No. 16-452

In The
Supreme Court of the United States

ROBERT R. BENNIE, JR.,

Petitioner,

v.

JOHN MUNN, in his official capacity as Director of the Nebraska Department of Banking and Finance, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is a Circuit split regarding the "person of ordinary firmness test."

2. Whether Petitioner properly raised his argument in the Eighth Circuit.

3. Whether there an actual case and controversy because Petitioner is asking only for prospective injunctive or declaratory relief for actions he stipulated ended over six years ago.

4. Whether Petitioner has a particularized concrete injury necessary to confer Article III standing when the trial court found that his speech was not chilled by any action taken by the Defendants.

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JURISDICTIONAL STATEMENT

This Court has no jurisdiction for two reasons. First, there is no ongoing violation of law necessary to establish a case and controversy for injunctive or declaratory relief – the only relief sought by Petitioner Robert Bennie ("Bennie") in this case. Second, Bennie lacks Article III standing because the trial court found his speech was not chilled. Because his speech was not chilled, Bennie suffered no particularized concrete injury necessary to confer Article III standing.

STATEMENT OF THE CASE

This Petition involves an appeal from the factual findings of the District Court made following a bench trial. Bennie sought only prospective declaratory and injunctive relief under 42 U.S.C. § 1983 against Rodney Griess ("Griess"), Jack Herstein ("Herstein") and John Munn ("Munn") (collectively the "Department Employees"), who were employed by the Nebraska Department of Banking and Finance (the "Department"). Bennie claimed that prior to March 10, 2010, the Department Employees retaliated against him for exercising his First Amendment rights as a leader of the Tea Party movement by contacting his broker-dealer, LPL Financial ("LPL"), about his political statements which were published in a newspaper.

A. The actions about which Bennie complains ended on March 10, 2010 and have not been repeated.

Bennie stipulated that no action taken by any employee or agent of the Department after March 10, 2010, formed any basis for Bennie's claims in this case. (ECF 192, 3:10-4:2). The District Court found that Bennie "is claiming no First Amendment violation based on any acts of the defendants after March 10, 2010." (Appx. B-10).

B. Bennie's speech was not chilled.

The District Court made factual findings that the actions of the Department Employees in this case did not chill Bennie, and would not chill a person of ordinary firmness, from exercising constitutional rights. (Appx. B-14-15).

C. The Department has regulatory authority over advertisements.

As part of its regulatory duties, the Department regularly reviews, and makes inquiries, regarding advertisements made by registered persons, including public statements made in newspaper articles, to determine whether those statements comply with the Securities Act of Nebraska (the "Act"), Department rules, federal laws, regulations, Financial Industry Regulatory Authority ("FINRA") rules, and broker-dealer and investment adviser policies. (ECF 173).

FINRA's rule relating to "Communications with the Public" defines "advertisement" very broadly to include virtually any public communication. (Ex. 376) (Ex. 31, 798:11-800:18; 873:17-874:17). A broker-dealer agent or investment adviser representative who engages in advertising must submit the advertisement to his or her broker-dealer or investment adviser for compliance review before publishing the communication. (ECF 192, 248:18-22). The Department routinely makes inquiries regarding broker-dealer and investment adviser policies and whether agents and representatives are in compliance with those policies. (ECF 194, 546:25-547:5).

D. The Key Parties and Witnesses

Jackie L. Walter ("Walter") is a securities examiner employed by the Department. (ECF 173). Griess is the Securities Investigation and Compliance Unit Supervisor with the Department. *Id*. Herstein was the Assistant Director of the Department who was in charge of the Bureau of Securities. *Id*. Herstein was the direct supervisor of Walter and Griess. *Id*. Munn was the Director of the Department. *Id*. Sheila Cahill ("Cahill") was employed by the Department as legal counsel. *Id*.

Until November 2, 2010, Bennie was a registered agent and investment adviser representative for LPL, a broker-dealer subject to regulation by the Department. *Id*. Bennie owns Bob Bennie Wealth Management ("BBWM"). *Id*. Chris Zappala ("Zappala") was the

Vice-President of LPL in charge of marketing regulatory review. *Id*. Kenneth Juster ("Juster") was an in-house lawyer with LPL, responsible for advising LPL on broker-dealer regulations concerning FINRA and state regulations. *Id*.

E. The Five Inquiries

1. The E-Money CD

In November 2009, Walter brought a CD to Department and gave it to Herstein for routine compliance review (the "E-Money CD"). (ECF 192, 116: 13-117:5). Herstein assigned the E-Money CD to Griess. Griess and Herstein understood that Bennie had recently distributed the E-Money CD. (ECF 192, 123:3-9; 213:5-16) (ECF 193, 331:15-18).

Griess determined the E-Money CD failed to disclose Bennie's investment adviser representative affiliation with LPL. (ECF 192, 118:12-16). On November 17, 2009, Griess forwarded a copy of the E-Money CD to LPL. (Ex. 207). In an e-mail dated December 16, 2009, LPL agreed with Griess that the E-Money CD lacked a required investment advisory disclosure and stated it would follow up with Bennie and see that the omission was corrected. (Ex. 210) (Ex. 32, 9:6-18) (ECF 192, 41:11-16). Bennie agreed it was "totally appropriate" for the Department to ask LPL "why isn't this advisory services disclosure on there." (ECF 193, 458:15-17).

On December 17, 2009, Griess forwarded LPL's admission that the E-Money CD lacked a required disclosure to his supervisor, Herstein. (Ex. 211). In an e-mail dated December 17, 2009, Herstein responded: "Bob [Bennie] always is seen wearing a cowboy hat lately, so I say 'Hang Him High.'" *Id*. Herstein is a Western movie fan and this was a reference to a Clint Eastwood movie of that same title. (ECF 193, 415:8-24). Herstein's "Hang Him High" comment was a poor attempt at humor and was communicated only to Griess and was not disseminated to anyone outside the Department. *Id*.

2. The TV Commercial

In December 2009, Walter brought Herstein a recording of a television commercial featuring Bennie in which he stated in part: "If we decide to do business, I'll contribute $100 towards the purchase of a firearm." (the "TV Commercial") (Ex. 213). Everyone, including Bennie, agreed that the TV Commercial was very unusual. (ECF 193, 283:11-284:14; 332:21-24; 455:22-456:1) (ECF 192, 133:19-134:3; 136:19-137:7) (Ex. 453, 37:18-38:2). Offering cash towards the purchase of a firearm as a quid pro quo for the customer agreeing to do business with a representative was something the Department had never seen before in an advertisement. *Id*. Herstein and Griess suspected that Bennie did not submit the advertisement for approval to LPL believing LPL would not have approved it. *Id*. Herstein and Griess asked LPL whether the TV Commercial was submitted by Bennie and approved by LPL before

it aired. (ECF 192, 134:25-135:3; 136:19-137:7; 199:21-24) (ECF 193, 284:4-14).

Under the belief that Bennie had not obtained approval from LPL to run the TV Commercial, in early January 2010, before the article was published, Herstein and Griess discussed, internally, fining Bennie $50,000 for two advertising violations – the lack of investment advisor disclosure on the E-Money CD and the suspected lack of approval of the TV Commercial. (Ex. 217). Ultimately, the Department never issued any fines or sanctions against Bennie or LPL. (Appx. B-8).

As of February 1, 2010, the Department had not received a response from LPL regarding whether LPL had approved the TV Commercial. (ECF 193, 333:9-17). (ECF 192, 125:13-20).

3. The Article

While Griess waited for a response from LPL to the E-Money CD and TV Commercial inquiries, on February 1, 2010, the *Lincoln Journal Star* published an article regarding Bennie (the "Article"). (Exs. 219-220). While the Article was largely about Bennie's political views, it also stated "Bob Bennie Wealth Management is a business that runs the financial table, from retirement planning and estate planning to investment management." *Id*.

Griess and Herstein were concerned the Article was an advertisement because it referred to financial

services provided by BBWM. In the context of the two prior suspected disclosure/lack of approval violations, they wanted to know how the reference to BBWM's services got into an Article that was otherwise about politics. (ECF 193, 293:3-11) (ECF 193:12-25; 141:15-19). On February 1, 2010, Griess emailed a link to the Article to Zappala and, inappropriately, quoted the statements Bennie made in the Article about President Obama. (Ex. 218). Bennie was not copied on this e-mail. *Id*.

Director Munn first learned of Griess' February 1, 2010 e-mail around the time this lawsuit was commenced in the summer of 2011. (*Id*., 334:24-335:3; 239:13-25; 368:10-16; 371:11-23). When he learned about the email, over a year after it had been sent, Director Munn admonished Griess that it was inappropriate for him to quote Bennie's statements about the President. (*Id*., 371:11-23).

(a) The Conference Calls With LPL

The Department and LPL held two calls regarding Bennie's advertising activities, the first on February 4, 2010, and the second on February 8, 2010. Bennie was not on either of the calls.

(b) The February 4, 2010 Call

On February 4, 2010, Griess, Cahill, and Herstein had a telephone conversation with Zappala and Juster. (ECF 192, 126:3-6) (ECF 193, 258:13-16; 305:11-13)

(Ex. 452, 1193:4-9) (Ex. 6). According to Juster's notes, during the call the Department asked whether LPL approved the E-Money CD, the TV Commercial, and the Article. (Ex. 6) (ECF 192, 203:7-21). LPL responded that the E-Money CD and the TV Commercial were approved, but LPL was unsure if the Article was approved. *Id*.

Juster's contemporaneous notes from the call identify that the only issues discussed were whether Bennie was acting as a gun dealer, doing background checks to prevent felons from buying firearms, and whether other representatives offered gift cards – all issues relating to the TV Commercial, not the Article. (Ex. 6). Juster's notes from the call do not show that the Department asked any questions about Bennie's political statements or views. *Id*.

LPL's actions after the call show that the Department's inquiry was related to whether LPL approved the Article because of its reference to BBWM providing financial services – not Bennie's political views. On February 5, 2010, Zappala drafted proposed responses to three of the Department's questions which were: "1. Was the Article submitted to LPL for review?" "2. Does LPL believe the Article should have been submitted for review?" and "3. Were any notes or comments added to the review of the TV Commercial?" (Ex. 229). Recognizing that the Article's reference to BBWM could have implicated FINRA advertising rules, Zappala noted that "LPL would require the article to be submitted for review if Mr. Bennie intends to redistribute to [*sic*] article." *Id*. There is no mention of the political content of

the Article in Zappala's e-mail or in any other internal LPL document. *Id*. Zappala also had no discussions with Juster regarding Bennie's political views. "I don't remember talking to him [Juster] about any political views." (Ex. 452, 30:13-31:3). Juster's notes taken after the February 4, 2010 conference call confirm he followed up on the source of the BBWM reference. (Ex. 8).

Following the call, in an e-mail dated February 4, 2010, Griess asked LPL, as a "side note" ahead of the February 8 conference call, whether LPL intended to take any heightened supervisory action against Bennie. (Ex. 231). He did not request or demand that LPL do so, and LPL never imposed any heightened scrutiny on Bennie. (ECF 192, 163:21-164:10).

(c) The February 8, 2010 Call

On February 8, 2010, Herstein, Griess, and Cahill participated in a telephone conference with Zappala and Juster. (Ex. 253). During the call, LPL explained that the E-Money CD and the TV Commercial were approved by LPL, and that the Article was not an advertisement and did not need to be approved. *Id*. LPL explained that the reference to BBWM offering financial services was placed in the Article by the reporter, and Bennie had nothing to do with the reference. *Id*. (ECF 193, 242:3-244:25; 259:19-260:1; 306:14-307:7).

Juster's notes from the February 8, 2010 call state: "Newspaper article not submitted," "info about his biz [BBWM] was biographical only," and LPL did not consider the Article an ad because "it concerns his political

views, not his biz." (Ex. 7). Juster's notes are consistent with Cahill's notes from the February 8, 2010, call which specifically refer to the fact that the parties discussed the Article's reference to "Bob Bennie Wealth Management." (Ex. 233).

Juster testified he was relying on his notes for the specific subject areas covered during the calls with the Department. (Ex. 31, 137:18-138:2). Juster testified, "there were no substantive areas of inquiry that were not reflected in my notes." (*Id*., 139:6-17). The only specific question he could remember the Department asking is "whether it [the Article] was reviewed and approved by LPL." (*Id*., 134:17-23). Juster testified the Department's primary concern seemed to be with the TV Commercial, not the Article. (*Id*., 114:23-115:13). Juster did not remember the Department asking whether the Article contained inappropriate content. (*Id*., 43:14-45:14). Zappala testified he did not recall any discussions where the Department asked LPL about Bennie's political statements in the Article. (Ex. 452, 46:23-47:2; 47:8-11).

Once LPL explained that the reference to BBWM offering financial services was placed in the Article by the reporter, the Department did not consider the Article an advertisement within its regulatory purview. (ECF 192, 198:10-19) (ECF 193, 260:2-16; 309:9-20). The Department considered the inquiry regarding the Article closed as of February 8, 2010. *Id*. The Department asked no further questions regarding the Article after February 8, 2010. *Id*.

During the call, the Department also asked if LPL had any policies regarding political speech. (ECF 193, 243:22-244:2). Zappala testified he routinely receives questions from regulators regarding LPL's policies. (Ex. 452, 54:22-55:3). Juster testified it was appropriate for a regulator to ask about firm policies. (Ex. 31, 99:12-18; 102:1-17; 101:1-15). During the call, LPL stated it had no policy regarding political speech, which ended the inquiry. (ECF 192, 220:1-18).

Bennie falsely states that Griess and Cahill gave "differing explanations" as to why they asked about LPL's policy regarding political statements. (Petition at n.7). Both Griess and Cahill testified, consistently, that the Department routinely asks about firm policies to determine if there are any compliance issues with the representative. (ECF 193, 412:1-8; 413:25-414:5) (ECF 192, 220:5-18). This gives the regulator a sense of whether the broker-dealer is properly supervising its agents and representatives. (*Id*., 245:9-13; 410:15-544:7; 412:1-19; 413:20-24; 415:19-416:8).

On February 9, 2010, Zappala sent an email to Bennie regarding questions the Department asked during the February 8, 2010 call. (Ex. 235) Those questions were: "1. When did your TV commercial go off the air? . . . 2. How may gift cards have you distributed? . . . Did anyone use a gift card to purchase a firearm?" *Id*. In response, Bennie wrote: "None of their business." *Id*. "I believe this is harassment on the part of the Nebraska regulator. I would like to contact the Governor about this." *Id*. Neither LPL nor Bennie referred to the

Article or Bennie's political speech during this exchange.

On February 10, 2010, LPL sent an email to Griess formally responding to nine issues discussed during the February 8, 2010 call. (Ex. 237). None of those nine issues refer to the Article or Bennie's political speech. *Id*. As of February 10, 2010, the Department Employees considered the inquiries relating to the E-Money CD, the TV Commercial, and the Article to be resolved and determined that no action would be taken. (ECF 193, 320:1-7; 336:17-337:7) (ECF 192, 210:2-9) (Ex. 31, 127:22-128:2) (Ex. 32:18-11:1).

(d) LPL did not place Bennie on heightened supervision.

Relying solely on discredited testimony from Juster, and ignoring the District Court's findings, Bennie falsely claims that LPL assigned Bennie to a senior analyst, Virginia Hodge, as "heightened supervision" to give comfort to the Department. (Petition at 8). Bennie fails to tell this Court that on cross-examination, Juster clarified that he was not involved in Hodge's assignment to Bennie, does not know why LPL assigned her to Bennie, and does not believe LPL placed Bennie on any heightened supervision. Juster testified:

> Q. I just want to be clear though, to the extent that Mr. Zappala and Ms. Hodge have both testified that Mr. Bennie being appointed a senior analyst had nothing whatsoever to do

> with the Department of Banking, you would agree with that?
>
> A. **I don't know whether it's true or not. I wasn't involved in that decision.** I don't find it surprising, if that's what they testified, and I have no reason to doubt it.

(Ex. 31, 107:16-108:1) (emphasis added). Juster further testified: "I don't know what the motivation for reassigning him to a senior analyst was; so I don't know if it was related to this or not. I don't doubt Mr. Zappala's testimony, and I'm not aware of any other heightened supervision." (*Id*., 108:9-17) (emphasis added). "I'm not aware of whether or not that was related to this [the Department's] investigation, that reassignment, as I've said, and I'm not aware of any other heightened supervisory measures." (*Id*., 109:22-110:1) (emphasis added).

Bennie also omits the unrefuted testimony from the LPL employees who were actually involved in the assignment of Hodge to Bennie. Zappala, Cyrille Mahfoud, and Hodge testified that Hodge was assigned to Bennie in January 2010 as part of a departmental reorganization, *before* the Article and Griess' February 4, 2010, e-mail, as a "perk" to Bennie because he was a top producer. (Ex. 453, 8:21-9:7; 30:8-31:12) (Ex. 452, 49:7-16) (Ex. 462, 5:12-6:1). These LPL employees who were responsible for the reassignment testified the reassignment had nothing to do with the Department. *Id*.

LPL's decision to assign Hodge to review Bennie's advertising materials in January 2010 was not an "appeasement" of or a "concession" to the Department as stated in Bennie's Petition. (Petition at 8). LPL's assignment of Hodge to Bennie was completely unrelated to any action taken, or request made, by the Department. (Ex. 452, 49:7-16). Zappala testified:

> Q. Did LPL ever put Mr. Bennie on any heightened supervision?
>
> A. Not that I'm aware of.

(Ex. 452, 55:10-12).

The trial judge found: "[T]he evidence persuades the Court that the reassignment was decided upon before – and was unrelated to – anything the Department did." (Appx. B-15). LPL never imposed any heightened supervision on Bennie, never imposed a sanction upon him, and did not treat him any differently as a result of any actions taken by the Department. (Ex. 452, 55:6-56:12) (Ex. 31, 108:19-110:1).

4. The One-On-One Invite

Sometime after the February 8, 2010 conference call, Munn received an invitation from Bennie at Munn's home, inviting Munn to attend a private dinner with Bennie to discuss "important issues that may impact your financial goals." (the "One-on-One Invite") (Ex. 239) (ECF 193, 379:3-8). Munn brought the One-on-One Invite to the office for compliance review as he

routinely does with every solicitation he receives at his home. (ECF 193, 379:6-20; 337:25-338:5).

Upon review, Griess was concerned that in the disclosure on the One-on-One Invite: (a) Bennie, again, did not disclose his investment advisor status and (b) suggested that he was a Certified Financial Planner "with LPL" when a CFP (Certified Financial Planner) designation is not related to, associated with, or granted by LPL. (ECF 192, 217:20-23). LPL understood that the Department's concerns with the One-on-One Invite were that the invitation made no mention of his registered representative status with LPL, and Bennie's use of the CFP designation. (Ex. 35, 12:9-15).

Frustrated that this was the fourth issue involving Bennie's advertising disclosures in a short period of time, around February 18, 2010, Herstein instructed Griess to tell LPL to cancel the dinners until the compliance review was completed. (ECF 193, 338:6-19). Within two business days of receiving LPL's response to the inquiry, the Department advised LPL that the parties would "agree to disagree" regarding whether an investment advisor disclosure was required on the One-on-One Invite, but that the Department did not object to Bennie keeping his dinner appointments. (Ex. 247). At trial, Bennie could not identify any dinners that were cancelled. (ECF 194, 519:14-17). Bennie admitted that any cancelled dinners could have been rescheduled after March 2, 2010. (ECF 194, 520:12-17).

(a) Bennie Contacts the Governor

On February 25, 2010, Bennie used his political connections, called Governor Dave Heineman, told him that he was being harassed, and "I'd like to ask you to get them off my back, Dave." (ECF 192, 85:22-86:9) (Ex. 244). The Governor called Munn. (ECF 193, 380:1-15). Munn promised to look into the matter and provide the Governor with a summary of the nature of the Department's inquiries into Bennie's activities by noon that day. *Id*.

5. The Sun Life Invite

On or around March 1, 2010, Herstein received an invitation from Bennie at Herstein's home address inviting him to attend a seminar (the "Sun Life Invite"). (Ex. 248) (ECF 193, 341:21-25; 326:19-22). Herstein believed the Sun Life Invite lacked proper disclosures and asked Griess to review it to see if he agreed. (ECF 193, 342:1-9) (ECF 192, 191:2-8). Herstein routinely brought in solicitations which he received at his home for compliance review. (ECF 193, 326:9-25).

Griess determined the Sun Life Invite lacked required disclosures. (ECF 192:7-193:4). In an e-mail to LPL dated March 2, 2010, Griess summarized the Department's concerns regarding Bennie's recent string of advertising activities, and the reasons for the inquiries:

> In partial response to your email below, the Department would also welcome opening a dialogue on how to best proceed. Really, the

> primary issue (notwithstanding the firearm contribution) that concerns the Department is insuring that residents of NE know upfront who and what they're dealing with; i.e., if Mr. Bennie is acting pursuant to his registration as a broker dealer agent, then make certain the folks he's dealing with understand that, and that the association is properly disclosed. If perhaps the communication crosses into RA territory, disclose the association properly to the client also. Likewise, if the communication is insurance producer related (the Assistant Director just received a dinner seminar invitation for 3/10 or 3-11 – Bob Bennie Wealth Management-Sun Life Financial) but yet may cross into AG/RA fields, see to it that folks understand the relationships they're about to enter into. Basically common sense wouldn't you agree?

(Ex. 247).

In an e-mail dated March 9, 2010, LPL responded to the Department's inquiry admitting that the Sun Life Invite lacked required disclosures. (Ex. 251). LPL stated that its "reviewer did not require Mr. Bennie to add broker dealer disclosure as she erroneously believed he was distributing [the] invitation on approved letterhead that contained [the] broker dealer disclosure. We agree that LPL disclosure should have been included with the invitation." *Id*. While Bennie tries to blame LPL for the lack of disclosure on this invitation, he admitted it is ultimately his responsibility to comply with the disclosure rules. (ECF 193, 453:2-5).

F. The Department takes no action against Bennie or LPL.

In response to LPL's acknowledgement that the Sun Life Invite lacked required disclosures, on March 10, 2010, Herstein wrote an e-mail to Griess stating: "Was this the new 'expert reviewer'? My response to their response would be 'that's it'. We should keep this in a reserve file and move on and hopefully he will eventually hang himself along with LPL." (Ex. 252). Later on March 10, 2010, Herstein advised Munn: "I told Rod [Griess] we do nothing with Benny [*sic*] and only keep this latest in a reserve file only." (Ex. 251). By "reserve file" Herstein meant put it in a file and close the matter with no action being taken. (ECF 193, 343:3-11).

As of March 10, 2010, the inquiries related to the E-Money CD, the Television Commercial, the Article, the One-on-One Invite, and the Sun Life Invite were closed. (ECF 193, 343:14-18; 387:24-388:4) (Ex. 31, 24:14-25:5) (Ex. 35, 22:1-11).

The trial judge found that "No sanctions were imposed by the Department for any of the plaintiff's acts." (Appx. B-8). LPL never expressed any concerns to Bennie about his political speech and never told him that he could not talk about political issues. (ECF 192, 62:17-23). Bennie admitted LPL was "100% supportive" of him and his business during the five inquiries. (*Id.*, 62:17-63:1).

G. Bennie continues his political activities unabated.

The trial judge found that both during and after the Department's inquiries Bennie "continued his political activism." (Appx. B-8). The trial court found that Bennie's speech was not chilled by any of the Department's actions. (Appx. B-14).

Bennie admits he was aware the Department was conducting inquiries regarding his advertising activities, and that his speech was not chilled by those inquiries. (ECF 192, 100:3-10).

> Q. Okay. So I'm going to move to a little different topic now, okay? We're kind of done with the employment for a little bit and I want to go back and talk about your Tea Party activities, okay. And – and particularly from the time of this newspaper article on February 1st of 2010 up and to the point of your termination by LPL on November 2nd of 2010, okay?
>
> Did you continue to be engaged in various Tea Party activities and speeches and things like you had in the past?
>
> A. Yes.
>
> Q. Okay. And just generally – was it the same kind of thing? Did you do another Tea Party rally?
>
> A. We had two more Tea Party rallies at the Lancaster County Event Center, one in April of 2010 and one in September of 2010.
>
> Q. And were you a speaker at those?

> A. Both of them, yes.
>
> Q. Okay. And did you kind of continue to deliver the same message that you had in the past, that you felt –
>
> A. The same message about, you know, government expansion and – and antigovernment expansion and – and freedom and that sort of thing, yeah, Tea Party stuff.

(*Id*., 98:20-99:15).

In April 2010, just one month after the five inquiries ended, Bennie organized, led, and spoke at a large Tea Party rally in Lincoln attended by over 1,500 people, including Governor Heineman. (Ex. 260). Bennie continued his Tea Party activities unabated, calling himself a leader of the Tea Party in media reports and press releases as late as 2013. (ECF 194, 502:9-503:1) (Ex. 307) (Ex. 311).

There were media reports regarding Bennie's Tea Party activities after March 2010, but none of the reports referenced financial services Bennie or BBWM provided and the Department made no inquiries regarding them. (ECF 194, 485:1-487:10) (Ex. 259) (Ex. 260). Bennie continued to advertise his business both during and after the five inquiries. (Exs. 263-280). Bennie spent approximately $35,000 on advertising his business in both 2011 and 2012 with no scrutiny from the Department. (ECF 194, 522:7-12). Unbowed by anything the Department had done, in January 2013, Bennie asked his new broker-dealer, Prospera, if he could re-run the TV Commercial offering $100 towards

the purchase of a firearm if a client agreed to do business with him. (Ex. 2). Prospera refused to approve the ad because "it is the call to action-the offer of a gift towards the purchase of a firearm – at the end of the advertisement that causes us to hesitate in giving our approval." *Id*. That Bennie resubmitted the same ad that was the subject of a Department inquiry in 2009 is evidence his speech was not chilled.

H. Bennie hires a media consultant and orchestrates a media campaign.

In May of 2011, before he filed this lawsuit, Bennie hired a media consultant to publicize his significant displeasure with the Department, developed a media strategy, and implemented that strategy by contacting political officials, issuing press releases, holding multiple press conferences, and giving interviews to numerous media outlets. (ECF 194, 487:11-493:9). During media interviews in 2011 and 2012, Bennie referred to himself as a leader of the Tea Party movement in Nebraska. (*Id*., 495:3-496:3; 502:9-22). Through his media consultant, Bennie issued a press release on June 6, 2013, in which he referred to himself as a "Nebraska Tea Party Leader." (Ex. 311). In press releases, media interviews, and letters to public officials, Bennie publicly called on the Governor to fire the Defendants, and on the Attorney General to criminally prosecute them and put them in jail. (ECF 194, 505:19-506:6; 531:13-19) (Ex. 289) (Ex. 307) (Ex. 309) (Ex. 311).

I. Bennie's clients file a purported class action against him.

In or around May 2010, Bennie's clients, the Ripleys, filed a purported class action lawsuit against LPL alleging Bennie engaged in misconduct regarding client accounts. (ECF 193, 428:2-429:17; 431:1-6) (Ex. 464, 9:14-10:2).

J. LPL's audit of Bennie's office uncovers manipulated client documents.

LPL audited Bennie's office on an annual basis. (Ex. 456, 18:11-15). On July 15, 2010, LPL auditor Mark Findling ("Findling") conducted a regularly scheduled annual audit of Bennie's office. (Ex. 459, 16:9-11) (Ex. 456 18:11-15; 19:9-20). Findling found altered documents in Bennie's files which contained signatures copied from one document and pasted onto another in violation of LPL's policies. (Ex. 456, 21:20-24:3). Findling reported his findings to his manager, Christina Gomez ("Gomez"), at LPL. (*Id*., 24:12-20) (Ex. 459, 16:12-15). As a result of Findling's findings, Gomez requested that Matt Magee ("Magee"), another LPL auditor, conduct an unannounced "for cause" audit of Bennie's office. (Ex. 461, 13:6-19). The Department had nothing to do with LPL's audits of Bennie.

From August 17, 2010, through August 19, 2010, Magee performed a "for cause" audit of Bennie's office. (Ex. 461, 12:21-13:5, Vol. 7). Magee's audit of Bennie's files found more than a hundred altered documents including a "prevalent use of white-out on documents,"

documents signed in blank, incomplete forms signed by clients, and copied signatures, all of which were in violation of LPL's policies. (*Id.*, 19:3-13).

K. LPL terminates Bennie's contract.

Magee presented his audit findings to LPL's Advisor Business Conduct Committee ("ABC Committee") on October 29, 2010. (Ex. 457, 8:11-12; 49:24-51:13). LPL's ABC Committee voted unanimously to terminate Bennie's registration because of these violations effective November 2, 2010. (*Id.*, 51:22-52:3) (ECF 192, 90:7-13). In its U5, an official regulatory filing, LPL stated it terminated Bennie "for violating firm policies and procedures regarding obtaining client signatures on account documentation in that adviser [Bennie] used copied customer signatures on original documentation." (Ex. 401) (ECF 192, 94:15-95:24).

LPL employees involved in the decision to terminate Bennie's contract testified the Department's inquiries were not discussed and played absolutely no role in their decision to terminate Bennie's contract. (Ex. 457, 50:19-51:6; 54:17-25). Zappala, who handled the Department's inquiries for LPL, was not involved in the decision to terminate Bennie's contract, and did not even know Bennie was terminated. (Ex. 452, 65:2-66:3).

L. The Department had nothing to do with Bennie's termination.

In this lawsuit, Bennie claimed the Department caused LPL to fire him. Bennie's allegations were contrary to allegations he made in a separate arbitration. Bennie filed a FINRA arbitration against LPL claiming LPL wrongfully terminated him. (ECF 193, 430: 2-4). In his Amended Statement of Claim in the arbitration filed months *after* he sued the Department Employees, Bennie alleged his termination was related to the Ripley lawsuit, not the Department Employees' actions. Bennie alleged: "[T]he existence of LPL's grave concerns about the effect of the Ripley lawsuit on its IPO is the **only** logical explanation for LPL's otherwise inexplicable, malicious actions against Mr. Bennie." (Ex. 429, ¶ 117) (emphasis added). "In short, Mr. Bennie was maliciously fired in retaliation for the damaging effect the Ripley lawsuit had on LPL's IPO and to attempt to distance LPL from Mr. Bennie while simultaneously tarnishing his otherwise stellar reputation." (ECF 193, 433:12-18) (Ex. 429, ¶ 17).

The District Court found that "the evidence simply does not prove that the Department got the plaintiff fired." (Appx. B-15). Referring to a scene from The Godfather, the District Court noted that Bennie had become a "superstitious man" but "that does not mean the defendants can be held responsible for everything bad that happened to plaintiff, unless there is evidence they caused it to happen. There is not nearly enough evidence here to prove that." (Appx. B-16).

M. In the past six years, the Department has taken no adverse action against Bennie.

At the time of trial, the Defendants had no regulatory contact with Bennie, or his broker-dealer, regarding Bennie for over three years. (ECF 194, 523:24-524:4). The Defendants acknowledge they do not have authority to regulate a registered person based on political speech or views. (ECF 193, 304:10-13; 367:22-368:4). More than six years have now passed since the March 10, 2010 date in which Bennie stipulated the alleged harassment stopped, and the Department has taken no adverse action against Bennie.

REASONS FOR DENYING CERTIORARI

I. BENNIE ATTEMPTS TO MANUFACTURE A CIRCUIT SPLIT WHERE NONE EXISTS BY CITING CASES THAT APPLY A COMPLETELY DIFFERENT TEST (*PICKERING*) WHICH DOES NOT APPLY HERE.

Bennie boldly starts his Argument with the assertion that " . . . the Eighth Circuit exacerbated a split among the Circuit courts" regarding the appellate standard of review of whether a person of ordinary firmness would be chilled (Petition at 15). Bennie claims the Eighth, Third, and Sixth Circuits review whether a person of ordinary firmness would be chilled for clear error but that the First, Ninth, Tenth, Eleventh and D.C. Circuits review this issue *de novo* (Petition at 16).

Bennie does not cite a single case which holds that a finding that a person of ordinary firmness would or would not be chilled is reviewed de novo. To manufacture a circuit split, Bennies cites to cases applying the *Pickering* test. Whether a person of ordinary firmness would be chilled is not even an element of the *Pickering* test. All Circuits agree the *Pickering* test does not apply to non-governmental employees like Bennie in this case. EVERY Circuit agrees that whether a person of ordinary firmness would be chilled is a question of fact, which is obviously reviewed under the clearly erroneous standard per Rule 52.

A. Bennie attempts to create a circuit split by referencing a different test (*Pickering*) which only applies to governmental employees and contractors.

Bennie falsely argues that there is a split in authority among the Circuits relating to what standard of review applies to the issue of whether a person of ordinary firmness would be chilled by a government action. Bennie argues that "the First, Ninth, Tenth, Eleventh and D.C. Circuits Review a Trial Court's 'Ordinary Firmness' Finding De Novo." (Petition at 16). The cases cited by Bennie from these Circuits do not address, much less hold, that whether an action would deter a person of ordinary firmness from exercising his or her constitutional rights should be reviewed *de novo*.

None of the cases upon which Bennie relies even involve a "person of ordinary firmness" analysis. All of the cases upon which Bennie relies were filed by government employees who claimed they were retaliated against for exercising First Amendment rights. *See Tao v. Freeh*, 27 F.3d 635 (D.C. Cir. 1994); *Davignon v. Hodgson*, 524 F.3d 91 (1st Cir. 2008); *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1123 (9th Cir. 2008); *Powell v. Gallentine*, 992 F.2d 1088 (10th Cir. 1993). As government employees, their claims were resolved under the balancing test set forth in *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (the "*Pickering* test") – a test inapplicable to Bennie's situation.

B. The *Pickering* test has a policy rationale different from this case. Indeed, not even Bennie argues the *Pickering* test should apply here.

The *Pickering* test requires courts to strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id*. at 568. As this Court explained in *Connick v. Myers*, the "repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental." 461 U.S. 138, 143 (1983). That language "reflects both the historical evolvement of the rights of public employees, and the common-sense realization

that government offices could not function if every employment decision became a constitutional matter." *Id.* "[T]o this end, the Government, as an employer must have wide discretion and control over the management of its personnel and internal affairs." *Id.* (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974)).

Under *Pickering* and its progeny, courts apply a four part test to First Amendment claims asserted by government employees and contractors consisting of: (1) whether the employee's speech involves a matter of public concern, (2) whether the employee's interest in speaking outweighs the government's legitimate interest in efficient public service, (3) whether the speech played a substantial part in the government's challenged employment decision, and (4) whether the government would have made the same employment decision in the absence of the protected conduct. *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 675-76 (1996). The *Pickering* test does **not** require proof that the retaliation would chill a person of ordinary firmness from exercising constitutional rights.

Because Bennie is not a current or prospective employee or contractor of the Department, the *Pickering* test is completely inapplicable to this case. The *Pickering* test does not analyze whether the government's actions would chill a person of ordinary firmness. As a result, the cases cited by Bennie *do not and could not* hold that the ordinary firmness test should be reviewed *de novo*. Bennie has flatly misrepresented that the "First, Ninth, Tenth, Eleventh and D.C. Circuits Review a Trial Court's 'Ordinary Firmness' Finding De

Novo." (Petition at 16). Neither Bennie, nor any of the amici, cite a single case which holds that whether an action would chill a person of ordinary firmness is reviewed *de novo*. Contrary to Bennie's argument, the cases he cites do not create any circuit split on the issue.

C. Every Circuit which has addressed the issue has held that whether an action would deter a person of ordinary firmness from exercising his or her constitutional rights is a question of fact to be resolved by the trier of fact.

To prevail on his First Amendment retaliation claim, Bennie had to prove that the Department Employees took an adverse action against him that would chill a person of ordinary firmness from engaging in protected activity. *Zutz v. Nelson*, 601 F.3d 842, 848-49 (8th Cir. 2010). After considering all of the evidence, the District Court found that the Department's actions in this case did not chill Bennie, and would not chill a person of ordinary firmness from exercising constitutional rights. "The Court finds that the Department's questions to LPL in February and March 2010 were not sufficient, standing alone, to chill a person of ordinary firmness from continuing his political activity – just as they did not chill the plaintiff." (Appx. B-15); *see Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003) ("how plaintiff acted might be evidence of what a reasonable person would have done").

The Eighth Circuit affirmed finding no clear error in the District Court's factual finding. *See* Fed. R. Civ. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."). Under this Court's rules: "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." U.S. Sup. Ct. R. 10; *see, e.g.*, *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (the Supreme Court "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.").

Every Court of Appeals which has addressed the issue has held that whether a defendant's actions would chill a person of ordinary firmness from exercising his or her constitutional rights is a question of fact to be resolved by the finder of fact, not a mixed question of law and fact as claimed by Bennie. *See Starr v. Dube*, 334 F. App'x 341, 343 (1st Cir. 2009) ("we cannot say that a reasonable fact-finder could conclude that inmates of 'ordinary firmness' would be deterred from continuing to exercise their constitutional rights merely because of the filing of a disciplinary charge carrying potentially severe sanctions."); *Espinal v. Goord*, 558 F.3d 119, 129 (2d Cir. 2009) ("we have no trouble finding on the record in this case that there is

a triable issue of fact as to whether a severe beating by officers over the course of thirty minutes would deter a person of 'ordinary firmness' from exercising his rights."); *Bistrian v. Levi*, 696 F.3d 352, 376 (3d Cir. 2012) (whether a person of ordinary firmness would be chilled is "ultimately a question of fact."); *Bibbs v. Early*, 541 F.3d 267, 272 (5th Cir. 2008) (holding there was a question of fact whether an action might chill a person of ordinary firmness from exercising First Amendment rights); *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 583-84 (6th Cir. 2012) ("Whether an alleged adverse action is sufficient to deter a person of ordinary firmness is generally a question of fact."); *Garcia*, *supra*, (8th Cir.); *Brodheim v. Cry*, 584 F.3d 1262, 1274 (9th Cir. 2009) ("Namely, it is a matter of disputed fact . . . whether a 'person of ordinary firmness' would have had his or her First Amendment rights chilled by the conduct of appellees."); *Worrell v. Henry*, 219 F.3d 1197, 1213 (10th Cir. 2000) ("a fact finder could conclude that Mr. Turner caused Mr. Worrell 'an injury that would chill a person of ordinary firmness from continuing to engage in that activity.' ") (quotation omitted); *Bennett v. Hendrix*, 423 F.3d 1247, 1254 (11th Cir. 2005) (holding that plaintiffs alleged facts "that a jury could find would deter a person of ordinary firmness from the exercise of First Amendment rights.").

The Eighth Circuit's decision in this case is consistent with well-established Supreme Court precedent which holds that appellate courts review factual findings under the deferential "clear error" standard. *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015). "Factual

findings of a district court are, of course, entitled to substantial deference and will be reversed only for clear error." *United States v. Taylor*, 487 U.S. 326, 337 (1988). "Deference to trial court fact finding reflects an understanding that '[t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise.'" *Brown v. Plata*, 563 U.S. 493, 513 (2011) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985)).

Because the Courts of Appeals uniformly hold that whether a person of ordinary firmness would be chilled by a particular action is a question of fact which is reviewed for clear error, there is no circuit split which needs to be resolved. Bennie's Petition should be denied.

II. CERTIORARI SHOULD BE DENIED BECAUSE BENNIE DID NOT PROPERLY RAISE HIS ARGUMENT IN THE EIGHTH CIRCUIT.

The Eighth Circuit pointed out that Bennie raised the issue of whether an appellate court should conduct an independent examination of the whole record for the first time during oral argument. (Appx. A-10 at n.3). Bennie cited to none of the cases he relies on in his Petition in his briefs to the Eighth Circuit. The argument raised in the Petition was never litigated in the Eighth Circuit making this issue inappropriate for certiorari. *See Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958) ("Only in exceptional cases will this Court

review a question not raised in the court below."); *EEOC v. Fed. Labor Relations Auth.*, 476 U.S. 19, 24 (1986) ("Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals."); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977) ("This argument, however, was not raised in the District Court or in the Court of Appeals. Absent exceptional circumstances, we will not review it here."). Because this is not an exceptional case warranting departure from this Court's normal practice, the Petition should be denied.

III. BENNIE LACKS ARTICLE III STANDING BECAUSE INJUNCTIVE AND DECLARATORY RELIEF IS NOT AVAILABLE TO REMEDY PAST CONDUCT.

Bennie's claim can be summarized as follows:

1. In February/March, 2010, certain Department Employees asked questions of LPL regarding comments Bennie made in a newspaper article.

2. The Department never took any action against him after March 10, 2010.

3. Bennie wants a declaratory judgment that the Department Employees violated his constitutional rights in the past and an injunction prohibiting them from violating his rights in the future.

Bennie failed to establish an ongoing violation of law necessary to establish a case and controversy under Article III. In the Pretrial Order, Bennie abandoned his claim for damages under 42 U.S.C. § 1983, and voluntarily dismissed all claims against the Department Employees in their individual capacities, with prejudice. (ECF 173) (ECF 174). At trial, Bennie purportedly sought only prospective injunctive and declaratory relief. Bennie stipulated that no actions by the Department after March 10, 2010, form any basis of his claim. (ECF 192, 3:10-4:2). The District Court found that Bennie "is claiming no First Amendment violation based on any acts of the defendants after March 10, 2010." (Appx. B-10). All Department actions ended fifteen months *before* Bennie filed his lawsuit.

In *City of Los Angeles. v. Lyons*, 461 U.S. 95, 102 (1983), a plaintiff filed a section 1983 action against a police officer who placed him in a choke hold. The plaintiff sought an injunction preventing the police department from using the choke hold in the future. The District Court entered an injunction and the Ninth Circuit affirmed.

On certiorari, this Court reversed, holding that "the federal courts are without jurisdiction to entertain Lyons' claim for injunctive relief." *Id*. at 101. This Court held that Lyons failed to establish that a case and controversy existed that would confer Article III standing because there was no ongoing violation.

> It goes without saying that those who seek to invoke the jurisdiction of the federal courts

> must satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an actual case or controversy. Plaintiffs must demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions.

Id. at 101. "It is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions. The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant." *Id*. at 95, n.8.

Bennie's case was about the Department Employees' specific actions in the *past* which Bennie stipulated ended on March 10, 2010 – fifteen months before he filed his lawsuit. The Department Employees understand they cannot regulate based on anyone's political speech and there is no imminent threat they will do so. (ECF 192, 141:4-10; 198:25-199:16) (ECF 193, 304:10-13; 368:2-4). This case does not involve any unconstitutional custom or policy by the Department. More than six years have passed since the March 10, 2010 date in which Bennie stipulated the alleged harassment stopped, and the Department has taken no adverse action against Bennie. Because the acts Bennie complains of are not ongoing, there is no case and controversy for injunctive or declaratory relief necessary for Article III standing.

IV. BENNIE SUFFERED NO PARTICULARIZED, CONCRETE INJURY.

Five days after the Eighth Circuit's decision in this case, this Court held that to establish Article III standing, a plaintiff must establish some particularized, concrete injury. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id*. at 1548 (internal quotation omitted).

Here, the District Court found: "And the fact of the matter is that the plaintiff's political speech was not chilled by anything the defendants did." (Appx. B-14-15). Bennie does not challenge this factual finding in his Question Presented and the district court's finding is now the law of the case. *See* U.S. Sup. Ct. R. 14(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Because Bennie's speech was not chilled by the actions of the Department Employees, he suffered no particularized, concrete injury necessary for Article III standing. Because Bennie lacks Article III standing, this case is inappropriate for Supreme Court review.

V. THE EIGHTH CIRCUIT'S DECISION WAS CORRECT

While pointing out that this argument was raised by Bennie for the first time during oral argument, the Eighth Circuit:

1. Noted that whether a person would be chilled was a matter for the fact finder (to

which all Circuits agree-see infra at 29-31) (Appx. A-10, n.3).

2. Referred to prior Eighth Circuit case law which held "Ultimately, this sort of question is usually best left to the judgment of a jury, twelve ordinary people, than to that of a judge, one ordinary person. The jury, after all, represents the conscience of the community. It decides many similar questions – for example, what would a person of ordinary prudence have done in certain circumstances?" (Appx. A-10 at n.2 quoting *Garcia*, 348 F.3d at 729).

3. Referred to *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) heavily relied upon by Bennie and the Amici, but did not adopt Bennie's arguments.

The rationale for leaving the determination of whether an action would chill the speech of a person of ordinary firmness to the fact finder is simple: not every wrongful act rises to the level of a constitutional violation. "[I]t would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise." *Naucke v. City of Park Hills*, 284 F.3d 923 (8th Cir. 2002). "[We] have consistently held that, to be materially adverse, retaliation cannot be trivial; it must produce some injury or harm." *Littleton v. Pilot Travel Ctrs., LLC*, 568 F.3d 641, 644 (8th Cir. 2009). A fact finder is in the best position to make this determination.

Whether a person of ordinary firmness would be chilled by the government's actions is properly left to the finder of fact who can view all of the evidence in context, weigh the credibility of the witnesses and the evidence, and determine whether the specific acts would chill a person of ordinary firmness such as to cause harm. Here, after considering all of the evidence following a bench trial, the trial judge sitting as the trier of fact found that improper statements made by certain Department Employees to LPL in the context of otherwise valid inquiries into Bennie's regulated advertising activities did not chill Bennie, and would not chill a person of ordinary firmness, from exercising protected rights. First Amendment rights are adequately protected under the clear error standard which allows the reviewing court to reverse where the appellate court "on the **entire evidence** is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (emphasis added).

CONCLUSION

Neither Bennie nor any of the Amici cite a single case for the proposition that a factual finding that a person of ordinary firmness would not be chilled should be reviewed *de novo*. There is no circuit split and Bennie's attempt to manufacture one by referring to a different test must fail. All circuits hold that whether a person of ordinary firmness would be chilled is a finding of fact.

Moreover, Bennie failed to properly raise the argument in the Eighth Circuit and has no standing to seek a declaratory judgment/injunctive relief for acts that happened more than three years before trial, and which will not be repeated. Because the Court found Bennie was not chilled (which factual finding is not challenged in Bennie's Petition), Bennie has no particularized, concrete injury. Finally, the Eighth Circuit got it right, and its holding is in accord with all other circuits. Bennie's Petition should be denied.

DATED: December 7, 2016.

Respectfully submitted,

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