

Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

Name: Forrest Shoaf

Office Address: 529 Ridgecrest Lane

(including county)

Lebanon, TN 37087 (Wilson County)

Office Phone: 615.547.6042 Facsimile: None

Email Address: [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website <http://www.tncourts.gov>). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) *and* electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit fourteen (14) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Investor

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1987; BPR 012794

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee BPR 012794 - Active

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any State? If so, explain. (This applies even if the denial was temporary).

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

1987-1995: Bass, Berry & Sims (Nashville)

1995-1996: General Counsel, Alexander for President, Inc.

1996-2005: Investment Banker (1) J.C. Bradford, Inc.; (2) Morgan Kegan, Inc.; (3) Avondale Partners, LLC

2005-2011: General Counsel, Cracker Barrel Old Country Store, Inc. (Also served as Chief Financial Officer for 15 months)

2012: Present Retired, Private Investor

6. If you have not been employed continuously since completion of your legal education,

describe what you did during periods of unemployment in excess of six months.

April 2002 – October 2002 Republican Candidate for Congress 7th District of Tennessee (lost primary)

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I am retired from the practice of law, although I perform pro bono services for friends and family.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

My years in private practice were spent primarily in transactional matters. I specialized in municipal finance, public corporate finance (public offerings of debt and securities), private corporate finance, and general corporate practice. I served as bond counsel in bond offerings in 94 of 95 Tennessee counties and represented corporate clients before the Securities and Exchange Commission (“SEC”). I also served as underwriter’s counsel in many public offerings. As an investment banker, I did not function as an attorney, but drew upon my legal training and experience.

While serving as Chief Legal Officer and Corporate Secretary for Cracker Barrel, I oversaw the corporation’s legal matters before the SEC, the Equal Employment Opportunity Commission (“EEOC”), and federal and state courts in 42 states, including the U.S. Supreme Court. I estimate that, during my tenure, Cracker Barrel appeared before various courts and commissions more than 1,000 times. I also oversaw the corporation’s appearance before various municipal bodies, e.g., zoning boards.

9. Also separately describe any matters of special note in trial courts, appellate courts, and

administrative bodies.

Appeared before the U.S. Supreme Court in CBOCS West v. Humphries 553 U.S. 442 (2008)

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

N/A

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Trustee of my father's revocable trust (family farm)

Commissioner of the Tennessee Post-Conviction Defender Office Oversight Commission

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Commission.

As an officer in the United States Army, I appeared as an officer of the court in several courts martial.

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

None

EDUCATION

14. List each college, law school, and other graduate school which you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

U.S. Military Academy (West Point), 1968-1972 B.S., Dean's List

Vanderbilt University, 1978-1980 M.A. (Lit)

Harvard Law School, 1984-1987 J.D. (with honors)

Military Schools of Graduate Equivalency:

U.S. Army Command & General Staff College

U.S. Air Force War College

PERSONAL INFORMATION

15. State your age and date of birth.

62, 8 July 1950

16. How long have you lived continuously in the State of Tennessee?

Except for my military schooling and active service (12 years) and my law schooling, I have lived continuously in Tennessee since my birth, and even during my absence I remained a Tennessean, voting here (absentee) and holding a Tennessee driver's license.

17. How long have you lived continuously in the county where you are now living?

7 plus years

18. State the county in which you are registered to vote.

Wilson

19. Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

U.S. Army, Infantry

1968-1984, honorably discharged as a Major of Infantry

Decorations

Ranger Tab

Parachutist Badge

Air Assault Badge

Meritorious Service Medal and six other decorations

Served as a troop leader and staff officer with the 101st Airborne Division and 2d Infantry Division and as a Professor of English on the West Point faculty.

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

No

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you

were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Twice divorced (as a defendant)

Shoaf v. Shoaf in Davidson Chancery Court in 1997 and in Wilson County General Sessions Court in 2012.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

Cumberland University Board of Trust 2007 to Present

Webb School (Bell Buckle) Board of Trust 1993-2008; 2012 to Present

The Hermitage Board of Trust 2006 to 2010

The University Club of New York City 2007 to Present

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.
- If so, list such organizations and describe the basis of the membership limitation.
 - If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

Tennessee Bar Association 2005-2012

Nashville Bar Association 2005 - 2012

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school which are directly related to professional accomplishments.

Nashville Bar Journal: Best of the Bar 2009

30. List the citations of any legal articles or books you have published.

“Point/Counter Point: Is an Income Tax in Tennessee Constitutional?”

Tennessee Bar Journal Vol. 35, No. 9 (with Lewis R. Donelson)

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Panelist for Chief Legal Officer Leadership Forum (Argyle Executive Forum) 2012

Panelist for ALFA International Seminar in 2009

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Candidate for Congress, 7th District of Tennessee 2002 (lost primary)

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings which reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

See attachments. The Tennessee Bar Journal is entirely my own.

I oversaw and participated to a significant degree in the drafting of the Supreme Court brief excerpt.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? *(150 words or less)*

I have devoted a good deal of my life to public service, spending 25 years in military service as an Army Officer (12 years of active duty; 13 in the Reserves.) Now that I have retired from the active practice of law, I view the Court of Appeals as an ideal opportunity to once again render significant public service, this time to my native state. Our appellate courts are largely invisible to the average Tennessean, but they are nonetheless essential to the polity. I believe that I have the requisite experience and education to be a good judge, but, more important, I have the desire to be a good public servant. This position would not be a job to me; it is an opportunity to contribute to the well-being of my state. I have served before and I am ready, and would be honored, to serve again.

36. State any achievements or activities in which you have been involved which demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. *(150 words or less)*

I like to believe that my entire professional life demonstrates my commitment to equal justice under the law. As a troop leader, I strove to treat all soldiers under my command fairly and evenhandedly and I am confident that I did so. As a lawyer, I have endeavored to treat my clients and those “on the other side” of all transactions fairly and respectfully. My pro bono activities have largely involved helping friends and fellow employees with legal problems. Representative matters include: tenant-landlord disputes, “Lemon Law” complaints, other consumer protection matters and DUI advice. While my private practice has been rewarding and remunerative, few things in my life have been as satisfying as helping those who cannot afford a lawyer through their difficulties.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. *(150 words or less)*

I seek a position on the Court of Appeals, one of four allocated to the Middle Tennessee Grand Division. I do not wish to appear immodest, but I believe that I can render creditable service in the position. I believe that I have a unique set of skills and experience, having succeeded as an Army Officer, an academic, a lawyer, a financial expert and a businessman. I would also bring to the position a strong work ethic and a disciplined analytical approach to problem solving. Moreover, I believe that my skills of expression will enable me to render decisions by the Court in clear, concise language. Finally, I believe that other members of the Court will find me an affable, hard-working and well-prepared colleague.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? *(250 words or less)*

My community involvement has been primarily through my service on non-profit boards. I have for six years served on the Board of Trust of Cumberland University, chairing the Academic Affairs Committee and serving as well on the Board's Executive Committee. I also serve on the Webb School (Bell Buckle) Board of Trust, chairing its Finance and Audit Committee as well as holding a seat on the Executive Committee. This is my 16th year of service to Webb. I previously served as a trustee for the Hermitage (the home of Andrew Jackson) and for the Nashville Shakespeare Festival. During my tenure as Chief Legal Officer of Cracker Barrel, I acted as an advisor to the Cracker Barrel Old Country Store Foundation, and I formed Cracker Barrel Cares, a charitable corporation that assists Cracker Barrel employees who have suffered misfortune, e.g., during Hurricane Katrina. If I am appointed to the bench, I intend to continue my service on the Cumberland and Webb Boards unless I find that doing so will interfere with my judicial duties.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Commission in evaluating and understanding your candidacy for this judicial position. *(250 words or less)*

I believe that my entire life has been preparation for this position. I have been fortunate to have enjoyed several careers, all of which have taught me valuable lessons that should make me a good jurist. Beginning at West Point and throughout my military career, I learned the importance of service and sacrifice. Part of that service was purely academic. I was a professor of English for four years on the West Point faculty and, in preparation for that assignment, I received an M.A. in Literature from Vanderbilt. Both experiences honed my analytical and writing skills which I consider essential talents for an appellate judge. As a lawyer, I practiced in several areas: municipal finance, real estate, and corporate law. I concluded my legal career as the Chief Legal Officer of Cracker Barrel Old Country Store, Inc., a public company with 70,000 employees in 42 states. That assignment involved me in over 1000 legal cases, which ranged from city court to the U.S. Supreme Court, and involved many complex matters in several areas of law. I do not exaggerate when I say that I have overseen litigations in almost every kind of civil action. I also served as the Chief Financial Officer of Cracker Barrel for 15 months, which gave me a businessman's perspective that I believe would make me a better judge. Finally, during my ten years as an investment banker, I advised businesses large and small, which further increased my understanding of the commercial and financial sectors. In sum, I have been a soldier, a teacher, a lawyer, a financial officer, and a businessman. I have overseen complex civil litigation and served as a trusted counselor. Again, I do not wish to appear immodest, but I have excelled in all my endeavors, and I believe that my eclectic experience and my willingness to learn would make me a capable jurist.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. (250 words or less)

If appointed to the bench, I most assuredly would uphold the law even if I disagree with the substance of that law. That is, after all, what a judge is sworn to do, and I regard oaths of office as binding obligations. All soldiers do. The concept is simple – if you cannot abide by your oath, do not accept the office. Moreover, I cannot see how a jurist can faithfully discharge his duty if he cannot uphold settled law or enforce a statute no matter how personally repugnant he may find them. I compare this judicial duty to that I bore as a commissioned officer when I had to execute orders whose wisdom I doubted. Judges may, of course, interpret ambiguous laws and navigate where no precedent guides, but their duty is plain when the law is clear. The best example of my ability to uphold a law I disagree with can be seen in my service as a Commissioner on the Tennessee Office or the Post-Conviction Defender, which renders legal assistance to those convicted of capital crimes. I resisted appointment to the commission, for I believed that it impeded the efficient administration of justice, but once persuaded to take the seat, I have done all that I can to ensure that the office faithfully and zealously represents its clients.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.

A. Gary Brown, Esquire – CEO, CMG Life Services, Inc. | Email: [REDACTED]

B. Honorable Jim Cooper – Member of Congress (TN-5) | Phone: 615.736.5295

C. Bob McDonald – CEO, Cedarstone Bank & Chairman of the Cumberland University Board of Trust | Phone: 615.443.1411

D. Keith Simmons, Esquire – Managing Partner, Bass, Berry & Sims | Phone: 615.742.6200

E. Michael A. Woodhouse – former CEO & Chairman of the Board, Cracker Barrel Old Country Store, Inc [REDACTED]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the

office of Judge of the [Court] of Appeals of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: June 11, 2013.



Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.



TENNESSEE JUDICIAL NOMINATING COMMISSION
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

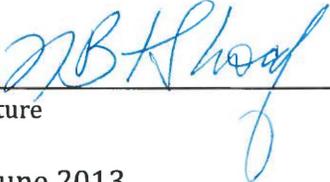
TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the state of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the

Judicial Nominating Commission and to the office of the Governor.

Forrest Shoaf
Type or Printed Name


Signature

11 June 2013
Date

012794
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

Writing Sample 1

Tennessee constitutional?

By N. B. Forrest Shoaf

No. When, in the last session of the General Assembly, the subject of an individual income tax arose, public debate centered on whether lawmakers had the political will to enact such a tax. Conspicuously absent from the debate was the basic question of whether an income tax is constitutional in Tennessee. If the question arose at all, it was generally brought up by advocates of the tax who cited a 1991 opinion by Attorney General Charles Burson that it is permissible. I argue, however, that if a broad-based income tax is enacted without an enabling constitutional amendment, the Tennessee Supreme Court could uphold its validity only by overturning a significant body of law that holds that the Tennessee Constitution prohibits such a tax.

When the current Tennessee Constitution was adopted in 1870, Article II, §28, contained the sentence "the Legislature shall have the power to levy a tax upon incomes derived from stocks and bonds that are not taxed ad valorem." In 1929, the General Assembly imposed a tax on the income from certain securities. The validity of that tax, now known as the Hall income tax, was upheld by the Tennessee Supreme Court in *Shields v. Williams*, 159 Tenn. 349 (1929). Two years later, the General Assembly, in extra session, levied a graduated tax on all income. This act, however, did not fare as well as Sen. Hall's. In *Evans v. McCabe*, 164 Tenn. 672 (1932), the court struck down the tax on the principle of "exclusion by affirmation," *i.e.*, that §28's enumeration of a permissible tax on one form of income (from securities) made impermissible a tax on all other forms of income. "When the Constitution conferred upon the Legislature the power to tax only one class of incomes, that instrument necessarily denied to the Legislature the power to tax incomes of other classes." *Evans*, at 680.

In 1960, in *Jack Cole Co. v. MacFarland*, 206 Tenn. 694 and in 1964, and in *Gallagher v. Butler*, 214 Tenn. 129, the Supreme Court quoted with approval and followed *Evans* in deciding two other tax cases. *Evans* and its progeny have never been overruled, and that part of Article II, §28, which informed the cases, has never been amended. Therefore, opponents of a general income tax contend that the tax cannot be imposed without a constitutional amendment or a subsequent Supreme Court decision overturning *Evans*.

The narrow logic of *Evans* has been criticized by some commentators, who argue that the court should have considered whether a general income tax can be wedged into either the "privilege" or "property" categories (both subject to the taxing power of the General Assembly under §28), rather than deciding the issue on a principle of construction. See "Constitutional Limitation on Income Taxes in Tennessee," W. Armstrong 27 *Vand. L. Rev.*, 475 (1974) and R. Cooper "Re-examining the Constitutionality of an Income Tax in Tennessee," Jan./Feb. 1992 *Tenn. Bar J.* 14. But even these writers concede that the court has subsequently ruled (in *Jack Cole*) that the receipt of income is not a "privilege" that can be taxed, and one critic has concluded that fitting an income tax into the "property" category will require such judicial gymnastics that the constitution should be amended before an income tax could be enacted. Cooper, at 22.

Proponents of an income tax also make much of former Attorney General Burson's opinion, issued in 1991 during Gov. McWherter's attempt to enact an income tax, that the Tennessee Constitution does not prohibit a general personal income tax. That opinion, however, will not bear close scrutiny. The opinion relies on General Burson's unsupported

(Continued on page 27)

N. B. Forrest Shoaf is an investment banker with J.C. Bradford & Co., specializing in mergers and acquisitions. Prior to joining Bradford, he was a partner in the Nashville firm of Bass, Berry & Sims. He is a graduate of West Point and the Harvard Law School.

COUNTERPOINT

No.

(Continued from page 23)

assertion that *Evans* is invalid because the "key provisions" of the constitution upon which *Evans* was based were "modified or removed" when the constitution was amended in 1971.

General Burson is correct that the constitution was amended in 1971, but he errs in saying that the "key provisions" that informed *Evans* were modified. Those "provisions" are embodied in the sentence quoted above from Article II, §28, which remains unchanged from 1870. Moreover, General Burson ignores, without comment, two opinions by his predecessors, both authored after the 1971 Constitutional Convention, to the effect that, even after the convention amended Article II, §28, an income tax violates the constitution. In May 1975, the attorney general's office issued an opinion reaffirming that "realizing and receiving income or earnings is not a privilege that can be constitutionally taxed,"¹ and in October 1977, the attorney general opined that "the General Assembly is without power to impose an income tax on any income other than on incomes derived from stocks and bonds that are not taxed ad valorem." Citing *Evans*, *Jack Cole Co.* and *Gallagher* as good law, the 1977 opinion specifically states that, "although these cases dealt with the provisions of Article II, §28, before its amendment in 1972, the income tax provisions in the amended section were adopted verbatim from the former provisions interpreted by these cases."

Thus, General Burson's opinion that *Evans* and its progeny are not good law is not only in direct conflict with three decisions of the Tennessee Supreme Court, it also conflicts with two prior opinions of the Tennessee Attorney General's office.

I conclude, therefore, that those who oppose an income tax on constitutional grounds have the better argument. For more than 70 years, the set-

tled law in Tennessee is that an income tax on any income other than that from stocks and bonds is unconstitutional. This rule can be changed only by an amendment of Article II, §28 or by a Supreme Court decision overruling all three prior decisions of the Supreme Court.

Of course, no one can know how the present court would vote if another

case involving the constitutionality of a general income tax comes before it, but if the court does validate such a tax, it will have to resort to creative avoidance of *stare decisis*. 52

1. This opinion also noted that the call to the 1971 Convention forbade it from considering an income tax.

OPINIONS, REACTIONS,

"Before the legislature imposes an income tax on the citizenry, should it not eliminate the special interest exemptions from current taxes so that we can see whether additional taxes are truly necessary?" — **James H. Harris III, Nashville**

■■■■
"The last thing our legislators need is another way to pick our pockets.

Giving the politicians a new tax is like offering to buy an alcoholic the next drink. The drunk won't quit until the bottle is empty, and the politicians won't quit until our pockets are bare. Taxes represent the forced confiscation of our wealth by the government and shouldn't be increased until all avenues for spending reduction have been exhausted." — **Rick Tate, Knoxville**

■■■■
"I would like to propose that we do not need tax reform as much as we need spending reform. There is no end to 'felt' needs, nor to the spending that legislators will undertake in order to promote their re-elections, or reward

friends. If they have more money to spend, it will be spent.

Over 40 percent of all that is earned goes for taxes of one kind or another. We do not need additional taxes; we need to be allowed to keep more of our honest earnings. The top rate of the federal income tax rate, when it was passed, was 1.5 percent (this is not a typo). Tennessee's sales tax was passed in the 1950s and was announced to be a temporary tax.

All of us see waste in state spending; and, tax money spent on things that are no business of government. Lawyers used to be the protectors of liberty. I call on fellow lawyers to point out, and decry the waste; to help curtail government spending; and, to protest any new taxation. — **Clinton R. Anderson, Morristown**

■■■■
"The state and its counties and cities do not overtax us. Debating state taxation without resisting gluttonous federal taxation is like stomping on the ants and letting the elephants run wild. Challenge the ugly monster: the federal

income tax absorbs the lion's share of the tax base, leaving the states and localities snarling over the carrion like hyenas. I want state leaders to camp on the Capitol steps waving protest signs in legitimate rebellion. Any tax is "revenue neutral" and adjustable to raise enough money. The clamor for a state income tax is about more government money and power." — **Michael J. Mollenhour, Knoxville**

■■■■
"I am opposed to an income tax and I hope the Bar Association will fight the same. Every level of government is looking for revenue and the strain it is causing will soon have a negative effect on everyone. There are hundreds of justifications for any tax. The problem is government creates nothing and takes away from those who can create. The more so-called services offered, the more infringement on our freedoms and rights. Government is not the answer for everything and neither is an income tax for Tennessee." — **Charles E. Ridenour, Sweetwater**

Writing Sample 2

No. 06-1431

In the
Supreme Court of the United States

CBOCS WEST, INC.,
Petitioner,

v.

HEDRICK G. HUMPHRIES,
Respondent.

*On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit*

BRIEF FOR THE PETITIONER

Michael W. Hawkins

Counsel of Record

Michael J. Newman

DINSMORE & SHOHL LLP

Suite 1900

255 East Fifth Street

Cincinnati, OH 45202

(513) 977-8270

(513) 977-8141 fax

michael.hawkins@dinslaw.com

michael.newman@dinslaw.com

Michael Zylstra

General Counsel and

Vice President

CBOCS West, Inc.

307 Hartmann Drive

P.O. Box 787

Lebanon, TN 37088

(615) 235-4006

(615) 443-9583 fax

michael.zylstra@crackerbarrel.com

QUESTION PRESENTED

Is a retaliation claim cognizable under 42 U.S.C. § 1981 where an employee complains about race discrimination?

and enforce contracts . . . as is enjoyed by white citizens

Section 1981(b) – For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

Passed by Congress in 1866, 42 U.S.C. § 1981 (hereinafter “Section 1981”) guarantees to every person “the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.” 42 U.S.C. § 1981(a) (2006). Largely unaltered to this day, Section 1981 is an historical statute.

Shortly after the Civil War, some states enacted laws that are commonly referred to as the Black Codes. Their authors designed these laws “to restrict the liberties of the newly freed slaves to ensure a supply of inexpensive agricultural labor and to, unfortunately, maintain white supremacy.” BLACK’S LAW DICTIONARY 163 (7th ed. 1999) (defining “Black Codes”). In a post-slavery America, some could not part with the institution of slavery, and insisted on creating a new system that would parallel the old and maintain a subordinate caste. *Developments in the Law - Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 40 (1980). In this historical context, one could argue that

Section 1981 was intended to wipe out the Black Codes and the vestiges of slavery.

Nearly one hundred years later, America was in the midst of the Civil Rights Movement. While this movement was largely designed to promote equality among the races, it can be credited with a much broader effect. In particular, the Civil Rights Movement spawned Congress' creation of a revolutionary statutory scheme in Title VII, which, among other things, protects against: (1) discrimination based on an individual's "race, color, religion, sex, or national origin" in the employment context, 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-2(a)(2); and (2) an employer's retaliation against an employee for engaging in protected activity such as "making charges, testifying, assisting, or participating in enforcement proceedings" under Title VII, 42 U.S.C. § 2000e-3(a).

In Title VII, Congress created the Equal Employment Opportunity Commission (hereinafter "EEOC") to enforce Title VII's protections against employment discrimination and retaliation. *See* 42 U.S.C. § 2000e-4 (2006). Congress also created specific requirements for filing claims against employers alleging discrimination or retaliation, namely: (1) an individual must bring a charge of discrimination before the EEOC within 180 days of the discriminatory act, 42 U.S.C. § 2000e-5(e)(1); (2) where an employee initiates a charge with a state agency, he/she must file the charge with the EEOC within 300 days of the alleged unlawful employment practice, *id.*; and (3) once the EEOC issues a right to sue letter to the aggrieved individual, he/she must file suit within 90

days or forever be barred from bringing a claim alleging employment retaliation or discrimination, *id.* at § 2000e-5(f)(1).

In 1991, Congress amended both Section 1981 and Title VII. The Civil Rights Act of 1991 specifically amended Section 1981 to include subsection (b), which defines the phrase “make and enforce contracts” to include only “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” 42 U.S.C. § 1981(b).

The Civil Rights Act of 1991 amended Title VII by including 42 U.S.C. § 2000e-2(k) (2006), which establishes the burden of proof in disparate impact discrimination cases. Congress also created the right to a jury trial when litigating disputes under Title VII. *See* 42 U.S.C. § 1981a(c) (2006).

From 1866 to the present, not once has Congress amended Section 1981 to include a cause of action based on retaliation as it has done in numerous statutes throughout history. *Compare* 42 U.S.C. § 1981, *with* 29 U.S.C. 158(a)(4) (2006), 29 U.S.C. § 215(a)(3) (2006), 42 U.S.C. § 2000e-3(a) (2006), 29 U.S.C. § 623(d) (2006), 42 U.S.C. § 12203(a) and (b) (2006), 29 U.S.C. § 2615 (2006), 38 U.S.C. § 4311(b) (2006), *and* 49 U.S.C. § 31105 (2006).

II. FACTUAL BACKGROUND

Petitioner operates a restaurant chain known as “Cracker Barrel” in a number of states. It employed Respondent as an associate manager in one of its

restaurants. JA 82. Petitioner discharged Respondent on December 5, 2001 after another associate manager complained that Respondent left the store's safe open during the evening hours in violation of his responsibilities. JA 109.

Respondent, who is African-American, challenged his termination by filing an EEOC charge on August 9, 2002. JA 37, 55. Respondent did not check the box on his EEOC charge denoting retaliation under Title VII. JA 37, 55. On March 3, 2003, the EEOC issued a right to sue letter advising Respondent that he had 90 days in which to file a lawsuit (*i.e.*, until June 5, 2003). JA 83. Respondent, however, did not file his complaint until January 12, 2004, 221 days after June 5, 2003. JA 84, 91 (while January 12, 2004 was 221 days after June 5, 2003, the Court noted that Respondent was 195 days tardy in filing his lawsuit against Petitioner).

III. LOWER COURT PROCEEDINGS

On January 12, 2004, Respondent filed his complaint against Petitioner in the United States District Court for the Northern District of Illinois seeking relief for racial discrimination and retaliation under both Title VII and Section 1981. JA 86-87. In response to Petitioner's Motion to Dismiss, the District Court dismissed Respondent's Title VII discrimination and retaliation claims because he failed to file those claims within 90 days of receiving his right to sue letter. JA 91-92.

After the Court's decision, Respondent's only remaining claims were his Section 1981 discrimination and retaliation claims. JA 109-110. Following

discovery, Petitioner filed a Motion for Summary Judgment. JA 108. In response to the motion, Respondent abandoned his Section 1981 discrimination claim. JA 115 (noting that it became “apparent from the presentation [Respondent made] in his opposition papers” that Respondent’s retaliation claim was the only claim that had “any vitality”). The District Court granted Petitioner’s Motion, holding that Respondent could not establish a *prima facie* case of retaliation. JA 113-116.

Respondent then appealed his case to the Seventh Circuit Court of Appeals with respect to his Section 1981 claims. JA 117-118. In opposition, Petitioner argued, *inter alia*, the following: (1) a new decision from the Seventh Circuit precluded Respondent from even bringing a retaliation claim under Section 1981, *see Hart v. Transit Mgt. of Racine, Inc.*, 426 F.3d 863 (7th Cir. 2005); and (2) assuming that Respondent had a viable Section 1981 retaliation claim, he could not establish a *prima facie* case of retaliation against Petitioner. *See* JA 117-166 *generally*.

On appeal, the Seventh Circuit overruled its decision in *Hart* and ruled in favor of Respondent. JA 146, 149 n. 12. It held that Section 1981 provides for a cause of action based on retaliation:

[T]he issue before us is whether section 1981, as amended by the Civil Rights Act of 1991, applies to claims of retaliation. We hold that it does. The plain text of the statute, as amended in 1991, makes clear that section 1981 encompasses the “termination of contracts,” and there can be no doubt that a retaliatory

discharge is indeed a termination of the employment contract. . . . [T]he legislative history confirms that Congress intended retaliation to be included within section 1981.

JA 137-138. Of particular import, the Seventh Circuit disclaimed its duty to “harmonize” Section 1981 and Title VII, despite the statutes’ partial overlap. JA 145.

SUMMARY OF ARGUMENT

One of the lasting principles of the American Revolution is the idea that “laws should be made not by a ruler, or his ministers, or his appointed judges, but by representatives of the people.” Antonin Scalia, Editorial, *How Democracy Swept the World*, WALL ST. J., Sept. 7, 1999, at A24. Indeed, this principle has become accepted all over the world, even in countries where the principle is not actually practiced. *Id.* This case is of paramount importance for the protection of this principle in the United States. This case is not about taking a remedy away from Respondent or anyone else who is retaliated against for complaining about racial discrimination in the workplace. That remedy already exists in Title VII of the Civil Rights Act of 1964. This case is about respect for and proper construction of the laws Congress, as the elected representatives of the people, enacts.

The sole legal issue presented in this case is whether a retaliation claim is cognizable under 42 U.S.C. § 1981. This Court should reverse the Seventh Circuit Court of Appeals and hold that Section 1981 does not recognize a cause of action based on retaliation because: (1) the plain language of Section

1981 does not provide for a cause of action based on retaliation; (2) proper application of statutory construction shows that Congress intended to exclude retaliation from Section 1981; (3) the Seventh Circuit misused legislative history to create a cause of action under Section 1981 where none exists in the text of the statute; (4) the Seventh Circuit erroneously relied on this Court's decisions in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), to support its decision; and (5) public policy demands reversal.

Absent any textual support, the Seventh Circuit improperly created a cause of action based on retaliation under Section 1981. This unauthorized creation poses a danger to the long-standing jurisprudence of this Court, holding that when a statute's language is plain, the only function of any court is to enforce the statute according to its terms. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989); *Caminetti v. United States*, 242 U.S. 470, 485 (1927); *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 33 (1894); *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

By creating a cause of action for retaliation under Section 1981, the Seventh Circuit has, in effect, drafted, passed, and executed legislation without concern for the democratic norms embodied in the Constitution, particularly the separation of powers. *See* U.S. CONST. ARTS. I, II, & III. *See also* THE

FEDERALIST NO. 78, at 401-02 (Alexander Hamilton) (Phoenix Press Paperback ed., 2000) (“It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”) (capitalization in original).

The Seventh Circuit ignored the plain language of Section 1981 and Congress’ intentional exclusion of a cause of action based on retaliation in Section 1981. Historically, when Congress has wished to create such a cause of action in an anti-discrimination statute, it has explicitly done so. Congress did not include an anti-retaliation provision in Section 1981, and courts are not free to create rights and remedies beyond those set forth in the text that Congress has chosen to enact.

The Seventh Circuit’s decision threatens to eviscerate the administrative and procedural safeguards of Title VII that Congress specifically enacted to govern claims of race discrimination and retaliation in the employment context. *See* 42 U.S.C. § 2000e, *et seq.* (“Title VII”). This, by itself, tips the scales in favor of Petitioner’s position.

Finally, the Seventh Circuit’s decisions to (1) improperly infer a cause of action based on retaliation from the legislative history alone, (2) erroneously rely on the Court’s opinions in *Sullivan* and *Jackson*, and (3) ignore proper public policy concerns support Petitioner’s argument.

For these reasons, the Court should reverse the Seventh Circuit's decision and hold that Section 1981 does not provide for a cause of action based on retaliation.

ARGUMENT

I. THE PLAIN TEXT OF SECTION 1981 DOES NOT PROVIDE FOR A CAUSE OF ACTION BASED ON RETALIATION.

The text of Section 1981, like all other statutes, only protects specific rights. At its core, Section 1981 “protects the equal right of ‘all persons . . . to make and enforce contracts’ without respect to race.” *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006) (quoting 42 U.S.C. § 1981(a)). In the Civil Rights Act of 1991, Congress defined the phrase “make and enforce” to include “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” 42 U.S.C. § 1981(b). Even though amended, an employer’s conduct is not actionable under Section 1981’s text unless it is “racially motivated.” *Runyon v. McCarey*, 427 U.S. 160, 168 (1976). Courts cannot disregard Congress’ express language and create a cause of action based on retaliation where none exists in the statute. The fact of the matter is that the plain language of Section 1981 does not contain the word “retaliation” or any wording that one could legitimately construe as an anti-retaliation clause. *See, e.g.*, 42 U.S.C. § 2000e-3(a) (the congressionally created anti-retaliation clause in Title VII).