

No. 20-_____

In The
Supreme Court of the United States

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COALITION FOR BETTER GOVERNMENT
and DARLEEN JACOBS,

Petitioners,

vs.

ALLIANCE FOR GOOD GOVERNMENT,

Respondent.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

◆

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Lanham Act, 15 U.S.C. § 1051 *et seq.*, explicitly protects against the potential chilling of First Amendment-protected speech like that in this case by including in each of its remedial provisions a qualification that the offending use of the mark must have been for commercial purposes.

In this case, the Fifth Circuit decision in *Alliance I* to hold Coalition liable under the Lanham Act for non-commercial political speech was clearly erroneous and results in manifest injustice. Furthermore, the Fifth Circuit decision in *Alliance I* to hold Jacobs personally liable for the award of attorneys' fees as Coalition's counsel under the Lanham Act's fee-shifting provision, 15 U.S.C. § 1117(a) is unwarranted and contrary to congressional intent.

The questions presented are:

1. Should this Court permit the Lanham Act to be extended to non-commercial political speech?
2. Should this Court permit the imposition of a sanction of attorney fees awarded against Counsel for Coalition pursuant to the fee shifting provision of the Lanham Act?

PARTIES TO THE PROCEEDINGS

The petitioners are Coalition for Better Government, the Defendant and Appellant below and Darleen Jacobs, the Objecting Party/Appellant below.

The Respondent is Alliance for Good Government, the Plaintiff and Appellee below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Coalition for Better Government and Darleen Jacobs state that, Coalition for Better Government is no longer a corporation. Coalition for Better Government disbanded during the pendency of the underlying litigation. Coalition for Better Government has and had no parent corporations, nor is there or was there any publicly held company that owns ten (10%) percent or more of the party's stock.

STATEMENT OF RELATED PROCEEDINGS

Alliance for Good Government vs. Coalition for Better Government, No. 17-30859, U.S. Court of Appeals for the Fifth Circuit, Judgment rendered on August 22, 2018.

Alliance for Good Government vs. Coalition for Better Government, No. 18-30759, U.S. Court of Appeals for the Fifth Circuit, Judgment rendered on August 22, 2019.

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INTRODUCTION

Alliance for Good Government (“Alliance”) is a non-profit civic organization formed in 1967 to promote “honest and open government.” Alliance’s founding chapter is in Orleans Parish, but it operates both in New Orleans and throughout Louisiana. The organization hosts political forums, endorses candidates, and participates in campaigns through advertising. It occasionally distributes and publishes sample ballots featuring endorsed candidates.

Alliance ballots dating back to 1969 feature the same logo it continues to use today – a design with the organization’s name in blue type on a rectangular white background arranged around a stylized bird. Alliance considers its bird to be an eagle. In 2016, Alliance registered its service marks with the United States Patent and Trademark Office (“PTO”): the word mark “Alliance for Good Government,” and the composite mark consisting of the entire logo.

Coalition for Better Government (“Coalition”) is a non-profit civic organization formed in New Orleans in 1982 to endorse political candidates. **Coalition** operates mainly in New Orleans and promotes preferred candidates by advertising sample ballots in New Orleans newspapers. **Coalition** and Alliance sometimes endorse the same or opposing candidates: candidates endorsed by each have run in the same election at least twice.

Coalition also has a logo, which it uses in sample ballots dating back to at least 1992 (possibly the early

1980s). **Coalition**'s logo features its name in white type on a rectangular blue background arranged around a stylized bird. **Coalition**'s bird appears identical to Alliance's, but **Coalition** believes the birds are different types: **Coalition** considers its bird to be a hawk, not an eagle. **Coalition** had previously registered its mark as a "Hawk" with the Louisiana Secretary of State's Office. Both **Alliance** and **Coalition** exist solely to engage in the endorsement of candidates for public office and their activities are not commercial in nature.



OPINION BELOW

The opinion of the United States Court of Appeal for the Fifth Circuit is reproduced at App. 1 and includes the twenty-two page dissent of the Honorable James L. Dennis Circuit Judge.



JURISDICTION

The Court of Appeals issued its opinion on May 19, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1) which provides that cases in the court of appeal may be reviewed by the Supreme Court upon the petition for writ of *certiorari* of any party to any civil or criminal case before or after rendition of judgment or decree.



STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Lanham Act are as follows:

Any person who shall, without the consent of the registrant:

- a) use in commerce any reproduction, counterfeit, copy or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution or advertising of any goods or services on or in connection with which such use is likely to cause confusion or to cause mistake or to deceive; or
- b) reproduce, counterfeit, copy or colorable imitate a registered mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisement intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services or in connection with such use is likely to cause confusion, or to cause mistake, or to deceive.

15 U.S.C. § 1114(a) & (b).

When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) or of this title, or a willful violation under section 1125(c) of this title, shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title,

and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits, the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages, the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive, the court, may in its discretion, enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorneys' fees to the prevailing party. 15 U.S.C. § 1117.

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STATEMENT OF THE CASE

On April 19, 2017, the Respondent, Alliance for Good Government filed its initial complaint against Petitioner, Coalition for Better Government, seeking relief for trademark infringement, trademark counterfeiting, trademark dilution, unfair competition, and Louisiana State causes of action. The claims were based on trademark registrations, including a standard character mark and a composite mark referred to

as “alliance marks.” The complaint described both parties as political organizations that endorse candidates for public office. The trademark actions were brought pursuant to the Lanham Act. In its complaint, Alliance makes no allegations that the other party engages in commercial activity of any kind. Coalition filed its answer to the Alliance complaint and generally denied the allegations contained therein, as well as several affirmative defenses including the defense that its “*actions are protected by the First Amendment of the United States Constitution in that its action constitutes purely noncommercial and political free speech.*”

On August 18, 2017, Petitioner filed its well-pleaded Motion for Summary Judgment, and the Respondent filed its Motion for Partial Summary Judgment on August 22, 2017. In its Opposition to the Respondent’s Motion for Summary Judgment, Petitioner puts the non-commercial nature of its activities squarely at issue.

The district court denied the Motion for Summary Judgment filed by Coalition and granted the Motion for Partial Summary Judgment filed by Alliance with respect to its trademark and infringement claim.

Thereafter, Alliance moved to dismiss without prejudice Counts III-VI of the original complaint and moved for a final judgment, including a permanent injunction against Coalition based upon the district court’s earlier granting of summary judgment on Count I of the complaint for trademark infringement. The district court granted judgment permanently

enjoining Coalition for use of “Coalition for Better Government” and the corresponding logo. A Notice of Appeal was filed by Coalition on October 24, 2017 from the judgment granting the permanent injunction. While the appeal was filed, Alliance filed its first Motion for Attorneys’ Fees on November 6, 2017 which was opposed by Coalition. The motion for attorneys’ fees filed by Alliance was granted on June 22, 2018, and Alliance was awarded \$68,237.25 in attorneys’ fees. The award was also appealed by Coalition. On September 13, 2018, the Fifth Circuit issued an order that the judgment of the trial court was affirmed as modified. (App. B) In so ruling, the court found the injunction as granted to be overly broad and modified the injunction to only apply to Coalition’s use of its logo. The court declined to address the applicability of the Lanham Act to political, non-commercial speech on the basis that Coalition had failed to properly raise them below. Such finding is clearly contrary to the record and the pleadings filed by Coalition.

On September 27, 2018, Alliance filed a subsequent Motion for Attorneys’ Fees requesting an additional \$28,608.00 in attorneys’ fees on appeal to which Coalition filed its opposition, and the matter was set for submission on October 24, 2018. On October 17, 2018, or some seven days prior to the submission date on the Respondent’s Motion for Additional Attorneys’ Fees on appeal, Alliance filed its Motion for Joinder of Darleen Jacobs, counsel for Coalition. This motion was joined with a motion by Alliance to amend the earlier attorneys’ fees judgment to hold Darleen Jacobs

directly liable for all attorneys' fees awarded to Alliance under the Lanham Act. On April 15, 2019, the Fifth Circuit Court of Appeal issued its mandate on Coalition's second appeal ordering Alliance to file a single motion for attorneys' fees separating fees expended in seeking a judgment for infringement of its composite mark from the fees expended in seeking a judgment for infringement of its word mark, of which it was successful. (App. C) After filing such motion, Coalition filed its Opposition, and on March 30, 2020, the district court rendered its judgment in favor of Alliance and against Coalition and Darleen Jacobs, jointly and *in solido* in the amount of \$148,006.15. On April 2, 2020, Coalition and Darleen Jacobs filed their Notice of Appeal from the judgment.

On May 19, 2021, the Fifth Circuit Court of Appeal filed its mandate affirming the reasonableness of the district court award of attorneys' fees to Alliance under the Lanham Act and the joinder post-judgment of Darleen Jacobs.



REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* to address the Fifth Circuit's decision to apply the provisions of the Lanham Act to the non-commercial political speech of Coalition for Better Government even though such application is contrary to the clear and unambiguous provisions of the Lanham Act which requires some commercial activity or commercial

speech. Furthermore, such application also violates the First Amendment's protection of free speech.

Additionally, *certiorari* should be granted as the Fifth Circuit's affirmation of the award of attorneys' fees in the amount of \$148,006.15 against Coalition's attorney, Darleen Jacobs, after she had been joined *sua sponte* by the district court at the very conclusion of the case is an abuse of discretion and contrary to the law.

The issues here are worthy of this Court's review. The Lanham Act plainly does not reach the non-commercial political speech in which Coalition engages and holding otherwise curtails important First Amendment free speech guarantees.

I. THIS COURT SHOULD NOT PERMIT THE LANHAM ACT TO BE EXTENDED TO NON-COMMERCIAL POLITICAL SPEECH.

In its Complaint, the Plaintiff/Respondent, Alliance acknowledged that both Alliance and the Defendant/Petitioner, Coalition are non-profit political organizations that endorse candidates for political office. There is no allegation of commercial activity by either party.

At issue in this case is § 32(1) of the Act which covers infringement of registered marks. Section 32(1) creates a cause of action when trademark infringement "occurs "in connection with the sale, offering for sale, distribution, or advertising of any goods or

services” and is “likely to cause confusion, or to cause mistake, or to deceive.” *Id.*

Based on the similar language between §§ 43(a) and 32(1), courts have concluded that claims under the two provisions have the same elements, with the exception that § 32(1) applies solely to registered marks. See *Lamparello v. Falwell*, 420 F.3d 309, 312-13 (4th Cir.2005); cf. Margreth Barrett, *Finding Trademark Use: The Historical Foundation for Limiting Infringement Liability to Uses “In the Manner of A Mark,”* 43 Wake Forest L. Rev. 893, 942-43 (2008) (“While the statutory language of sections 32(1)(a) and 43(a) differs, the provisions are generally understood to impose the same standard for infringement.”). “To prevail under either cause of action, the trademark holder must prove:

(1) that it possesses a mark; (2) that the [opposing party] used the mark; (3) that the [opposing party’s] use of the mark occurred ‘in commerce’; (4) that the [opposing party] used the mark ‘in connection with the sale, offering for sale, distribution, or advertising’ of goods or services; and (5) that the [opposing party] used the mark in a manner likely to confuse consumers.”

Lamparello, 420 F.3d at 313 (alterations in original). Significantly, both provisions require that actionable infringement be “in connection with” goods or services in a manner likely to cause confusion to consumers. Compare 15 U.S.C. § 1125(a) (use of mark “in connection with any goods or services”), with *id.* § 1114(1)

(use of mark “in connection with the sale, offering for sale, distribution, or advertising of any goods or services”). “This is commonly described as the commercial use requirement.” *Utah Lighthouse Ministry*, 527 F.3d at 1052.

In light of this requirement, the clear majority of circuits to have considered whether the Act applies to *any* non-commercial speech have determined that it does not. *See Bosley Med. Inst., Inc.*, 403 F.3d at 676-77 (construing § 32(1)); *Taubman Co.*, 319 F.3d at 774 (same); *Farah*, 736 F.3d at 541; *Utah Lighthouse Ministry*, 527 F.3d at 1052-54; *Porous Media Corp.*, 173 F.3d at 1120; *cf. S.F. Arts & Athletics, Inc.*, 483 U.S. at 566 (Brennan, J., dissenting); *Radiance Found, Inc.*, 786 F.3d at 322.¹

In the instant case, Coalition’s use of its emblem certainly was not “in connection with commercial activity.” Coalition exists solely to engage in the endorsement of candidates for public office. Coalition does not

¹ In *United We Stand, Inc. v. United We Stand, America New York, Inc.*, the Second Circuit held that non-commercial political activities may be “services” within the meaning of the Lanham Act but also stated that a “crucial” factor in permitting such a conclusion is that the infringer use the Mark not as a commentary on its owner, but instead as a source identifier, 128 F.3d 86, 89-92 (2d Cir.1997). Not only is the Second Circuit the sole outlier court in an otherwise uniform line of federal appellate authority holding that the Lanham Act does not apply to non-commercial speech, but the Second Circuit is also incorrect that purely political speech is a “service” under the Lanham Act. “[S]uch a service is not being rendered in commerce[;] it is being rendered as part of the political process.” *Tax Cap Comm. v. Save Our Everglades, Inc.*, 933 F. Supp. 1077, 1081 (S.D. Fla. 1996).

charge money for its endorsement nor does it accept money from candidates. As the district court recognized, “[p]eople are not buying products here.” Because the entities’ activities are not commercial in nature, the Lanham Act simply does not apply to this case.

Applying the Lanham Act in the manner the *Alliance I* panel did was also clearly inconsistent with Congress’ intent in enacting the statute. Congress specifically recognized the constitutional problems of creating liability for free speech and sought to avoid doing so. See *Radiance Found, Inc.*, 786 F.3d at 321; see also *MasterCard Int’l Inc. v. Nader 2000 Primary Comm., Inc.*, No. 00 CIV. 6068, 2004 WL 434404 at *7-8 (S.D.N.Y. Mar. 8, 2004) (The legislative history of the Lanham Act clearly indicates that Congress did not intend for the Act to chill political speech.”). Congress’s concerns were well founded. As stated, the *Alliance I* panel’s interpretation of the Lanham Act raises serious constitutional concerns. Coalition limits itself to endorsements of political candidates so its use of an avian emblem similar to Alliance’s occurred in the context of engaging in political speech, then results in the precise problem Congress aimed to avoid: creating liability under federal trademark law for actors exercising their free speech rights.

It is well established that commercial speech – that is, speech that does “no more than propose a commercial transaction,” *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983) is accorded only a “measure of First Amendment protection.” Indeed, “the government may freely regulate” misleading commercial

speech, the very speech that the Lanham Act was meant to target. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24 (1995). **By contrast, free speech protections are at their zenith in the context of political speech precisely because such speech is at the heart of the values embodied in the First Amendment.** See *McIntyre v. Ohio Elecs. Comm’n*, 514 U.S. 334, 346 (1995) (Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.) The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people. Extending liability under the Lanham Act to non-commercial political speech risks eroding the First Amendment’s safeguards for political expression.² Finally, under the canon that “statutes should be interpreted to avoid a construction of the Act that could conflict with the First Amendment.”

Because Coalition only used its emblem in the context of political speech, the Lanham Act simply and obviously cannot be applied to its speech. Thus, the

² To the extent that there may be concern over permitting a political organization to use marks that are confusingly similar to those of another political entity, Justice Brandeis’s concurring opinion in *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), which Justice Holmes joined, suggests an answer: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”

Alliance I panel’s decision to impose on Coalition liability under the Act was clearly erroneous.³ Moreover, adhering to that grievously wrong decision will result in a manifest injustice by stifling the political speech that is key to functioning of our democracy. The law-of-the-case doctrine therefore does not stand as an impediment to correcting our past mistakes, and the majority

³ For nearly sixty years, this court has repeatedly and consistently explained that the law of the case does not apply when a prior “decision is clearly erroneous and works manifest injustice.” *Lincoln Nat. Life Ins. Co. v. Roosth*, 306 F.2d 110, 113 (5th Cir.1962); accord *Lumberman’s Mut. Gas. Co. v. Wright*, 322 F.2d 759 (5th Cir.1963); *White v. Murtha*, 377 F.2d 428, 432 (5th Cir.1967); *Morrow v. Dillard*, 580 F.2d 1284, 1290 (5th Cir.1978); *Goodpasture, Inc. v. M/V Pollux*, 688 F.2d 1003, 1005-06 (5th Cir.1982). Clear error is a familiar legal standard for reviewing prior decisions that applies across various contexts. For example, appellate courts apply clear error in reviewing district court’s factual findings, *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985), and in reviewing discretionary decisions by district courts, *United States v. Walker*, 772 F.2d 1172, 1176 n.9 (5th Cir.1985). A decision is clearly erroneous when the reviewing court is left with “a definite and firm conviction” that the previous court was in error. *Id.* Under this standard, based on the foregoing analysis, it is plain that the decision in *Alliance I* was clearly erroneous. On a handful of occasions, this court has stated that for a previous decision to be “clearly erroneous” such that the exception to the law-of-the-case doctrine for clearly erroneous and manifestly unjust rulings may apply, the prior decision must have been “dead wrong.” *E.g., City Pub. Serv. Bd. v. Gen. Elec. Co.*, 935 F.2d 78, 82 (5th Cir.1991). But the “dead wrong” language has been employed infrequently and inconsistently and does not alter or supplant the proper and longstanding test for assessing whether a previous ruling was clearly erroneous—that the appellate court must have a definite and firm conviction that the prior decision was wrong.

errs in failing to do so. *See Vahlco Corp.*, 895 F.2d at 1072-73.

At the outset of the litigation, Alliance claimed that both Coalition’s “word-mark” – its trade name, Coalition for Better Government – and its “composite mark” – its emblem – infringed on Alliance’s marks. The district court agreed, enjoining Coalition from using both its trade name and emblem. Coalition appealed and this court concluded that only Coalition’s emblem, not its trade name, violated the Lanham Act. The *Alliance I* panel thus modified the district court’s injunction to restrain only Coalition’s use of the emblem. *See* 901 F.3d at 51.

During the pendency of the first appeal, the district court determined the case was “exceptional” within the meaning of the Lanham Act’s attorneys’ fee provisions, 15 U.S.C. § 1117(a), and thus awarded Alliance, as the prevailing party, \$68,237.50 in attorneys’ fees. *Alliance II*, 919 F.3d at 297.

The *Alliance II* panel noted, however, this court’s earlier determination in *Alliance I* that Alliance had only prevailed on its emblem claim. Hence, in *Alliance II*, “we remand[ed] for the district court to reassess the amount of fees” to omit work that furthered Alliance’s trade name claims from its fee calculation. *Id.* at 293. Specifically, our mandate called only for the district court “to account for billed time for claims on which Alliance did not prevail and to adjust the fee accordingly.” *Id.* at 298. The Court in *Alliance II* gave no indication that the district court should take any action

other than a downward adjustment of the attorneys' fees award.

In failing to hew to the constraints we imposed on remand, the district court violated the well-established mandate rule. That rule “provides that a lower court on remand must implement both the *letter and the spirit* of the [appellate court’s] mandate.” *Tollett*, 285 F.3d at 364 (internal quotation marks omitted) (alterations in original). Notably, the mandate rule extends both to those matters “decided expressly or by necessary implication” by the appeals court. *DeJoria v. Maghreb Petroleum Expl., S.A.*, 938 F.3d 381, 394 (5th Cir.2019). A district court is “without power to do anything which is contrary to either the letter or spirit of the mandate *construed in the light of the opinion of [the] court deciding the case*.” *Id.* (alterations in original) (internal quotation marks omitted). In violating the mandate, the district court imposed \$148,000.00 in attorneys' fees as a sanction against Coalition's attorney, Jacobs.

Tollet v. City of Kemah presented very similar facts to the present appeal, and that decision underscores the district court's error. 285 F.3d at 364. In *Tollett*, a district court awarded \$5,000 in sanctions against the defendant city and two of its employees. The amount of the award was purportedly to compensate the plaintiff for attorneys' fees and court costs incurred in connection with the sanction entities' discovery abuses. On appeal, the plaintiff conceded that the quantum of the sanctions was not supported by proof of reasonable fees and costs. Thus, this court vacated the award and

“remand[ed] for a redetermination and assessment of reasonable attorneys’ fees and costs.” *Id.* at 362 (*emphasis omitted*).

But on remand, the district court-imposed sanctions and attorneys’ fees against not only the city but also the city’s counsel while dropping the fees it had previously assessed against the city’s employees. *Id.* at 363. The city and its attorney appealed, contending that the district court violated the mandate rule. The Court agreed, explaining that it was “clear from our opinion” in the first appeal “that the district court was not to redetermine . . . whether and against whom, sanctions should be imposed. The opinion expressly directed the district court *only* to determine the *proper amount to impose as . . . sanctions*.” *Id.* at 365. According, we, once again vacated the sanctions and fee award. *Id.* at 366; *see Doe v. Chao*, 511 F.3d 461, 466-67 (4th Cir.2007) (holding that district court violated the mandate rule when the appeals courts’ mandate called only for reconsideration of award of attorneys’ fees for work performed during district court proceedings but, on remand the district court awarded fees for work performed during appellate phase of the litigation); *Wang v. Douglas Aircraft Co.*, 221 F.3d 1350 (9th Cir.2000) (unpublished) (district court violated mandate rule where mandate directed court to determine whether a foreign law firm was entitled to attorneys’ fees based on the work performed by the firm, but the district court instead awarded fees in accordance with terms of a letter agreement between the terms of a letter agreement between the foreign firm and a local firm that

reallocated fees; appeals court’s mandate “precluded any . . . inquiry” other than whether the foreign firm was entitled to fees based on its legal services, not a letter agreement.)

Here, too, the import of the directive to the district court by *Alliance II* on remand was “clear”; it was only to reevaluate its attorneys’ fee calculation in order to award Alliance fees solely for time spent on the emblem claim thereby reducing its earlier award. The “necessary implication” of our mandate was that the district court was barred from doing anything other than reducing the fee award. *DeJoria*, 935 F.3d at 394. Venturing beyond that limited directive, the district court *sua sponte* joined Jacobs as a party to the case, after having earlier dismissed such an effort to join her; held her personally liable; and awarded additional attorneys’ fees against Coalition and Jacobs for Alliance’s prosecution of both appeals and its motion for attorneys’ fees causing the fee award to mushroom to over \$148,000. But as in *Tollett*, the directive to the district court “was not to redetermine . . . against whom [] sanctions should be imposed,” nor was it to augment the sanctions. *See id.* at 365.

Coalition is therefore correct that the district court’s order was directly contrary to our mandate. The majority, however, fails to mention this argument thereby characterizing Jacobs and Coalition as merely contending that the district court was an “improper forum” for considering appellate attorneys’ fees. *See Maj. Op.* at 10 n.54. True, Coalition made that assertion in its briefing on appeal, but it also expressly objected to

the district court’s award of appellate attorneys’ fees on a second basis.

The Lanham Act cannot be constitutionally applied to the non-commercial political speech of a political organization, such as the political endorsements made by Coalition in this case. Misapplying the Lanham Act to non-commercial political speech creates an anomalous precedent that will beget grave injustice – the imposition of liability for, and consequent chilling of, the exercise of constitutionally protected free speech. What is more, the previous decisions in *Alliance I & II* set dangerous precedents inviting federal courts to improperly involve themselves in state and local political disputes. See *Seven-Up v. Coca-Cola*, 86 F.3d 1379, 1383 & n.6 (5th Cir.1996) (holding that § 43(a) of the Lanham Act applies only to activities that are “‘commercial’ in nature”); *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 547 & n.13 (5th Cir.2001) (same), *abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *Farah v. Esquire Magazine*, 736 F.3d 528, 541 (D.C. Cir.2013) (holding that the Lanham Act applies only to commercial speech); *Utah Lighthouse Ministry*, 527 F.3d 1045, 1052-54 (10th Cir.2008) (same); *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 676-77 (9th Cir.2005) (same); *Taubman Co. v. Webfeats*, 319 F.3d 770, 774 (6th Cir.2003) (same); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir.1999) (same); cf. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 552, 566 (1987) (Brennan, J., dissenting) (explaining that a “key” requirement of the

Lanham Act is the rule that a trademark violation occurs only when an offending trademark is applied to *commercial* goods and services”); *Radiance Found., Inc. v. N.A.A.C.P.*, 786 F.3d 316, 322 (4th Cir.2015) (“Although this case does not require us to hold that the [First Amendment’s] commercial speech doctrine is in all respects synonymous with the” Lanham Act’s requirement that an infringer’s use of a mark be “‘in connection with’” goods and services, “we think that doctrine provides much the best guidance in applying the Act. The ‘in connection with’ element [in § 32(1) of the act] reads very much like a description of different types of commercial actions: in connection with the *sale, offering for sale, distribution, or advertising* of any goods or services” (quoting 15 U.S.C. § 1114(1)(a)).

The Lanham Act, 15 U.S.C. § 1051, *et seq.*, explicitly protects against the potential chilling of First Amendment-protected speech like that in this case by including in each of its remedial provisions a qualification that the offending use of the mark must have been for commercial purposes. Thus, in order for the NAACP to prevail upon Count I of its counterclaim, it must demonstrate that the Plaintiffs’ use was “in commerce . . . in connection with the sale, offering for sale, distribution, or advertising of any goods or services.” 15 U.S.C. § 1114(1)(a).⁴ Under Count III, the Defendant must show use of a “mark or trade name in commerce”

⁴ The requirement under § 1114(1)(b) is similar, but not identical. It requires that the marks be used on materials “intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services.”

and may not prevail upon this count if the use was “any fair use, including a nominative or descriptive fair use” or if the use was a “noncommercial use of mark” or was any form of “news reporting and news commentary.” 15 U.S.C. § 1125(c). Finally, if Defendant’s Lanham Act claims are infirm, its state law claim (Count IV) also fail. *Lamparello v. Falwell*, 420 F.3d 309, 312 n.1 (4th Cir.2005).

Here, Applicant’s use of marks was not “in commerce” and “in connection with” the sale of goods and services. First, the speech in question is non-commercial speech. “The hallmark of commercial speech is that it does no more than propose a commercial transaction.” *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 683 F.3d 539, 533 (4th Cir.2012) quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983).

Both the Sixth Circuit, *Taubman Co. v. Webfeats*, 319 F.3d 770, 774 (6th Cir.2003) and the Ninth Circuit, *Bosley Med. Inst. v. Kremer*, 403 F.3d 672, 674 (9th Cir.2005) have held that the Lanham Act’s prohibitions apply exclusively to commercial speech. While the Fourth Circuit has not yet drawn that conclusion, it has nevertheless acknowledged that permitting a party to transform Lanham Act protections into “rights to control language” would raise First Amendment concern. *Lamparello v. Falwell*, 420 F.3d 309, 313 (4th Cir.2005). Accordingly, the fact that the speech in question is “non-commercial” does not, perforce, demand the conclusion that the Lanham Act is applicable, but it strongly suggests it.

But such an allegation is insufficient to show that Respondent's marks are being used in conjunction with the sale of goods and services. It is equivalent to asserting that a newspaper which publishes an article about Planned Parenthood – using that entity's trade name – is using the mark in commerce and in connection with the sale of goods and services, but rather whether they are offering goods and services through the use of the Defendant's marks. *See CPC Int'l, Inc.* at 462, n.1.

Just as importantly, “speech does not ‘retain [] its commercial character when it is inextricably intertwined with otherwise fully protected speech.’” *Greater Baltimore*, 683 F.3d at 553 quoting *Riley v. Nat'l Fed. of the Blind of North Carolina*, 487 U.S. 781, 796 (1988). [S]olicitation is characteristically intertwined with informative and perhaps persuasive speech . . . and without solicitation the flow of such information and advocacy would likely cease.” *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980); *see also Riley v. Nat'l Fed. of the Blind of North Carolina*, 487 U.S. 781, 796 (1988). Accordingly, the Supreme Court has held that speech related to the solicitation of contributions by charitable organizations is non-commercial speech, fully protected by the First Amendment. *Village of Schaumburg*, 444 U.S. 620, 632 (1980) (because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics of goods and services, it has not

been dealt with in our cases as a variety of purely commercial speech”).

Alliance for Good Government (Alliance) and Coalition for Better Government (Coalition) are New Orleans-based non-profit corporations whose principal activity is the vetting and endorsement of political candidates vying for local and state offices. Their missions and work can only be described as political. Neither organization offers or advertises commercial goods or services. And the speech in which they engage – purely political speech – is at the core of the First Amendment’s protections. *See Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (“[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.” (Internal quotation marks omitted)).

The Lanham (Trademark) Act, 15 U.S.C. § 1051 *et seq.*, prohibits deceptive trade practices such as false advertising and trademark infringement. Section 1125 provides for civil liability in the case of:

any person who on or in connection with any goods or services, . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any . . . false or misleading description of fact, or false or misleading representation of fact which –

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the . . . sponsorship, or

approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of is or another person's goods, services, or commercial activities[.]

15 U.S.C. § 1125(a)(1)(A) & (B).

To establish standing under the Lanham Act, “the Plaintiff’s injuries must fall within the ‘zone of interests’ the statute was intended to protect.” *Lexmark Int’l v. Static Control Comps.*, 572 U.S. 118, 130 (2014). In *Lexmark Int’l*, the Supreme Court explained that a “plaintiff suing under § 1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant’s advertising; and that occurs when deception of consumers causes them to withhold trade from the plaintiff.” *Id.* In other words, to proceed with their Lanham Act claim, Plaintiffs must plead an injury to some commercial interest in sales or business reputation that was proximately caused by the Defendants’ misrepresentations.

Respondents have not met their burden to establish standing under the Lanham Act. Specifically, Respondents fail to show that their alleged injuries fall within the zone of interests of the Act. However, “[t]he mere fact that the parties may compete in the marketplace of ideas is not sufficient to invoke the Lanham

Act.” *Farah v. Esquire Magazine*, 736 F.3d 528, 541 (D.C. Cir.2013).

It is well established that Section 1125(a) applies only to “commercial speech”, which is not at issue here. *Alliance for Good Government v. Coalition for Better Government*, 901 F.3d 498, 506 n.8 (5th Cir.2018) (noting Section 1125(a) applies only to “commercial advertising and promotion”); *Nichols v. Club for Growth Action*, 235 F. Supp. 3d 289, 295 (D.D.C. 2017) (“The Lanham Act only restricts commercial speech or speech connected with a good or service.”). The allegedly defamatory comments made by Defendants during the InfoWars video are not commercial speech or advertisements but rather expressions of opinions as commentary during a radio show. *See Farah*, 736 F.3d at 541. The complained of conduct at issue does not fall within the zone of interest that the Lanham Act was intended to protect. *Seven-Up v. Coca-Cola*, 86 F.3d 1379, 1383 & n.6 (5th Cir.1996). Because Plaintiffs do not have standing under the Lanham Act, the claims under that statute should have been dismissed with prejudice.

II. THIS COURT SHOULD NOT PERMIT THE IMPOSITION OF A SANCTION OF ATTORNEYS’ FEES AWARDED AGAINST COUNSEL FOR COALITION PURSUANT TO THE FEE SHIFTING PROVISION OF THE LANHAM ACT.

Regrettably, in holding Jacobs personally liable for the award of attorney’s fees, this Court becomes the

first to sanction such liability under the Lanham Act's fee-shifting provision, 15 U.S.C. § 1117(a). Indeed, the Federal Circuit, in construing that the Patent Act's identically worded fee-shifting provision, has expressly held that the provision cannot be used to impose liability for attorneys' fees on a party's counsel. *Phonometrics, Inc.*, 64 F. App'x at 222 ("Section 285 is a fee-shifting statute that in exceptional cases may require the losing party to reimburse the prevailing party its attorneys' fees. Sheraton, [the prevailing party,] has provided us with no legal basis for entering a fee award against the losing party's attorney under § 285 . . . Counsel for Phonometrics is not liable for fees awarded under § 285"); see also *Baker*, 821 F.3d at 623-24 (borrowing attorneys' fees jurisprudence under the Patent Act to interpret the fee-shifting provision in the Lanham Act).

That no court has previously permitted imposing attorneys' fees against a party's counsel under the Lanham Act and that the Federal Circuit has held that imposing such fees on an attorney is not authorized by the Patent Act is unsurprising in light of the text of the statutes' attorney' fees provisions which both read: "The Court in exceptional cases may award reasonable attorney fees to the prevailing party." 15 U.S.C. § 1117(a); 35 U.S.C. § 285. Notably absent from the provisions is any explicit authorization to impose attorneys' fees against a party's counsel. "When a fee-shifting statute that authorizes the courts to award attorneys' fees to prevailing parties, the appropriate inference is that an award against attorneys is not

authorized.” *Healey*, 947 F.2d at 624. Section 1117(a) thus “stands in contrast to other sections and [Federal] Rules [of Civil Procedure] that expressly provide for the imposition of sanctions against attorneys,” *id.*, such as 28 U.S.C. § 1927, which empowers courts to order “[a]ny attorney who multiplies the proceedings in any case unreasonably and vexatiously” to pay the costs and attorneys’ fees incurred because of their conduct, and Rule 11(b) which authorizes district courts to award sanctions against “attorney[s]” for misconduct in an array of circumstances. The availability of these traditional – and effective tools to discipline wayward behavior by counsel means that courts will not be hampered in their ability to police proceedings without applying § 1117(a) against a litigant’s counsel similarly, these well-established provisions ensure that parties can recover costs incurred as a result of opposing counsel’s unprofessional conduct.

Further underscoring that Jacobs cannot be held liable for the award of attorneys’ fees under § 1117(a) for her representation of Coalition is that, even in cases where courts have imposed attorneys’ fees personally on individuals who were not party to the underlying litigation, they have done so not against a party’s counsel, rather, attorneys’ fees have been assessed against individuals who served as a company’s president, owner, or sole shareholder when that individual’s conduct caused the case to be “exceptional” under a proper interpretation of the Lanham or Patent Acts. *See, e.g., Mach. Corp. of Am. v. Gullfiber AB*, 774

F.2d 467, 475 (Fed. Cir.1985)⁵ (holding that an individual who was “not a party to” the claims for violation of the Patent Act “may be assessed fees under § 285 [of

⁵ The majority cites Jacobs’s leadership role within Coalition as a basis for holding her personally liable for the fee award. Maj. Op. at 8. But this misapprehends the basis of the district court’s decision to hold Jacobs liable for the fee award; the district court expressly cited Jacobs’s conduct as Coalition’s *counsel* – not her position within Coalition’s corporate structure – as rendering the case “exceptional” under the Lanham Act and thus justifying imposing liability for the award on her personally. Indeed, in its order holding Jacobs personally liable, the district court discussed only Jacob’s actions as an attorney for Coalition: “Jacobs is personally responsible for” filing a meritless “motion for summary judgment, . . . counterclaim, and . . . motion to dismiss because she personally signed them, thus certifying that they were not presented for any improper purpose and were not frivolous.” The court further found that Jacobs’ conduct rendered the case exceptional because she was “personally responsible” for abuses in discovery that necessitated issuance of a protective order to prevent a wasteful deposition; “she was the one who insisted on proceeding with the depositions even after the Court granted summary judgment and Alliance informed the Court that it would not pursue its remaining claim.” The magistrate also affirmed her position in discovery. Wholly absent from the court’s order is any mention of actions undertaken by Jacobs in her position as an officer or principal of Coalition. The majority’s citations to *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000) and *Insituform Technologies, Inc. v. CAT Contracting, Inc.*, 385 F.3d 1360 (Fed. Cir.2004) are therefore inapposite; those cases concern imposition of personal liability for fees on non-lawyers who had senior roles in organizations that had already been held liable for the fees in question. It was precisely the individuals’ wrongful conduct-alleged conduct, in *Nelson*-that was undertaken in their positions within their respective organizations that permitted-or would permit, in *Nelson*-holding them personally liable for the fees imposed on their organizations. Conversely, the district court sought to hold Jacobs liable based not on her role and work within Coalition but instead for her conduct as its counsel.

the Patent Act] if his conduct supports a finding that the case is exceptional” (citing *Hughes v. Novi American, Inc.*, 724 F.2d 1222 (Fed. Cir.1984)); *Iris Connex, LLC v. Dell, Inc.*, 235 F. Supp. 3d 826, 852-53 (E.D. Tex. 2017) (imposing attorneys’ fees against a company that filed a meritless patent-infringement suit and holding the owner of the company jointly liable for the fees where the owner was the “driving force behind th[e] litigation” and was “responsible” for making the case exceptional). Jacobs was not the President of Coalition, was not its owner nor its sole shareholder.

Federal Rule of Civil Procedure Rule 19(a) requires that a party must be joined if: “(1) in that party’s absence, the court cannot account complete among existing parties; or (2) the court’s disposition of the matter may as a practical matter impair or impede the ability of the absent party to protect its interest; or (3) an existing party would be subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligation.”

In its motion to join Darleen M. Jacobs, the Defendant submits two arguments to do so, first, that the fee award against Coalition grants hollow relief because Coalition has no assets making recovery of the attorney fees impossible as Jacobs is responsible for Coalition’s empty shell as well as the conduct that makes this an exceptional case. This conclusory statement is made without factual support or evidence. Coalition is a non-profit civic organization formed in New Orleans in 1982 to endorse political candidates and as such it would not be expected to have significant

assets. Alliance is also a non-profit civic organization that has openly admitted that it is without significant assets and may well have to bankrupt if it were forced to pay its own attorney fees. Coalition as a non-profit organization had approximately 37 members and at the time this litigation was instituted; Errol Ware, now deceased, was the president. The representation by Alliance that Jacobs is "president/director/counsel" of Coalition is false and knowingly misleading. Alliance knows through discovery responses and deposition testimony that Jacobs was not the president of Coalition. Errol Ware was the president until his untimely death two weeks before Jacobs' deposition. The narrative of Alliance and its attorneys that Jacobs controls all aspects of the activities of Coalition is simply a false one. The litany of materials that Alliance argues that Coalition does not have, i.e., bank accounts, records of meetings etc. is not unusual for informal, grassroots political organizations and should not be a factor in imposing personal liability on Jacobs.

Second, Alliance argues that Jacobs is necessary because she has employed a "litigation strategy designed to bankrupt Alliance even if it prevails." Again, there is no factual support for such a statement. In fact, at the time this litigation was instituted by Alliance, Errol Ware was the president and not Jacobs. Alliance is the entity that instituted this litigation, not Coalition and certainly not Jacobs. As a vigorous advocate for her client, Coalition, Jacobs successfully prevailed in two appeals to the Fifth Circuit, first, to lift the overly broad preliminary injunction and second, to

argue that the original award of attorneys' fees was an abuse of discretion. Additionally, Jacobs prevailed on discovery motions in court. It would seem that Alliance wants Jacobs punished for being such a formidable opponent and such action, if affirmed, will have a chilling effect on attorneys in their representation of a defendant in a Lanham Act case. The fact that she filed a Motion for Summary Judgment and was unsuccessful certainly cannot be said to be unreasonable. The fact that she wanted to take a deposition is also not evidence of unreasonable litigation. What she did do is be successful on two appeals to this Court necessary to correct the decisions of the district court. Alliance's assertion that Jacobs is responsible for Coalition's empty shell state is categorically wrong and unsupported by any evidence.

When Darleen M. Jacobs was added as a party defendant on August 30, 2019, the district court had already entered judgment on the plaintiff's motion for attorney fees. On October 17, 2018, Alliance filed its Motion for Joinder of Jacobs and simultaneously therewith filed its motion to alter the judgment holding Jacobs personally liable for the award of attorney fees that had previously been granted. **This Motion to join Jacobs and alter the Judgment to include Jacobs was denied by the District Court on May 3, 2019. Alliance never refiled this Motion and Jacobs was not a party to the proceedings.** It was a *sua sponte* Order of the District Court on August 30, 2019 that made Jacobs a party to these proceedings. The Federal Rules of Civil Procedure are designed to

further the due process of law that the Constitution guarantees, U.S. Const. amend. V, Fed. R. Civ. P. 1. Jacobs, while served with Alliance's Motion to Join, this Motion was later dismissed, and she was never afforded a proper opportunity to contest the issues or the judgment in the case that had already been decided and to which she would be bound. She had no opportunity to personally contest the issue of exceptional case or Alliance's right to attorneys' fees. These issues had already been decided when she was joined. In addition, she was not given a real opportunity to contest the issue of piercing the corporate veil that allowed her to be ultimately cost in judgment. There was no oral argument, despite several requests, there was no evidentiary hearing, and the trial court order of August 30, 2019 joining her further ordered that there could be no further briefing without leave of court.

This language would obviously have a chilling effect on a litigant filing any additional briefing on the matter. Alliance argues that Jacob's claims of lack of due process are meritless, but a review of this record would suggest otherwise. Motions are not "pleadings" for purposes of the Federal Rules, and as such, the motion is not an "amended pleading" as described in *Nelson*. Consistent with *Nelson*, then Jacobs "was never served with an amended pleading." Also consistent with *Nelson*, then the motion to add non-party Jacobs to the fee judgment must be denied, and if Plaintiff Alliance wishes to pursue this course of action, it must do so by way of an amended complaint subject to rules.

This case is clearly factually distinguishable from *Iris Connex* and Jacobs has not engaged in any of the conduct determined to be present in *Iris Connex*.

Additionally, the trial court relied on *Nelson v. Adams U.S.A., Inc.*⁶ as a basis for joining Jacobs at such a late stage of the litigation, and after rendition of the judgment, awarding attorney fees but did not apply it correctly. The Supreme Court reversed the Court of Appeal in *Nelson, Id.* and held that the shareholders rights to due process had been violated because he “was never afforded a proper opportunity to respond to the claim against him.” *Id.* at 46.⁷ It is clear that the Supreme Court required that a party joined under the circumstances presented have a real and proper opportunity to contest the issues.

The Nelson court further explained that, in addition to the procedural restrictions, “**the right** (emphasis added) of the non-party “to contest on the merits his personal liability for fees originally sought and awarded against [the corporate party] . . . **is just what due process affords him.**” Thus, the failure to amend the pleadings properly, failure to serve an amended pleading properly, and resulting denial of the ability to raise defenses which resulted from the district court’s amending the judgment to add a non-party was also a due process violation.

⁶ 529 U.S. 460, 464, Record No. 130, at 3-7 (2000).

⁷ 529 U.S. 460, 463-64 at 46 (2000).

The same due process violations would recur here. The motion/attempt to add Jacobs post-judgment to the attorney fee award must be denied.

In addition to the due process violations described in *Nelson* which were carried out by Alliance in failing to pursue Jacobs through an amended pleading, the procedure that was used also violated Jacobs' right and ability to defend herself.

The Federal Rules of Civil Procedure provide a basis on which a party can raise defenses to the claims against it.⁸ They also allow a party to discover evidence and witnesses the adverse party intends to use.⁹ The "motion" process being utilized by Alliance to obtain a judgment against Jacobs prevents her from relying on the Federal Rules of Civil Procedure. She cannot raise any jurisdictional or pleading defenses. She has no idea what evidence or witnesses will be used against her and has no basis to engage in discovery. Jacobs is being denied her constitutional right to prepare a defense in accordance with the applicable, controlling rules.

Further, Fed. R. Civ. P. 37 provides that the right to a jury trial "is preserved to the parties inviolate." However, to obtain a jury trial, Jacobs must make a demand for one "no later than 14 days after the last pleading directed to the issue is served" pursuant to Fed. R. Civ. P. 37(b). Again, as set out above, the

⁸ Fed. R. Civ. P. 12.

⁹ Fed. R. Civ. P. 16, 26-37.

“motion” filed by Alliance is not a pleading for purposes of the Federal Rules of Civil Procedure.¹⁰ Jacobs is being prevented from even requesting that a jury determine if she is to be held individually liable to the Plaintiff Alliance under the Lanham Act.

Alliance cannot force Jacobs to forego the procedural safeguards and steps set out in the Federal Rules of Civil Procedure; the motion is patently insufficient as a device to bring Jacobs, a non-party, into this proceeding and attempt to obtain a judgment against her. The motion must be denied.

The totality of the circumstances supports the proposition that Jacobs was not afforded due process in this proceeding and had no proper opportunity to contest the issues.

In sum, Coalition and Jacobs may not be held liable for anything in this case because no Lanham Act Claim arises from Coalition’s non-commercial political speech, and independently of that, no Lanham Act defendant’s counsel may be cast for attorney’s fees under the Act’s fee-shifting provision.¹¹ See *Healey*, 947 F.2d at 624; cf. *Phonometrics, Inc.*, 64 F. App’x at 222.

¹⁰ Fed. R. Civ. P. 7.

¹¹ Jacobs was joined as a party only after this court held that Coalition had waived its non-commercial speech and First Amendment defenses, and thus never had the opportunity to lodge these defenses on her own behalf in this court. Now, when she attempts to advance those arguments to protect herself from personal liability, the majority holds the law of the case precludes her doing so. Maj. Op. at 11. This is highly inequitable, particularly in light of the clear merit of her constitutional and statutory defenses,

Bereft of authority under the Lanham Act to impose fees directly on Jacobs, the district court's decision resembles an attempt to pierce Coalition's corporate veil, but during the proceedings in the district court, Alliance never attempted to pierce Coalition's corporate veil. In fact, its motion for attorneys' fees makes some mention of veil piercing nor asserts that Jacobs is the alter ego of Coalition. *Cf. Huard v. Shreveport Pirates, Inc.*, 147 F.3d 406, 409-10 (5th Cir.1998) (observing that, under Louisiana law, "a plaintiff seeking to pierce the corporate veil" must either demonstrate that the corporate form was used "to perpetuate fraud" or must "bear[] a heavy burden of proof in demonstrating that the corporate form has been disregarded by the shareholders to the extent that the corporation and shareholders are indistinguishable").¹² In the absence of any argument that the district court should pierce Coalition's corporate veil, it is unsurprising that the

which she has never personally waived. The majority attempts to justify its decision on the grounds that the merits of the infringement claim itself are no longer at issue, and the question now is only one of the appropriate amounts of attorneys' fees. Maj. Op. at 11. But the majority offers no analysis as to why Coalition's litigation choices somehow bind Jacobs personally, and as noted, *infra*, there was no finding by the district court that Jacobs controlled Coalition such that its litigation conduct could be attributed to her. The majority thus errs in stripping Jacobs of the opportunity to marshal her full array of defenses.

¹² "Whether to apply Louisiana or federal law is not an issue. State and federal alter ego tests are essentially the same. Our non-diversity alter ego cases rarely state whether a state or federal standard controls and applies state and federal cases interchangeably." *Century Hotels v. United States*, 952 F.2d 107, 110 n.4 (5th Cir.1992).

court did not make any of the predicate findings necessary to disregard the legally distinct juridical identities of Coalition and Jacobs' there was none finding that Coalition was the alter ego of Jacobs, that Coalition disregarded corporate formalities, nor that Coalition was used by Jacobs to perpetuate a fraud. *See id.* Also, in its briefing appeal, Alliance expressly disclaims that it seeks to veil pierce contending instead that it could do so in a *separate* lawsuit. Under these circumstances, veil piercing is obviously inappropriate and cannot support the district court's decision to thrust upon Jacobs the liability for fees charged to Coalition.

Accordingly, the district court was without authority under the Lanham Act to hold Jacobs directly and personally liable for attorneys' fees, did not invoke any other source of authority to hold Jacobs liable in her capacity as an attorney, and could not and did not make the findings necessary to pierce Coalition's corporate veil.



CONCLUSION

This Court should grant the Petition for *Certiorari*.

Respectfully submitted,

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