No. ________

In The
Supreme Court of the United States

ANN MCGEEHAN,

Petitioner,

vs.

MICHAEL MCGEEHAN,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Special Appeals Of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Assuming any exist, what are the standards of review, limitations, and proper procedures, with due regard to federalism principles, when the Federal Government invokes 28 U.S.C. §517 ("Interests of United States in Pending Suits"), no agency regulations were adopted and/or applicable, and were these concerns and principles properly applied in this divorce proceeding in state court which precluded production and receipt of Respondent's salary, pension, and retirement information?

2. Assuming any exist, with due regard to federalism principles and judicial review, what standards of review, limitations, and proper procedures apply to state and federal appellate courts examining the correctness of 28 U.S.C. §517 determinations?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES – Continued

INTRODUCTION

Petitioner Ann McGeehan respectfully petitions for a Writ of Certiorari on the issues of appropriate legal review for a Federal Statute (28 U.S.C. §517). This Federal statute, without Certiorari, would otherwise permit unfettered involvement by the Federal Government on pending State and Federal cases, made more manifest with the increased usage by the Federal Government of "Statements of Interest." As held by the Maryland Court of Special Appeals, this statute may lack meaningful judicial review, on a quintessential statute on State/Federal relationship. Thus, the Court of Special Appeals of Maryland in *Ann McGeehan v. Michael McGeehan* concluded it was beyond their power to review for legal error, even when done in a divorce proceeding, due to overriding Federalism concerns. It is therefore manifestly appropriate for this Court to examine and review this Federal statute's usage in the case *sub judice* and other cases. *See also* Supreme Court Rule 10(c) – Considerations Governing Certiorari Review on Certiorari ("a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court . . . ").

The Maryland Court of Special Appeals addressed the merits of the legal issue, in an opinion dated October 26, 2016. On February 17, 2017, the Maryland Court of Appeals granted timely certiorari review by Ms. McGeehan, not on the federal issue, but applying discretionary review to only a state law issue on the titling of real property under Maryland Family Law §8-201(e). The Court ultimately decided on August 10, 2017, in Petitioner's favor, in partial reversing the Court of Special Appeals on this state law issue on titling three marital properties between the parties. Left outstanding for review by this Court, untouched by the Court of Appeals, is the Court of Special Appeals' ruling on the federal issue, which found no judicial error because the judicial courts in Maryland "are required by [28 U.S.C.] §517 to trust" that the decision by the United States Attorneys' Office to actively intervene in the private divorce proceedings was correct. Therefore, no mechanism or standard of review, exists to permit judicial review for Ms. McGeehan in the trial and appellate courts of the State of Maryland.

On October 27, 2017, Petitioner requested this Court for additional time to file a Petition for Writ of Certiorari on the federal question, which was filed and later granted by this Court, extending the time to filing through January 5, 2018. (Case No. 17A476, *McGeehan* application).

OPINIONS BELOW

Review is sought of *McGeehan v. McGeehan*, (unreported) 2016 Md. App. LEXIS 175 (Dec. Oct. 26, 2016), *Writ of Certiorari Granted* (Limited), 451 Md. 580, 155 A.3d 435 (Feb. 17, 2017), *affirmed in part and vacated in part, and remanded by McGeehan v. McGeehan*, 455 Md. 268, 167 A.3d 579 (Dec. Aug. 10, 2017). This unreported opinion affirmed the decision of the Circuit Court for Howard County, Maryland, on the "objected to" justifications, use and appropriateness in the "Statements of Interest" by the United States Government under 28 U.S.C. §517 ("Interests of United States in Pending Suits"), which resulted in the non-production of documents and information highly relevant to the divorce proceedings. A copy of the Court of Special Appeals' decision is reproduced in Appendix A.

Subsequently, the Maryland Court of Appeals granted Certiorari, limited to the issue of the "requirements of [Family Law Article] §8-201(e)" and not the federal question presented herein. A copy of this Order by the Maryland Court of Appeals, dated February 17, 2017, is reproduced as Appendix B. The Reported Opinion, though available in the Maryland and Atlantic 3rd reporters as *McGeehan v. McGeehan*, 455 Md. 268, 167 A.3d 579 (Dec. Aug. 10, 2017), is not fully reproduced herein as the grant of Certiorari was limited and not granted on any federal issues. Nevertheless, as confirmation on the limited grant of Certiorari, reproduced herein as Appendix C, are a copy of the introductory paragraph of the 55-page Slip op., as well as the Mandate from the Court of Appeals, reversing and remanding to the Circuit Court on the vacated "monetary award" "consistent with the views expressed in this opinion." (App. a27)

The unreported decision of Judge Mary Kramer, of the Circuit Court of Howard County, Maryland, dated October 8, 2015, denying Plaintiff/Respondent Michael McGeehan's "Exceptions to Report and Recommendations of Special Master," is reproduced herein as

Appendix D.[1] The unreported decision of Special Master Judge Raymond Kane, (retired) appointed to handle the "special" discovery issues created by the Federal Government's "Statements of Interest" in this case, and signed on September 4, 2015, is reproduced herein as Appendix E.

The "Statement of Interest Pursuant to 28 U.S.C. §517" was filed by the United States of America on July 5, 2015. Noted within the filing is "[t]he United States urges the Court to deny [Petitioner's] motions. [Respondent] is prohibited from providing U.S. Government information to [Petitioner] without prior authorization. [. . .] *See, e.g.*, 22 C.F.R. §172.4."[2] (App. a37) A copy is reproduced here of the Government's filing with the Circuit Court, as Appendix F.

The "Supplemental Statement of Interest Pursuant to 28 U.S.C. §517," was filed on September 11, 2015,

[1] These decisions by the Circuit Court in favor of Petitioner, as challenged in the Court of Special Appeals, were evidently not enforced at the trial level, due to the federalism concerns created through Federal statute 28 U.S.C. §517, after the Federal Government noted its express refusal to abide by the Special Master's decision, absent Federal Court confirmation. *See* "Supplemental Statement of Interest Pursuant to 28 U.S.C. §517" (App. G) (Noting that enforcement by the State Court of the Master's Report and Conclusions "the United States may have to consider alternative options for protecting its interests in this matter including, if necessary, intervention and removal to federal court.") (App. a43)

[2] As noted *infra*, this is a Department of State regulation. Before 2015, there is no evidence that Respondent worked at the Department of State in any capacity, but was instead, as described by the Maryland Court of Special Appeals, an employee of "one of the alphabet soup of federal intelligence agencies." (App. a6)

a week after the Special Master's Report was issued on September 4, 2015. Within the body is claimed that "[this] filing of a Statement of Interest does not constitute formal intervention in a pending case." (App. a40) A copy is reproduced here as Appendix G.

STATEMENT OF JURISDICTION

The Court of Special Appeals of Maryland entered its decision on February 17, 2017, affirming in all respects the errors presented by Petitioner for appellate review, except one issue, which the Court briefly noted was not actually decided by the trial court (Issue #5 at the Court of Special Appeals) and thus "remand[s] as to this issue only, without affirmance or reversal." (App. a22) The Court of Appeals granted discretionary Certiorari review only on a State Law issue of Maryland Family Law §8-201(e) (Issue #4 at the Court of Special Appeals). (App. C) The Maryland Court of Appeals reversed the Court of Special Appeals, limited to the marital real property titling issue, on August 10, 2017, and no reconsideration motions were filed from this decision, making the original deadline for Certiorari due under this Court's Rules 13(1) and 13(3), "within 90 days after the entry of the judgment." On October 27, 2017, an Extension of Time was filed with this Court, seeking to file a Petition for Writ of Certiorari solely on the unaddressed federal issue, and subsequently granted on November 1, 2017, extending the time to filing Certiorari through January 5, 2018. (No.

17A476) The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

PROVISIONS INVOLVED IN THE CASE

28 U.S.C. §517 (Interests of United States in Pending Suits)

"The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

22 C.F.R. §172.1 Purpose and scope; definitions.

(a) This part sets forth the procedures to be followed with respect to:

> **(1)** Service of summonses and complaints or other requests or demands directed to the Department of State (Department) or to any Department employee or former employee in connection with federal or state litigation arising out of or involving the performance of official activities of the Department; and
>
> **(2)** The oral or written disclosure, in response to subpoenas, orders, or other requests or demands of federal or state judicial or quasi-judicial authority (collectively,

> "demands"), whether civil or criminal in nature, or in response to requests for depositions, affidavits, admissions, responses to interrogatories, document production, or other litigation-related matters, pursuant to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or applicable state rules (collectively, "requests"), of any material contained in the files of the Department, any information relating to material contained in the files of the Department, or any information acquired while the subject of the demand or request is or was an employee of the Department as part of the performance of that person's duties or by virtue of that person's official status.

(b) For purposes of this part, and except as the Department may otherwise determine in a particular case, the term "employee" includes the Secretary and former Secretaries of State, and all employees and former employees of the Department of State or other federal agencies who are or were appointed by, or subject to the supervision, jurisdiction, or control of the Secretary of State or his Chiefs of Mission, whether residing or working in the United States or abroad, including United States nationals, foreign nationals, and contractors.

22 C.F.R. §172.4 Testimony and production of documents prohibited unless approved by appropriate [State] Department officials.

(a) No employee of the Department shall, in response to a demand or request in connection with any litigation, whether criminal or civil, provide oral or written testimony by deposition, declaration, affidavit, or otherwise concerning any information acquired while such person is or was an employee of the Department as part of the performance of that person's official duties or by virtue of that person's official status, unless authorized to do so by the Director General of the Foreign Service and Director of Personnel (M/DGP) or the Legal Adviser (L), or delegates of either, following consultation between the two bureaus, or as authorized in §172.4(b).

(b) With respect to the official functions of the Passport Office, the Visa Office, and the Office of Citizens Services, the Assistant Secretary of State for Consular Affairs or delegate thereof may, subject to concurrence by the Office of the Legal Adviser, authorize employees to provide oral or written testimony.

(c) No employee shall, in response to a demand or request in connection with any litigation, produce for use at such proceedings any document or any material acquired as part of the performance of that employee's duties or by virtue of that employee's official status, unless authorized to do so by the Director

> General of the Foreign Service and Director of Personnel, the Legal Adviser, or the Assistant Secretary of State for Consular Affairs, or the delegates thereof, as appropriate, following consultations between the concerned bureaus.

STATEMENT OF THE CASE

As noted by the Court of Special Appeals of Maryland in its Opinion, the case's background was as follows:

> "[Respondent] and [Petitioner] married in 1996. [Petitioner] brought a significant investment portfolio in the marriage. [Respondent] came into the marriage without financial resources, but with an interest in investing money.
>
> Sometime after they married, [Respondent] convinced [Petitioner] to let him manage her portfolio. Although it is not clear where the money went or how long it took, in the end [Respondent] either traded away or spent the entirety of [Petitioner's] investment portfolio. In 2005, [Petitioner] discovered the loss. She was pregnant at the time with the parties' fourth child and was, understandably, upset. To compensate [Petitioner] for frittering away her investment portfolio and accruing a tax liability of over $500,000 in her name, [Respondent] transferred three pieces of real property to [Petitioner] and they were re-titled in [Petitioner's] name alone. (App. a2-a3)

[. . .]

"In 2002, [Respondent] announced that he had a secret new job and, as a result, the family needed to move to Europe. They lived in Europe for the next 8 years. [Respondent] worked for the United States Government and operated several businesses in Europe in conjunction with his work . . . " (App. a3)

[. . .]

"The parties and their children returned to the United States in 2010. [Respondent] continued to work for the U.S. Government, although it appears to have been in a different capacity. After giving birth to their eighth and final child, [Petitioner] attempted to work but was unable to find permanent employment. In 2014 the parties' marriage dissolved. [Respondent] left the family home." (App. a4)

"[Respondent] filed for divorce in the Circuit Court for Howard County in December of 2014. Discovery was complicated and time consuming in part because the U.S. Government noted an interest in the case and in maintaining the secrecy of [Respondent's] employment records. The resulting disputes were only resolved when the circuit court appointed a special discovery magistrate. The divorce trial finally began at the end of November 2015, and, on December 11, 2015, the parties were awarded a judgment of absolute divorce." (*Id.*)

> "The judgment of absolute divorce awarded the parties joint legal custody and shared physical custody of the children. . . . [Petitioner] was ordered to pay [Respondent] a monetary award of $230,000. [Petitioner] was also awarded $15,303 for discovery costs and $7,000 for her attorney's fees related to discovery. Finally, the trial court ordered that the family home be sold and the proceeds divided between the parties." *Id.*

As noted in the Court of Special Appeals, the "Statement of Interest" by the Government, based on the §517 statute, permits every federal agency to *de facto* intervene to a degree in every pending state or federal case nationwide, and with no direct bounds, limitations, or even as in the case *sub judice*, applicable regulations, has significant legal and federalism concerns. To address the Government's "interest" in this action, and in the spirit of federalism, the Circuit Court even appointed a Special Discovery Master, paid for by the parties, to address the Federal Government's claimed concerns. The Special Discovery Master found *inter alia* as follows:

(1) "This is an action for divorce, child custody, child support and access, in which each party seeks alimony, equitable distribution of property, attorney fees and suit money."

(2) " . . . the Court is required to consider [in this action] certain financial factors [. . .] [including] the right of each party to receive retirement benefits; the value of all property

interests of each party, and how and when such property interests were obtained."

(3) "Such factors may also be appropriate considerations in determining child support, child access, and use and possession of the marital home."

(4) "The information and documents sought by the [Petitioner] primarily concern [Respondent's] employment history and financial activities prior to 2015, including, the identity of his employers, his salary, fringe benefits, retirement benefits, expense reimbursement reports, banking and stock trading accounts."

(5) "The discovery sought by [Petitioner] is relevant to the issues to be tried."

(6) "The [Respondent] has steadfastly refused to provide the requested discovery contending that he has been instructed by his employer not to disclose information related to his employment. He asserts that the discovery requests concern 'government information.'"

(7) "22 C.F.R. subsection 172.4, relating to prohibitions against testimony and production of documents concerns 'information acquired' and 'documents acquired' as part of 'the performance of the employee's duties.' It does not appear to apply to an employee's personal income and personal records not related to exposing the particulars of any government program."

(8) "[The documents sought by Petitioner] are items particular to the [Respondent], and not

'information acquired' or 'documents acquired' as part of the performance of his job."

(9) "All of the subject information and documents sought from the [Respondent], with the exception of his travel history in the course of his employment, are discoverable." (App. a32-a33)

However, this spirit of federalism was not a two-way street. The Special Discovery Master, Raymond Kane, a retired Circuit Court judge from Howard County, ruled after extensive argument, that the materials were to be provided to Petitioner, and the Regulation cited by the Government inapposite. Thus, a week later, the Government's *inter alia* claimed in a "Supplemental" Statement of Interest as follows:

[. . .]

(2) "The United States understands that the Special Master has recommended that [Respondent] be ordered to provide certain information about his employment. Adoption of the Special Master's recommendations would conflict with and harm the interest of the United States.

(3) [Respondent] is a federal Government employee. The disclosure of information related to his employment, therefore is subject to the control of the U.S. Government under applicable law. [Respondent] is not authorized to provide information regarding his employment without the approval of the U.S. Government, and the U.S. Government has not authorized

> [Respondent] to provide Government information in response to [Petitioner's] discovery requests. *See e.g.*, 22 C.F.R. §172.4.[3]
>
> (4) [. . .] The United States' position is that this federal regulation does encompass information as it pertains to [Respondent's] Government employment, including salary, and the federal regulation has been construed and applied incorrectly by the Special Master."
>
> [. . .]
>
> (7) "If the court is not willing to hear from the United States concerning its interests in this matter, then the United States may have to consider alternative options for protecting its interests in this matter including, if necessary, intervention and removal to federal court . . . " (App. a42-a43)

Judge Mary Kramer after a hearing attended by the parties and a United States Attorney, affirmed Judge Kane's Order compelling Respondent to provide the documents "within 10 days from the date of this Order . . . " (App. a28) However, Judge Kramer added a provision to her Order, "that if any discovery sought would not be available for direct disclosure by Plaintiff due to restrictions from federal law, Plaintiff shall

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[3] The e.g. notation of "example given" is because the regulation was inapposite not only for not applying to this divorce situation to keep secret Respondent's salary and retirement benefits, was inapposite as well, as this regulation only governs some State Department personnel, and not a Regulation applicable to the "alphabet soup" national security agency that employed Respondent. *See supra* 22 C.F.R. §172.1.

immediately instruct the U.S. Attorney, in writing, to provide to Judge Mary M. Kramer for *in camera* inspection . . . " (App. a29) Although the *in camera* inspection was done, no documents were ever provided in this divorce proceeding, in compliance with the Orders of Special Discovery Master Judge Kane, whose Order was then later affirmed by Judge Kramer's Order.

It is in this backdrop, that the appeal was filed. As relevant to the procedural history before this Court, the Court of Special Appeals of Maryland, then analyzed Petitioner's "five issues on appeal: (1) the trial court should not have allowed the U.S. Government to participate to the extent it did in the divorce proceedings; (2) the trial court incorrectly found that [Petitioner] was voluntarily impoverished; (3) the trial court should have awarded her use and possession of the family home; (4) the trial court erred in the disposition of marital property and grant of a monetary award; and (5) the trial court should have voided two deeds of trust [Respondent] placed on the family home." (App. a5)

The first Question Presented argued and addressed by the appellate court was on "Federal Government Participation in the Divorce Proceedings." (App. a6) The Court of Special Appeals' discussion focuses and informs this Court's inquiry as well.

> "[Respondent] was an employee of the U.S. Government. We infer from all of the secrecy (but, of course, don't know) that he worked

> for one of the alphabet soup of federal intelligence agencies."[4] [. . .] The United States, through "the United States Attorney for the District of Maryland filed a statement of interest in the proceedings," included *infra* as Appendix F. This Statement of Interest confirmed that Respondent could not respond to the requested information by Petitioner "regarding his earnings and benefits." (App. a7)
>
> Thereafter, "[t]he circuit court allowed the government to participate and to *object to the production of certain information in discovery and at trial*.[5] The court's order allowed the government lawyers to prevent [Respondent] from disclosing for *whom he actually worked,*

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[4] In a footnote, the Court of Special Appeals commented that since "the government has not filed a motion to participate in the proceedings of this Court . . . [w]e are, therefore, unconstrained and will discuss anything in the case file (which, fortunately, contains nothing likely to be secret)." (App. a6)

[5] On or about July 10, 2015, Petitioner's Counsel at trial filed "*Defendant's Response to 'Statement of Interest' Filed by Federal Government Pursuant to 28 U.S.C. §517*," requesting the Court deny the Government's "Interest" request as "vague" and without apparent factual basis in the record. This action and inaction by the Federal Government in response to subpoenas, even after a special Discovery Master found in Petitioner's favor, would if adopted without judicial review on its accuracy, preclude almost all information as to the marital property Petitioner was entitled to discover and receive in her divorce. Thus, prior to January 2015, Respondent has thus far successfully made "secret," due to non-production of documents, about 13 years of employment information during the marriage. This precludes standard examination by Respondent's spouse, for example, of Respondent's (1) salary, (2) pension and survivor rights benefits, and (3) information of the value of any jointly titled ventures of the couple during their marriage.

> *the dates of employment, job titles, salaries, and the like.* [Petitioner] argues that *(1) the government failed to identify its specific interest in the case and in fact did not have an interest in the case; and (2) the effect of the government's improper involvement was to make it impossible for the trial court to properly identify marital property.*" [Emphasis Added] (App. a7-a8)

Citing in particular, the wording of 28 U.S.C. §517 and the D.C. Circuit Court of Appeals' decision in *Falkowski v. EEOC*, 783 F.2d 252 (D.C. Cir. 1986) (*Per curiam, JJ. Ginsburg, Robinson, and McGowan*), the Maryland Court of Special Appeals concluded that there was "a presumption" that the "U.S. Government has wide latitude to participate in any pending suit 'to attend to the interests of the United States.'" *Id.* at a8. Further, in examining the limitation of this presumption, the Maryland appellate court concluded "there is no standard by which to review the government's decision to intervene or the trial court's decision to permit the intervention. *See Falkowski*, 783 F.2d at 254 (noting that there is no standard of review in the statute, any regulation, or any administrative practice.") (App. a8)

Thus, the Court concluded:

> "[W]hile we acknowledge that the government's statement of interest, quoted above, was vague, we also understand that there will be occasions where such vagueness is required. We trust, and are required by §517 to trust, that the federal government will not use its power to participate in state court

proceedings lightly or frivolously. Therefore we reject [Petitioner's] first claim." *Id.*[6]

[6] Furthermore, the Court of Special Appeals noted "[Petitioner's] second point – that the federal government made it impossible for the circuit court to identify marital property – there is more to say." While the Court ultimately determined that it could not say if what was "missing" meant that the Court should consider it as a form of legal error, the Maryland court still ultimately deferred any examination and judicial review, noting that the Federal Government "could have simply declined to produce *any* employment information and [Petitioner] would have had no recourse." [Emphasis as Shown] (App. a9)

REASONS FOR ALLOWANCE OF THE WRIT

I. CERTIORARI IS DESIRABLE AND IN THE PUBLIC INTEREST, BY THIS COURT'S EXAMINATION ON THE STANDARD OF REVIEW OF 28 U.S.C. §517 AT THE TRIAL AND APPELLATE LEVEL, GENERALLY AND IN THE CIRCUMSTANCES OF THIS CASE, WHEN THE FEDERAL GOVERNMENT SIGNIFICANTLY INTERFERED WITH A STATE COURT DIVORCE PROCEEDING, BY OBJECTING AND PRECLUDING PRODUCTION OF SIGNIFICANT INFORMATION ASCERTAINING THE MARITAL PROPERTY DUE PETITIONER, INCLUDING SALARY, PENSION AND SURVIVOR BENEFITS.

A. This Case Is Distinguishable from the D.C. Circuit Court of Appeals in *Falkowski v. EEOC*, 783 F.2d 252 (D.C. Cir. 1986) (*Per Curiam, JJ. Ginsburg, Robinson, and Mcgowan*) That "Statements of Interest" Under §517 Can Be Unreviewable Even When the Agency *Chaney* Factors Do Not Exist or Apply, and the Apparent Significant Increase in Use of These "Statements" Per a Recent Harvard Law Review Article.

This case involves a Federal statute, that has historical but complex value in the dynamic field of federalism. The only Circuit Court of Appeals to address the issue, the D.C. Circuit Court, did so in a case involving a party's request that the Federal Government assist in their suit, which the government declined. Nevertheless, the D.C. Circuit Court of Appeals did generally agree with the proposition by the Government in this case. This is despite the differences between the proactive involvement of the "vague" Statement of Interest in Petitioner's case, in stark contrast to the appealing party in *Falkowski*, who believed it was legal error for the Attorney General to *not appear.* This policy and practical concern also underlay the *Heckler v. Chaney*, 470 U.S. 821 (1985) determination by this Court, and discussed in *Falkowski*, on unreviewability of an agency's *refusal* to take enforcement action under a Federal statute. Thus, neither *Falkowski*, nor this Court's precedent, suggests that §517 is "unreviewable" as concluded by the Maryland Court of Special Appeals. Unlike this Court, the Maryland Court's conclusion is necessarily constrained due to federalism and Constitutional supremacy clause concerns.

> Congress empowered the Attorney General to send a lawyer into court "to attend to the interests of the United States." Congress has provided no further guide to exercise of this authority, however, and the Attorney General has imposed no self-restraint through regulation or practice. We have previously recognized both the entirely discretionary nature of the power and the breadth of that discretion. As we noted more definitively in our earlier opinion, neither the statute, nor any regulation, nor any administrative practice cabins

this discretion or furnishes any standard by which to review the Attorney General's determinations in this area.

We further observe that the Attorney General has long possessed the power to decide whether to provide counsel for a federal employee. This power dates back at least to the establishment of the Department of Justice in 1870, and agents of the Attorney General have appeared in court to defend federal employees at least since 1821. Although administrative decisions on provision of an attorney may not have enjoyed the deference traditionally commanded by those on prosecutions and enforcement actions, we certainly can say that in each of these situations, the Attorney General acts in the context of a lengthy history of discretionary authority.

We face in this case no colorable claim that the Department's refusal to furnish appellant with a lawyer transgresses any constitutionally protected right, and we intimate no view as to the outcome proper were that the case. [. . .]

We emphasize that we do not read *Heckler v. Chaney* to require us to shift the general presumption of reviewability to one of unreviewability for the purposes of this case, and we have not done so. As we have heretofore had occasion to observe, *Chaney* "concerned an agency's *refusal to take enforcement action under a statute*," and "hence, judicial review was inappropriate because of the lack of statutory

> guidelines and the longstanding tradition of absolute discretion in prosecutorial decision-making." Here we conclude simply that some of the factors that led the *Chaney* Court to establish a presumption of unreviewability for agency enforcement decisions convince us that any presumption of reviewability of representation decisions has been rebutted.

Falkowski v. EEOC, 783 F.2d 252, 253-54 (D.C. Cir. 1986) (*Per curiam*) (JJ. Ginsburg, Robinson, McGowan)

The *Falkowski* decision does not deal with the vast majority of "Statements of Interest" or the very real risk, as illustrated by this case, that federalism and state sovereignty interests can be impaired. *See also Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 384 (3d Cir. 2006) (Noting ability of United States *to decline* expressing §517 "Interest" in case, that they could be expected to weigh on by the judiciary, in case involving reparations on "Nazi Era Cases against German Defendants Litigation").

There is a significant and quantifiable difference when the United States expresses "Interest" under §517, dissimilar to the interests in *Falkowski*, by submitting them in cases; (1) proactively,[7] (2) as an invested party (such as here with the government's documents), (3) in a state court, (4) in contradiction of Court Orders, and (5) in a divorce case, which is almost

[7] The United States Attorney represented by the Government, was also present throughout a significant amount of testimony at trial in this case, and was permitted to "object" repeatedly on matters.

always outside the purview of Federal involvement. *See, e.g.*, *Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992) (discussion of "domestic relations exception" in Federal jurisdiction on divorce, alimony, and child custody orders and decrees, while acknowledging "[a]s a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts . . . [and] as a matter of judicial expertise, it makes far more sense to retain the rule that federal courts lack power to issue these types of decrees because of the special proficiency developed by state tribunals over the past century and a half. . . .").

From the *lack of interest*, more approved as discretionary in comparison to *Chaney*, are the more neutral "amicus" type interest filings, similar to that of the Solicitor General, which have been an important factor for the United States and the Federal Government, throughout its history. As noted by this Court on a boundary dispute between Florida and Georgia, prior to §571's (or its predecessor's) enactment in 1870:

> "There is no mode of proceeding by which the United States can bring into review the decision of this court upon a question of boundary between two States. Justice therefore requires that the United States, which represent the rights and interests of the other twenty-nine States, should have an opportunity of being heard before the boundary is established.
>
> The attorney-general having filed an information, stating that the interests of the United States are involved in the

> establishment of the boundary line between Florida and Georgia, he has a right to appear on behalf of the United States and adduce proofs in support of the boundary claimed by them to be the true one, and to be heard at the argument.
>
> *The United States will not, by this proceeding, become a party in the technical sense of the word, and no judgment will be entered for or against them. But the evidence and arguments offered, in their behalf, will be considered by the court in deciding the matter in controversy.*" [Emphasis Added]

Florida v. Georgia, 58 U.S. (17 How.) 478, 490 (1855).

What has changed, and was detailed in the recent Winter 2017 Harvard Civil Rights-Civil Liberties Law Review, are the increased use of these Statements in trial level court conflicts between litigants. While their use has expanded, there has been (1) continual lack of standards for these "Statements of Interest" based on geography and between agencies seeking Justice Department assistance and (2) little to no publicity for how, why, or even sometimes when (months or years after the case is filed) these Statements are being done.

> "Several federal statutes grant the United States the authority to file statements of interest in trial-level litigation. The most commonly invoked provision is 28 U.S.C. §517, which gives the Department of Justice broad authority to file amicus briefs across the nation. Still, the capacious statute does not specify how or when the federal government

> should participate in private party litigation, and the department has not published any guidelines governing this practice.
>
> When the United States offers briefs in private litigation, it often waits until an appellate court or the Supreme Court reviews the case. But occasionally, the United States will get involved in trial-level litigation. The litigation subjects for prior amicus statements are vast: terrorists in Libya, Medicaid, and the arrests of homeless people. Past statements have outlined official administration stances on patent law, copyright law, and constitutional law. The statements often appear to the surprise of the litigating parties. They are filed days, months, or even years after the lawsuit was originally brought. Part I will describe some basic data on these statements – data never before compiled – to start the public discussion."

Victor Zapana, NOTE: The Statement of Interest as a Tool in Federal Civil Rights Enforcement, 52 Harv. C.R.-C.L. L. Rev. 227, 231-232 (Winter, 2017).

Mr. Zapana notes further, that while he concentrated on collecting information in particular on Civil Rights litigation, the overall difficulty in gaining significant and comprehensive information, review and statistics for this "Statements of Interest" phenomenon.

> "Among the most powerful – and least examined – tools in civil rights litigation is the statement of interest. These written statements are filed by the U.S. Department of

> Justice in many of the over 15,700 state and federal trial courts across the nation and are 'designed to explain to the court the interests of the United States in litigation between private parties.'"
>
> [. . .]
>
> "This Note places a spotlight on the often-unnoticed trial-level statements of interest in civil rights litigation, offering the first in-depth analysis of the briefs. This Note intends to provide the public with information about the statements of interest, to put the statements in a historical context, and to suggest that they are useful, though potentially unwieldy, enforcement tools for civil rights litigants. I have searched on the Internet, Public Access to Court Electronic Records ("PACER"), Westlaw, Lexis Advance, and Bloomberg Law for all publicly available references to trial-level statements of interest. Based on the search, I found 614 federal and state cases since 1925 in which the United States filed a statement of interest at the trial level but did not intervene as a party. I sorted the cases into various categories based on their subject matter and analyzed those involving civil rights. I found that although the government only recently has publicized its use of trial-level amicus statements in civil rights cases, the government quickly and quietly has ramped up the briefing over the last decade."

Id. at 228, 229-230.

Mr. Zapana's Note continues in discussing the "historical practice" of the predecessor statute of §517, which traces to 1870, but in recent years, has been used increasingly by the Government with little invocation of specific or sufficient "interests" and the apparent lack of concern for the "legal limitations" inherent in the Statute.

> **"A. Diverging from Historical Practice**
>
> Government third-party statements in cases are relatively common, resulting from a longstanding practice that started near the nation's founding. Federal government amicus briefs did not appear until about 1820, and the earliest form was the "suggestion," which government officials often filed in cases involving foreign sovereigns. For instance, the French vessel The Cassius was sued twice for allegedly violating federal law. The government filed suggestions in both cases, offering early arguments of foreign sovereign immunity. Because The Cassius was an official French vessel, the government argued, the courts did not have jurisdiction to hear either case.
>
> When Congress enacted the Statutory Authorization Act of June 22, 1870, the predecessor statute to 28 U.S.C. §517, government intervention and briefing in private lawsuits occurred only in cases involving foreign sovereigns and their property. Indeed, for generations, the early government statements dealt exclusively with foreign vessels, foreign policy, suits against government officials, and

> disputes over government property, contracts, and employees. Filing statements of interest in these areas of the law continues to this day, and few would quarrel with this practice.
>
> However, as shown *supra*, the filing of statements of interest in civil rights lawsuits has occurred with increasing frequency. These filings mark a substantial shift from the practice of offering traditional government amicus briefs. Unlike the older statements, the new ones involving civil rights cases rarely invoke proprietary, administrative, or institutional interests. The asserted interests are less clear, more indeterminate; sometimes, the government invokes interests that are not tethered to any federal law. Although §517 is broadly written, it nonetheless requires that "the interests of the United States be at stake." Moreover, the federal government must articulate a "sufficient interest." This legal limitation derives in part from the "traditional view that a law suit is a private controversy in which outsiders have no place." When the asserted interest is less recognizably federal in character, the government statement departs from the traditional amicus brief. Such a practice makes some lawyers – defense attorneys among others – nervous."

Id. at 238-239.

Ultimately, the Article recommends greater transparency and consistent standards would benefit the modern practice of Statements of Interest. One problem is that the statistical analysis does not apply easily to state court "interest" statements, as these are typically not easily locatable and/or paper filing systems, while Federal Courts are generally accessible via PACER. *See id.* at 229, ftnt. 12 ("Many older federal court documents, and most state court documents, are unavailable online, and the costs of doing a more intensive search (visiting courthouses across the country and paying for processing fees) would have made this Note impracticable."). Furthermore, the Article notes while "federal regulations require that the Solicitor General approve the filing of all appellate and Supreme Court amicus briefs, the regulations do not have a similar requirement for trial-level statements of interest." *Id.* at 229, ftnt. 10. (Citations Omitted).

Thus, the Note concludes with the following recommendation:

> "This Note intends to start a discussion about federal trial-level statements of interest and civil rights litigation. I have performed original research on these amicus briefs, compiled the publicly available information about them, and demonstrated their recent and rapid rise. The governmental practice is booming: During several months of 2015, the Department of Justice was issuing such statements of interest every few days. As this Note shows, the current governmental filings differ significantly from the amicus briefs filed in the early years of our nation. Moreover, federal and state courts are still determining how much to defer to these civil rights statements and whether they are undue intrusions into

> private litigation. Nonetheless, we should encourage this new practice in civil rights litigation, insofar as the statements filed are rights-protective."

Victor Zapana, NOTE: The Statement of Interest as a Tool in Federal Civil Rights Enforcement, 52 Harv. C.R.-C.L. L. Rev. 227, 256.

B. This Case Is an Ideal Vehicle for Review, as the Issue Is Clearly Presented Both in the Maryland Trial and Appellate Court That They Were Either Unwilling or Powerless to Challenge or Ultimately Review the Matter (Invoking the Federalism Concerns of a Federal Statute Normally Entitled to Supremacy Clause Deference), Despite the Impairment to This Typically Sole State Law Concern of Divorce Proceedings.

Federalism issues of the type are important for this Court, and only this Court to resolve. Under Supreme Court Rule 10(c), an appropriate avenue for United States Supreme Court review, is when "a state court . . . has decided an important question of federal law that has *not been, but should be, settled by this Court* . . . " [Emphasis Added]

As noted *supra*, this is what we have here. Whether the Court of Special Appeals was legally correct in concluding that they "are required by §517 to trust" whether the interference by the Federal Government agency was proper or warranted, is really a function of the dual State/Federal system and federalism principles applicable to this unique statute – a statute that has not been subject to direct review by this Court since the predecessor statute was enacted in 1870.

As noted in the Harvard Civil Rights-Civil Liberties Law Review Note, these federalism concerns have been increasingly prevalent, with the significant expansion of "Statements of Interests" in more state and federal trial-level cases, with little attention being directed to ensure that standards are in place for their use, since none exist at present. In our federal system of judicial review, the only court capable of "correcting" the State Court, is the only court still capable of directly hearing Ms. McGeehan's challenge – the Supreme Court. Not only did the Maryland Court of Special Appeals properly tee up the issue for this Court's review, by deciding the merits against Petitioner, but based on two judicial Court Orders against the Federal Government, there was significant reasonable belief that the unrestricted use of 28 U.S.C. §517, significantly prejudiced Petitioner in this divorce case seeking to obtain a fair accounting of Respondent's salary, pension, and survivor benefits by his employer, who happened to be the Federal government.

II. THIS COURT SHOULD ISSUE A CALL FOR RESPONSE (CFR) AND/OR CALL FOR VIEWS OF SOLICITOR GENERAL (CVSG), AS THE HUSBAND RESPONDENT IS NOT DIRECTLY INVOLVED WITH THE NON-PRODUCTION OF DOCUMENTS CRITICAL TO THE DIVORCE PROCEEDINGS, ORIGINALLY ORDERED BY THE MASTER AND TRIAL JUDGE, AS THESE DOCUMENTS WERE INSTEAD PRECLUDED AT THE BEHEST OF THE FEDERAL GOVERNMENT.

In this Certiorari Petition, the Respondent Michael McGeehan was represented by Counsel through the Maryland Court of Appeals. Recently, it was confirmed that he is presently unrepresented in the matter. However, even if Respondent were fully represented, it is unlikely that he would provide a proper comprehensive response to the Certworthy issue contended by Petitioner. Instead, it is the Federal Government, who was directly involved throughout the proceedings, as an active interested party, yet unwilling to "formally interven[e]" in this case. (App. a40)

In correspondence dated July 24, 2015, and in the appeal record, from Petitioner's trial Counsel to the Government's Counsel Mr. Phelps, it was noted the difficulty the non-production of documents was creating "in a divorce case [with Respondent] claiming to have no authority to provide his own paystubs for work . . . All of the records relate to [Respondent's] income, retirement, expense reimbursements, and other pay. There is, in fact, no federal statute that this request [to the Government] be made. However, as the [Respondent] is refusing to provide the discoverable records, I am making this request from you." (Bates Stamp 2281)

Similarly, Respondent's Counsel Mr. Knust also blamed the Government's intransigence. In separate correspondence dated October 8, 2015 to Government's counsel Mr. Phelps, Mr. Knust noted that both Judge Kane and Judge Kramer had ruled that these materials were to be provided within 10 days after the October 16, 2015 hearing, where Judge Kramer adopted Judge Kane's Recommendation. Thus, Respondent stated "[i]t is our position that Mr. McGeehan has complied with all discovery requests to the extent possible and that it is his employer who is preventing him from being able to provide any further records . . . We are requesting the government provide any applicable documents in response to the following list that has been requested of [Respondent] for the time period of 2002 to present; . . . " (Bates Stamp 2291).

Accordingly, Petitioner respectfully requests, should this Court determine to issue a Response, to appreciate that the "party" Respondent is unlikely to fully or properly respond, as it was primarily the Federal Government who objected on the record from providing the requested and ordered documents, based upon this important but unique Federal Statute. Accordingly, Calls for Response (CFR) and/or Calls for the Views of the Solicitor General (CVSG), should include consideration that the best "party" to respond is the Solicitor General of the United States. Thus, a courtesy copy of this Petition is also being provided to the Solicitor General's Office. While the Federal Government technically chose to not file a "formal intervention" in this case, as they themselves noted in the bottom of the footnote for their Supplemental Statement of Interest Pursuant to 28 U.S.C. §517, as these "Statements of Interest" are at the heart of the legal issues being sought for review with this Court, the requested relief is respectfully appropriate under the circumstances of this case. (App. a40)

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court of the United States grant review of this matter.

Respectfully submitted,

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