No. 09-20871

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES PATRICK PHILLIPS,
WESLEY C. WALTON,
AND JAMES BROOKS
Defendant-Appellant,

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
No. 4:04-CR-512-SS

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN FAVOR OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to those persons and entities listed by Appellant, the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL"), a nonprofit corporation, is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct.[1] NACDL's mission is to fulfill three core goals: (1) to ensure justice and due process for persons accused of crime; (2) to foster the integrity, independence and expertise of the criminal defense profession; and (3) to promote the proper and fair administration of criminal justice. NACDL is the only national bar association working in the interest of public and private criminal defense attorneys and their clients.

NACDL is a professional bar association founded in 1958 that comprises more than 12,800 direct members and 94 state, local, and international affiliate organizations with another 35,000 members. The membership includes private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this *amicus* brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *Amicus Curiae* National Association of Criminal Defense Lawyers hereby certifies that no counsel for a party authored this brief in whole or in part; that no party or counsel for a party contributed money that was intended to fund preparation or submission of this brief; and that no person other than the amicus curiae, its members, and its counsel, contributed money that was intended to fund preparation or submission of this brief.

affiliate organization and awards it full representation in its House of Delegates. NACDL is committed to providing *amicus* assistance on the federal and state level in cases that present issues of importance, such as the one presented here, to criminal defendants, criminal defense lawyers, the criminal justice system as a whole, and the proper and fair administration of criminal justice.

This case raises important questions concerning a criminal defendant's Sixth Amendment right to counsel of choice. The right to counsel of choice is fundamental to the preservation of the balance of power between the prosecution and defense, a balance which is critical to ensuring the liberty of individuals in a free society. Indeed, the right to counsel of choice guaranteed under the Sixth Amendment is a fundamental safeguard to ensure that our adversarial system of criminal justice is administered fairly. By interfering with defendants' access to legally available means to pay for their attorneys' fees, the government, under policies it has since repudiated, systemically and illegitimately violated the fundamental principles of our adversarial system as embodied in the Sixth Amendment.

PRELIMINARY STATEMENT

NACDL agrees with, and will not repeat here, the Statement of Jurisdiction, the Statement of the Issues, and the Statement of the Case in the Brief of Appellants. NACDL also agrees with, and will not repeat here, Appellants' Statement of Relevant Facts and Standard of Review. NACDL will address only one issue on appeal, namely whether the prosecutors' interference with El Paso Corporation's payment of legal fees to James Patrick Phillips, Wesley C. Walton, and James Brooks (collectively "Appellants") violated their Sixth Amendment right to counsel of choice

SUMMARY OF THE ARGUMENT

The Sixth Amendment guarantees a defendant's right to qualified counsel of his choosing. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S 617, 624-25 (1989). "This right, fundamental to our system of justice, is meant to assure fairness in the adversary criminal process." *United States v. Morrison*, 449 U.S. 361, 364 (1981) (citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)). Absent a legitimate and justifiable interest, the government cannot infringe upon or interfere with the right to counsel of choice. *See Maine v. Moulton*, 474 U.S. 159, 170-71 (1985). Here, the prosecution interfered with El Paso Corporation's decision to abide by its longstanding policy of advancing legal fees to former employees and exerted pressure on the company until it abandoned that policy.

This type of coercion and interference violated appellants' right to counsel of choice as guaranteed by the Sixth Amendment. *See United States v. Stein*, 541 F.3d 130, 157 (2d Cir. 2008).

The government pressured El Paso to stop paying appellants' legal fees by saying that it construed such efforts to be uncooperative with the government's investigation; the company eventually succumbed to the pressure to avoid indictment and stopped paying those fees. The government's interference served no legitimate purpose.

Such interference was once Department of Justice ("DOJ") policy under the repudiated Thompson Memorandum, but even the government recognized that the policy served no purpose but to undermine constitutional protections which form the cornerstone of the adversarial criminal justice system. Though no longer government policy, it is imperative to the integrity and fundamental fairness of the criminal justice system that such interference be recognized for what it is: unconstitutional interference with a bedrock constitutional right.

The Second Circuit in *Stein*, the only court to substantively address the right to counsel in the context of the Thompson Memorandum, held that when a corporation is coerced by the government not to pay their employees' legal fees under the policy established in the Thompson Memorandum, the decision by the corporation amounts to state action and unconstitutionally infringes on a

defendant's Sixth Amendment right. 541 F.3d at 148-51. Departing from the well-reasoned conclusion reached in *Stein* would sow confusion among the courts of appeals and would give prosecutors incentives to seek tactical advantage by interfering with defendants' right to counsel of their choosing.

ARGUMENT

I. THE GOVERNMENT'S INTERFERENCE WITH APPELLANTS' RIGHT TO COUNSEL VIOLATED THEIR SIXTH AMENDMENT RIGHTS AND NECESSITATES DISMISSAL OF THEIR CONVICTIONS

By threatening El Paso that it would be subject to indictment if did not stop paying the legal fees of appellants, the government coerced El Paso into discontinuing payment of the legal fees of appellants. The government's influence over El Paso's decision to pay appellants' legal fees is unconstitutional and dismissal of the indictments against appellants is the only remedy to cure the defect caused by the prosecution's conduct. *Id*. at 146.

A. The Repudiated Thompson Memorandum, and Successor Policies, Allowed (and Even Encouraged) Prosecutors to Unconstitutionally Interfere with the Right to Counsel of Choice.

In 2003, then-Deputy Attorney General Larry D. Thompson issued a memorandum (the "Thompson Memorandum") that set forth the Department of Justice's policy on evaluating cooperation by corporations in criminal investigations. The Thompson Memorandum laid out specific considerations "to guide [DOJ] prosecutors as they make the decision whether to seek charges against

a business organization." *See* "Principles of Federal Prosecution of Business Organizations," Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Jan. 20, 2003), *available at* http://www.justice.gov/dag/cftf/business_organizations.pdf. At issue here is the Thompson Memorandum's directive to weigh "the extent and value of a corporation's cooperation," by analyzing "whether the corporation appears to be protecting its culpable employees and agents . . . through the advancing of attorney fees," among other factors.[2] *Id*. at 7-8. Under the Thompson Memorandum, prosecutors made widespread use of the payment of employees' legal fees in determining whether to indict a corporation. *See, e.g.*, Ass'n of Corporate Counsel, *The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results* 12 (2006), *available at* http://www.acc.com/surveys /attyclient2.pdf.

Because this aspect of the Thompson Memorandum significantly impaired the Sixth Amendment rights of employees to receive the assistance of counsel of their choice, DOJ's policy of considering the payment of attorneys' fees as a factor in deciding whether to indict the company was subject to widespread criticism from the Bar, the business community, and Congress. *Id*.; *see also* Crystal Joy

[2] The Thompson Memorandum, in a footnote, did carve out an exception for a corporation that is bound under state law to pay legal fees of officers under investigation prior to a formal determination of their guilt. *Id*. at 8 n.4. That exception is not at issue in this case.

Carpenter, Commentary, *Federal Prosecution of Business Organizations: The Thompson Memorandum and its Aftermath*, 59 Ala. L. Rev. 207, 222-26 (2007).[3] The severe backlash prompted DOJ to repudiate the Thompson Memorandum in 2006.

On December 12, 2006, then-Deputy Attorney General Paul J. McNulty issued a memorandum that substantially revised the policies enunciated in the Thompson Memorandum. *See* "Principles of Federal Prosecution of Business Organizations," Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Dec. 12, 2006), *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf (the "McNulty Memorandum"). The McNulty Memorandum noted the "unprecedented success in prosecuting corporate fraud" DOJ experienced during the life of the Thompson Memorandum, but acknowledged the validity of concerns over the

[3] *See, e.g.*, Senator Arlen Specter, *On the Thompson Memo, Terrorist Surveillance, and the Detainee Act*, Remarks at the NACDL White Collar Crime Seminar (Sept. 15, 2006), *reprinted in* Nat'l Ass'n of Criminal Defense Lawyers, 30 Champion 55 (Dec. 2006) (Senator Specter stating that the Thompson Memorandum and the Government's consideration of "whether corporations agree not to pay counsel fees for people in their employ" is "surprising and shocking"); Joan C. Rogers, *Judge Condemns DOJ Policy of Pressuring Companies Not to Pay Employees' Legal Fees*, 22 Law. Man. on Prof. Conduct: Current Reports (ABA/BNA) 342, 344 (July 12, 2006) (quoting Former Attorney General Richard Thornburgh's statement that consideration of fee payment arrangements serves to "disadvantage the employee and increase the likelihood that he or she will plead guilty or cooperate in some way," and condemning it as "offensive" and an "improper exercise[] of government power"); *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, S. Hrg. 109-835 at 19 (Sept. 12, 2006) (statement of former Attorney General Edwin Meese III) (condemning the use of fee advancement as part of a prosecutor's charging decision and recommending that "all references in the [Thompson] Memorandum to a company's payment of its employees' legal fees . . . be eliminated").

administration of the policy and its infringement on constitutional protections. In light of those concerns, the McNulty Memorandum set out to adjust the policies.

As relevant here, the McNulty Memorandum still allowed prosecutors to consider a company's decision to advance legal fees to employees in weighing the extent and value of a corporation's cooperation, but emphasized that it should not, generally, be a consideration. The McNulty Memorandum noted that "[m]any state indemnification statutes grant corporations the power to advance the legal fees of officers under investigation prior to a formal determination of guilt" and that many corporations include such obligations in their corporate charters, bylaws, or employment agreements. *Id*. at 11.

But even the McNulty Memorandum did not do enough to ensure that the government did not infringe employees' Sixth Amendment right to counsel. In the wake of the decision in *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008), which held that government pressure on employers to stop advancing legal fees to their employees "unjustifiably interfered with [their] relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment," *id*. at 136, and continued backlash from the Bar and from Congress, the DOJ again revised its policies on August 28, 2008. *See* "Principles of Federal Prosecution of Business Organizations," U.S. Dep't of Justice, United States Attorneys' Manual §§ 9-28.000 to .1300 (Aug. 28, 2008). After five years and significant criticism from

both the Judiciary and the Bar, DOJ finally completely repudiated the Thompson Memorandum's inclusion of corporate payment of attorney's fees as a factor in evaluating the corporation's cooperation. The new policy provides that:

> "[i]n evaluating cooperation, however, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action."

Id. § 9-28.730. The current policy forbids the constitutionally impermissible practice that was rampant during the life of the Thompson Memorandum.

The government's decision to acknowledge the grave dangers of its prosecution policies, and to revise its policies to eliminate the most serious flaws, is not enough to safeguard the Sixth Amendment rights of corporate employees to receive the assistance of counsel of choice. The government's voluntary cessation of objectionable policies is no guarantee that such policies will not be resumed. And because DOJ prosecution policies provide defendants no enforceable legal right, U.S. Dep't of Justice, United States Attorneys' Manual § 1-1.100 (May 2009), changes in policies do nothing to prevent abuses in individual cases. Further, DOJ's decision to modify the policy prospectively does nothing to cure the effects of the Sixth Amendment violation that appellants have already suffered; to address that violation, the indictment against appellants must be dismissed. This

Court should adopt a rule similar to *Stein* to safeguard corporate employees' Sixth Amendment right to counsel of choice.

B. Out of Fear of Indictment, Corporations Had No Choice but to Change Long-Standing Policies to Advance Legal Fees to Employees as a Result of Pressure Exerted by the Government.

Indictment of a corporation, even absent a conviction, often functions as a corporate death penalty: it becomes effectively impossible for many companies to do business after indictment, which as a practical matter has many (or most) of the same consequences as conviction itself. "In the 212-year history of the U.S. financial markets, no major financial-services firm has ever survived a criminal indictment." Ken Brown et al., *Called to Account: Indictment of Andersen in Shredding Case Puts its Future in Question*, Wall St. J., Mar. 15, 2002, at A1; *accord* Committee On Capital Markets Regulation, Interim Report 84 (Nov. 30, 2006), *available at* http://www.capmktsreg.org/pdfs/11.30 Committee _Interim_ ReportREV2.pdf; Dale A. Oesterle, *Early Observations on the Prosecutions of Business Scandals of 2002-03: On Sideshow Prosecutions, Spitzer's Clash with Donaldson over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 Ohio St. J. Crim. L. 443, 471-72 (2004) ("In business, particularly in the financial services industry . . . an indictment can ruin a firm, or a career, well before trial."); *see also* Scot J. Paltrow, *Princeton/Newport Partners: Additional Charges Filed in Securities Fraud Case*, L.A. Times, Jan. 20

1989 (noting that Princeton Newport Partners, a securities firm, went out of business after being indicted for racketeering).

Perhaps the best documented example of this phenomenon is the failure of Arthur Andersen LLP. Before it was indicted, the company, one of the "big five" accounting firms, was a ninety-year-old organization with over 85,000 employees in approximately 390 offices in 85 countries. *See* Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 Am. Crim. L. Rev. 107, 109 (2006). The company was indicted on March 14, 2002, convicted in June 2002, and sentenced to pay a fine of $500,000. To illustrate the effect an indictment can have on a company, in the two weeks following the indictment, Arthur Andersen lost $300 million in revenue and was forced to lay off 560 employees. *See Roquet v. Arthur Andersen LLP*, 398 F.3d 585, 587-88 (7th Cir. 2005). Though subsequently convicted, the indictment alone was sufficient to call into question the company's continued viability.

The indictment and conviction lead to the collapse of one of the largest companies in the world and resulted in more than 28,000 employees losing their jobs in the United States. Ainslie, *supra*, at 107. The Supreme Court later overturned the company's conviction based on erroneous jury instructions. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 705-06 (2005) (holding that the jury instructions were deficient as to the knowledge requirement of obstruction

of justice). The damage, however, was already done; the company shuttered its doors and now serves as a warning to all corporations: no company is too big too fail once indicted.

The lesson is clear: The risk of indictment is something that no company can afford to take lightly. Few, if any, companies can run the risk of ruinous harm stemming from an indictment in order to defend a single official or even a group of officials. If prosecutors tell company officials they will consider indictment if the company complies with its ordinary policy of funding the legal defense of its officers stemming from their official duties, it is the rare company that can afford to disregard that threat and fund the defense. In most instances, the threat alone is enough effectively to end corporate support of the defense, making cooperation with edicts such as those stemming from the Thompson Memorandum virtually mandatory. "Few if any competent defense lawyers would advise a corporate client at risk of indictment that it should feel free to advance legal fees to individuals in the face of the language of the Thompson Memorandum itself." *United States v. Stein*, 435 F. Supp. 2d 330, 364 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008). The Second Circuit explained the dynamic; although the case involved the accounting firm KPMG LLP, its statements could apply just as easily to any company:

> KPMG faced ruin by indictment and reasonably believed it must do everything in its power to avoid it. The government's threat of indictment

> was easily sufficient to convert its adversary into its agent. KPMG was not in a position to consider coolly the risk of indictment, weigh the potential significance of the other enumerated factors in the Thompson Memorandum, and decide for itself how to proceed.

541 F.3d at 151 (citing Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 367 (2007)).

Here, El Paso Corporation did what virtually any corporation in its place would have done when confronted with increasing pressure by the prosecution to "cooperate" or risk indictment: It changed its long-standing corporate policy to pay employees' legal fees. For a period of over two years, the prosecution in this case sent El Paso numerous letters inquiring about its payment of fees for employees who were not providing evidence for the government's investigation. Throughout this time period, the company made clear that it was committed to cooperation and would take no action that would call into question that commitment. The company even went so far as to solicit advice and guidance from the government on the advancement of legal fees.

Though the government never explicitly required the company to stop paying legal fees, the tone and language of each letter, coupled with the climate created by the Thompson Memorandum (which remained in effect at the time the relevant decisions were made), made its position clear: The company would not receive the benefit of its cooperation with the government should it continue to pay appellants' legal fees. The government's position created an untenable situation,

making it effectively impossible for El Paso to continue paying its officials' attorneys' fees in accordance with longstanding policy if it wished to avoid grave risk to its existence. As even the Justice Department recognized when it abandoned the policy embodied in the Thompson Memorandum, such a position unconstitutionally infringes on employees' Sixth Amendment right to counsel of their choice and serves no legitimate end.

C. The Pressure Exerted by the Government on El Paso to Stop Paying Employees' Legal Fees under the Thompson Memorandum and El Paso's Acquiescence Amounted to an Impermissible Infringement on Right to Counsel of Choice.

The Sixth Amendment guarantees a criminal defendant the right to assistance of counsel. U.S. Const. amend. VI. The right to counsel is a cornerstone of our criminal justice system, for "it is through counsel that all other rights of the accused are protected"; "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (internal quotations and citations omitted). The government cannot be permitted to interfere with that right, especially in complex cases such as this one, where considerable resources are necessary for an effective defense.

1. El Paso's Decision not to Pay Appellants' Legal Fees Constituted State Action Because of the Influence Exerted by the Government

The Sixth Amendment guarantee ensures that no state action will interfere with the right to counsel. In *Stein*, the Second Circuit determined that because the government exerted undue influence in coercing a private entity, KPMG, to halt payment of legal fees, KPMG's actions were effectively the actions of the state. 541 F.3d at 147 (quoting *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 187 (2d Cir. 2005)); *see also Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 615 (1989) (finding state action where "the Government did more than adopt a passive position toward the underlying private conduct" and where it "made plain not only its strong preference for [the private conduct], but also its desire to share the fruits of such intrusions").

Here, there is no dispute that El Paso, which is not a state entity, made the ultimate decision to terminate the payment of appellants' legal fees. As outlined above, however, El Paso's decision was the direct result of the government's undue pressure exerted to try to persuade the company to stop paying its officers' legal fees. The consequences of indictment were far too grave for the company not to comply. As in *Stein*, because the government coerced El Paso to terminate payment of legal fees to appellants, the decision by El Paso constitutes state action.

2. The Government's Conduct in this Case Violated Appellants' Right to the Assistance of Counsel of Choice

Having established that the conduct of El Paso constituted state action because of the coercive nature of the pressure exerted on the company by the government, we next turn to whether the government's action was justified. The Sixth Amendment precludes the government from interfering, without justification, with the exercise of the right to counsel. "This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance." *Moulton* 474 U.S. at 170-71. Thus, the Supreme Court has recognized, "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Id*. at 171; *see also Stein*, 541 F.3d at 151 ("The Sixth Amendment protects an individual's right to choose the lawyer or lawyers he or she desires." (internal quotation marks and citations omitted)). At its core, the Sixth Amendment thus requires the government "to refrain from unreasonable interference with the individual's desire to defend himself in whatever manner he deems best, using every legitimate resource at his command." 3 Wayne R. LaFave et al., *Criminal Procedure* 570 (3d ed. 2007) (quoting *People v. Crovedi*, 65 Cal. 2d 199 (1966)).

There can be no justification, aside from weakening the defense, for a prosecutor to exert pressure on El Paso to stop paying legal fees for individual employees. There can be no suggestion that El Paso's payment of fees was in any way unlawful. El Paso is an upstanding business organization with a longstanding policy, formalized as a mandate in its corporate bylaws, of advancing legal fees to its officers, consistent with a common business practice widely recognized to be appropriate and beneficial. All fifty states have adopted laws that permit firms to provide such financial support, and the articles of incorporation or bylaws of forty-eight of the fifty largest U.S. corporations include indemnification and fee advancement provisions.[4] These laws and corporate policies reflect the consensus view that firms benefit when officials acting within the scope of their employment do not fear individual liability because of their professional actions. Fee advancement policies also are essential for companies to attract and retain talent. Threatening El Paso with indictment for abiding by its longstanding policy is precisely the type of state interference with the right to counsel that is impermissible. *Stein*, 541 F.3d at 156 (noting that, absent justification, the "the Sixth Amendment prohibits the government from impeding the supply of defense resources (even if voluntary or gratis)").

[4] Douglas R. Young, *United States: Shifting Boundaries – As Courts Reexamine Cooperation in Federal Investigations, Individuals Are Fighting Back*, Mondaq Bus. Briefing, Oct. 25, 2006, *available at* http://www.mondaq.com/unitedstates/article.asp?articleid=43704.

In fact, the government itself has no legitimate interest in seeing that the accused has anything but the most effective defense. *See, e.g.*, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) ("The court has, moreover, an 'independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'" (quoting *Wheat v. United States*, 486 U.S. 153, 160 (1988))); *see also Stein*, 541 F.3d at 157 ("A company that advances legal fees to employees may stymie prosecutors by affording culpable employees with high-quality representation. But if it is in the government's interest that every defendant receive the best possible representation, it cannot also be in the government's interest to leave defendants naked to their enemies."). The ability of employees to retain lawyers experienced in complicated white-collar cases is critical to the proper functioning of the system; the presence of qualified counsel on *both* sides of a case advances important interests in reliable outcomes. *See, e.g.*, *Ridder v. CityFed Fin. Corp*., 47 F.3d 85, 87 (3d Cir. 1995) (noting that state laws permitting or requiring corporations to advance employee legal fees "enhance the reliability of litigation outcomes involving directors and officers of corporations by assuring a level playing field"). The government can advance no legitimate interest in requiring El Paso to discontinue paying appellants' legal expenses, except to separate appellants

from their retained counsel. That is not a legitimate basis for impairing an accused's Sixth Amendment right to counsel.

3. The Government's Pre-Indictment Conduct Impaired Appellants' Relationships with Counsel

It is well established that the Sixth Amendment right to counsel does not attach until a prosecution is commenced. *See Rothgery v. Gillespie County*, 554 U.S. 191, 197 (2008). Here, there is no argument that the government's interference with appellants' right to counsel began pre-indictment. But there is likewise no dispute that, by coercing El Paso during the pre-indictment phase to discontinue paying appellant's attorneys' fees, it interfered with appellants' ability to conduct their defense once they were indicted. Because the pre-indictment actions of the government impaired appellants' defense post-indictment and tainted the entire proceedings, the government impermissibly infringed upon their Sixth Amendment rights. *See Stein*, 541 F.3d at 153 ("When the government acts prior to indictment so as to impair the suspect's relationship with counsel post-indictment, the pre-indictment actions ripen into cognizable Sixth Amendment deprivations upon indictment.").

D. Dismissal of the Indictment Is the Appropriate Remedy to Cure the Violations of Appellants' Constitutionally Protected Right to Counsel of Choice.

Remedies for deprivations of the right to counsel "should be tailored to the injury suffered from the constitutional violation." *Morrison* 449 U.S. at 364.

Dismissal of an indictment is the appropriate remedy "where necessary to 'restore the defendant to the circumstances that would have existed had there been no constitutional error.'" *Stein*, 541 F.3d at 144 (quoting *United States v. Carmichael*, 216 F.3d 224, 227 (2d Cir. 2000). In *Stein*, the Second Circuit affirmed the trial court's dismissal of an indictment against thirteen defendants because of government interference with their right to counsel, finding that no remedy short of dismissal would return the defendants to "the status quo ante." *Stein*, 541 F.3d at 145.

Here, much like in *Stein*, there is no remedy that will return appellants to the status quo ante. The government, over a period of years, made clear that El Paso's decision on whether to advance legal fees to employees would be a factor in valuing the corporation's cooperation and ultimately whether the corporation would be indicted. That pressure caused El Paso to break with its longstanding policy and stop paying appellants' legal fees. During the many months that followed, the defense made countless decisions about the conduct of the defense—decisions that were made subject to artificial constraints on resources caused by the elimination of a source of funding that, but for the government's pressure, would have been available. Identifying a remedy narrower than dismissal that would "restore [appellants] to the circumstances that would have existed had there been no constitutional error," *Carmichael*, 216 F.3d at 227, would thus require "a

speculative inquiry into what might have occurred in an alternate universe," *Gonzalez-Lopez*, 548 U.S. at 150.

While, just two months before the trial, the government stated that it "did not care" whether El Paso advanced appellants' fees, R. 2233, in an attempt to cure the constitutional violation of appellants' right to counsel, the government's eleventh-hour curative efforts are insufficient. There is no way to return appellants to the position they would have occupied but for the government's interference: its effects have simply been too pervasive.

In *Stein*, the Second Circuit rejected a nearly identical argument, finding that it was unrealistic "to expect [a corporation] to exercise uncoerced judgment" after years of government pressure "as if it had never experienced the government's pressure in the first place." 541 F.3d at 145. As in *Stein*, the "government's intervention, coupled with the menace inherent in the Thompson Memorandum, altered the decisional dynamic in a way" that no remedy short of dismissal of the indictment would return appellants to the same position they were in prior to the interference. *Id.* Because here "there was a Sixth Amendment violation" that cannot be cured "dismissal of the indictment is required." *Id*. at 146.

CONCLUSION

The Sixth Amendment right to counsel of choice is essential to ensure the fair administration of criminal justice and a cornerstone of the adversarial system

embodied in our Constitution. The government cannot limit or interfere with a criminal defendant's right to counsel solely in an effort to weaken the defense. Such a practice is contrary to the very foundations of our adversarial system of justice and furthers no legitimate state interest. Though the type of interference demonstrated here is no longer routine DOJ policy, such policies cannot be allowed to be resurrected. Accordingly, the Court should dismiss the indictments against appellants as the only available remedy to make them whole.

July 8, 2011 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 4,744 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

*/s/*_____
John P. Elwood

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of July, 2011, I caused this Motion for Leave to File Brief of National Association of Criminal Defense Lawyers as *Amicus Curiae* in Favor of Defendant-Appellant to be filed via the CM/ECF filing system, which will then send notification of such filing to all counsel of record.

/s/_____
John P. Elwood