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The Chamber of Litigation, Part II

Examining the U.S. Chamber of Commerce's involvement in some of the most notorious civil cases of the last decade

Acknowledgments

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About Public Citizen

Public Citizen is a national non-profit organization with more than 400,000 members and supporters. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including consumer rights in the marketplace, product safety, financial regulation, worker safety, safe and affordable health care, campaign finance reform and government ethics, fair trade, climate change, and corporate and government accountability.

About Chamber Watch

Chamber Watch is a project of Public Citizen. Its mission is raise awareness about the U.S. Chamber of Commerce, its reactionary, anti-worker, anti-consumer, anti-environmental agenda, and the central role it plays in the corporate capture of our democracy via its position as a leading lobbyist, dark money elections spender, and litigator.

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I. Introduction

The American courts are the theater for many of our nation's most consequential debates. The courts have famously ended segregation in public schools, established a woman's right to choose, and more recently, legalized gay marriage. But beyond these iconic cases, the courts often play a role in deciding important public policy questions. From environmental protections to food safety laws to minimum wage laws to corporate and executive liability for wrongdoing to individual access to the civil justice system, the courts rule on a variety of issues that have a tremendous influence on all of us.

The United States Chamber of Commerce, well known as the nation's largest lobbying group[1] and one of the largest dark money elections spenders,[2] is also a prodigious litigator, seeking to advance its anti-worker, anti-consumer, anti-environmental agenda in the courts. In the first report in this series on the Chamber's litigation, we undertook a quantitative analysis of the Chamber's legal activity, examining over 500 active cases in which the Chamber was involved over a recent three year period.

In this second report, we turn to a qualitative analysis of the Chamber's litigation and examine the factual circumstances of a few dozen Chamber cases as well as the arguments the Chamber made in its court filings. We primarily focus on cases that involve the legal issues most often addressed by Chamber litigation and/or the industries most often assisted by Chamber litigation. However we also take a closer look at classes of cases where the Chamber argues for a legal position that is at odds with its public advocacy or where the Chamber supports parties and/or advances legal arguments that would shock the conscience.

The purpose of this report is *not* to re-litigate the legal issues addressed in these cases. The Chamber's legal arguments carried the day in some of these cases and were rejected in others.[3] Moreover, simply winning a legal argument should not be taken as evidence that the winning position was "right" in any larger, moral sense of the word as the *Dred Scott v. Sandford*, *Plessy v. Ferguson*, and *Bowers v. Hardwick* cases all illustrate.

Instead, this report will primarily examine the factual assertions and public policy arguments the Chamber makes in its litigation. To the extent that we discuss its legal arguments, it will be to assess their consistency with arguments it has made in other cases and in other fora.

[1] The Chamber has spent more than $1.3 billion on lobbying since 1998. *See*, *Influence & Lobbying Top Spenders, 1998 – 2015*, CENTER FOR RESPONSIVE POLITICS, http://bit.ly/1T4DpdA (viewed on March 1, 2017)
[2] The Chamber has spent more than $150 million on congressional races since 2008. *See*, *U.S. Chamber of Commerce Outside Spending Summary*, CENTER FOR RESPONSIVE POLITICS, http://bit.ly/2ihQHMY (viewed on March 1, 2017)
[3] The first report in this series contains a more thorough discussion of the Chamber's win-loss record and its implications.

II. Executive Summary

If one were to make a film about the recent history of notorious civil cases in the United States, the United States Chamber of Commerce would be entitled to a starring role. While its involvement in the *Citizens United* case that expanded the ways it and other corporate interests may purchase vast influence over our political system is well known, less well known is its involvement in many other egregious civil cases of recent years.

A close reading of the Chamber's pleadings reveals it to be advancing four main positions.

- **Corporate Impunity:** Time and again, the Chamber opposes any and all means of holding corporations and their executives accountable for wrongdoing. Whether arguing to make it more difficult for consumers and small businesses harmed by corporate malfeasance to go to court or arguing for more limited corporate prosecutions and smaller penalties or by arguing against U.S. jurisdiction in cases where corporations are accused of human rights abuses overseas, **the Chamber's ultimate goal is the same: corporate accountability should be minimized and/or eliminated wherever and however possible**.

- **Bigger is Better:** In case after case, the Chamber advances arguments that will benefit giant multinationals at the expense of small and medium-sized businesses. Whether it's by arguing for reduced access to the courts, opposing stricter supervision of Wall Street banks designed to reduce the risk of future financial crises, fighting for Big Oil against emissions controls, or supporting Big Pharma's schemes to keep drug prices sky high, **the Chamber always comes down on the side of its deep-pocketed Big Business patrons, ignoring the impact on small businesses**.

- **Greed is Good:** The Chamber takes a very robber baron view of business and the economy. Whether defending Wall Street speculation or Big Pharma price gouging or appalling fast food labor practices or new economy exploitation of gig economy workers, **what matters to the Chamber are corporate profits**, and then, primarily in the short-term. This myopic focus on short-term profits blinds the Chamber to seeing how many regulations can actually palliate market imperfections and thereby increase wealth creation – for all.

- **Government Intervention is Bad:** The Chamber is opposed to nearly all forms of government regulation, even in cases where such regulation would correct obvious market failures. It opposes rules promoting clean air, clean water, greater information, and prudent banking practices as bad for the economy. The Chamber repeatedly ignores negative externalities and rejects the well-established economic doctrine that government regulation is necessary to correct them.

Some of the individual cases most illustrative of these positions include:

- **Litigation related to the Deepwater Horizon oil spill in the Gulf of Mexico.** The Chamber filed an amicus brief on behalf of BP *on 4 separate occasions*, arguing for legal technicalities that would eliminate or reduce civil fines and penalties that government agencies sought to impose upon BP as well as obstruct class action litigation brought by small businesses against BP.

- **Litigation related to the Buckyball magnetic toy responsible for injuring thousands of children.** The Chamber filed an amicus brief in support of the CEO of the company that sold Buckyballs, a toy that injured over 1,700 young children. It argued that he should not be personally liable for recall costs in spite of the fact that he had had ample warning of the danger posed by the toy and had indeed fought recall efforts, resulting in a delay that led to further sales—and further injuries.

- **Litigation related to for-profit Corinthian Colleges' fraudulently misleading students.** The Chamber filed an amicus brief in support of Corinthian Colleges' effort to prevent former students from suing it in court for fraud despite the fact that Corinthian was already the subject of multiple investigations targeting similar conduct and had already settled a previous fraud case involving similar allegations.

- **Litigation related to the Keystone XL pipeline.** The Chamber sided with the Canadian energy giant behind the pipeline over American ranchers and farmers who didn't want the pipeline being routed through their land.

- **Fracking Litigation.** The Chamber fought to strike down municipal zoning ordinances to prevent fracking.

- **Minimum Wage Litigation.** The Chamber fought to strike down Seattle's law raising the minimum wage to $15 an hour, claiming that it would be bad for workers.

- **GMO Labeling Litigation.** The Chamber filed an amicus brief opposing Vermont's GMO labeling law, arguing that it did not advance a legitimate state interest, was supported by "fringe" groups, and impinged upon corporations' free speech rights.

- **Alien Tort Statute Litigation.** The Chamber filed amicus briefs in cases involving Nigerian and Papua New Guinean plaintiffs who alleged that foreign multinationals had been complicit in gross human rights abuses including rape, pillage, and aerial bombardment of civilians. In both cases, public protests against the industrial sites in question were brutally repressed by the government, allegedly at the behest of and assisted by the corporate defendants.

- **Walmart Gun Sales Litigation.** The Chamber filed an amicus brief supporting Walmart's effort to prevent shareholders from voting on a proxy resolution calling for the company's board to examine its sale of high capacity firearms.

- **Litigation against Goldman Sachs for fraudulently misleading investors.** The Chamber filed an amicus brief supporting Goldman Sachs in its efforts to make it more difficult for defrauded investors including pension funds to sue as a result of huge losses they suffered during the financial crisis.

III. Access to the Courts: Do as We Say, Not as We Do

One of the Chamber's primary policy priorities is to limit access to the courts for consumers and small businesses.[4] To this end, the Chamber has aggressively fought to preserve and expand forced arbitration and class action bans. It has done so both by lobbying against new rules that would restrict the use of forced arbitration clauses and class action bans and by litigating to defend forced arbitration clauses and class actions bans in court. In fact, our first report in this series found that restricting access to the courts was the legal issue most often litigated by the Chamber. The Chamber went to court in a total of 112 cases over the three year period we examined to try and prevent others from having their day in court.

What accounts for the Chamber's intense interest in restricting access to the courts? Limiting access to the courts makes it harder for consumers and small businesses to hold big corporations accountable when they engage in fraudulent or tortious conduct and is therefore a potent way for big corporations to improve their bottom lines. And given the current deregulatory environment, it is significantly less likely that regulators will pursue enforcement actions against corporate bad actors. In the absence of regulatory enforcement actions, civil actions in the court led by consumers and small businesses are even more important to preserving some measure of corporate accountability.

Corinthian Colleges or *La mala educación*

Corinthian Colleges is perhaps one of the most notorious companies to have used forced arbitration as a shield to protect itself from allegations of fraud. Corinthian was a for-profit college whose business model depended on peddling degree programs to economically disadvantaged adults with aggressive marketing campaigns premised upon false job placement statistics.[5] Corinthian charged students almost $50,000 for an associates business degree when the same degree might cost just over $6,000 at a community college.[6] Corinthian's executives handsomely rewarded themselves for executing this swindle, with CEO Jack Massimino's compensation topping $3 million per year.[7] Corinthian wound up being investigated and fined by state and federal regulators for deceptive practices and was ultimately forced to declare bankruptcy and close down in 2015.[8]

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[4] *U.S. Chamber Policy Priorities for 2016*, pgs. 17 – 18, UNITED STATES CHAMBER OF COMMERCE, http://uscham.com/2hx33S1 (viewed on March 1, 2017)

[5] Matt Hamilton, *Corinthian Colleges must pay nearly $1.2 billion for false advertising and lending practices*, LOS ANGELES TIMES (March 23, 2016), http://lat.ms/25nt9a7

[6] David Halperin, *For-Profit Corinthian Colleges On the Brink: Who's Responsible?,* REPUBLIC REPORT (June 20, 2014), http://bit.ly/2iZzvcR

[7] *Id*.

[8] Chris Kirkham, *Corinthian closing its last schools; 10,000 California students displaced*, THE LOS ANGELES TIMES (April 26, 2015), http://lat.ms/1GxN2OF

In July 2013, the Chamber filed an amicus brief[9] in a class action case filed by Corinthian students alleging that the school had engaged in deceptive marketing practices, exactly the type of fraudulent conduct for which Corinthian ultimately ran afoul of state and federal regulators. Despite the fact that the plaintiffs were in part asking for public injunctive relief under various California consumer protection laws, the Chamber's brief contends that their suit should be dismissed and the case heard by an arbitrator chosen by Corinthian in accordance with the forced arbitration clause found in the contract the students had signed with Corinthian.[10] The Chamber argues that a private arbitrator selected by a corporate defendant (as opposed to a judge) should be charged with interpreting and applying California laws that provide for the power to enjoin companies from engaging in certain conduct that would *prospectively* harm additional consumers not involved in the suit.

In its motion for leave to file its *amicus curiae* brief, the Chamber argues that the case "presents a special circumstance," namely the changed ruling in a different case being a justification for the Chamber to file an untimely brief in support of Corinthian.[11] But what's truly special about this case is just how widespread the wrongdoing at Corinthian was – and how evidence of this wrongdoing was already public knowledge *at the time the Chamber decided to wade into the case on behalf of Corinthian*.

As far back in 2004, students at Corinthian were already filing suits against the school alleging deceptive practices.[12] Of course, Corinthian relied on forced arbitration clauses to remove these suits from court where they might receive a fuller hearing and into arbitration with an arbitrator of its choosing. Not surprisingly, the arbitrator in the 2004 case found for Corinthian, as Corinthian was only too happy to trumpet in a press release.[13]

That same year, both the U.S. Department of Education and the Securities and Exchange Commission (SEC) opened investigations into Corinthian.[14] Those investigations were ultimately closed without any finding of wrongdoing. However in 2007, Corinthian settled with the California Attorney General and agreed to pay almost $6 million to students who had been the victims of its deceptive marketing practices.[15]

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[9] Motion of the Chamber of Commerce of the United States of America for Leave to File Brief as *Amicus Curiae* in Support of Defendants-Appellants, *Ferguson v. Corinthian Colleges*, Case No. 11-56965 (9th Cir. 2013), http://bit.ly/2iGCJnK

[10] *Id*. at 3-4

[11] *Id*. at 3

[12] Jeffrey Billman, *Bad Education*, ORLANDO WEEKLY (April 14, 2005), http://bit.ly/2hW8NF3

[13] Corinthian Colleges press release, *Corinthian Colleges Reports Favorable Arbitration Award in Satz Case – Arbitrator Finds in Favor of Company on All Counts* (January 23, 2006), http://bit.ly/2hW8N7P

[14] Jeffrey Billman, *Bad Education*, ORLANDO WEEKLY (April 14, 2005), http://bit.ly/2hW8NF3

[15] *Brown Reaches Multi-Million Settlement With Corinthian Vocational School,* CALIFORNIA DEPARTMENT OF JUSTICE (July 31, 2007), http://bit.ly/2iYAXMp

But Corinthian's legal problems didn't end there. In 2012, the Consumer Financial Protection Bureau (CFPB) announced that it was investigating Corinthian.[16] By May of 2013 – two months before the Chamber came to Corinthian's aid – at least six state attorneys general were investigating Corinthian, many for – you guessed it – deceptive marketing practices.[17] In June 2013, Corinthian revealed that it was again under investigation by the SEC for its recruitment practices.[18]

Despite the multiple investigations into Corinthian for deceptive marketing practices, Corinthian's past settlement for deceptive marketing practices, and Corinthian's history of using forced arbitration to squelch allegations of deceptive marketing practices, the Chamber still apparently thought it made sense to support Corinthian in its efforts compel yet another suit alleging deceptive marketing practices into arbitration. Of course, Corinthian would choose the arbitrator who would hear the case and would rule not only on whether or not Corinthian had defrauded the plaintiffs, but whether Corinthian's marketing practices violated California consumer protection laws and could therefore be enjoined in order to prevent future Corinthian students from being defrauded.

The Chamber's support of Corinthian suggests that the Chamber does not care about fraud or the exploitation of vulnerable students by a cabal of greedy executives. Unfortunately, the Corinthian case isn't the only case in which the Chamber tried to shield a corporate bad actor from being held accountable by making it more difficult for consumers to have their day in court.

Goldman Sachs or *The Wolf of Wall Street*

The NECA-IBEW Health & Welfare Fund administers death, disability, and healthcare benefits for electrical workers across the country. In fall 2007 and again in spring 2008, it invested a total of $440,000 in mortgage-backed securities (MBS) sold by Goldman Sachs.[19] The returns on these investments were needed to pay for the critical benefits the fund provides to thousands of electrical workers. Unfortunately, the MBS market collapsed in the fall of 2008, as the real estate bubble burst and it became known that many of the underlying mortgages that had been bundled and packaged into MBSs were subprime and suffered from poor underwriting standards. As a result, NECA-IBEW sustained a loss on its investment.

NECA-IBEW was not alone in losing money. In 2008, pension funds in OECD countries lost an average of 23 percent because of the global financial crisis triggered by the subprime mortgage

[16] Paul Fain, *CFPB's First For-Profit Salvo*, INSIDE HIGHER ED (May 10, 2012), http://bit.ly/2jjIpp5

[17] *State attorneys general investigating for-profit colleges*, CALIFORNIA WATCH (May 3, 2013), http://bit.ly/2hYHKUN

[18] John Lauerman, *Corinthian Falls After SEC Starts Probe on Recruitment*, BLOOMBERG (June 11, 2013), http://bloom.bg/2iMnxTW

[19] *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 150 (2nd Cir. 2012), http://reut.rs/2jWdqPd

crisis in the United States.[20] This 23 percent loss represented roughly $5.4 *trillion*. In the U.S., pension fund losses were even steeper, averaging 26 percent representing more than $2.5 *trillion*.[21]

The MBSs in which NECA-IBEW invested came with statements by Goldman Sachs affirming the quality of the underwriting and appraisal standards used for the underlying mortgages.[22] Indeed, Goldman Sachs made similar statements on hundreds of MBS offerings it sold between 2004 and 2008. The total notional value of these MBSs was approximately $600 billion.[23]

Because of these misleading statements attesting to the quality of the underlying mortgages, NECA-IBEW decided to launch a class-action suit against Goldman Sachs on behalf of itself and all other similarly situated parties who had been misled by Goldman when they purchased MBSs issued by Goldman. Goldman argued in court that such a class action suit should not be permitted as each individual MBS offering as well as each tranche of each individual offering was unique and as such, the investors NECA-IBEW sought to represent in its class action were not all similarly situated and therefore could not constitute a class. The U.S. Court of Appeals for the 2nd Circuit found for NECA-IBEW and allowed the class action to proceed.[24]

Goldman then appealed the Second Circuit's ruling to the Supreme Court and the Chamber filed an amicus brief in support of Goldman. In its brief, the Chamber alleges, among other things, that permitting such a class action case to move forward would "further burden already busy courts" and would harm the nation's economy.[25]

Yes, you read that correctly. Despite the fact that widespread fraud and other wrongdoing in the mortgage market led to a global financial crisis that cost 8.7 million Americans their jobs,[26] more than 9.3 million American homeowners their homes,[27] and pension funds $5.4 trillion, the Chamber was concerned that allowing some of the victims of Wall Street's malfeasance to band together to sue the big banks might *really* harm the economy.

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[20] Anna Cristina D'Addio & Edward Whitehouse, *Pensions During the Crisis: Impact on Retirement-Income Systems and Policy Responses*, IN THE PUBLIC INTEREST (July 2010).

[21] *Id*.

[22] *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 151 (2nd Cir. 2012), http://reut.rs/2jWdqPd

[23] Brief of the Securities Industry and Financial Markets Association and the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of the Petitioners, pg. 19, *Goldman Sachs & Co. v. NECA-IBEW Health & Welfare Fund*, Case No. 12-528 (S.Ct. 2013), http://bit.ly/2kfnoZx

[24] *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 164 (2nd Cir. 2012), http://reut.rs/2jWdqPd

[25] Brief of the Securities Industry and Financial Markets Association and the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of the Petitioners, pg. 4, *Goldman Sachs & Co. v. NECA-IBEW Health & Welfare Fund*, Case No. 12-528 (S. Ct. 2013), http://bit.ly/2kfnoZx

[26] John Kell, *U.S. recovers all jobs lost in financial crisis*, FORTUNE (June 6, 2014), http://for.tn/2j2eiTj

[27] Laura Kusisto, *Many Who Lost Homes to Foreclosure in Last Decade Won't Return – NAR*, THE WALL STREET JOURNAL (April 20, 2015), http://on.wsj.com/1DIGvQ8

Instead of acknowledging that the civil justice system provides a meaningful way to hold corporate bad actors like Goldman Sachs accountable and thereby exercises an important deterrent effect on corporate wrongdoing, the Chamber argues that additional obstacles should be thrown up before consumers and investors seeking redress in the courts. Such a position, in the long term, may actually promote economic instability as it will make it easier for corporate fraud to go unpunished.

What's more, the Chamber's argument that allowing a class action in this type of case would further burden the courts is laughable as class actions actually *reduce* caseloads by allowing similarly situated plaintiffs to band together and file one case rather than dozens or hundreds or thousands of individual cases.

Citigroup or *Other People's Money*

The Chamber's true aim of making it as difficult as possible for wronged consumers and investors to obtain justice via civil suits becomes even clearer in yet another case involving MBSs. In this case, the SEC brought an enforcement action for negligence against Citigroup. The SEC alleged that in early 2007 Citi created a $1 billion mortgage fund that it purposely filled with MBSs it believed would fail so that it could offload these toxic MBSs from its own balance sheet and then bet against the fund's performance and thereby profit when the value of the fund declined. According to the SEC, Citi falsely told investors in the fund that the MBSs in the fund had been chosen by an independent party. Citi ultimately pocketed $160 million on the deal while the unsuspecting investors lost $700 million.[28]

The SEC and Citi agreed to a $285 settlement in which Citi would neither admit nor deny the alleged fraud. Jed Rakoff, the federal judge hearing the case, refused to accept this proposed settlement, stating that a settlement in which the defendant did not admit to any misconduct was not in the public interest and was in fact viewed by Citi as a mere cost of doing business.[29] Citi and the SEC then appealed and the Chamber filed an amicus brief supporting reversal of Judge Rakoff's decision.

In its brief, the Chamber makes plain its objection to Judge Rakoff's decision, writing "[b]usinesses will often have to defend civil litigation – including class actions – based on the same allegations as those asserted by the agency. The ubiquitous 'no admit, no deny' feature of consent judgments is designed precisely to avoid impairing the company's ability to defend itself in future litigation."[30] The Chamber, ever vigilant against efforts to hold corporations accountable, doesn't want corporate bad actors to be forced to admit their wrongdoing in settlements with the government for fear that such admissions will then be used against them in civil suits filed by the consumers or investors who were harmed.

[28] Edward Wyatt, *Judge Blocks Citigroup Settlement With S.E.C.*, THE NEW YORK TIMES (Nov. 28, 2011), http://nyti.ms/2ktaTgy

[29] *U.S. Securities and Exchange Commission v. Citigroup Global Markets, Inc.*, 11 Civ. 7387, pg.10 (SDNY 2011).

[30] Brief of *Amici Curiae* Chamber of Commerce of the United States of America and Pharmaceutical Research and Manufacturers of America Supporting Reversal, pg. 12, *U.S. Securities and Exchange Commission v. Citigroup Global Markets, Inc.*, 752 F.3d 285 (2d Cir. 2014), http://bit.ly/2jSymEN

In this case, Citi agreed to settle with the SEC for $285 million. Even if all of this money were returned to the duped investors (which it wasn't), it wouldn't come close to making up for the $700 million they lost. In order to be made whole, these investors would have to file and win a civil suit against Citi, and the Chamber is only too happy to make it as difficult as possible for them to succeed. It would appear that the Chamber places protecting corporate bad actors far above protecting ordinary consumers and investors.

The Chamber also has the audacity to suggest in its brief that "the public will gain nothing – and will lose much" if corporate bad actors are required to admit their wrongdoing in settlements with the government.[31] Perhaps it should tell that to the investors who were defrauded by Citi to the tune of $700 billion. Or to the victims of the innumerable other cases of corporate wrongdoing that have dominated the headlines over the last several years. In the face of such an epidemic of corporate crime, public policy cries out for tougher enforcement by government regulators and prosecutors and more civil actions by the victims of these crimes. Only then will corporations stop viewing fines and settlements as merely a "cost of doing business" as did Citi and only then will there be a strong disincentive against engaging in future wrongdoing. Obviously, the public has a tremendous interest in seeing corporate crime reduced as it is members of this same public that are defrauded, injured, poisoned, and sometimes even killed as a result of corporate malfeasance.

IV. Defending Wall Street: Party Like it's 2007

You may have noticed that two of the cases discussed above in which the Chamber argued to make it harder for consumers and investors harmed by corporate wrongdoing to have their day in court involved Wall Street banks. This shouldn't come as a surprise, since in our first report on Chamber litigation, we found that the financial services industry was the industry most frequently supported by the Chamber's litigation. In 88 cases over the roughly three year period we examined, the Chamber's court filings supported financial services companies. Banking and insurance giants State Farm, Bank of America, Goldman Sachs, Allstate, Deutsche Bank, Citigroup, Wells Fargo, AIG, and JPMorgan Chase were all supported by Chamber legal filings in a minimum of four cases each over this three year period.

While the Chamber's briefs supporting financial services companies dealt with a broad range of legal issues, many centered, like the two cases discussed above, on litigation stemming from the 2008 financial crisis and subsequent regulations enacted to help prevent future similar crises. Over and over again, the Chamber argued in court that those responsible for the financial crisis shouldn't be held responsible, and that the subsequent rules to prevent a future crisis shouldn't be enforced. It's almost as if the Chamber learned nothing from the 2008 financial crisis!

Countrywide or *Margin Call*

[31] *Id*. at 13

Perhaps no company became more associated with the subprime mortgage crisis than Countrywide Financial.[32] Under CEO Angelo Mozilo, Countrywide became the largest mortgage lender in the U.S. in the years before the housing bubble burst. When the bubble finally did burst in 2008, Countrywide's mortgage lending collapsed and the company was bought in a fire sale by Bank of America.

In the waning days of the housing bubble, Countrywide created a program it called High Speed Swim Lane, or "Hustle" for short.[33] According to a U.S. Department of Justice (DOJ) investigation, the evocatively named Hustle encouraged the underwriting of subprime mortgages. Underwriting safeguards were jettisoned and Countrywide employees were given bonuses based on underwriting volume rather than quality. The defect rate in mortgages issued under the auspices of Hustle was *nine times* greater than the industry norm.[34]

Countrywide would then sell these defective mortgages to Fannie Mae and Freddie Mac under a pre-existing agreement whereby Countrywide had promised to sell Fannie and Freddie investment grade mortgages.[35] Fannie and Freddie lost an estimated $850 million on the defective mortgages they purchased from Countrywide.[36]

In 2012, DOJ sued Countrywide and one of its senior executives for violating the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). FIRREA was passed in 1989 in response to the savings and loan crisis and it strengthened civil and criminal penalties for defrauding or damaging banks and/or their depositors.[37]

In 2013, a jury found the defendants liable for fraud[38] and the defendants appealed.

Enter the Chamber. Despite Countrywide's notorious role participating in the frenzy of subprime lending that caused the financial crisis that harmed not just tens of millions of Americans *but also millions of American businesses*, the Chamber filed an amicus brief supporting Countrywide's appeal.

The Chamber argues that Countrywide could not be found liable for fraud under FIRREA because Countrywide itself was the only bank affected by the alleged fraud and FIRREA was intended to punish third parties whose fraud affected banks rather than banks that harmed themselves. The

[32] For further details on Countrywide's role in precipitating the subprime mortgage crisis, *see* Bethany McLean and Joe Nocera, *How the roof fell in on Countrywide*, FORTUNE (Dec. 23, 2010), http://for.tn/1tyoQFK.
[33] Danielle Douglas, *Bank of America is found liable for Countrywide Fraud*, THE WASHINGTON POST (Oct. 23, 2013), http://wapo.st/2kkaxYU
[34] *Id*.
[35] *U.S. ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650, 653 - 55 (2nd Cir. 2016), http://bit.ly/2jLZAhL
[36] Danielle Douglas, *Bank of America is found liable for Countrywide Fraud*, THE WASHINGTON POST (Oct. 23, 2013), http://wapo.st/2kkaxYU
[37] Financial Institutions Reform, Recovery, and Enforcement Act, Pub.L. 101-73, http://bit.ly/2jOHklC
[38] Danielle Douglas, *Bank of America is found liable for Countrywide Fraud*, THE WASHINGTON POST (Oct. 23, 2013), http://wapo.st/2kkaxYU

Chamber goes so far as to write that allowing a bank to be found liable under FIRREA for self-affecting conduct is "potentially dangerous to the national banking system."[39]

The Chamber's argument in this case is the very definition of chutzpah. Here, Countrywide had engaged in reckless, speculative, dishonest conduct. This conduct undermined Countrywide's financial viability, harmed Fannie Mae and Freddie Mac, and contributed to the 2008 financial crisis, which nearly destroyed the American financial system. Indeed, the banking system alone necessitated an injection of approximately $250 billion in taxpayer money in order to be stabilized.[40] To argue that seeking to hold financial institutions legally accountable for their own risky conduct somehow poses a threat to the national banking system when *in fact risky conduct by these very same financial institutions actually led to a banking crisis not even seven years ago* beggars belief. It exposes the Chamber not as the voice of American business that it claims to be, but as a voice for corporate impunity, however terrible the collateral consequences may be.

AIG or *The Big Short*

If Countrywide was the poster child for subprime mortgages, then AIG and its CEO Maurice "Hank" Greenberg were the poster children for the complex and speculative financial engineering that allowed the subprime crisis to morph into a full-blown financial crisis. AIG sold credit default swaps (CDSs) on hundreds of billions in assets. A CDS is like an insurance contract on the underlying asset. Many of these assets were MBSs whose value depended on the ability of homeowners to repay their mortgages.[41] If the value of an MBS that a CDS insured declined, then AIG had to pay the holder of that CDS.

With the bursting of the real estate bubble and the concomitant slowing of the economy, more and more homeowners became delinquent on their mortgage payments, a situation exacerbated by the huge numbers of subprime mortgages that had been underwritten by financial institutions like Countrywide during the bubble years. CDS holders began to demand payment from AIG as MBS values began to fall and AIG found itself at the center of the burgeoning financial crisis. AIG ultimately required $70 billion in taxpayer money in order to stay afloat.[42]

The New York State attorney general sued Greenberg and another top AIG executive for fraud relating to activities predating the financial crisis.[43] On four separate occasions during this

[39] Brief for *Amici Curiae* the Clearing House Association, L.L.C., American Bankers Association, Financial Services Roundtable, and Chamber of Commerce of the United States of America in support of defendants-appellants, pg. 2, *U.S. ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650 (2nd Cir. 2016), http://bit.ly/2jZcqGn

[40] *TARP Programs*, U.S. DEPARTMENT OF THE TREASURY, http://bit.ly/1WDo9LO (viewed on March 1, 2017)

[41] Valerie Ross, *What Went Wrong at AIG?*, KELLOGGINSIGHT (Aug. 3, 2015), http://bit.ly/2lhqy2K

[42] *TARP Programs*, U.S. DEPARTMENT OF THE TREASURY, http://bit.ly/1WDo9LO (viewed on March 1, 2017)

[43] Chris Dolmetsch, *Hank Greenberg's Manager 'Lesson' at Core of Fraud Trial*, BLOOMBERG (Sept. 27, 2016), http://bloom.bg/2jZyiSd

marathon litigation, the Chamber filed amicus briefs on behalf on Greenberg. We examined the two later briefs that were filed during the three year period we studied.

In its 2013 brief, the Chamber again argues that seeking to hold companies and executives responsible for wrongdoing would negatively affect the economy.[44] It also argues that federal securities law precluded state authorities from bringing their own enforcement actions.[45]

In its 2016 brief, the Chamber again repeats its assertion that prosecuting Greenberg would somehow damage New York's economy.[46] But this time it also adds a new argument, one that coming from the Chamber is stunning for its hypocrisy. As discussed in the previous section of this report, the Chamber is a fierce opponent of class action law suits. And yet in its 2016 brief in the *Greenberg* litigation, the Chamber has the audacity to assert that the New York Attorney General should not be allowed to seek disgorgement from corporate executives accused of wrongdoing because doing so would reduce the amount of money *available to investors and consumers suing the same executives as part of a class action*![47]

What is going on here? Has the Chamber suddenly grown a conscience? Does it suddenly care about the millions of investors and consumers harmed by corporate wrongdoing? Or is it merely cynically grasping for any argument it can in its long-running effort to prevent Greenberg and corporate wrongdoers like him from being held accountable?

It's clearly the latter, as the Chamber also argues against the N.Y. attorney general's efforts to seek a lifetime ban barring the defendants from serving as officers or directors of any company or participating in the securities industry.[48] After all, depriving the business and financial communities of the services of people like Hank Greenberg is probably too distressing a thought to bear for the Chamber. Indeed, the Chamber would probably argue that doing so would pose a risk to the economy!

MetLife or *Too Big to Fail*

As we've seen, the Chamber came to the aid of the companies and executives whose wrongdoing was central to precipitating the financial crisis. Following the financial crisis, Congress passed and President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act.

[44] Brief of *Amici Curiae* the Chamber of Commerce of the United States of America, Business Roundtable and the Securities Industry and Financial Markets Association in support of defendants-appellants, pg. 5, *People v. Greenberg*, 2013 NY Slip Op 04726 (N.Y. Ct. of Appeals 2013), http://bit.ly/2llpkiY

[45] *Id*. at 11-12

[46] Brief of *Amici Curiae* the Chamber of Commerce of the United States of America and the Securities Industry and Financial Markets Association in support of defendants-appellants, pg. 20, *People v. Greenberg*, 2016 NY Slip Op 04253 (N.Y. Ct. of Appeals 2016), http://bit.ly/24a5JXD

[47] *Id*. at 25

[48] *Id*. at 28

The Chamber very much opposed Dodd-Frank and lobbied hard against its passage.[49] Once enacted, the Chamber continued its fight against Dodd-Frank, seeking to undermine it in Congress, before the agencies charged with rulemaking under the act, and in the courts.[50] In fact, a review of lobbying disclosure reports reveals that the Chamber has lobbied on Dodd-Frank more frequently than any other organization or company.[51]

Part of the Chamber's campaign against Dodd-Frank was its support of MetLife's lawsuit against the Financial Stability Oversight Council (FSOC) created by Dodd-Frank. The primary purpose of FSOC was to identify risks posed to the financial stability of the United States including those posed by individual banks and non-bank financial institutions.[52] FSOC was vested with the power to designate banks and non-bank financial institutions that pose a threat to U.S. financial stability as systemically important financial institutions (SIFIs), thereby subjecting them to additional oversight.[53] SIFIs are those banks and other financial services companies whose size and interconnectedness with other financial institutions means that their failure would present a risk to the entire financial system and would therefore necessitate a government bailout in order to prevent a complete collapse much the way AIG and other financial services companies necessitated a bailout in 2008-9. In other words, they are too big to fail.

In December 2014, FSOC designated MetLife as a SIFI.[54] MetLife then challenged this designation in court and the Chamber filed an amicus brief in support of MetLife. Incredibly, the Chamber begins its brief by claiming that FSOC's designation of MetLife as a SIFI is "of great concern to many of the Chamber's members."[55] One is left to wonder, why would a retailer care about MetLife being designated as a SIFI? Why would a tech company care? Why would an oil company care? And what of all those "mom and pop shops" the Chamber is always claiming to represent – why would *they* care? Indeed, to the extent that any companies beyond the dozen or so giant banks and other financial services companies directly concerned by the SIFI designation process would care, they would likely be *supportive* of the process as it is designed to reduce the risk of future financial crises that would quite obviously negatively impact them.

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[49] *See*, *e.g.*, Chamber of Commerce Letter Opposing the Conference Report for H.R. 4173, the "Dodd-Frank Wall Street Reform and Consumer Protection Act, June 27, 2010, http://uscham.com/2kIVSVb (viewed on March 1, 2017).

[50] Matt Taibbi, *How Wall Street Killed Financial Reform*, ROLLING STONE (May 10, 2012), http://rol.st/1oJSJnX

[51] *Issue Lookup, Number of Dodd-Frank Mentions*, CENTER FOR RESPONSIVE POLITICS, http://bit.ly/2knDFeU (viewed on March 1, 2017)

[52] *About FSOC*, U.S. DEPT. OF THE TREASURY, http://bit.ly/1MOy120 (viewed on March 1, 2017)

[53] *Financial Stability Oversight Council*, U.S. DEPARTMENT OF THE TREASURY, http://bit.ly/2lscfp8 (viewed on March 1, 2017)

[54] Mary Williams Walsh, *Regulators Deem MetLife a 'Too Big to Fail' Institution*, NEW YORK TIMES (Dec. 18, 2014), http://nyti.ms/2lSKVAD

[55] Brief for the Chamber of Commerce of the United States of America as amicus curiae in support of plaintiff MetLife, Inc., pg. 1, *MetLife, Inc. v. Financial Stability Oversight Council*, case 1:15-cv-00045-RMC (D.C. Dist. Ct. 2016), http://bit.ly/2lnR5Le

Having begun its brief by making disingenuous claims of broad-based company concern, the Chamber next proceeds to make disingenuous arguments about why FSOC should not have designated MetLife as a SIFI. The Chamber repeatedly suggests that the SIFI designation process should only apply to banks, writing that it "was enacted to address companies that were particularly susceptible to distress (*e.g.*, Lehman Brothers)" and "[FSOC's] interpretation is especially problematic with respect to entities whose business models are not particularly susceptible to market distress, such as traditional insurance companies."[56]

It's almost as if the Chamber has developed amnesia and has forgotten the central role that AIG played in the financial crisis. AIG was not a bank. It was, of course, an insurance company. Just like MetLife. What's more, recognizing the role that non-bank financial companies played in propagating the financial crisis, Dodd-Frank specifically gives regulators the power to designate non-bank financial companies for additional supervision.[57] As such, the Chamber's suggestion that the SIFI designation process should only apply to banks is not only historically ignorant, but is also entirely spurious.

The Chamber goes on to claim that FSOC's assertion that huge losses at MetLife could ultimately lead to huge losses at other financial services companies and thereby disrupt financial markets and the broader economy is too speculative.[58] Yet there is no way to determine with absolute certainty whether or not a particular company presents a systemic risk to the broader financial system. Moreover, the AIG precedent has shown the danger posed by huge insurance companies like MetLife. And most importantly, the statute itself does not require that regulators be certain that a company pose a systemic risk, only that they determine that a company "*could* pose a threat to the financial stability of the United States." (emphasis added),[59] "could" being the exact word with which the Chamber takes issue in its brief.

In short, the Chamber has no good legal arguments against FSOC's designation of MetLife as a SIFI. What the Chamber really opposes is the creation of FSOC itself and the proposition that financial institutions that are too big to fail should be subjected to stricter regulation in order to prevent them from damaging the broader economy. Once again, the Chamber shows itself to be more concerned with the interests of a few behemoth companies and the executives who run them than with the health of the broader economy and the millions of small and medium-sized companies that would be hurt should a too big to fail financial services company blow up.

[56] *Id*. at 11-12

[57] 12 U.S. Code § 5323, http://bit.ly/2lPYYKy (viewed on March 1, 2017)

[58] Brief for the Chamber of Commerce of the United States of America as amicus curiae in support of plaintiff MetLife, Inc., pgs. 15-16, *MetLife, Inc. v. Financial Stability Oversight Council*, case 1:15-cv-00045-RMC (D.C. Dist. Ct. 2016), http://bit.ly/2lnR5Le

[59] 12 U.S. Code § 5323(a)(1), http://bit.ly/2lPYYKy (viewed on March 1, 2017)

V. Supporting Big Oil: Drill, Baby, Drill

What do Wall Street and Big Oil have in common? They're not high on the public's list of most trusted industries. And that's precisely what makes the Chamber so valuable to them. When they need help, be it in Congress or the courts, the Chamber and its claimed 300,000 members[60] are there to ride to the rescue. The Chamber and its thousands of small business members can lend an aura of respectability to the often unpopular policies these industries seek to promote. Chamber president Tom Donohue has acknowledged as much, stating "We're the reinsurance industry for individual industry associations and state chambers of commerce and people of that nature. [Troubled industries such as Wall Street] will come to us and say, 'Can we collect our reinsurance?' I want to give [members] all the deniability they need."[61]

In essence, the Chamber's line of work is something akin to legalized money laundering. It takes oodles of industry cash and uses it to promote publicly unpopular but industry-friendly policies. It repackages these industry-friendly policies as being supported by the broader American business community including, most critically, small businesses. Industry money, tainted in the eyes of the public, is – voilà! – transformed into something much more respectable as the Chamber provides it with the imprimatur of small business support.

The first report in this series found that after financial services, the energy/utilities industry was the next most supported by Chamber litigation. What's more, environmental issues, of critical importance to the energy/utilities industry, were the third most litigated legal issues by the Chamber. The Environmental Protection Agency (EPA) was the government agency most often sued by the Chamber – 15 times in the three year period we examined!

BP or *Giant*

The *Deepwater Horizon* oil rig, leased to BP, exploded on April 20, 2010, killing 11 people[62] and ultimately resulted in the largest oil spill in history.[63] While then BP CEO Tony Hayward minimized the gravity of the spill and its attendant environmental damage and infamously declared that he wanted his life back,[64] the Chamber was equally aggressive in trying to shield BP from being held responsible for the disaster. The Chamber filed not one, not two, not three, but four briefs supporting BP in *Deepwater Horizon*-related litigation.

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[60] For more information on why this number likely greatly overstates the number of paying Chamber members, *see* Dan Dudis & David King, *The Gilded Chamber 2.0*, PUBLIC CITIZEN (Sept. 26, 2016), http://bit.ly/2cBZfY5.

[61] *The Chamber of Secrets*, THE ECONOMIST (April 21, 2012), http://econ.st/2lf0fsN

[62] Leslie Kaufman, *Search Ends for Missing Oil Rig Workers*, THE NEW YORK TIMES (April 23, 2010), http://nyti.ms/2lffBNV

[63] Campbell Robertson & Clifford Krauss, *Gulf Spill Is the Largest of Its Kind, Scientists Say*, THE NEW YORK TIMES (Aug. 2, 2010), http://nyti.ms/2lf3fp2

[64] Tom Bergin, *BP CEO apologizes for "thoughtless" oil spill comment*, REUTERS (June 2, 2010), http://reut.rs/2lzTsuf

The Chamber's first legal salvo on behalf of BP came in 2013, when BP sued the EPA over its decision to suspend BP in its entirety from doing business with the federal government based upon the *Deepwater Horizon* spill and the resulting Clean Water Act violation. The Chamber begins its argument by, like Hayward, minimizing the gravity of the spill, characterizing it as "a misdemeanor environmental violation that occurred at a single facility."[65]

Amazingly, the Chamber goes on to suggest that the EPA's decision to suspend the company responsible for the largest oil spill in history is not grounded in the public interest.[66] Then, as is its wont, the Chamber claims that the EPA's decision will have negative economic consequences, in that it will lead to layoffs as BP loses government contracts and/or leases.[67] Of course, the Chamber's argument completely ignores the fact that when a government suspends a company, the work doesn't just dry up. The government will have to contract with a new, presumably more responsible company to do the work that the suspended company had been doing. As such, the net economic and employment consequences of such a suspension will be zero. In fact, the only impact of such suspension decisions will be to incentivize responsible conduct on the part of businesses, but apparently the Chamber isn't interested in incentivizing responsible conduct. It's also worth noting that the Chamber's concerns about job losses due to suspensions apparently don't extend to the thousands of jobs lost as a result of the spill itself.[68]

Having worked to prevent BP from being suspended from government contracting and leasing, the Chamber next turned its attention to limiting BP's civil liability for the *Deepwater Horizon* oil spill. Seeking to resolve the raft of litigation by small businesses and individuals harmed by the spill, BP negotiated an agreement in 2012 whereby those businesses that could show that their income dropped during the oil spill would not have to prove affirmatively that this lost income was caused by the spill itself in order to be eligible for compensation.[69] In 2013, BP, facing rising claims, decided that it was no longer happy with the agreement it had negotiated and so it went to court arguing that proof of causation was in fact required for reimbursement of economic losses.[70] And in 2014, the Chamber filed a brief supporting BP's causation arguments.[71]

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[65] Brief of the Chamber of Commerce of the United States, the American Petroleum Institute, the National Association of Manufacturers, National Ocean Industries Association, Organization for International Investment, and Technology Association of America as *amici curiae* in support of plaintiff's motion for summary judgment, pg. 3, *BP Exploration & Production v. McCarthy*, case no. 4:13-cv-02349 (S.D. Texas 2013), http://bit.ly/2lEn8ak

[66] *Id*.

[67] *Id*.

[68] For a discussion of the economic impacts of the Deepwater Horizon oil spill, *see*, Maria Gallucci, *BP Oil Spill Has Lasting Economic Toll Five Years After Deepwater Horizon Explosion*, INTERNATIONAL BUSINESS TIMES (April 16, 2015), http://bit.ly/1PTf9gm.

[69] Campbell Robertson & John Schwartz, *How a Gulf Settlement That BP Once Hailed Became Its Target*, THE NEW YORK TIMES (April 26, 2014), http://nyti.ms/2m5KmmT

[70] *Id*.

[71] Brief of the Chamber of Commerce of the United States of America, the National Association of Manufacturers and the United States Hispanic Chamber of Commerce as *amici curiae* in support of

Essentially, the Chamber's brief, like BP's own pleadings, chooses to ignore the plain terms of the agreement that BP had negotiated. The Chamber instead claims that by not requiring proof of causation, the court was not honoring the terms of the agreement and was thereby undermining the predictability of class action settlements.[72]

The U.S. Court of Appeals for the Fifth Circuit ruled against BP, writing "BP seeks to override the explicit language disclaiming the need for evidence of causation"[73] and "[t]here is nothing fundamentally unreasonable about what BP accepted but now wishes it had not."[74] BP petitioned for a writ of *certiorari* to the United States Supreme Court and the Chamber again filed a brief supporting BP.[75]

In its second brief in this case, the Chamber repeats the arguments it made in its first brief, seemingly ignoring the fact that BP agreed not to require affirmative proof of causation in its original settlement and claiming that the court's fidelity to the actual terms of the agreement somehow injects uncertainty into the class action realm.[76] Leaning again on its claimed substantial membership and its reputation as the voice for American business, the Chamber also tries to suggest that many businesses share BP's concerns[77] when in fact BP's situation is unique: it agreed to a stipulation that loss of business income after the oil disaster could be attributed to BP's spill, and as such, it is hard to see how the holding in this case would have any impact on other corporate class action defendants. In fact, upholding the terms of the settlement would not only benefit the small business plaintiffs, but the broader principle, presumably of importance to the Chamber, that contractual agreements should be respected.

As in the AIG litigation, the Chamber also feigns to be looking out for consumers, arguing that somehow the court's refusal to second guess BP's own decision to not require affirmative proof of causation will lead to higher prices for consumers.[78] Putting aside the fact that one of the primary thrusts of Chamber litigation is precisely to limit consumers' ability to seek redress in the courts, the Chamber's argument here quite simply beggars belief. Nothing in the court's decision forces any other corporate class action defendant to do what BP did, namely agree to stipulate that causation

defendants-appellants, *Lake Eugenie Land & Development, Inc. v. BP Exploration & Production, Inc.*, 744 F.3d 370 (5th Cir. 2014), http://bit.ly/2lfzswI

72 *Id*. at 3.

73 *Lake Eugenie Land & Development, Inc. v. BP Exploration & Production, Inc.*, 744 F.3d 370, 375 (5th Cir. 2014)

74 *Id*. at 377

75 Motion for leave to file *amicus curiae* brief and brief for *amici curiae* the Chamber of Commerce of the United States of America, the United States Hispanic Chamber of Commerce, the National Association of Manufacturers, the American Tort Reform Association, and the American Petroleum Institute in support of petitioners, *BP Exploration & Production, Inc. v. Lake Eugenie Land & Development, Inc.*, case no. 14-123 (U.S. S. Ct. 2014), http://bit.ly/2lCZtGF

76 *Id*. at 4-5

77 *Id*. at 11

78 *Id*.

and damages could be demonstrated by a showing of lost income. The Chamber's claims that the court's decision in this case will lead to an avalanche of "me too" claims and spiraling litigation costs[79] passed on to consumers are therefore without any basis in fact.

The Chamber's two briefs in this case lead one to an inevitable conclusion: it would appear that the Chamber is willing to make almost any argument in defense of giant corporations, no matter how specious.

What's more, the Chamber completely ignores the fact that the dispute over causation would affect the claims of thousands of small businesses. Indeed, the first six named plaintiffs in the suit are all small businesses. As we saw in the third section of this report, one of the Chamber's highest litigation priorities is restricting access to the civil justice system. In this case, it becomes apparent just how dangerous the Chamber's crusade against the civil justice system is for small businesses that must often rely on the courts when they have been harmed by a corporate giant like BP. But the Chamber, despite its oft-referenced thousands of small business members, does not hesitate to side with Big Business, even when the big business in question is advancing the flimsiest of legal arguments, as is the case here.

Having argued against suspending BP from government contracting and leasing and having twice argued to limit BP's civil liability for the *Deepwater Horizon* oil spill, the Chamber next turned to trying to limit BP's penalties under the Clean Water Act (CWA). As BP fought the government in court over its liability under the CWA for the oil spill, the Chamber yet again filed a brief supporting BP.[80]

In its fourth brief supporting BP in litigation related to the *Deepwater Horizon* spill, the Chamber makes three arguments in favor of limiting BP's liability. First, it advances its favorite argument that holding corporate wrongdoers accountable will somehow damage the economy[81] rather than deter corporate wrongdoing and incentivize responsible business practices. Second, it seems to suggest that where different corporations control different elements of the extraction apparatus[82] but where all of the elements fail resulting in an oil spill as was the case with the *Deepwater Horizon* spill, there is some legal dispute as to which parties may be held liable under the CWA.[83] Third, the

79 Id.

80 Brief of the Chamber of Commerce of the United States of America, National Association of Manufacturers, Business Roundtable, Texas Oil and Gas Association, and American Petroleum Institute in support of petitioners for writ of certiorari, *Anadarko Petroleum Corp. v. United States*, case nos. 14-1167 and 14-1217 (U.S. S. Ct. 2015), http://bit.ly/2l4W5Bc

81 *Id*. at 3 – 6

82 In this case, Transocean owned the Deepwater Horizon rig while BP and Anadarko owned the Macondo well to which the rig was attached.

83 Brief of the Chamber of Commerce of the United States of America, National Association of Manufacturers, Business Roundtable, Texas Oil and Gas Association, and American Petroleum Institute in support of petitioners for writ of certiorari, *Anadarko Petroleum Corp. v. United States*, pgs. 8 – 13, 17 case nos. 14-1167 and 14-1217 (U.S. S. Ct. 2015), http://bit.ly/2l4W5Bc

Chamber asserts that the CWA provisions relating to fines should be interpreted in the light most favorable to BP so as to minimize its monetary liability.[84]

When you examine together the Chamber's briefs supporting BP– arguing against suspension and for reduced civil liability and small fines – it becomes clear that the Chamber's guiding philosophy comes something close to corporate impunity. If it becomes ever more difficult for both consumers and the government to hold giant corporations accountable via the court system, then these corporations will be ever freer to engage in risky behavior without the threat of being held legally responsible when things go south, such as in the *Deepwater Horizon* disaster or the financial crisis of 2008.

The Chamber v. the EPA or *The Day After Tomorrow*

Of course, the Chamber's litigation in the environment/energy space isn't just limited to its briefs supporting BP. Nor is it limited to amicus briefs supporting major corporations. As mentioned above, the Chamber has made something of a specialty out of suing the EPA, and nowhere is this more true than when it comes to regulating greenhouse gas emissions (GHGs).

In 2007, the U.S. Supreme Court held that the EPA possessed the authority to regulate GHGs as pollutants under the Clean Air Act (CAA).[85] As a result of this holding, the EPA set about developing a regulatory framework for GHGs. In 2010, the Chamber filed suit against the EPA and sought to invalidate this framework, including rules finding that GHGs may be reasonably anticipated to endanger public health and welfare, regulating emissions from cars and light trucks, regulating stationary sources of GHG emissions, and adjusting the threshold of GHG emissions triggering regulation.[86]

While the original pleadings in this case fell outside of the three year period we examined, the Chamber's petition for panel rehearing or for rehearing *en banc*, filed with the D.C. Circuit Court of Appeals in 2012, was included among the approximately 500 filings we examined. In these pleadings, the Chamber disingenuously claims that it is not challenging the U.S. Supreme Court's 2007 holding that GHGs are to be considered as air pollutants under the CAA.[87] However, since the Chamber had intervened in the prior *Massachusetts* decision authorizing the EPA to regulate GHGs arguing against such authority[88] and then vigorously contested the EPA's chosen regulatory

[84] *Id*. at 14 – 18

[85] *Massachusetts v. EPA*, 415 F.3d 50 (U.S. Sup. Ct. 2007)

[86] *Coalition for Responsible Regulation, Inc., et al. v. EPA (coordinated endangerment rule, auto rule, timing rule, triggering rule, and grounds arising after lawsuit)*, U.S. CHAMBER LITIGATION CENTER, http://bit.ly/2mjCIEM (viewed on March 1, 2017)

[87] Chamber of Commerce of the United States of America's combined petition for panel rehearing or for rehearing en banc, *Coalition for Responsible Regulation v. EPA*, pgs. 1 – 2, 684 F.3d 102 (D.C. Cir. 2012), http://bit.ly/2m9HxBe

[88] *Commonwealth of Massachusetts, et al. v. EPA, et al*., U.S. CHAMBER LITIGATION CENTER, http://bit.ly/2lDHWy8 (viewed on March 1, 2017)

framework in this case, it's not hard to read between the lines and see that what the Chamber really objects to is *any* regulation of GHGs. After all, just prior to this litigation, the Chamber's senior vice president for environment, technology, and regulatory affairs called for a "Scopes monkey trial" to put climate science on trial.[89]

The Chamber's petition for rehearing goes on to make an argument that is shocking for its scientific illiteracy. It argues that "[t]he Panel failed to grapple with the principal thrust of the Chamber's statutory argument – that wholly foreseeable adaptation and mitigation responses over long time periods might limit any endangerment, within the meaning of the statute, *before it ever occurs*" (emphasis in the original).[90] This argument completely ignores the scientific consensus that the window of opportunity in which to act in order to stave off the serious, irreversible consequences that would occur with a global temperature increase of greater than 2 degrees Celsius is closing rapidly. Indeed, the international panel of scientists charged by the United Nations with studying climate change assert that the window of opportunity is "becoming ever more elusive" and that strong action to reduce GHG emissions is urgent.[91] The Chamber's "hear no evil, see no evil" argument that no action is required and that everything will just work itself out naturally has no basis in scientific fact.

Unfortunately, the Chamber's legal crusade to block the regulation of GHGs didn't end with its 2010 suit against the EPA. In 2015, the Chamber again sued the EPA, this time to block the implementation of the Clean Power Plan (CPP). The CPP would reduce GHG emissions from power plants by placing emissions limits on coal and natural gas-fired plants thereby incentivizing the development of renewable energy sources.[92]

In the opening brief it filed with the other petitioners, the Chamber claims that the CPP "subordinates the energy diversity, consumer protection, reliability, and other policies in current state dispatch law to the single overarching goal of shifting the generation of electricity to zero- or low-emitting resources" and also alleges that it "*constrains* industry's ability to keep consumer prices low" (emphasis in the original)[93]

The Chamber's arguments are, quite simply, fallacious. The Chamber's own petition later acknowledges that the effect of the CPP will actually be to increase energy diversity, writing that

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[89] Jim Tankersley, *U.S. Chamber of Commerce seeks trial on global warming*, LOS ANGELES TIMES (Aug. 25, 2009), http://lat.ms/1wpPUfd

[90] Chamber of Commerce of the United States of America's combined petition for panel rehearing or for rehearing en banc, *Coalition for Responsible Regulation v. EPA*, pg. 14, 684 F.3d 102 (D.C. Cir. 2012), http://bit.ly/2m9HxBe

[91] David Jolly, *United Nations Group Warns on Emissions*, THE NEW YORK TIMES (Nov. 5, 2013), http://nyti.ms/2kZUPi5

[92] *Fact Sheet: Overview of the Clean Power Plan*, ENVIRONMENTAL PROTECTION AGENCY, http://bit.ly/2eGKusk (viewed on March 1, 2017)

[93] Opening brief of petitioners on core legal issues, *West Virginia v. EPA*, pg. 21, case no. 15-1363 (D.C. Cir. 2015), http://bit.ly/21p80cB

EPA estimates show that coal-fired generating capacity will be cut in half, falling to 183,000 MW in 2030 while renewable generating capacity will increase to 174,000 MW in 2030.[94] In other words, the CPP will not eliminate coal from the US energy mix but will instead reduce its dominance in favor of renewable energy sources, thereby – wait for it – diversifying the nation's energy mix! And energy diversity is precisely what the Chamber claims to champion.

The Chamber's claims about the CPP's negative impact on consumers also fall flat. By reducing GHG emissions, the CPP is an important part of any global strategy to limit global warming. The more the planet warms, the greater the risk of rising sea levels, severe storms, droughts, heatwaves and all the other potentially catastrophic impacts of climate change, all of which will negatively impact consumers. Property lost to rising seas and more frequent storms, increased food prices as a result of more frequent droughts, the spread of formerly tropical diseases as a result of hotter temperatures are just a few of the ways that consumers may suffer because of GHG emissions and the warming they cause.

Even if one takes the Chamber's feigned concern for consumers to refer only to the price that consumers will pay for energy, its argument falls apart. Recent data shows that wind and solar power are now often cheaper than conventional alternatives.[95] Likewise, the Chamber's concerns about reliability are also without merit. Numerous studies have shown that it is possible to scale up renewable energy in the U.S. without sacrificing reliability.[96]

A review of the Chamber's pleadings in GHG emissions regulations-related litigation leads one to the inescapable conclusion that the Chamber's opposition to such regulations is not motivated by any altruistic impulse to defend consumers or high-minded commitment to states' rights in a federal system of government. In fact, given the existential threat climate change poses to property and casualty insurers, food and beverage companies, and the travel and leisure sector to name just three industries grappling with the numerous disruptions caused by a warming planet, the Chamber's opposition to regulating GHGs isn't even motivated by what's good for business. What does motivate the Chamber in its opposition to GHG regulations is its fierce commitment to the fossil fuel industry. When an allegedly broad-based organization that styles itself as the voice for American business writ large stridently defends such narrow, parochial interests, it calls into question the very legitimacy of the organization to speak for its broader membership.

[94] *Id*. at 22

[95] Tom Randall, *World Energy Hits a Turning Point: Solar That's Cheaper Than Wind*, BLOOMBERG (Dec. 15, 2016), http://bloom.bg/2h3nZf3. For a more detailed analysis of the relative true costs of different energy sources, *see*, Lazard's Levelized Cost of Energy Analysis – Version 10.0, LAZARD, http://bit.ly/2gV6fBw (viewed on February 22, 2017).

[96] *FACT: Renewable Energy is Reliable*, UNION OF CONCERNED SCIENTISTS, http://bit.ly/2lwcHmw (viewed on March 1, 2017)

Colorado's Renewable Energy Standard or *Gone with the Wind*

Colorado, like many states, has adopted a requirement that electricity providers obtain at least a certain percentage of their power from renewable sources such as wind and solar. The minimum requirement in Colorado is 20 percent.[97] When industry challenged this requirement in court, the Chamber filed an amicus brief in support of industry's position.[98]

A 20 percent renewables requirement means of course that the vast majority of electricity sold in Colorado – 80 percent – may come from conventional sources. But apparently even 20 percent renewable power is too much for the Chamber. Despite its paeans to "energy diversity" in the CPP litigation discussed above and despite its frequent public pronouncements about the need for an "all of the above" energy strategy,[99] *it turns out that for the Chamber, "all of the above" means fossil fuels. Even 20 percent for renewables is intolerable*. This case proves that the Chamber's nods to "energy diversity" and an "all of the above" energy strategy are merely messaging feints designed to camouflage its resolutely pro-fossil fuels agenda.

This case also provides an excellent example of the opportunistic hypocrisy that pervades the Chamber's legal filings. In the CPP litigation, the Chamber argued that the EPA's regulatory scheme impinged upon the states' regulatory authority and sang the praises of a state by state approach to regulation.[100] However in this case, the Chamber argues that Colorado's renewable energy standard combined with the renewable energy standards in existence in 28 other states have resulted in "a patchwork of inconsistent, often conflicting mandates."[101] Clearly, the Chamber's legal arguments are not motivated by any coherent legal or ideological philosophy but are instead hashed out on an *ad hoc* basis. If state regulations would be better for the fossil fuel industry, then the Chamber wraps itself in the mantle of federalism and states' rights. If, on the other hand, state regulations might penalize the fossil fuel industry, then the Chamber suits up as a champion of uniform federal standards.

California's Low Carbon Fuel Standard or *The Formula*

Colorado's renewable energy standard isn't the only state initiative aimed at reducing fossil fuel consumption that the Chamber attacked in court. In 2009, California created a low carbon fuel

[97] For more details about the Colorado renewable energy standard, *see*, *Renewable Energy Standard*, COLORADO ENERGY OFFICE, http://bit.ly/2l9Skux (viewed on March 1, 2017).

[98] Motion for leave to file brief as *amici curiae* and brief of the Chamber of Commerce of the United States of America and the American Fuel & Petroleum Manufacturers as *amici curiae* in support of petitioners, *Energy and Environmental Legal Institute v. Epel*, case no. 15-471 (U.S. Sup. Ct. 2015), http://bit.ly/2l9XyGH

[99] *See*, *e.g.*, *Why We're Big on Developing More American Energy*, U.S. CHAMBER OF COMMERCE, http://uscham.com/1WBAJeh (viewed on March 1, 2017).

[100] Opening brief of petitioners on core legal issues, *West Virginia v. EPA*, pgs. 74-5, case no. 15-1363 (D.C. Cir. 2015), http://bit.ly/21p80cB

[101] Motion for leave to file brief as *amici curiae* and brief of the Chamber of Commerce of the United States of America and the American Fuel & Petroleum Manufacturers as *amici curiae* in support of petitioners, *Energy and Environmental Legal Institute v. Epel*, pg. 14, case no. 15-471 (U.S. Sup. Ct. 2015), http://bit.ly/2l9XyGH

standard (LCFS) in order to reduce the carbon intensity of fuels sold in the state.[102] The oil and transportation industries sued to block the implementation of the LCFS and the Chamber filed an amicus brief supporting the industry position.[103]

As in the Colorado renewable energy standard case, the Chamber again argues against state regulatory authority, alleging that state LCFS regulations "fragmented" the market for transportation fuels.[104]

The Chamber's brief also takes issue with the fact that California's LCFS created a market for low carbon intensity fuel credits. Producers of low carbon intensity fuels would be eligible for credits under California's LCFS that they could then sell to producers of high carbon intensity fuels. These high carbon intensity fuel producers, assuming they purchased sufficient credits to offset the high carbon intensity of their fuels, would then be able to continue selling their high carbon intensity fuels.[105] So structured, California's LCFS provides economic incentives to reduce carbon intensity rather than simply prohibit the sale of high carbon intensity fuels. As such, it is a flexible, market-based solution rather than a rigid regulation of the kind the Chamber claims to hate.

And yet the Chamber of Commerce of the United States of America, that avatar of market solutions, takes issue with California's market-based approach, complaining about the supply, price, and alleged price volatility of credits.[106] Of course, issues of supply, price, and volatility are common to almost any market for any good or service. The supply of beachfront vacation homes is surely less abundant than many of us would prefer and the market for stocks is surely more volatile than many of us would like, but you don't see the Chamber of Commerce questioning the validity of these markets.

Middlefield, New York's Fracking Ban or *Promised Land*

The Chamber hasn't only fought state environmental initiatives in court. It has also gone after local ordinances. In 2011, the town of Middlefield, N.Y. passed a zoning ordinance that forbade fracking within town limits.[107] Industry challenged this ordinance in court, and once again, the Chamber filed an amicus brief in support of the industry position.

[102] For more information on California's LCFS, *see*, *Low Carbon Fuel Standard*, CALIFORNIA AIR RESOURCES BOARD, http://bit.ly/2mp5Men (viewed on February 23, 2017).
[103] Brief for the Chamber of Commerce of the United States of America and the American Petroleum Institute as *amici curiae* in support of petitioners, *American Fuel & Petrochemical Manufacturers Association v. Corey*, case nos. 13-1148 & 23-1149 (S. Ct. 2013)
[104] *Id*. at 19-20
[105] *LCFS Basics*, CALIFORNIA AIR RESOURCES BOARD, http://bit.ly/2mgN74Y (viewed on March 1, 2017)
[106] Brief of the American Petroleum Institute and the Chamber of Commerce of the United States of America as *amici curiae* in support of appellants, *American Fuel & Petrochemical Manufacturers Association v. Corey*, pgs. 17-18, case nos. 13-1148 & 23-1149 (S. Ct. 2013), http://bit.ly/2lKpaFs
[107] Kate Taylor & Thomas Kaplan, *New York Towns Can Prohibit Fracking, State's Top Court Rules*, THE NEW YORK TIMES (June 30, 2014), http://nyti.ms/2lvFA3Y

The Chamber begins its brief by making an argument that is stunning for its hypocrisy. Having extensively litigated and lobbied against laws and regulations that seek to limit GHG emissions, the Chamber now touts the fact that the natural gas produced by fracking "is the cleanest of fossil fuels, emitting substantially lower amounts of greenhouse gases and air pollutants than other fuels."[108] Apparently for the Chamber, GHG emissions don't matter until they do, and then only when the purportedly "clean" energy is a fossil fuel.

The Chamber's other main policy argument against Middlefield's fracking ban is economic. Writing in April 2014, the Chamber claims that the oil & gas industry "will add another 1.3 million jobs by 2030, a significant number of which are projected for minorities and women. Indeed, just in New York, it has been estimated that developing the Marcellus Shale could generate $1.2 billion in economic activity *every year*"[109] (emphasis in original). Putting aside the dubious industry studies predicting millions of jobs and billions in economic activity as well as the Chamber's feigned concern for women and minorities,[110] events subsequent to the writing of the Chamber's brief have demonstrated that the Chamber's economic arguments in favor of fracking haven't been borne out by the facts. Neighboring Pennsylvania, which shares the gas-rich Marcellus Shale with New York, has seen the fracking industry shed thousands of jobs since 2014 as the price of natural gas plummeted.[111] In fact, some drilling companies in Pennsylvania have diversified into renewable energy since the fracking boom went bust![112]

Keystone XL or *O Pioneers!*

In 2014, the Chamber attempted to involve itself in litigation surrounding the proposed Keystone XL pipeline. Several Nebraskans had sued the governor to prevent him from bypassing the state Public Service Commission with respect to pipeline routing decisions. In fact, the three named plaintiffs were all small businesspeople – two ranchers[113] and a farmer[114] – whose property lay in one of the proposed pipeline paths.

Notwithstanding the opposition of local small businesspeople, the Chamber sought to file an amicus brief in support of the governor's ability to make unilateral routing decisions with respect to

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108 Brief for the Chamber of Commerce of the United States of America and the American Petroleum Institute as *amici curiae* in support of petitioners, *Cooperstown Holstein Corporation v. Town of Middlefield*, pgs. 1 – 2, case nos. APL 2013-00242 & APL 2012-00245 (N.Y. Ct. App. 2014), http://bit.ly/2lAdMcV

109 *Id*. at 35-6

110 In the first report in this series, we show that employment and labor relations constituted the second most-litigated legal issue by the Chamber. Many of the cases involved the Chamber supporting corporate defendants in lawsuits filed by employees alleging racial and/or gender discrimination on the job or in hiring.

111 Marie Cusick, *Drilling downturn hits Marcellus Shale industry hard*, NPR (Feb. 17, 2016), http://n.pr/1WrLNah

112 *Id*.

113 Guy Raz, *Ranchers' Land Becomes Ground Zero in Energy Fight*, NPR (Feb. 25, 2012), http://n.pr/2lKyhGc

114 Melissa Block, On Nebraska Farmland, Keystone XL Pipeline Debate is Personal, NPR (Dec. 16, 2014), http://n.pr/1AdEutV

Keystone XL.[115] This was also the position taken by Keystone XL's foreign backer, Alberta tar sands energy giant TransCanada, which was eager to hasten and streamline the decision making process.

The Nebraska Supreme Court denied the Chamber's motion for leave to file an amicus brief in the case,[116] and the Chamber hasn't published it, so we can't know exactly what arguments the Chamber would have advanced had it been allowed to file one. But what we do know is that the *United States* Chamber of Commerce chose to support the position of a *Canadian* corporation over the interests of American small business owners. Once again, we see that the Chamber is guided by an unwavering fealty to the fossil fuel industry – domestic and foreign – at the expense of not only consumers and the environment, but also any businesses whose interests run counter to those of the fossil fuel industry.

The Chesapeake Bay Cleanup or *The Bay*

The Chamber's environmental litigation is not limited to the energy sector. It has challenged a vast array of environmental laws and regulations, including many having to do with clean water. One good example of this is its litigation opposing the EPA's plans to clean up the Chesapeake Bay.

The Chesapeake Bay is the nation's largest estuary. While it once supported a tremendous abundance of fish and shellfish, increasing industrial, commercial, residential, and agricultural development resulted in more and more polluted and nutrient-laden runoff, producing a severely degraded ecosystem with poor water quality.[117] Because the Bay's watershed is spread out over parts of six states and the District of Columbia and the states had not made significant individual progress in improving the Bay's water quality, the EPA developed and promulgated a plan to limit the amount of nitrogen, phosphorus, and sediment that could be released into the Bay's watershed.[118]

The Chamber, never missing an opportunity to engage in the sort of legal shape-shifting at which it is so adept, switched back to its federalism hobby horse in this case, writing "[b]usinesses…are best able to succeed when they can follow well-worn paths of state and local decisionmaking."[119] Forgotten are the Chamber's pro-centralized regulation arguments against Colorado's renewable energy standard, California's low carbon fuel standard, and Middletown's fracking ban.

115 *Thompson, et al. v. Heineman*, U.S. CHAMBER LITIGATION CENTER, http://bit.ly/2mcuTot (viewed on March 1, 2017)

116 *Id.*

117 *Pollution down, but Chesapeake Bay no healthier – yet*, THE BALTIMORE SUN (Jan, 23, 2015), http://bsun.md/2mqfZqV

118 *Chesapeake Bay TMDL Executive Summary*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, http://bit.ly/2mN02uP (viewed on March 1, 2017)

119 Brief of the Chamber of Commerce of the United States of America, National Association of Manufacturers, and National Federation of Independent Business Small Business Legal Center as *amici curiae* in support of petitioners, *American Farm Bureau Federation v. EPA*, pg. 4, case no. 15-599 (S. Ct. 2016), http://bit.ly/2kRW1sE

Besides attacking the EPA's regulatory regime as federal overreach, the Chamber also again makes its go-to argument, namely that the challenged regulation will be bad for economic growth.[120] Of course nowhere does the Chamber mention all of the industries that are hurt by the degraded Chesapeake Bay ecosystem. No mention of the seafood industry, decimated by the collapse of the Bay's oyster population, or the tourism and hospitality industries or any other industries that depend on clean water in the Chesapeake Bay and within its watershed.

The Chamber's arguments are simultaneously myopic and alarmist. It only focuses on those businesses that might encounter added compliance costs because of regulations and never acknowledges the legions of businesses that would benefit from clean water and a healthy environment. Nor does it ever recognize the tremendous adaptability and ingenuity of American entrepreneurs to innovate in order to find cost effective ways of complying with regulations. This is rather odd given that the Chamber is quick to tout the innovative capacities of American entrepreneurs in other contexts.[121]

VI. Opposing Labor: Workers of the World, Disperse!

If there's one thing the Chamber hates as much as laws and regulations limiting GHG emissions, it's laws and regulations aimed at helping improve workers' rights, compensation, and working conditions. In fact, issues relating to employment and labor relations were the second most frequently litigated topics by the Chamber.

The Chamber takes a zero sum approach to labor issues: what's good for workers is bad for management. This Manichean vision of labor relations ignores management science's belatedly realization that businesses are often most productive when their workers are well paid and well treated. Even some of the Chamber's member companies – and not necessarily those historically known for treating their workers well – are beginning to understand that paying their workers more and treating them better makes business sense in that it increases productivity and, ultimately, revenues.[122]

Seattle's $15 Minimum Wage or *Nine to Five*

Unfortunately, despite some Chamber member companies shifting their stances on labor issues in a positive direction, the Chamber remains resolutely opposed to raising wages for workers. One clear-cut example of this is its litigation against Seattle's $15 minimum wage.

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120 *Id*. at 9

121 *See*, *e.g*., *Dear 45: Help America's Innovators Drive Our Country and Our Economy Forward*, U.S. CHAMBER OF COMMERCE, http://uscham.com/2mfzmXu (viewed on March 1, 2017).

122 For a more complete discussion of this subject, *see*, *Neil Irwin, How Did Walmart Get Cleaner Stores and Higher Sales? It Paid Its People More*, THE NEW YORK TIMES (Oct. 15, 2016), http://nyti.ms/2l8qI82.

In 2014, Seattle passed a law raising the city's minimum wage to $15/hour by 2017 for employees of large companies and franchisees and by 2021 for employees of small companies.[123] Industry challenged the law in court and the Chamber filed two amicus briefs supporting industry's contention that the law should be struck down.

In its first brief, the Chamber argues that the minimum wage law would "inflict economic harms on the people of Seattle" in that it would "(1) cause unemployment to rise, as franchisees lack the capital, demand, and revenue to pay every worker $15.00 per hour; (2) harm the very people the Ordinance is ostensibly designed to help – low-skilled and inexperienced workers – as the jobs worth $15.00 per hour shift to those with more skill and experience; and (3) cause many of those employees fortunate enough to keep their jobs to lose their benefits and work fewer hours as businesses take other measures to offset increased labor costs."[124] The Chamber also writes that "[a]llowing the Ordinance to take effect does nothing to advance [workers'] economic welfare and likely will undermine it by, among other things, possibly costing them their jobs. As is often the case, the interests of franchisees and their employees are aligned."[125]

Let's just pause for a moment and try and unpack all of that. First of all, how many low-wage workers working at fast food restaurants or other franchise businesses are earning benefits as the Chamber's brief suggests they are? In fact, a staggering 87% of fast food workers don't earn health benefits.[126] So the Chamber is claiming that raising the minimum wage will cause workers to lose benefits they don't even have.

Second, the Chamber claims that franchisees don't have the capital or revenue to pay workers $15.00 an hour. Yet the average McDonald's restaurant takes in $2.7 million a year and books its owner $154,000 in profit. What's more, a McDonald's franchisee owns an average of 6 restaurants, meaning that s/he nets almost $1 million in profit a year.[127] And labor costs only represent a little more than 20% of an average franchisee's expenses.[128] Given these numbers, it's quite clear that franchisees do have the capital and revenue to afford paying their workers more.

Third, the Chamber claims that minimum wage workers will lose their jobs as a result of raising their wages. The Chamber filed its brief in April 2015, and in the interim, the Seattle law has gone into effect, with the minimum wage rising from just under $9.50 to $11 an hour in April 2015 and

[123] *$15 Minimum Wage*, OFFICE OF THE MAYOR, http://bit.ly/2limaND (viewed on March 1, 2017)

[124] Brief of the Chamber of Commerce of the United States, American Hotel & Lodging Association, Asian American Hotels Owners Association, Home Care Association of America, National Restaurant Association, and Washington Retail Association as *amici curiae* in support of plaintiffs-appellants, *International Franchise Association, Inc. v. Seattle*, pgs. 7-8, 803 F.3d 389 (9th Cir. 2015), http://bit.ly/2mtGuM4

[125] *Id.* at 18-19

[126] Michelle Chen, *Five myths about fast-food work*, THE WASHINGTON POST (April 10, 2015), http://wapo.st/2lO9TU6

[127] Bryan Gruley and Leslie Patton, *McRevolt: The Frustrating Life of the McDonald's Franchisee*, BLOOMBERG (Sept. 16, 2015), http://bloom.bg/2lSAEai

[128] *Id.*

then to $15 an hour in January 2017.[129] We can therefore look at what's actually happened in Seattle and see if the Chamber's apocalyptic prediction that workers would lose their jobs came true. A study looking at the effects of the first increase to $11 an hour showed that it succeeded in raising wages for low-wage workers by an average of 7% and only likely resulted in job losses of 1%.[130] These results are in line with research into the employment effects of past minimum wage increases in the U.S. which show that they have had very modest or no effects on employment for low-wage workers while increasing their incomes.[131]

The Chamber's assertion that the interests of franchisees and their employees are aligned with respect to opposing an increase in the minimum wage is therefore demonstrably incorrect. Raising the minimum wage is good for low-wage workers. It increases their incomes without significantly reducing employment. It may even be good for employers as well. As noted in the beginning of this section, some employers have recently discovered that paying their employees more has raised productivity and increased revenues. As such, the Chamber may actually be right about the interests of franchisees and their employees being aligned – it's just that such an increase would actually benefit both parties rather than harm them as the Chamber claims.

The Chamber Rides to the Rescue of Uber or *Taxi Driver*

Not content with having tried to undo Seattle's law increasing the minimum wage, the Chamber again targeted the city, this time suing to overturn an ordinance that would allow the drivers of for-hire vehicle platforms such as Uber to unionize.

The Chamber's suit advances several arguments against the Seattle ordinance. First it claims that the ordinance would deny "individuals the freedom to negotiate the arrangement that best suits his or her individual circumstances"[132] and "would fix wages and prices."[133] However, the Chamber later goes on to admit that in order to work for a ride-hailing company like Uber, "drivers pay a technology licensing fee to the company […] which is a percentage of the fare that the rider pays. [The company] collect[s] the fee and any other related fees from the riders on behalf of drivers, subtract[s] [its] technology licensing fee, and remit[s] the remainder to the drivers."[134]

In other words, there is no "freedom to negotiate" with the company and it is the company that "fixes wages and prices." To the extent that the Chamber is actually concerned with freedom or price-fixing, its only concern is that ride-hailing companies like Uber continue to have the freedom

[129] Jared Bernstein, *So far, the Seattle minimum-wage increase is doing what it's supposed to do*, THE WASHINGTON POST (Aug. 10, 2016), http://wapo.st/2liN0Vu
[130] *Id*.
[131] Ben Spielberg and Jared Bernstein, *The truth about the minimum wage*, MSNBC (Nov. 17, 2015), http://on.msnbc.com/1MUfkmF
[132] Complaint of the Chamber of Commerce of the United States of America, *Chamber of Commerce of the United States of America v. Seattle*, case no. 2:16-cv-00322, pg. 2 (WD Wash. 2016), http://bit.ly/2lDmokO
[133] *Id*. at 3
[134] *Id*. at 8

to determine prices and that they not have to actually negotiate with workers over wages and benefits.

The Chamber's concern about the impact of unionization on ride-hailing companies' bottom lines is made all the more clear when it writes "unions […] will seek to reduce the prices paid to app-based companies for the use of their ride referral applications. […T]hose companies will incur additional costs of doing business […] such as reimbursement of driver's expenses or payment of other benefits."[135] In other words, the Chamber's lawsuit has nothing to do with preserving competition and everything to do with protecting giant ride-hailing companies' bottom lines.

The Chamber also claims that unionization "would threaten one of the most vibrant cutting edge sectors of the economy."[136] But this begs the question: vibrant for whom? While Uber may be worth tens of billions of dollars[137], and its CEO may be worth over $6 billion,[138] what are average Uber drivers earning? According to data for Uber drivers in three major U.S. cities, they are earning somewhere between $9 and $13 dollars an hour.[139] They don't receive benefits nor does Uber pay Medicare and Social Security payroll taxes for them precisely because it's cheaper for Uber to maintain the fiction that they are independent contractors. Unionizing would of course allow for these drivers to negotiate not only for better wages but for benefits which would provide them with a measure of both immediate and long term economic security.

The Chamber's insistence on describing ride-hailing platforms as a "vibrant" and "cutting edge" sector of the economy provides a tremendous insight into the kind of economy the Chamber envisions for the future – one in which all of the gains accrue to a tiny number of managers and investors and where the vast majority of workers earn little, have no benefits, and are prevented from organizing in order to gain bargaining leverage.

VII. Corporate Free Speech: "Corporations are people, my friend"

While slightly over half of the cases the Chamber litigated dealt with one of the three legal issue areas we've discussed above – restricting access to the courts, environmental laws and regulations, and employment & labor relations – there are several other highly specific legal issues to which the Chamber devoted significant legal resources. One of these is the extent to which corporations have free speech rights under the First Amendment. The Chamber's position on this issue is none too

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135 *Id*. at 17

136 *Id*. at 4

137 Andrew Ross Sorkin, *Why Uber Keeps Raising Billions*, THE NEW YORK TIMES (June 20, 2016), http://nyti.ms/2lj70ay

138 *#64 Travis Kalanick*, FORBES, http://bit.ly/2mgqqBd (viewed on March 1, 2017)

139 Jacob Bogage, *How much Uber drivers actually make per hour*, THE WASHINGTON POST (June 27, 2016), http://wapo.st/2mmktzn

different from Mitt Romney's infamous declaration at the Iowa State Fair: "[c]orporations are people, my friend."[140]

Vermont's GMO Labeling Law or *Foodfight!*

In 2014, Vermont passed a law requiring the labeling of genetically modified foods or GMOs.[141] Industry sued to block the law and the Chamber filed an amicus brief alleging that the Vermont law violated the free speech rights of food and beverage manufacturers. The Chamber brief alleges that the Vermont law would compel "the dissemination of messages aligned with fringe groups" and would hurt businesses that "only want to use their labels […] to convey truthful, non-misleading information."[142]

First of all, when roughly nine out of ten Americans support mandatory GMO labeling,[143] it's hard to fathom how the Chamber can dismiss such overwhelming support as being "aligned with fringe groups." What's more, contrary to the Chamber's suggestions, nothing in the Vermont law would require food and beverage manufacturers to convey untruthful or misleading information; all manufacturers would have to do would be to indicate on their products' labels whether they contained GMOs.

The Chamber also claims that "Vermont's [GMO] disclosure requirement compels manufacturers to promote one side of a public policy debate."[144] This contention is plainly not true, as all the Vermont law does is require manufacturers to disclose if their products contain GMOs. Manufacturers are already required by the Food and Drug Administration (FDA) to publish their products' nutritional information and ingredients[145] and it's hard to see how the Vermont requirement to disclose GMO content is any different. After all, there are differing views as to whether carbohydrates, fats, trans fats, sugars, and all sorts of various ingredients are healthy and/or safe and in what amounts. Requiring their publication does not force manufacturers to promote any particular side of a public policy debate. Rather, it provides consumers with full information that allows them to make informed decisions.

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140 Philip Rucker, *Mitt Romney says 'corporations are people'*," THE WASHINGTON POST (August 11, 2011), http://wapo.st/2l4m8wx

141 Dana Ford and Lorenzo Ferrigno, *Vermont governor signs GMO food labeling into law*, CNN (May 8, 2014), http://cnn.it/1m6zxvU

142 Brief for *amicus curiae* Chamber of Commerce of the United States of America in support of plaintiffs-appellants, *Grocery Manufacturers Association v. Sorrell*, pg. 3, case 15-1504 (2nd Cir. 2015), http://bit.ly/2mmW9Az

143 Lydia Wheeler, *Poll: Most Americans support mandatory GMO labeling*, THE HILL (Dec. 2, 2015), http://bit.ly/2l5sn3h

144 Brief for *amicus curiae* Chamber of Commerce of the United States of America in support of plaintiffs-appellants, *Grocery Manufacturers Association v. Sorrell*, pg. 10, case 15-1504 (2nd Cir. 2015), http://bit.ly/2mmW9Az

145 For more information on labeling requirements, *see*, *Labeling and Nutrition Guidance Documents & Regulatory Information*, U.S. FOOD AND DRUG ADMINISTRATION, http://bit.ly/2l5Daum (viewed on March 1, 2017).

Perfect information, where all producers and consumers have all information about price, quantity, and quality of goods and services, is a key assumption of free market efficiency. In the absence of perfect information, government intervention to promote greater information sharing can improve market efficiency.[146] The Chamber's position in this case would therefore seem to contradict basic economic principles. But as we saw in the California LCFS litigation, the Chamber isn't one to allow its supposed dedication to market principles to stand in the way of opposing a market-friendly law or regulation.

The Chamber's opposition to Vermont's GMO labeling law makes clear that it takes an extremely expansive view of corporate free speech, and believes that the situations in which the government can require corporations to disclose information should be extremely, extremely limited. Taken to its logical conclusion, the Chamber's argument would call into question a host of information disclosure requirements, such as the afore-mentioned nutrition and ingredient labeling requirements but also various requirements that companies are required to make to investors. It is an exceptionally dangerous argument, that if accepted, would lay the groundwork for a golden age of corporate secrecy that would be incredibly harmful to consumers and investors.

The Extractive Industries Transparency Rule or *Syriana*

One such information disclosure requirement designed at least in part to help investors that the Chamber challenged in court was a provision of the Dodd-Frank Act that required oil, gas, and mining companies to publicly disclose all payments they make to the U.S. and foreign governments. This bipartisan provision was included in Dodd-Frank as a way to help combat the resource curse. The resource curse refers to the failure of governments in many countries rich in natural resources to use the monies obtained from the extraction of these resources to benefit the public welfare and instead for political leaders to steal much of it for their own personal use.[147] If U.S.-traded companies were forced to report such payments, the citizens of these impoverished but resource-rich countries would have an opportunity to know how much their governments were receiving in exchange for the extraction of their natural resources, thus providing them with leverage to demand an accounting for how these ostensibly public monies were being spent. Investors could also use such information to help measure the political risk to which resource extraction companies were exposing themselves in often politically unstable countries.

The Chamber, along with several other industry groups, sued to block this rule, also known as Section 1504 of Dodd-Frank. In its complaint, the Chamber alleges that Section 1504's public disclosure requirement violates oil, gas, and mining companies' free speech rights.[148] While the

[146] For a more detailed discussion of the importance of information to market efficiency, *see*, Joseph Stiglitz, *Information*, LIBRARY OF ECONOMICS AND LIBERTY, http://bit.ly/2m3V2Fp (viewed on March 1, 2017).
[147] For a more detailed discussion of the resource curse, *see*, *The Resource Curse*, NATURAL RESOURCE GOVERNANCE INSTITUTE, http://bit.ly/2jcRX15 (viewed on March 1, 2017).
[148] Complaint of the American Petroleum Institute, the Chamber of Commerce of the United States of America, the Independent Petroleum Association of America, and the National Foreign Trade Council,

Chamber claims that Section 1504 would require the disclosure of "sensitive, confidential information,"[149] companies are already required to disclose much information in their filings with the SEC that might be considered sensitive. And the Chamber's argument that the information is confidential is by definition circular: information is only confidential because its disclosure hasn't previously been required.

In the Section 1504 litigation, the Chamber doesn't limit itself to arguing that the rule should be struck down because it violates corporate free speech. It also claims that in writing the rule, the SEC "failed to properly consider the costs and benefits associated with the Rule" and notes approvingly that the SEC admitted that the social benefits of the rule "'cannot be readily quantified with any precision.'"[150]

The Chamber's argument here exposes the fatal flaw that makes cost-benefit analysis a poor metric by which to evaluate many rulemakings. Costs are most often born by industry and are most often monetary in nature and are therefore theoretically relatively straightforward to quantify. Of course, while industry is best-placed to estimate costs of compliance, it also has an incentive to exaggerate such costs in the hopes that an inflated cost estimate will cause the rulemaking agency to conclude that the costs of the proposed rule outweigh the benefits and therefore decide against issuing the rule. Inflated cost estimates also give industry another opportunity to attack a rule in court by claiming that the rulemaking agency didn't properly account for the allegedly significant costs of the challenged regulation.

Calculating the benefits of a rule, on the other hand, is often much less straightforward, as the benefits of many regulations are difficult to quantify monetarily. How do regulators put a monetary value on lives saved due to cleaner air, cleaner water, safer food, or more effective medicines? In the case of Section 1504, how can the SEC quantify the gain to investors of greater political risk factor disclosure or to the citizens of developing countries of reduced corruption and increased spending on schools, hospitals, and infrastructure? Any such calculations would be inherently subjective, as there is no agreed upon way to assign a monetary value to improved living conditions.

Despite the serious methodological flaws undermining cost-benefit analysis, the Chamber is a major champion of it, often using it as a go-to argument in its litigation to block important public protections.

The Conflict Minerals Transparency Rule or *Blood Diamond*

Section 1502 of Dodd-Frank is a separate section of the law that also relates to transparency in the extractives sector. It requires U.S.-traded companies to disclose if the products they manufacture or contract to manufacture contain tantalum, tin, gold, or tungsten from the Democratic Republic of

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American Petroleum Institute v. U.S. Securities and Exchange Commission, pgs. 28-9, 953 F. Supp. 2d 5 (D.D.C. 2013), http://bit.ly/2lNiE01

[149] *Id.*

[150] *Id.* at 4-5

the Congo (DRC) or neighboring countries.[151] The extraction of these minerals has been used to finance the ongoing bloodshed in the DRC, which is estimated to have cost over 5 million people their lives and included a horrific rape epidemic.[152]

Section 1502 was designed to help reduce the market for these conflict minerals and thereby the huge sums of money fueling the violence in the Congo. The Chamber joined with other industry groups and sued to block it. As in the 1504 litigation, the Chamber advances two main arguments: that 1502 violated companies' free speech rights and that the rulemaking agency had incorrectly applied cost-benefit analysis to the rule.[153]

In its free speech argument, the Chamber rather shockingly contends that the rule fails to "materially advance" the U.S. government's interest in promoting peace and security in the DRC.[154] This is an astounding argument coming from the Chamber, as the Chamber never misses an opportunity to tout the power of markets. The Chamber admits that Section 1502 will reduce the demand for these four minerals mined in the DRC. Yet if Section 1502 will reduce the demand for these minerals, then by definition, market forces will compel their price to drop, thereby reducing the flow of money to the rebel groups driving the conflict in the DRC.

The Chamber, however, does more than merely admit that Section 1502 will reduce demand for conflict minerals mined in the DRC; it suggests that Section 1502 is tantamount to an embargo.[155] And incredibly, it goes on to suggest that such an embargo may actually harm the DRC.[156] Such arguments recall the arguments that corporations used during the 1980s to oppose divestiture and an embargo against the apartheid regime in South Africa. Indeed, the Chamber's South African affiliate opposed calls for an embargo and for divestiture and instead supported a campaign for U.S. companies operating in South Africa to engage in vaguely-defined "social justice activities."[157]

With respect to cost-benefit analysis, the Chamber makes two contradictory claims. First, the Chamber claims that identifying the country of origin for the four minerals in question is exceedingly difficult and will result in exorbitant compliance costs for affected companies.[158] Several pages later, in attempting to justify its argument that Section 1502 will actually be bad for the Congolese, the Chamber favorably cites a comment by Verizon stating that almost all certified

[151] *Fact Sheet: Disclosing the Use of Conflict Minerals*, U.S. SECURITIES AND EXCHANGE COMMISSION, http://bit.ly/2mncCVA (viewed on March 1, 2017)

[152] Jeffrey Gettleman, *The World's Worst War*, THE NEW YORK TIMES (Dec. 15, 2012), http://nyti.ms/1vkRBZV

[153] Opening brief of petitioners, *National Association of Manufacturers v. U.S. Securities and Exchange Commission*, pgs. 1-2, 748 F.3d 359 (D.C. Cir. 2014), http://bit.ly/2lPFL8U

[154] *Id*. at 54

[155] *Id*.

[156] *Id*.

[157] Mary Fallon, *U.S. Business Urges Civil Disobedience Against South Africa*, ALBANY TIMES-UNION (July 6, 1986), http://bit.ly/2lhW4cL

[158] Opening brief of petitioners, *National Association of Manufacturers v. U.S. Securities and Exchange Commission*, pg. 9, 748 F.3d 359 (D.C. Cir. 2014), http://bit.ly/2lPFL8U

smelters have avoided sourcing from the DRC and surrounding countries.[159] If smelters have been able to determine the country of origin of these minerals and thereby avoid sourcing from the DRC and surrounding countries, why is it so hard and allegedly so expensive for manufacturers to do the same? It would appear that this is yet another example of where the Chamber and industry make inflated cost estimates in order to try and kill off a rule that they don't like.

Having inadvertently exposed the dubious nature of industry cost estimates, the Chamber then goes on to attack the fact that the SEC did not provide a monetary estimate of the benefits of Section 1502, quoting the SEC's determination that it was "unable to readily quantify with any precision" the benefits of the rule.[160] Stop and think for a moment what the Chamber is actually doing here. *The Chamber is suggesting that the SEC was remiss for not putting a monetary value on reducing a long-running deadly military conflict*. For not being able to calculate in a numerically precise and meaningful way the impact of a disclosure rule on promoting peace and reducing the scale, scope and length of the conflict. This argument is quite simply appalling and perfectly illustrates the horrible flaw inherent in the cost-benefit analysis that the Chamber champions.

VIII. Corporate Hall of Shame: The Chamber's Little Shop of Litigation Horrors

The Chamber's repeated support for a corporate-friendly version of cost-benefit analysis leads it to engage in some pretty morally indefensible litigation. After all, cost-benefit analysis prioritizes things such as industry compliance costs that can be assigned a monetary value over those that can't easily or adequately be monetized such as democracy, improved health outcomes, lives saved, reduced corruption, and healthy streams. In this next section we'll examine several cases in which the Chamber's litigation shocks the conscience.

Buckyballs or *Small Soldiers*

Buckyballs were small, silver, neodymium magnets that hit the U.S. market in 2009 and were originally labeled as a toy suitable for ages 13 and up.[161] Unfortunately, they proved irresistible to younger children, who often swallowed them. Swallowing more than one Buckyball could lead to serious health consequences, as the magnets' attractive powers were so strong that they would bore their way through internal organ soft tissues. One gastroenterologist wrote, "'when two [Buckyballs] are ingested they have a way of finding each other. When they catch a loop of the intestine, the pressure leads to loss of blood supply, tissue rot, perforation and potentially death.'"[162]

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[159] *Id*. at 17
[160] *Id*. at 20
[161] Mario Aguilar, *How Buckyballs Fell Apart*, GIZMODO (July 24, 2014), http://bit.ly/2l8lhLa
[162] *Id*.

The Consumer Product Safety Commission (CPSC) estimated that 1700 children went to the emergency room as a result of having swallowed Buckyballs or their imitators between the toy's debut in 2009 and 2011.[163] In 2012, alarmed at the continuing rise in ingestion incidents, the CPSC sued Buckyballs' manufacturer to force it to stop selling the magnets and recall those already sold.[164]

Instead of recognizing that he was selling a dangerous toy that was causing serious physical harm to significant numbers of children, Craig Zucker, the CEO of the company that made Buckyballs, decided to fight the CPSC. He continued to sell the potentially lethal magnets and launched a shockingly callous and tone deaf "Save our Balls" campaign, lightheartedly suggesting that because hippos kill people and people die falling out of beds, both hippos and beds should also be banned.[165]

The CPSC ultimately sued Zucker personally in order to recover the costs of the Buckyball recall, estimated to total up to $57 million.[166] The Chamber then filed an amicus brief on his behalf. The Chamber's brief makes two main arguments in defense of Zucker.

First, the Chamber challenges the CPSC's effort to hold Zucker liable as a responsible corporate officer for his company's refusal to recall its dangerous product.[167] The Chamber argues that those responsible for a corporation shouldn't be held individually liable for corporate conduct unless it can be proven that they had knowledge or intent of such wrongdoing[168] and that the presumption of responsible corporate officer liability contained in the Food, Drug, and Cosmetic Act shouldn't be expanded to cover conduct such as Zucker's.[169] Such an argument seeks to absolve corporate executives of responsibility for corporate wrongdoing that takes place on their watch. Eliminating the responsible corporate officer doctrine would provide them with a huge legal incentive to look the other way and not ask questions when they may have reason to believe that people within the company are engaged in wrongdoing. It also would provide corporate executives with an incentive to avoid leaving any sort of paper trail that might later be used to prove their knowledge of wrongdoing. Both of these perverse incentives would favor the development of bad management practices within corporate America, an outcome that should concern the Chamber.

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163 Rachel Abrams, *After Two-Year Fight, Consumer Agency Orders Recall of Buckyballs*, THE NEW YORK TIMES (July 17, 2014), http://nyti.ms/2lkHRvo

164 Casey Chan, *Buckyball Magnets Have Been Banned by the Feds*, GIZMODO (July 25, 2012), http://bit.ly/2lkEPY7

165 Mario Aguilar, *How Buckyballs Fell Apart*, GIZMODO (July 24, 2014), http://bit.ly/2l8lhLa

166 *Id*.

167 Brief of the Chamber of Commerce of the United States of America as *amicus curiae* supporting plaintiff's opposition to motion to dismiss, *Zucker v. U.S. Consumer Product Safety Commission*, pg. 2, case 8:13-cv-03355 (D. MD 2013), http://bit.ly/2l8owlP

168 *Id*.

169 *Id*. at 2-3

Moreover, in this case, where Zucker is the co-founder and CEO of a small start-up that began with $2000,[170] if Zucker isn't responsible, then who is? It's not as if there are a lot of other possibilities. While admitting that Zucker fought the CPSC's efforts to force a recall,[171] the Chamber's argument suggests that his engagement with and oversight of his company's day to day operations was somehow close to nonexistent prior to the CPSC's decision to try and force a recall. What's more, Zucker continued to sell Buckyballs during the recall effort and therefore even if you accept the Chamber's highly implausible argument that he was out to lunch prior to the CSPC's decision to try and force a recall, he is certainly responsible for the sale of Buckyballs that took place after the CSPC announced that it would demand a recall.

The Chamber's second argument, not surprisingly, has to do with money. It laments the fact that the doctrine of responsible corporate officer liability has been used "to impose increasingly onerous penalties," noting a series of fines or disgorgements ranging from the tens of thousands of dollars to the tens of millions of dollars and prison terms of up to three years.[172]

A review of the cases in which these "onerous" fines were imposed reveals the fines to be entirely reasonable. A $20,500 fine cited by the Chamber was imposed on an executive of an x-ray machine manufacturer whose machines failed to comply with federal regulations requiring that they display exposure time in seconds and terminate exposure at a preset time.[173] A $50,000 fine was imposed on the owner of two pharmacies who mishandled thousands of doses of schedule II drugs that later disappeared.[174] A $1.3 million fine was imposed on the owner of a company for violating the Clean Water Act by discharging untreated wastewater.[175] A $34.5 million disgorgement order against three pharmaceutical executives was imposed as a result of the misbranding of OxyContin as less addictive and less subject to abuse than other pain medications.[176] Mishandling or misbranding dangerous drugs, discharging untreated wastewater, and manufacturing x-ray machines that may result in over exposure can all have serious consequences for public health and/or the environment. Imposing serious financial penalties for such conduct is in no way onerous.

The Chamber claims that the CPSC's effort to force Zucker, as a responsible corporate officer, to pay up to $57 million to foot the recall bill would raise serious public policy concerns.[177] But it then goes on to admit that "reprehensibility of defendant's conduct is '[p]erhaps the most important

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[170] Mario Aguilar, *How Buckyballs Fell Apart*, GIZMODO (July 24, 2014), http://bit.ly/2l8lhLa

[171] Brief of the Chamber of Commerce of the United States of America as *amicus curiae* supporting plaintiff's opposition to motion to dismiss, *Zucker v. U.S. Consumer Product Safety Commission*, pg. 6, case 8:13-cv-03355 (D. MD 2013), http://bit.ly/2l8owlP

[172] *Id*. at 4

[173] *United States v. Hodges X-Ray, Inc*., 759 F.2d 557 (6th Cir. 1985), http://bit.ly/2n6JPVa

[174] *United States v. Poulin*, 926 F. Supp. 246 (D. Mass. 1996), http://bit.ly/2npNeMa

[175] *United States v. Hong*, 242 F.3d 528 (4th Cir. 2001), http://bit.ly/2mJOGux

[176] *Friedman v. Sibelius*, 686 F.3d 812 (D.C. Cir. 2012), http://bit.ly/2mWLQTg

[177] Brief of the Chamber of Commerce of the United States of America as *amicus curiae* supporting plaintiff's opposition to motion to dismiss, *Zucker v. U.S. Consumer Product Safety Commission*, pg. 5, case 8:13-cv-03355 (D. MD 2013), http://bit.ly/2l8owlP

indicium of the reasonableness of a punitive damages award.'"[178] One is left to wonder: what could be more reprehensible than continuing to sell a toy that you *know* is dangerous, that you *know* is sending children to emergency rooms all around the country, often with serious internal injuries? If this doesn't qualify as reprehensible conduct, then what does?

The Alien Tort Statute or *Black November*

The Alien Tort Statute (ATS) states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[179] Originally enacted in 1789, it has more recently been successfully used in cases involving human rights violations, war crimes, torture, state-sponsored sexual violence, and extrajudicial killings.[180] Beginning in the mid-1990s, plaintiffs have attempted to use the ATS to hold multinational corporations accountable for complicity in human rights violations.[181] Industry, including the Chamber of Commerce, has fiercely opposed this use of the ATS.

Two cases we examined highlight the Chamber's steadfast opposition to seeing the ATS used by victims of human rights abuses to obtain justice in U.S. courts from the multinational corporations allegedly complicit in their abuse.

In *Kiobel v. Royal Dutch Petroleum*,[182] 12 Nigerian plaintiffs alleged that Shell, an Anglo-Dutch multinational oil company, were complicit in human rights abuses committed against them by officials in former Nigerian dictator Sani Abacha's government.[183] They claimed that when they began to protest the environmental degradation caused by Shell's activities in the Niger Delta, Shell enlisted the Nigerian government in a campaign to repress the demonstrations by raping, looting, and pillaging.[184]

In *Rio Tinto PLC v. Sarei*,[185] the plaintiffs were from the island of Bougainville, a province of Papua New Guinea. They lived near and/or worked in a copper and gold mine operated by Rio Tinto, an Anglo-Australian mining multinational. The operation of this mine led to massive water and air pollution, negatively affecting the islanders' health. Those islanders who worked at the mine were paid less than white workers recruited from elsewhere and lived in slave-like conditions. Eventually, islanders rebelled and through acts of sabotage, forced the mine to close. Rio Tinto sought the government's help to quash the rebellion and reopen the mine. The Papua New Guinean

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[178] *Id*.
[179] 28 U.S.C. §1350
[180] *The Alien Tort Statute*, THE CENTER FOR JUSTICE & ACCOUNTABILITY, http://bit.ly/2l8DKax (viewed on March 1, 2017)
[181] *Id*.
[182] 133 S. Ct. 1659 (2013), http://bit.ly/2j3HLHV
[183] Adam Liptak, *Supreme Court Debates Rights Case Aimed at Corporations*, THE NEW YORK TIMES (Feb. 28, 2012), http://nyti.ms/2llbb54
[184] *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), http://bit.ly/2j3HLHV
[185] Docket No. 11-649 (S. Ct. 2013), http://bit.ly/2l8QqOL

army attacked, killing many islanders. This touched off a ten year civil war during which time the Papua New Guinean government committed numerous human rights abuses including aerial bombardment of civilians, burning of villages, and rape and pillage, all at the alleged behest of Rio Tinto according to plaintiffs.[186]

In both of these cases, the Chamber filed amicus briefs supporting the giant foreign multinationals sued for their alleged complicity in these appalling human rights abuses.

In *Kiobel*, the Chamber filed two amicus briefs. Its first brief opens by complaining about the number of ATS suits filed over the last two decades and the fact that these suits have "maligned business activities" in dozens of countries.[187] Given that the allegations in *Kiobel* involved Shell enlisting the Nigerian dictatorship in committing gross human rights abuses against peaceful protestors, one is left to wonder as to the Chamber's definition of "business activities." What's more, the Chamber claims that plaintiffs' allegations in ATS cases often boil down to nothing more than the fact that "[t]he defendant corporation did business in a nation known to have a tarnished human-rights record."[188] As evidence of this claim, the Chamber then goes on to cite the example of an ATS suit against an oil company that began operations in Sudan knowing that the Sudanese government was forcibly expelling local villagers from the land the company would then use for its exploration and drilling operations.[189] If corporate tolerance of and profiteering from forced expulsions is the best example the Chamber has of allegedly innocent business activity prompting an ATS lawsuit, then it becomes obvious that truly benign business practices in impoverished nations *aren't* the subject of ATS lawsuits as the Chamber claims they are.

The Chamber also repeatedly asserts that ATS suits harm both the economic and political development of poor countries. It claims that such suits "deter corporate investment in developing countries, retarding those countries' growth."[190] It also claims that "[m]any [developing nations] rely on foreign investment to provide the income and political stability they need to develop democratic institutions and economic self-sufficiency."[191] Given that the local workers at many of these mines, oil wells, and other installations are often paid very little as was the case in *Sarei*, the Chamber's focus on "growth" is misplaced. While it is certainly true that foreign corporate investment is good for political, military, and business elites in these countries, unless this wealth is shared, it does little to benefit the broader population, which is left to deal with the often terrible environmental consequences of said investment, as was the case in both *Kiobel* and *Sarei*.

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186 *Sarei v. Rio Tinto PLC*, 456 F.3d 1069 (9th Cit. 2006), http://bit.ly/2mBGsmg

187 Brief for the Chamber of Commerce of the United States of America as *amicus curiae* in support of respondents, *Kiobel v. Royal Dutch Petroleum*, pg. 2, 133 S. Ct. 1659 (2013), http://bit.ly/2l92qQe

188 *Id*. at 6

189 *Id*.

190 *Id*. at 14

191 *Id*. at 23

The Chamber's argument that foreign investment promotes political stability is also questionable. As we have seen earlier with the resource curse, foreign investment in the extractives sector often leads to corruption and instability. Indeed, both Nigeria and Papua New Guinea are poor nations that have been marked by political instability, at least in part fueled by disputes over natural resource governance. Nigeria has suffered from numerous coups as well as one civil war, unrest fueled in part by the country's vast oil wealth.[192] And environmental and labor abuses at the Rio Tinto mine at issue in *Sarei* actually led to civil war.

In its second amicus brief in *Kiobel*, the Chamber doubles down on many of the arguments it made in its first brief. It now claims that ATS lawsuits malign "*routine* business activities"[193] (emphasis added). If the Chamber believes that the corporate conduct alleged in *Kiobel* and *Sarei* can be qualified as routine, then corporate wrongdoing is more serious and widespread than even the most vocal corporate critics had imagined.

The Chamber also advances a new argument in its supplemental brief. In response to the U.S. government taking the position that the ATS could apply to U.S. corporations but not to foreign corporations, the Chamber claims that U.S. companies might relocate overseas because "[i]t is inherent in the concept of private business that they will seek to minimize avoidable costs – whether imposed by taxation, litigation, or otherwise – where lawful to do so."[194] The Chamber is saying two things here. First, that companies always try to minimize costs, and second, that companies follow the law. With respect to the first claim, if companies truly wanted to minimize costs in the ATS context, then all they would have to do would be to stop engaging in or being complicit in human rights abuses! Problem solved! As to the second claim, the gravity of the allegations in these cases combined with the daily drumbeat of headlines involving corporate wrongdoing suggest that many corporations are rather less law-abiding than the Chamber would have us believe.

In *Sarei*, the Chamber makes many of the same arguments that it made in *Kiobel*. It again complains about the number of ATS suits, deploring that "[m]ore than fifty percent of the companies listed on the Dow Jones Industrial Average have been named as defendants in ATS actions."[195] First of all, only 30 companies compose the Dow Jones Industrial Average,[196] so this is hardly evidence of an overwhelming number of lawsuits. What's more, the companies in the Dow Jones Industrial Average are all large multinationals with operations all over the world. By virtue of their large size

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[192] *Nigeria: A history of coups*, BBC (Feb, 15, 1999), http://bbc.in/2lTScCh

[193] Supplemental brief for the Chamber of Commerce of the United States of America as *amicus curiae* in support of respondents, *Kiobel v. Royal Dutch Petroleum*, pg. 2, 133 S. Ct. 1659 (2013), http://bit.ly/2llGGf7

[194] *Id*. at 27

[195] Motion of the Chamber of Commerce of the United States of America for leave to file brief as *amicus curiae* and brief as *amicus curiae* in support of petitioners, *Rio Tinto PLC v. Sarei*, pg. 7, Docket No. 11-649 (S. Ct. 2013), http://bit.ly/2m8JErI

[196] *Companies in the Dow Jones Industrial Average*, CNN MONEY, http://cnnmon.ie/2kpzjHR (viewed on March 1, 2017).

and global footprint, they are among the most likely to become entangled in complicated relationships with unsavory regimes.

But most importantly, the Chamber's interpretation of this statistic is incredibly tendentious. The Chamber sees the fact that more than 50% of Dow Jones Industrial Average companies have been sued under the ATS as evidence that ATS suits are out of control, but isn't it at least equally plausible that this statistic is evidence of an epidemic of corporate wrongdoing in developing countries? When one considers that in the auto industry, GM, Toyota, VW, and Takata have all recently engaged in wrongdoing *in this country* and that in the financial services sector, Goldman Sachs, Citigroup, JPMorgan Chase, BNP Paribas, and Standard Chartered have all recently engaged in wrongdoing *in this country*, why would one expect a majority of multinationals to follow the law – both international and local – in developing countries where legal oversight is typically much less stringent?

And this absence of legal oversight is really the crux of the matter here. The Chamber knows that multinationals are unlikely to be punished for breaking the law in many developing countries. The Chamber knows that legal and political systems are often weak and corrupt in these countries, and that multinationals are essentially immune from serious prosecution. Therefore, when the Chamber argues against corporate liability under the ATS, what it is really arguing for is corporate impunity, particularly in the case of American companies where if the U.S. courts refuse to hear the case, it is highly unlikely that any other court will.

The Chamber may begin its ATS briefs with solemn condemnations of human rights abuses,[197] but make no mistake, the legal position for which it is arguing would make it much more difficult for victims of these atrocious crimes to ever hold the multinationals complicit in them responsible. Once again, the Chamber is arguing for corporate impunity.

Guns Sales at Walmart or *Bowling for Columbine*

Roughly 33,000 Americans are fatally shot each year; 12,000 of these deaths are homicides while the vast majority of the rest are suicides.[198] Meanwhile, Walmart is the largest seller of guns in the United States. It is estimated that Walmart and other big box stores account for 20% of gun sales and an even larger percentage of ammunition sales.[199]

Against this somber background, Trinity Wall Street church, a Walmart shareholder, put forth a proxy resolution asking Walmart's board to provide oversight over company decisions relating to the sale of products that especially endanger public safety and may potentially harm the company's

[197] See, e.g., Supplemental brief for the Chamber of Commerce of the United States of America as *amicus curiae* in support of respondents, *Kiobel v. Royal Dutch Petroleum*, pg. 2, 133 S. Ct. 1659 (2013), http://bit.ly/2llGGf7

[198] *Gun Deaths in America*, FIVETHIRTYEIGHT, http://53eig.ht/2hCNdVS (viewed on March 1, 2017).

[199] Shannon Pettypiece and Esmé Deprez, *America's Gun King, Wal-Mart, Is Geared Up for the Holiday Rush*, BLOOMBERG (Dec. 16, 2015), http://bloom.bg/2mL3E0m

reputation.[200] Trinity's resolution particularly focused on Walmart's sales of high capacity weapons. Walmart asked the SEC to issue a no-action letter permitting it to omit Trinity's resolution from proxy materials. The SEC issued such a no-action letter and Trinity sued Walmart, seeking to enjoin its exclusion of its resolution.[201] The Chamber then filed an amicus brief in support of Walmart.

Typically, a company may exclude a proposed shareholder resolution from its proxy materials if the resolution concerns "ordinary business" matters including the choice of which products to sell.[202] However, an exception to this rule exists where the shareholder proposal "focuses on sufficiently significant social policy issues."[203]

The Chamber argues in its brief that Trinity's resolution does not raise significant policy issues that are intertwined with the nature of Walmart's business.[204] This is a rather stunning argument for the Chamber to make, given the severity of gun violence in the U.S. and the leading role Walmart plays in selling guns and ammunition to Americans. When 82 percent of Americans believe gun violence to be a serious problem and 58 percent believe it to be a very serious problem,[205] it is hard to see how Trinity's proposal *doesn't* raise a significant policy issue. And given the fact that Walmart is the largest seller of guns and ammunition in the U.S., which together account for a $6.5 billion market,[206] one is hard-pressed to see how the epidemic of gun violence in the U.S. isn't intertwined with Walmart's business.

The Chamber's argument would preclude many, many important shareholder resolutions from ever being put forward for a vote by shareholders, and would as such undermine transparent and participatory governance at public companies. Even more troubling from a business point of view, the Chamber's hardline position against these sorts of shareholder proposals may ultimately be bad for business. As Trinity's proposal notes, the selling of high capacity firearms may harm Walmart's reputation, ultimately leading to decreased sales. In a hyper-connected, social media-saturated world, companies must be ever vigilant about their reputations, and shareholder resolutions can assist them in identifying and correcting potential trouble spots. The Chamber's position would rob companies of these opportunities as well as foreclose much shareholder activism capable of having a beneficial impact on important public policy challenges facing the U.S. and the world.

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[200] *Trinity Wall Street v. Wal-Mart Stores, Inc*., Case No. 14-4764 (3d. Cir. 2015), http://bit.ly/2lrBHtr

[201] *Id*.

[202] *Id*.

[203] *Id*.

[204] Brief for the American Petroleum Institute, Business Roundtable & the Chamber of Commerce of the United States of America as *amici curiae* in support of defendant-appellant, *Trinity Wall Street v. Wal-Mart Stores, Inc*., pgs. 13 – 17, Case No. 14-4764 (3d. Cir. 2015), http://bit.ly/2lUo9uf

[205] Gary Langer, *Views on Gun Control: A Polling Summary*, ABC NEWS (Jan. 5, 2016), http://abcn.ws/1kIfTJm

[206] Shannon Pettypiece and Esmé Deprez, *America's Gun King, Wal-Mart, Is Geared Up for the Holiday Rush*, BLOOMBERG (Dec. 16, 2015), http://bloom.bg/2mL3E0m

Allergan's Patent Caper or *Away from Her*

Actavis (now known as Allergan following an inversion with a smaller, Irish pharmaceutical company of the same name) produced and sold Namenda IR, a twice-daily pill designed to treat Alzheimer's disease. As Namenda IR neared the end of its period of patent exclusivity, Actavis introduced a new once-daily version of the same drug called Namenda XR. Actavis obtained patent exclusivity on Namenda XR through 2029 and then withdrew almost all Namenda IR from the market prior to the expiration of its patent exclusivity in July 2015. This forced Alzheimer's patients taking Namenda IR to switch to Namenda XR before generic IR became available. Due to state generic drug substitution laws, once a patient is taking patent-protected XR, it becomes difficult for pharmacists to switch them back to generic IR. As a result of Actavis' machinations, it was effectively able to extend the patent life on Namenda by 14 years.[207]

The State of New York brought an antitrust action against Actavis seeking an injunction to prevent it from discontinuing production and sale of Namenda IR prior to the expiration of its patent exclusivity. A district court judge issued a preliminary injunction and Actavis appealed. The Chamber then filed an amicus brief in support of Actavis.

In its brief, the Chamber claims that the preliminary injunction preventing Actavis from discontinuing production and sale of Namenda IR prior to the expiration of its patent exclusivity is an extraordinary step and is "tantamount to a federal court commandeering a private business and its factories."[208] The Chamber's argument is pure hyperbole, as all the court is doing is preventing Actavis from exploiting the peculiarities of generic drug substitution laws in order to unfairly obtain an additional 14 years of patent exclusivity on the same drug.

Of course, the reason that Actavis has engineered the replacement of IR with XR is because patent exclusivity allows it to charge a lot more for what is essentially the same drug. A review of drug prices reveals that a 30 day supply of XR currently sells for roughly $400,[209] while a 30 day supply of generic IR sells for as little as $15.[210] In other words, Actavis' patent caper, if it had been successful, would have cost patients and/or their insurance companies at least an extra $385 per month, goosing Actavis' profits. In fact, the cost savings to patients are probably even greater than that, as we don't know what Actavis would be charging for XR had it successfully shielded it from generic IR competition, but we can assume that it would be even more expensive than the actual price today.

The Chamber's support for Actavis in this case runs counter to the interests of many if not most of its members that provide health insurance for their employees or must purchase health insurance on the open market in the case of sole proprietorships. Spending on prescription drugs represents

[207] *New York v. Actavis*, No. 14-4624 (2d. Cir. 2015), http://bit.ly/2lXoQkP

[208] Brief *amicus curiae* of the Chamber of Commerce of the United States of America in support of defendants-appellants, *New York v. Actavis*, pg. 3, No. 14-4624 (2d. Cir. 2015), http://bit.ly/2mf6T3J

[209] *Namenda XR*, GOODRX.COM, http://bit.ly/2muqptq (viewed on March 1, 2017)

[210] *Namenda*, GOODRX.COM, http://bit.ly/2ldHDv9 (viewed on March 1, 2017)

10% of total healthcare spending (much more if drug spending in hospitals is accounted for) and is increasing faster than any other component of healthcare spending.[211] When the Chamber defends schemes such as Actavis' to artificially keep drug prices sky high, it is helping to increase healthcare costs for businesses. What the Chamber is really defending in this case is simple corporate greed, the consequences for the broader business community and for consumers be damned.

IX. Hypocrisy: Arguments of Convenience

We began the third section of this report by highlighting the fundamental disconnect between the Chamber's very public lament about our allegedly overly litigious culture and its advocacy for legislation that would restrict access to the courts on the one hand, and its own very active litigation practice on the other. However, the Chamber's hypocrisy is not limited to the civil justice arena. In our review of the Chamber's litigation, we came across several cases where the Chamber advanced arguments entirely inconsistent with its public positions. Some of these policy inconsistencies have already been mentioned in other sections of this report. In this section, we examine a few cases where the Chamber makes particularly hypocritical arguments.

Litigation Finance or *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb*

If there's one thing the Chamber hates, it's regulation. Chamber president Tom Donohue never misses an opportunity to condemn regulations.[212] Financial regulations, environmental regulations, product safety regulations, food safety regulations, drug safety regulations, worker safety regulations, you name the regulation, the Chamber's opposed.

However, there was one case where the Chamber learned to embrace regulation. In Colorado, the Chamber filed two amicus briefs in litigation pitting the state against two litigation finance companies. Litigation finance companies provide advances to plaintiffs to help them pay for personal expenses while they await resolution of their cases. In exchange, plaintiffs agree to repay the companies from any future judgments or settlements they may receive. Colorado sought to regulate litigation finance companies under its Uniform Consumer Credit Code and two of them sued to prevent it from doing so.

In its second brief in this case, the Chamber writes that it "support[s Colorado's] position that consumer lawsuit lending is subject to regulation under the UCCC. It is not only the right legal conclusion; *it is also the right policy*. Regulation of this industry under the UCCC will help to curb the myriad ills caused by lawsuit lending"[213] (emphasis added). Assume for a moment that the

[211] *National Health Expenditures 2015 highlights*, CENTERS FOR MEDICARE & MEDICAID SERVICES, http://go.cms.gov/1OghS4e (viewed on March 1, 2017)

[212] *See, e.g.*, 2017 *State of American Business Address*, U.S. CHAMBER OF COMMERCE, http://uscham.com/2ik34rk (viewed on March 1, 2017) where Donohue criticizes regulations roughly two dozen times.

[213] *Amici curiae* brief of the Chamber of Commerce of the United States of America and the Denver Metro Chamber of Commerce in support of respondents, *Oasis Legal Finance Group, LLC v. Suthers*, pg. 6, Case No. 13SC497 (Colo. 2015), http://bit.ly/2mGfCt3

Chamber is right about lawsuit lending causing "myriad ills." Whatever these ills are, they most certainly pale in comparison to the myriad ills caused by the big Wall Street financial services companies and their role in the financial crisis of 2008. And yet we have seen in the fourth section of this report how the Chamber opposed Dodd-Frank and supported the Big Banks in financial crisis-related litigation. If stronger regulation is *the right policy* for a niche market such as litigation finance, then how on earth is it not also *the right policy* for the too big to fail financial institutions responsible for the financial crisis?

In response to the lawsuit lenders' contention that they were not extending credit but were rather purchasing assets, the Chamber argues that "there is no 'market' in which such 'shares' of litigation are sold."[214] Yet this same argument could be made about the market for custom derivatives for which there is no real market beyond the original purchaser. And the Chamber has vigorously opposed efforts to regulate derivatives.[215]

The Chamber also points to the fact that the effective nominal annual percentage rate on these advances is very high, often around 100 percent.[216] It argues that the UCCC "provides exactly the regulation necessary to make sure that the 'relative price' (read: interest rates) do not disadvantage the borrowers in the legal lending market."[217] It concludes this argument by writing that "[r]egulation of plaintiffs' conduct under the UCCC will insure that plaintiffs' business model will be licensed and transparent, and that plaintiffs will be prevented from charging interest rates that pervert the prosecution of personal injury cases."[218]

What a difference an industry makes. When the CFPB announced plans to regulate payday lenders, whose nominal annual percentage rates average around 400 percent,[219] the Chamber protested, citing the concerns of payday lenders.[220] If the 100 percent annual interest rates charged by litigation lenders warrant regulation, then why do the 400 percent annual interest rates charged by payday lenders not?

Again and again, the Chamber furiously opposed efforts to regulate Wall Street banks, derivatives, and payday lenders, and yet somehow, the litigation finance industry is in desperate need of regulation – what gives? The obvious answer is that the litigation finance industry provides money

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[214] *Id*. at 10

[215] *See, e.g.*, Matthew Yglesias, *Chamber of Commerce Flies In Executives to Front For Derivative-Dealing Banks*, THINK PROGRESS (April 20, 2010), http://bit.ly/2lY2ob5

[216] *Amici curiae* brief of the Chamber of Commerce of the United States of America and the Denver Metro Chamber of Commerce in support of respondents, *Oasis Legal Finance Group, LLC v. Suthers*, pg. 13, Case No. 13SC497 (Colo. 2015), http://bit.ly/2mGfCt3

[217] *Id*. at 15 – 16

[218] *Id*. at 20

[219] *Consumer Financial Protection Bureau Proposes Rule to End Payday Debt Traps*, CONSUMER FINANCIAL PROTECTION BUREAU, http://bit.ly/2bxqnYX (viewed on March 1, 2017)

[220] J.D. Harrison, *Small Businesses' Concerns Fall On Regulators' Deaf Ears*, U.S. CHAMBER OF COMMERCE (Aug. 25, 2015), http://uscham.com/1IgSUcS

to consumers and small businesses who might otherwise not have the financial wherewithal to pursue their cases against the Chamber's big business members. This is clearly the main reason that the Chamber suddenly discovered a love of regulators and regulations on the high plains of Colorado.

Country of Origin Labeling or *Traitor*

The U.S. Department of Agriculture (USDA) developed and implemented country of origin labeling requirements for meat products. The meat industry sued to block the requirements and the Chamber of Commerce filed an amicus brief supporting the meat industry, again arguing that such a labeling requirement violated corporations' free speech rights.[221]

The *United States* Chamber of Commerce claims to be the voice of American businesses in Washington and in the courts, and yet here it is opposing a rule that would undoubtedly benefit both American producers and American consumers. Many consumers desire to buy American products, particularly when it comes to food, where the made in the U.S.A. label provides reassurance as to the safety of the product. Requiring country of origin labeling would therefore be a boon to American meat producers, who would likely see consumer demand for their products increase as a result of such a labeling requirement.

As such, the Chamber's opposition to country of origin labeling requirements penalizes American producers in favor of foreign producers and calls into question the very purpose of the Chamber. If the Chamber does not exist to stand up for American business interests, then what is its purpose? This case lays bare the Chamber's true allegiance to giant multinational conglomerates at the expense of smaller American producers.

X. Conclusion

Issue advocacy litigation of the type the Chamber engages in is certainly not a negative in and of itself. Everything depends on how it is used – on what legal issues it raises, on what legal and policy arguments it advances, on what litigants it supports and/or opposes.

Unfortunately for the Chamber, and for America, its litigation falls short by all three of these measures. Much of its litigation addresses legal issues that are only of interest to an exceedingly narrow business constituency – Wall Street and Big Oil being the two most frequent beneficiaries. The policy arguments its litigation advances are almost uniformly bad for consumers, investors, workers, small businesses, and the environment. And the corporate litigants it supports are a who's who of corporate bad actors – BP, Goldman Sachs, Countrywide, Citigroup, Corinthian Colleges, AIG, and Walmart, just to name a few.

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221 Brief of *amici curiae* the National Association of Manufacturers, Chamber of Commerce of the United States, and Business Roundtable supporting appellants American Meat Institute *et al*., *American Meat Institute v. United States*, Case No. 13-5281 (D.C. Cir. 2014), http://bit.ly/2lADFZi

The Chamber didn't *have* to support the Buckyball CEO in the face of 1700 injured children. It didn't *have* to repeatedly go to bat for BP after the worst oil spill in history. It didn't *have* to try and kill a shareholder resolution relating to America's gun epidemic, one of the most serious issues facing our country. It didn't *have* to support foreign multinationals accused of complicity in truly appalling human rights violations overseas.

It chose to.

The Chamber's involvement in these cases speaks volumes about what kind of an organization it is. It is an organization that is blind to the tremendous suffering caused by corporate wrongdoing – here at home and around the world. It is an organization that is blind to the serious problems inherent in unregulated markets and to the power of smart government regulations to correct these flaws.

Commerce, by definition, includes buying and selling. It suggests a web of economic activity including businesses of all sizes as well as consumers. When examining the Chamber's litigation in light of this definition, it should be obvious that the Chamber is no longer a chamber of *commerce*, but has instead become a lobby for unrestrained corporate power. Perhaps it's time that the Chamber's name better reflected the organization it has become.