2011, MR. ZELL sent RUPERT an email stating: "So, my questions for you are: (1) For us merely to defeat the other sides' MSJ [Motion for Summary Judgment], is the only thing that we must do is to show that there are material questions of fact that must first be determined before the Court can find that Ohio's statute of limitations applies as the other side has argued in its MSJ? (2) If so, then does my Memo in Opposition to the other side's MSJ do that? (3) How sure are you that Missouri law applies to the Note?" (Trial Exhibit P-121 in Part XIII of 6th Cir. *Separate Appendix*.)

- On 8/9-10/2011, having just learned about them from his 20-year-old law-school study guide, MR. ZELL sent emails to

RUPERT asking RUPERT to research various alternative or tolling arguments under Ohio law applicable to MRS. ZELL's Note. *(*Trial Exhibits P-90 & P-92 in Parts VII & VIII of 6th Cir. *Separate Appendix*.)

- On 8/9/2011, RUPERT forwarded to MR. ZELL a research memo KLINGELHAFER had just prepared on tolling "the statute of limitations on a note." (Trial Exhibit P-59, ECF 220, Page ID # 5781.)

- On 8/11/2011, RUPERT forwarded to MR. ZELL a second research memo Defendant KLINGELHAFER had just prepared on "debts barred by the statute of limitations." (Trial Exhibit P-93 in Part IX of 6th Cir. *Separate Appendix*.)

- MR. ZELL then used KLINGELHAFER's three research memos to prepare (for RUPERT's review) initial drafts of MRS. ZELL's memorandum in opposition to the debtors' summary-judgment motion, MRS. ZELL's own summary-judgment motion, and MRS. ZELL's reply brief — all of which focused on the SOL applicable to MRS. ZELL's note.

- RUPERT then made extensive comments on MR. ZELL's drafts. *See, e.g.*, Trial Exhibits P-90 (ECF 199, Page ID # 4462); P-92 (ECF 199, Page ID # 4462); P-93 (ECF 227, Page ID # 6403); P-121 (ECF 227,

Page ID # 6403) in Parts VII, VIII, IX, & XIII of 6th Cir. *Separate Appendix*.

- MR. ZELL then repeatedly revised the drafts of MRS. ZELL's pleading and briefs based on RUPERT's comments. *See, e.g.,* Trial Exhibit P-47 at 7 (re: "4th draft of MSJ").

- Finally, RUPERT approved and filed the final version of MRS. ZELL's *Memorandum in Opposition* to the summary-judgment motion, Mrs. Zell's own *Motion for Summary Judgment*, and Mrs. Zell's *Reply* Brief. (Trial Exhibits P-277, P-278, & P-279 in Parts I, II, & III of 6th Cir. *Separate Appendix*.)

Yet, as previously stated, RUPERT and KLINGELHAFER both testified they had ***never*** been asked to research the SOL applicable to MRS. ZELL's Note, and they had therefore ***never*** researched the SOL issue, during the ***entire*** trial-court proceedings in the Ohio action. Incredibly, KLINGELHAFER testified she did not ***even know*** her research memos were going to be used to address a statute-of-limitations issue!

Based on RUPERT's and KLINGELHAFER's obviously-false testimony, Judge Marbley stated in his *Findings of Fact and Conclusions of Law* (App. D) "there's no evidence … [KLINGELHAFER was asked by RUPERT or did] research[] statute of limitations" or RUPERT was asked by MR. ZELL "to research ...

procedural choice of law [such as the statute of limitations]." (App. D at 40 & 41.)

Judge Marbley adopted RUPERT's and KLINGELHAFER's obvious perjury despite the extensive email evidence showing:

- RUPERT and KLINGELHAFER were representing MRS. ZELL during the trial-court proceedings in the Ohio action, and ***procedural choice of law (e.g., the statute-of-limitations issue)*** was the ***sole*** determining factor in whether MRS. ZELL would prevail.

- There was ***no*** ambiguity in the plain meaning of the words in MR. ZELL's 7/5/2011 email to RUPERT, ***which RUPERT then forwarded to KLINGELHAFER***, stating "if your research suggests that we might have a statute-of-limitations problem (i.e., that Ohio law applies), please let me know."

- KLINGELHAFER prepared and sent three research memos on the SOL applicable to MRS. ZELL's Note to RUPERT, who then forwarded those research memos to MR. ZELL.

- MR. ZELL sent several emails to RUPERT discussing the SOL issue raised in the debtors' summary-judgment motion — which had to be rebutted — including ask-

ing "[h]ow sure" RUPERT was Missouri's SOL applied to MRS. ZELL's Note.

- Based on KLINGELHAFER's research memos, MR. ZELL prepared (for RUPERT's review) initial drafts of MRS. ZELL's pleading and briefs on the SOL applicable to MRS. ZELL's Note.

- RUPERT then revised, approved, and filed final drafts of those pleadings and briefs on the SOL issue in court.

At trial, MRS. ZELL's expert witness (James Leickly) confirmed the ***obvious falsity*** of KLINGELHAFER's and RUPERT's testimonies that they had not researched the SOL or erroneously advised MRS. ZELL (via MR. ZELL) on the SOL applicable to MRS. ZELL's Note and, thus, confirmed the ***truthfulness*** of MR. ZELL's testimony that KLINGELHAFER and RUPERT had indeed done both of those things — and even did them ***in writing*** via numerous emails to MR. ZELL.

Here is a short sampling of Mr. Leickly's testimony:

> The only question of research [for Mrs. Zell's response to the debtors' summary-judgment motion] — the only thing you would need to research would be that statute of limitations ****
>
> ***

> So, yes, it's procedural law. That was what the issue was. So Frost Brown, from everything I could tell, every clue I could see, what they said, how they argued, was researching the statute of limitations issue. That's what they were researching.
>
> If they weren't researching that, that would be malpractice because that was the issue. They identified the problem. They just didn't identify the proper solution to the problem.
>
> ***
>
> I don't see how you can read it any other way, that they are trying to determine — as they do this research, they are trying to determine statute of limitations, which state's laws apply because we all agree, if Ohio applies, Mrs. Zell is out. If Missouri applies, it's a ten-year instead of a six, she's in ****
>
> Everything I've seen — and this is directly on point — everything I've seen leads me to believe that the research, the issue in the case, the obvious issue in the case, they knew what it was. Whether they addressed it right or not, they knew what the issue was. It was a statute of limitations[.]

Trial Transcript (ECF 220, Page ID # 5913, line 12 to # 5918, line 14).

B. Disproving Big Lie # 2

The second Big Lie came in RUPERT's testimony and involved an ***unanswered*** 6/24/2011 email MR. ZELL had sent to RUPERT before the debtors (i.e., plaintiffs) in the underlying case filed their summary-judgment motion on the SOL issue on 7/5/2011. With regard to "the run-of-the-mill pleadings that plaintiffs' counsel is churning out," MR. ZELL suggested several ***possible*** ways to "minimize my mother's pre-trial litigation costs — without, however, making my mother wholly dependent on my own inadequate legal research and writing skills." (ECF 86-19, Page ID # 1629.)

Although other suggestions were also made, the only one later implemented was that MR. ZELL would start signing MRS. ZELL's pleadings and list RUPERT as "of counsel" so RUPERT would not have to make so many stylistic changes to the first drafts of MRS. ZELL's pleadings that MR. ZELL would continue to submit to RUPERT to revise and review. *See* MRS. ZELL's *Amended Complaint* at ¶¶ 52-54 (ECF 117, Page ID # 2622-2623); Trial Transcript (ECF 221, Page ID # 6137, line 11 to 6138, line 22) (testimony improperly struck).

Since MR. ZELL had received no response to his 6/24/2011 email, he sent a 6/26/2011 email explaining the signing change was intended to relieve RUPERT of responsibility ***only*** for the professional "tone that would befit a pleading that you would sign," but ***not*** for any "legal[] insufficien[cy]" MR. ZELL's first drafts might contain. *See* ¶ 52 of *Amended Complaint* (ECF 117, Page ID # 2622-2623). RUPERT's only response on 6/27/2011 was: "I

talked with Joe [Dehner], and I think we may be able to work something out. I'll get back to you shortly on that." Email (ECF 86-18, Page ID # 1627).

RUPERT then testified that, in the 6/24/2011 email proposing that MR. ZELL sign MRS. ZELL's pleadings, MR. ZELL was actually asking FBT "not to do any[more legal] research" in the underlying case unless "there was a specific issue that [MR. ZELL] wanted researched." Trial Transcript (ECF 219, Page ID # 5555, line 19 to # 5556, line 15). RUPERT falsely added he and the Zells then agreed, in a meeting in his office on 7/1/2011, this is what they would do going forward. *Id*. (Page ID # 5517, lines 11-21; # 5571, lines 17-21; # 5590, lines 12-17).

RUPERT's testimony, which the district court uncritically adopted in its findings, was demonstrably false for seven reasons:

1. RUPERT's characterization of the 6/24/2011 email was belied by the email's own words. The email did not say MR. ZELL wanted MRS. ZELL to be dependent on MR. ZELL for all the legal research. On the contrary, it stated MR. ZELL did ***not*** want MRS. ZELL to be "wholly dependent on my own inadequate legal research and writing skills."

2. RUPERT's testimony ignored the later email dated 6/26/2011, which emphasized that, under MR. ZELL's proposal, RUPERT was still to revise MR. ZELL's drafts if they were "legally insufficient," but not simply to make the "tone" sound more "professional." Yet, of

the two emails, this was the only one to which RUPERT responded.

3. Does the email MR. ZELL sent to RUPERT on 6/29/2011 while arranging a meeting with RUPERT for himself and MRS. ZELL on 7/1/2011, *see* p. 22, *supra*, sound like it was written by someone who, a few days later on 7/1/2011, would have agreed to an arrangement whereby the legal sufficiency of his mother's pleadings would now become his own ***sole*** responsibility and not that of the law firm his mother was ***continuing*** to employ?

4. While a meeting did take place on 7/1/2011, there was never any discussion, let alone any agreement, on even the key ***signing*** component of MR. ZELL's proposal. Proof is that, on 7/5/2011, MR. ZELL sent RUPERT an email asking: "(a) Who — you or me — should sign [the next pleading] … and (b) who should be listed as 'of counsel' on it?" RUPERT then replied back: "I think you should sign it and list me as 'of counsel' in the signature block." *See* Trial Exhibit P-127 in Part V of 6th Cir. *Separate Appendix*.

5. FBT could produce no personal notes, no notes to the file, no emails, or any other documentation to back up this supposed agreement. However, in his 6/27/2011 email to MR. ZELL, RUPERT stated he had discussed MR. ZELL's proposal with Respondent Dehner (ECF 86-18, Page ID # 1627), who did ***not*** testify about it.

6. In almost four years of pretrial litigation — including litigation on the *Third-Party Complaint* specifically concerning MR. ZELL's potential liability — FBT never even once mentioned this supposed agreement.

7. MR. ZELL's testimony was that he was to do a large part of the writing, but FBT's attorneys were ***always*** responsible for doing the legal research, for MRS. ZELL's pleadings and briefs. (Trial Transcript, ECF 222, Page ID # 6189, line 16 to # 6190, line 11; ECF 221, Page ID # 6137, line 11 to 6138, line 22.) More importantly, the emails cited in § VIII.B of 6th Cir. *Opening Brief* support MR. ZELL's testimony by showing the FBT attorneys always provided MR. ZELL with the legal research he used — ***even after*** the 7/1/2011 meeting.

   Indeed, the last nails in FBT's coffin are the following statements taken from MR. ZELL's and RUPERT's emails ***relating to the drafting of MRS. ZELL's Amended Reply Brief on the SOL issue*** (citations are to MRS. ZELL's *Separate Appendix* before the 6th Circuit):

ZELL (8/8/2011)

"[S]omeone at FBT will need to review what I wrote for legal sufficiency."
(Appendix VII, p. 183)

RUPERT (8/9/2011)

"I am having someone research the two points you identified" (Appendix VII, p. 175)

RUPERT (8/10/2011)

"I will have an associate research these [additional] issues." (Appendix VIII, p. 186)

RUPERT (8/11/2011)

"Below is the results of the research." (Appendix IX, p. 191)

III. The Courts' Cover-up of FBT's Perjury

The district and appellate courts ignored all of the overwhelming evidence of FBT's perjury, thereby demonstrating a cover-up. Here is what the courts claimed:

> Her [MRS. ZELL's] ***only*** proof ... that witnesses for the Defense provided this Court with false testimony is her repeated assertion that she would not have hired attorneys at her own expense if she had intended to vest any responsibility for the legal sufficiency of the pleadings and briefs in her son, Jonathan Zell.

District court's opinion denying *Motion for a New Trial* (App. B at 31) (emphasis added).

> [T]he content of the emails [sent and received by FBT] is entirely consistent with [FBT's] trial testimony.... None of the emails to which Zell points ... proves that any [FBT] attorney lied on the witness stand.

Appellate court panel's opinion (App. A at 13).

What these opinions claim is the equivalent of calling up "down" and black "white." Clearly, such whitewashing of FBT's obvious perjury forecloses any possibility of a good-faith error on the part of the courts.

REASONS FOR GRANTING THE PETITION

Just as *Caperton* afforded this Court the opportunity to clarify the circumstances under which the lower courts' actions would create an ***appearance of bias*** violative of due process, the instant case affords the Court the opportunity to clarify the circumstances that would demonstrate ***actual bias.***

In the instant case, the district and appellate courts' obvious cover-up of Petitioner's proven allegations of perjury against FBT as well as their framing of Petitioner's son for FBT's own malpractice represent a truly ***exceptional*** case of actual bias that cries out for redress by this Court. The courts' proceedings were shams set up to give the impression of a fair legal process, but where the decisions had already been decided in advance.

Worse, FBT would never have risked its reputation, and its attorneys would never have risked their law licenses, by committing perjury in such a way that it would be so obvious to all — ***unless*** they had reason to believe the district court judge would let them get away with it.

Similarly, the district court judge would never have risked his reputation by covering up FBT's perjury in such a way that it also would be so obvious to all — ***unless*** he had reason to believe the Sixth Circuit would cover up for him, too.

As Professor D'Amato stated, *see* p. 16, *supra*:

> ***Can any person be safe in court if this practice is allowed to continue?***

Especially in these present times where the issue of judicial partisanship has been so much in the news, whether this Court will send a message to the lower courts that they ***no longer*** have *carte blanche* to corruptly "fix" court cases is a question that is vitally important to determining if the courts' claims of impartiality and non-partisanship and, thus, even of legitimacy are valid.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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