No. 18-1005

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 REHEARING

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*Imagine what it is like: You want to do everything possible to ensure your mother wins her lawsuit. You recommend that she retain a prominent law firm. You supervise the law firm's work. But then the facts are turned around, and you find yourself slandered and framed for the law firm's own legal malpractice.*

*What would **you** do*?

— Jonathan Zell

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## PETITION FOR REHEARING

Pursuant to Sup. Ct. R. 44, petitioner Eileen Zell respectfully moves this Court for an order:

1. Vacating the Court's order issued on 3/4/2019, which denied petitioner's petition for writ of certiorari;

2. Granting petitioner's petition for writ of certiorari filed on 1/29/2019; and

3. Remanding this case to either the district or appellate courts below for the purpose of:

> (a) Affording petitioner the oral argument (which petitioner was previously denied) to address petitioner's claim that the district and appellate courts below uncritically accepted, and based their respective decisions on, Respondent Frost Brown Todd's ("FBT's") "blatant, obvious, and wholesale perjury at trial"; and/or
>
> (b) Requiring the district or appellate courts below to address petitioner's argument that the findings of fact and conclusions of law contained in the district court's pretrial decision dismissing FBT's *Third-Party Complaint* against petitioner's son (Jonathan (Zell) constitutes the law of the case and, as such, must be consistent with the district and appellate courts' later decisions.

## REASONS FOR GRANTING REHEARING

### I. Isn't "Review for Error" Inappropriate for the Supreme Court?

> "*They have had all they have a right to claim when they have had two courts in which to have adjudicated their controversy*."
>
> — President William Howard Taft

2 Henry Pringle, *The Life and Times of William Howard Taft* 997-98 (1939).

Petitioner (or, more specifically, petitioner's undersigned counsel) recognizes that "review for error should play, at best, a minor part in the Court's work...." Arthur Hellman, *Error Correction, Law-making, and the Supreme Court's Exercise of Discretionary Review*, 44 U. Pitt. L. Rev. 795, 799 (1983).

Nonetheless, this Court should grant a rehearing in the instant case because, as the highest court in the land, this Court must properly supervise the lower federal courts. In particular, this Court may not, in the way the Catholic Church has protected priests who molest children, protect the lower courts when they corruptly "fix" court cases to favor politically-powerful litigants as ***obviously*** occurred in the instant case.

For, here, an appellate panel joined the district court in corruptly "fixing" the instant case to favor a politically-powerful law firm. Then, in denying a rehearing en banc, the entire Sixth Circuit covered up those miscarriages of justice.

Accordingly, the undersigned began petitioner's petition for writ of certiorari with the heading ***"I Accuse!"*** and then went on to state:

> [I]n 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.

Petitioner's accusations against the district and appellate courts might be difficult for this Court to hear. For, as psychologist Kate Roberts has said:

> Denial ... is a strong force in our everyday lives. It's part of the way we cope with negativity around us....
>
> "... We don't want to hear the message ...."
>
> Catholics don't want to think their church protected pedophiles....
>
> "... So the initial reaction is, 'no, it's not true, it can't be like that. If it's like that what does that mean? How does that affect me?'"

Alia Dastagir, *Surprising no one: What Lori Loughlin and Michael Jackson uproar teaches us about denial*, USA Today (3/14/2019), https://www.usatoday.com/story/news/investigations/2019/03/14/lori-loughlin-college-admissions-michael-jackson-leaving-neverland-catholic-abuse-denial-outrage/3152770002/.

However, according to the Hatch Institute, the prevalence of judicial bias and favoritism is an open secret:

> Judges ... routinely hide their connections to litigants and their lawyers....
>
> All too often ... the conflicted jurist ... proceeds to rule in favor of the connected party....

***

> Hundreds of judicial transgressions have been uncovered during the last decade, with results that cost the defeated litigants their home, business, custody, health or freedom.
>
> ***
>
> The numbers suggest that at least some of these judges' rulings did not pass the smell test....

Peter Green and John Mazor, *Corrupt justice: what happens when judges' bias taints a case?* The Guardian (10/18/2015), https://www.theguardian.com/us-news/2015/oct/18/judge-bias-corrupts-court-cases.

Apropos of President Taft's comment quoted in the beginning of this section, it's true that petitioner "ha[s] had two courts in which to have adjudicated ... [her] controversy." But, since both of those courts corruptly "fixed" the result, petitioner has a right to expect the Supreme Court to intervene.

Therefore, in this present petition for rehearing, the undersigned is now ***accusing this Court***, in failing to intervene, of having protected the courts below in the same way the Catholic Church has protected law-breaking priests. This is intolerable. For "[n]o tyranny is more cruel than the one practiced in the shadow of the laws and under color of justice." Charles de Secondat, Baron de Montesquieu, *Considerations on the Causes of the Greatness of the*

*Romans and Their Decline* 130 (David Lowenthal trans., 1999) (1965).

Also, "[i]f impunity is not demolished, all efforts to bring an end to corruption are in vain." Rigoberta Menchú Tum, *The Plague of Corruption: Overcoming Impunity and Injustice*, in Global Corruption Report 2001, at 155 (Robin Hodess, Jessie Banfield & Toby Wolfe eds., Transparency Int'l 2001).

Accordingly, with all due respect, the accusation against this Court that it is protecting corrupt case-fixing judges is offered as the "substantial grounds not previously presented" that is required for a rehearing petition. *See* Sup. Ct. R. 44.2.

However, should this Court find that to be inadequate grounds for requesting rehearing, the undersigned would welcome a hearing on the sanctions that should therefore be imposed. For that would then be the ***only*** time that petitioner (or the undersigned) has had a hearing on their charges of perjury against FBT or charges of a cover-up of that perjury by the district and appellate courts below.

## II. The Evidence Presented at Trial

- **According to the hours-long and undisputed testimony at trial of petitioner's expert witness (James Leickly):**

1. FBT's e-mails, legal research, and billing statements for that research clearly demonstrated that:

> (a) Petitioner had (via her son, Jonathan Zell) repeatedly requested ***in writing*** of several of the FBT attorneys that those attorneys advise petitioner whether Missouri's not-yet-expired ten-year statute of limitations ("SOL") or Ohio's already-expired six-year SOL applied to petitioner's $90,000 promissory note.
>
> For example, on 7/5/2011 Jonathan Zell sent an e-mail to Rupert, stating:
>
> > Please find enclosed below previous memos on the statute of limitations issue from FBT attorneys Patricia Laub and Douglas Bozell. However, if 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 settlement.
>
> ECF 135-4, PageID #3303-3304. (As will be shown below, Rupert forwarded Zell's 7/5/2011 e-mail to Klingelhafer on 7/11/2011; Klingelhafer responded to Rupert on 7/13/2011; and Rupert responded to Zell on 7/13/2011.)
>
> (b) After petitioner's promissory note became embroiled in the underlying Ohio litigation on 10/12/2010, FBT attorneys Morris, Bernay, Klingelhafer, and Rupert all researched the SOL applicable to petitioner's promissory note

> and then erroneously advised petitioner (via Jonathan Zell) ***in writing*** that Missouri's unexpired ten-year SOL applied to the note.
>
> In doing so, FBT attorneys Morris, Bernay, Klingelhafer, and Rupert had all erroneously researched the ***substantive*** choice-of-law rules instead of the ***procedural*** choice-of-law rules — although only the latter would apply to the SOL issue.

Consider these excerpts from Leickly's testimony:

> **LEICKLY:** ... The only thing you [meaning FBT] would need to research [in the Ohio litigation] would be that statute of limitations [on petitioner's note]....

Trial Transcript (RE 220, PageID #5913, lines 12-13).

> **MR. ZELL:** ... Here is an email [dated 7/13/2011] from Mr. Rupert to me [answering the question in Zell's previously-quoted 7/5/2011 e-mail].
>
> > "I had an associate do some limited research on whether Missouri law would apply."
> >
> > ***
> >
> > "... Recent cases apply the *Restatement's* factor-driven test elements listed below...."

... [W]hat is the issue [they're researching]...?

***

**LEICKLY:** ... [I]t's clearly statute of limitations.

**MR. ZELL:** ... [H]ere is the research memo [dated 7/13/2011] from Katherine Klingelhafer to Mr. Rupert...

***

**LEICKLY:** ... [They are discussing the] factors that ... come out of the *Restatement of Law (Second) Conflict of Laws* section.... [T]hey are looking to those [conflict-of-laws] factors to help them in their ... statute of limitations quest....

***

**MR. ZELL:** ... [D]oes that apply in this case, that — those *Restatement* factors?

**LEICKLY:** ... [N]o, they don't apply to this case.

**MR. ZELL:** Why not?

***

**LEICKLY:** They [the FBT attorneys] argued standard conflicts of law [which applies to substantive law].... I don't see any evidence that they understood that .... procedural law ... means ... the statute of limitations....

*Id.* (PageID #5930, line 16 to #5935, line 20).

2. The FBT attorneys' erroneous SOL research and advice to petitioner constituted obvious legal malpractice. It caused petitioner to turn down the substantial settlement offers she had received from the makers of the $90,000 promissory note; to have the note ruled uncollectible in the Ohio litigation; and, in the process, to be billed over $73,000 by FBT.

- **According to the district court's pretrial decision (App. E at 52-53 and 58-59) dismissing FBT's *Third-Party Complaint* against Jonathan Zell, the district court found that:**

1. Jonathan Zell served as an intermediary between petitioner and FBT as well as voluntarily assisted FBT in FBT's representation of petitioner during the Ohio litigation concerning petitioner's note.

> 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.

District court's opinion (App. E at 53).

2. FBT (as opposed to Jonathan Zell) was solely responsible for the erroneous research and advice — given to petitioner during the trial proceedings in the Ohio litigation — that Missouri's longer SOL governed petitioner's note.

> 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**.**

*Id*. (App. E at 59 n. 2).

- **According to the district court's *Plenary Order* (ECF 192, PageID #4312) issued on the eve of trial, the findings from the above pretrial decision were final and couldn't be revisited at the trial.**

## III. The Lower Courts' Decisions

As shown in Section II above, the documentary evidence (including FBT's e-mails, legal research, and billing statements), the undisputed testimony of petitioner's expert witness (James Leickly), and the district court's own pretrial decision on the *Third-Party Complaint* clearly demonstrated that:

1. All of the research on the promissory-note matter — especially concerning the SOL issue — was conducted by FBT; and

2. FBT's research and advice to petitioner on the SOL issue was fatally flawed.

3. Despite having lost petitioner's case, FBT billed petitioner over $73,000 on her $90,000 claim.

Nonetheless, the district and appellate courts ruled that it had been Jonathan Zell's — not FBT's — responsibility to advise petitioner on the SOL issue. How could this have even been possible?

In an attempt to ***hide*** their having mistakenly researched the substantive choice-of-law rules instead of the procedural choice-of-law rules (which would apply to the SOL), the FBT attorneys lied and falsely testified they had done this ***on purpose*** because neither petitioner nor Jonathan Zell had supposedly ever asked them to research the SOL applicable to petitioner's note — which, of course, was another obvious lie as shown below.

Consider Rupert's perjurious testimony:

**MR. ZELL:** ... Would you please read [from Jonathan Zell's 7/5/2011 e-mail to Rupert]....

**RUPERT:** .... It says: [“]Please find enclosed below previous memos on the statute of limitations issue from FBT attorneys Patricia Laub and Douglas Bozell. However, if 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 settlement.[”]

***

**MR. ZELL:** In response to this request, [“]Please research the statute of limitations issue and let me know if Ohio law applies,[”] did you do that?

***

**RUPERT:** As I told you, no, I did not because you told me [not to do so]....

***

**MR. ZELL:** ... [Not] in this e-mail that .... [y]ou previously read....

Trial Transcript (ECF 219, Page ID #5515, line 9 to #5521, line 12).

> **MR. ZELL:** [T]his research on the restatement that Ms. Klingelhafer did ... was directed towards the issue of which state's statute of limitations applies to the loan, correct?
>
> ***
>
> **RUPERT:** No....

*Id.* (Page ID #5536, line 11 to #5537, line 16).

The FBT attorneys' testimony — that none of them was ever asked to conduct (and, thus, never did conduct) any research on the SOL applicable to petitioner's promissory note during the entire trial-court proceedings in the Ohio litigation — was completely contradicted by all the documentary evidence (including the parties' e-mails). Also, if FBT wasn't researching what was essentially the ***only*** issue involved in petitioner's case — the SOL — then what was FBT doing for the over $73,000 it billed petitioner?

Nonetheless, both the district and appellate courts uncritically accepted FBT's false testimony and based their decisions directly on it. That the courts below did not do this in good faith can be seen by the lies the courts themselves used to reject petitioner's claim that the FBT attorneys had committed blatant and obvious perjury at trial.

Below is the sum total of the district and appellate courts' ***obviously-false*** rebuttals to petitioner's claim:

> Her [petitioner'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 panel's opinion (App. A at 13).

Clearly, the courts below completely ignored all of the documentary evidence, Mr. Leickly's expert testimony, and the district court's own prior decision on the *Third-Party Complaint* (which the district court later ruled ***couldn't*** be revisited at trial). In addition, neither the district nor the appellate court even responded to petitioner's argument that the district court's prior decision constituted the law of the case.

Worst of all, in an apparent attempt to prevent FBT's perjury or the obvious lies in the courts' decisions from being publicly exposed, the district court

denied petitioner's timely request for oral argument on her *Motion for a New Trial* and the appellate court also denied petitioner's timely request for oral argument.

Thus, in concluding that it had been Jonathan Zell's ***sole*** responsibility to advise petitioner on the SOL issue, the approach of the lower courts below was to ***accuse the accuser*** and their decisions were based on the principle of ***"Too Big to Lose."***

As a result, trying this four-year-long case before these judges was like raising a child up to adulthood only to have the child killed by a drunk driver (represented here by biased judges).

## IV. The Lower Courts Corruptly "Fixed" this Case

The lower courts' case-fixing was so obvious that what was said of the Russian government's ham-handed attempt to deny its obvious role in the recent poisoning of former Russian spy Sergeo V. Skripal in England would apply equally well to the lower courts' decisions in the instant case:

> [I]t was "an insult to the public's intelligence."
>
> ***
>
> [It] was not really meant to convince anybody ... but only to deliver a message ... that "nothing you say or do will change anything."

> The Kremlin . . . "is telling the West: 'Yes, we did it, ... and yes, we will do it again if we want.'"

Andrew Higgins, *Tragedy? Farce? Confusion? The Method Behind That Russian Poisoning Interview*, N.Y. Times (9/18/2018), https://www.nytimes.com/2018/09/18/world/europe/skripal-poisoning-russia.html.

The lower courts' case-fixing in the instant case was also similar to Saudi Arabia's implausible denial of complicity in the murder of Jamal Khashoggi. As Wael Ghonim, the Egyptian internet activist, stated with regard to this scandal:

> They lie, they know they are lying, & they know that we know they are lying.

Mark Mazzetti and Ben Hubbard, *In Pardoning Saudi Arabia, Trump Gives Guidance to Autocrats*, N.Y. Times (11/20/2018), https://www.nytimes.com/2018/11/20/us/politics/trump-khashoggi-statement.html.

## V. This Court is Telling the Lower Courts They Can Corruptly "Fix" Civil Cases With Impunity

Accordingly, by denying the petition for writ of certiorari, this Court is protecting case-fixing judges just as the Catholic Church has protected its law-breaking priests. The message this sends to the

lower courts is that they have *carte blanche* to corruptly "fix" civil cases with impunity.

## CONCLUSION

This Court should reconsider its denial of certiorari in this case.

Respectfully Submitted,

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## CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing from the denial of certiorari is presented in good faith and not for delay, and that it is restricted to the grounds specified in Sup. Ct. R. 44.2, namely substantial grounds not previously presented.

JONATHAN R. ZELL