

16-5086

United States Court of Appeals for the District of Columbia Circuit

METLIFE, INC,

Plaintiff-Appellee,

v.

FINANCIAL STABILITY OVERSIGHT COUNCIL,
Defendant-Appellant

BRIEF FOR WILLIAM MICHAEL CUNNINGHAM AS AMICUS CURIAE IN SUPPORT OF THE PUBLIC INTEREST AND AGAINST APPELLEES

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CORPORATE DISCLOSURE STATEMENT

William Michael Cunningham is filing as an individual, has no parent company, nor has he issued any stock.

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Letter to US Senator Richard Shelby commenting on the financial rescue plan. See: <http://www.ethicalmarkets.com/wp-content/uploads/2008/12/financialbailoutcomment1.pdf>

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[Global Market Turmoil Graphic](#) and [Financial Crisis Calendar Graphic](#), Creative Investment Research, Inc., December, 2008 and November, 2009.

INTEREST OF THE AMICUS CURIAE

William Michael Cunningham registered with the U.S. Securities and Exchange Commission as an Investment Advisor on February 2, 1990. He registered with the D.C. Public Service Commission as an Investment Advisor on January 28, 1994. Mr. Cunningham manages an investment advisory and research firm, Creative Investment Research, Inc. Mr. Cunningham holds an MA in Economics and an MBA in Finance, both from the University of Chicago in Chicago, Illinois.

Mr. Cunningham's understanding of capital markets is based on firsthand knowledge obtained in a number of positions at a diverse set of major financial institutions. He served as Senior Investment Analyst for an insurance company. Mr. Cunningham was an Institutional Sales Representative in the Fixed Income and Futures and Options Group for a leading Wall Street firm. Mr. Cunningham also served as Director of Investor Relations for a New York Stock Exchange-traded firm. On November 16, 1995, he launched one of the first investment advisor websites.

Mr. Cunningham has long been concerned with the integrity of the securities markets. He has worked to repair the damage caused by unethical institutions¹. From his testimony² on behalf of the public in Federal Court³, he understands that

¹ Property Flipping Remediation Yields Investment-grade Security.

<http://www.socialfunds.com/news/article.cgi?sfArticleId=682>

² See: Partial Revised Transcript from the Global Research Analyst Settlement Fairness Hearing. April 11, 2005. Before Judge William H. Pauley. In the U.S. District Court for the District of New York.

<http://www.creativeinvest.com/sri/fairness.html>

³ Supreme Court of the United States. No. 97-5066. William Michael Cunningham, Petitioner v. Board of Governors of the Federal Reserve System. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT. No. 97-1256 William Michael Cunningham, APPELLANT v. Board of Governors of the Federal Reserve System, Appellee. Decided April 30, 1997.

the widespread, generalized decline in ethical standards of business behavior over the past two decades requires consideration of the public interest.

Mr. Cunningham is as independent and objective as possible and comes to the Court with hands clean. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), William Michael Cunningham states that *no one* contributed money to fund preparing or submitting this brief.

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT.
No. 98-1459 William Michael Cunningham, APPELLANT v. Board of Governors
of the Federal Reserve System, Appellee. October, 1998.
US v. McGraw-Hill Companies Inc., et. al. Case No. CV 13-0779-DOC (JCGx).

BRIEF BY WILLIAM MICHAEL CUNNINGHAM AS (ProSe) AMICUS CURIAE IN PARTIAL SUPPORT OF THE APPELLANT/RESPONDENT AND OPPOSITION TO THE APELLEE/PETITIONER

Repeatedly over the past thirty years, signal market participants, *operating in the most materially advantaged country ever to exist*, abandoned ethical principles in the pursuit of material well-being. The following are the simple facts: individuals at the highest level of organizational management in the firms below unfairly transferred value from outsider to insider shareholders and/or engaged in fraudulent and unethical business behavior:

A.G. Edwards & Sons Inc.	Bank One
ABB Ltd.	Bear Stearns & Co. Inc.
Adlephia Communications	Bear Stearns Securities Corp.
AIM Advisors Inc.	Bernard L. Madoff Investment Securities LLC
AIM Distributors Inc.	BISYS Group Inc.
Alcatel-Lucent S.A.	Blackstone Advisory Services L.P.
Alliance Capital Management L.P.	Bristol-Myers Squibb Company
Alliance One International Inc.	CalPERS
American Express Financial	Canadian Imperial Bank of Commerce
American Funds	Canary Capital
American International Group Inc.	Cardinal Health Inc.
American Stock Exchange	Charles Schwab
Amerindo Investment Advisors Inc.	Chevron Corporation
Ameriprise Financial Services Inc.	Citigroup
AremisSoft Corporation	Citigroup Global Markets Inc.
AXA Advisors	Columbia Funds Distributor Inc.
AXA Rosenberg	Columbia Management Advisors Inc.
Baker Hughes	ConAgra Foods Inc.
Banc of America Investment Services	Countrywide Financial
Banc of America Securities LLC.	Credit Suisse First Boston
Bank of America's Nations Funds	HSBC Bank
Credit Suisse Securities (USA) LLC	

Cresap Inc.	ImClone
CSK Auto Corporation	Interactive Data Corp.
Daimler AG	Interpublic Group of Companies Inc.
DAV/Wetherly Financial L.P.	Invesco Funds Group Inc.
Dell Inc.	J.P. Morgan Chase
Deloitte and Touche LLP	Janney Montgomery
DHB Industries Inc.	Janus Capital Group Inc.
Edward D. Jones & Co. L.P.	KB Home
Empire Financial Holdings	Kellogg Brown & Root Inc.
Enron	Kmart
Evergreen Investment Management Company	KPMG LLP
Federal Home Loan Mortgage Corporation	Legg Mason
Federal National Mortgage Association	Lehman Brothers Holdings
Federated Investors	Limsco Private Ledger
First Union Corporation	Marsh & McLennan Companies Inc.
FleetBoston	Massachusetts Financial Services Co.
Franklin Templeton	MBIA
Fred Alger Management	McAfee Inc.
Freemont Investment Advisors	McCann-Erickson Worldwide Inc.
Galleon Management LP	Mercury Interactive LLC.
Gateway Inc.	Merge Healthcare Incorporated
Gemstar-TV Guide International Inc.	Merrill Lynch
General Re Corporation	Met Life⁴
Global Crossing	Millennium International Management L.L.C.
GlobalSantaFe Corp.	Millennium Management L.L.C.
Goldman Sachs	Millennium Partners L.P.
H.D. Vest Investment Securities	Morgan Keegan & Company Inc.
Heartland Advisors	Morgan Stanley
	Mutuals.com

⁴ SECURITIES AND EXCHANGE COMMISSION ADMINISTRATIVE PROCEEDING File No. 3-12257. <https://www.sec.gov/litigation/admin/2006/34-53624.pdf>

Hollinger International Inc.	National Century Financial Enterprises
Homestore Inc.	New Century Financial Corporation
New York Stock Exchange Inc.	Sunwest Management Inc.
Nicor	Strong Mutual Funds
Noble Corporation	Suntrust Capital Markets Inc.
Nomura Securities	Tenet Healthcare Corporation
Nortel Networks Corporation	Tidewater Inc.
Oppenheimer	Transocean Inc.
Panalpina Inc.	Tribune Company
Park Hill Group LLC	Tyco
Pax World Management Corp.	U.S. Bancorp Piper Jaffray
PBHG Funds	U.S. Foodservice Inc.
Pilgrim Baxter	UBS AG
PIMCO	UBS Warburg
Piper Jaffray & Co.	UnitedHealth Group Inc.
Pride International Inc.	Universal Corporation Inc.
Prudential Equity Group LLC	Value Line Inc.
Prudential Securities Inc.	Van der Moolen
Putnam Fiduciary Trust Company	Veras Investment Partners
Putnam Investment Management LLC	Volkswagen
Raymond James Financial	Wachovia Capital Markets LLC
Raytheon Company	Wachovia Corporation
RBC Dain Rauscher Inc.	Wextrust Capital LLC
RenaissanceRe Holdings Ltd.	Sirius Satellite Radio Inc.
Restoration Hardware	Spiegel Inc.
Royal Ahold (Koninklijke Ahold N.V.)	State of New Jersey
Samaritan Asset Management	State Street Bank and Trust Company
Security Trust Company N.A.	State Street Research
	WorldCom
	Xerox Corp.

This is no trivial listing of inconsequential firms. This is a multi-decade set of unethical business practices spanning every major capital market institution in the

country. There are hundreds of other cases.⁵ Fully identifiable entities engaged in illegal activities.⁶ They have, for the most part, evaded prosecution of any consequence.⁷

Thus, unethical behavior has become standard, to the detriment of the public.

Markets cannot survive continuously elevated levels of fraud, since fraudulent practices mask an entity's true value and misallocates capital by moving investment dollars from deserving entities and companies to unworthy ones.

Envy, hate⁸, and greed⁹ have flourished in capital market institutions, propelling ethical standards of behavior downward. Without meaningful reform there remains a significant risk that our economic system will simply cease functioning.¹⁰

⁵ For each successfully prosecuted incident, we estimate nine others either go undetected or do not make it to the prosecution and settlement phase.

⁶ See: Racial Bias in Securitization and Community Lending <http://twisri.blogspot.com/2009/08/wells-fargo-sued-for-racially-biased.html>, Mortgage GSE's, Predatory Lending and Minority Banks (2007 Prediction: Bear Stearns Will Fail.) <http://twisri.blogspot.com/2007/08/morgage-gses-predatory-lending-and.html>

⁷ See: Transaction Cost Theory of the Crisis <http://www.prlog.org/10746429-firm-releases-transaction-cost-theory-of-the-financial-crisis.html>

⁸ "Bank accused of predatory practices. Lawsuit alleges black neighborhood, churches targeted." Gazette.net. Online at: http://www.gazette.net/stories/06182009/collnew182411_32521.shtml

⁹ The relationship between investment banks and the economy. <http://twisri.blogspot.com/2009/03/why-market-failed.html>

¹⁰Proportional hazard models created by Mr. Cunningham and reflecting the probability of system wide market failure first spiked in September, 1998. The models spiked again in January and August, 2001. On December 22, 2005, we met with Ms. Elaine M. Hartmann and others from the Division of Market Regulation, U.S. Securities and Exchange Commission and specifically noted our model findings.

RESPONDENT FINANCIAL STABILITY OVERSIGHT COUNCIL (FSOC)
LACKS THE SKILL, TOOLS AND ABILITY TO EXPLICITLY OUTLINE
COSTS AND IT IS UNREASONABLE TO EXPECT THEM TO BE ABLE TO
DO SO.

In a June, 2010 comment letter to Mr. Phil Angelides, Chairman, Financial Crisis Inquiry Commission, Mr. Cunningham described the Transaction Cost Theory of the Financial Crisis. The letter included two separate graphical attachments, Global Market Turmoil Graphic and Financial Crisis Calendar Graphic released in November, 2009.¹¹

"Transaction costs" caused the market crisis in 2008 and concerns about these costs still dominate activity in the marketplace, but Respondent FSOC erred by focusing on the symptoms and not the cause of the crisis.

The Role of Transaction Costs

To understand the role transaction costs played in the financial crisis, it helps to definite them as financial instrument market existence costs, or as exchange-related costs that arise due to the existence of the financial instrument marketplace. Our research shows that as marketplace ethics decreased, transaction costs increased. Eventually, transaction costs rose to a level that caused general market failure, or the financial crisis. General market failure is defined as an inefficient allocation of liquidity in the global financial marketplace. This liquidity crisis was caused, at core, by an inability to either independently determine or believe (trust) the value of securities pledged as collateral for short term, or repo, loans.

Declining trust increased transaction costs in three ways:

- First, opportunistic behavior on the part of key financial market participants, commercial and investment banks, led to higher security prices. They simply gouged customers.
- Second, these same institutions developed a set of racially biased, low added value, high cost financial practices and products, designed solely to maximize firm

¹¹ [Global Market Turmoil Graphic](#) and [Financial Crisis Calendar Graphic](#), Creative Investment Research, Inc., December, 2008 and November, 2009.

revenue and profit. They concealed the fact that these products had limited value from both customers and regulators.

- Financial market participants attempted to use imagination to deal with the ethics/trust/ transaction cost issue. They did so via swaps, derivatives and other financial market "innovations" designed as 'safe-guards' to protect parties vulnerable to opportunistic behavior in financial transactions. These contracts were supposed to eliminate the need to be concerned about the behavior of unscrupulous actors and the impact that behavior might have on one's financial standing. Ratings on securities served as another type of insurance policy. Both sets of "insurance policies" proved ineffective, however, and only increased transaction costs. These significantly increased transaction costs precipitated and caused global market failure in 2007 and 2008.

Practices and policies that increase trust and thereby reduce transaction costs, like those the Respondent attempted to impose, will restore functionality to the financial and economic marketplace. These will also help prevent a reoccurrence of the financial crisis.

Missing Skill Set

Both Petitioner MetLife and Respondent FSOC lack the skill, tools and therefore the ability to calculate the cost of the regulations Respondent imposed. While the ability to do so is beyond the capability of mainstream economists,¹² performance suggests this may not be beyond the reach of the Amicus, as demonstrated in a number of instances.¹³

¹² Mr. Cunningham sought to work with the Respondent (and other Agencies) but FSOC is a hyper discriminatory organization, unable and unwilling to work with African American males from Washington, DC.

¹³ We note the following:

- On July 3, 1993, Mr. Cunningham wrote to US Securities and Exchange Commissioner (SEC) Mary Schapiro to notify the Commission about the "Nigerian letter" scam.
- Mr. Cunningham designed one of the first mortgage security backed by home mortgage loans to low and moderate income persons and originated by minority-owned institutions. (See: Security Backed Exclusively by Minority Loans, The American Banker. Friday, December 2, 1994. Online at <http://www.minoritybank.com/cirm24.html>)

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- Mr. Cunningham opposed the application, approved by the Federal Reserve Board on September 23, 1998, by Travelers Group Inc., New York, New York, to become a bank holding company (<http://www.creativeinvest.com/FRBtrav.pdf>). In October 1998, in a petition to this Court (United States Court of Appeals District of Columbia Circuit Case Number 98-1459) concerning the Travelers Group Inc./Citicorp merger (<http://www.creativeinvest.com/USAppealsCourt.pdf>), Mr. Cunningham cited evidence that growing financial market malfeasance greatly exacerbated risks in financial reducing the safety and soundness of large financial institutions.
 - On June 15, 2000, Mr. Cunningham testified before the House Financial Services Committee of the U.S. Congress on H.R. 3703, the Housing Finance Regulatory Improvement Act. He testified on ways to improve the supervision and regulation of government sponsored enterprises, Fannie Mae and Freddie Mac, or GSE's.
 - In 2001, he helped design a refinancing plan for victims of predatory lending that led to the creation of targeted community development investments. (See: <http://www.socialfunds.com/news/article.cgi?sfArticleId=682>)
 - On December 22, 2003, statistical models created by Mr. Cunningham and using the Fully Adjusted Return ® Methodology signaled the probability of system-wide economic and market failure. (See page 6: <http://www.sec.gov/rules/proposed/s71903/wmccir122203.pdf>)
 - On Monday, April 11, 2005, Mr. Cunningham testified before Judge William H. Pauley III in the U.S. District Court for the Southern District of New York on behalf of the public at a fairness hearing regarding the \$1.4 billion dollar Global Research Analyst Settlement.
 - In 2005, Mr. Cunningham served as an expert witness for homeowners in a case against PMI Group, Credit Suisse First Boston, Moody's, Standard and Poor's, Fairbanks Capital Corporation, Select Portfolio Servicing, US Bank National Association, as Trustee of CSFB ABS Series 2002-HEI, et. al., in the New Jersey Superior Court Law Division - Monmouth County. His testimony sought to establish that the corporate parties listed above were in fact responsible for facilitating unfair and predatory lending practices.
 - On December 22, 2005, Mr. Cunningham met with Ms. Elaine M. Hartmann of the Division of Market Regulation at the U.S. Securities and Exchange Commission. At that meeting, he issued a strongly worded warning that system-wide economic and market failure was a growing possibility.
 - On February 6, 2006, statistical models created by the firm using the Fully Adjusted Return ® Methodology confirmed that system-wide economic and

The listing from pages 9 to 11 above shows that the public remains at risk of being damaged by fraudulent financial market activity. Given this, the technical incompetence on the part of the Petitioner and Respondent requires that the Respondent proceed without the ability to calculate the full cost of regulation. In this case, the potential for public damage so outweighs the cost of regulation imposed on a single firm that proceeding is appropriate. The Respondent and the Petitioner are both in the process of developing the skills required.

We caution the Court against accepting any assessment of the cost of regulation from the Petitioner since the Petitioner's history of ethical malfeasance guarantees that any such figure is sure to be wildly overstated.

Total Systemic Cost

Below we provide a very summary level outline of the Total Systemic Cost calculation using the trade secret protected, proprietary Fully Adjusted Return® (FAR) Methodology.

The total systemic cost consists of the following:

- a. Transaction Related Social Returns. (TRSR) These include the social gains or costs of global market failure that can be attributed to specific security transactions involving this specific firm, impacts on ethical standards of marketplace behavior, informational asymmetry impacts (demand and supply side bargaining power impacts).

market failure was a growing possibility. (See page 2:

<http://www.sec.gov/rules/proposed/s71005/wcunningham5867.pdf>)

- On June 18, 2009, he testified before the House Ways and Means Select Revenue Measures Subcommittee at a joint hearing with the Subcommittee on Domestic Monetary Policy and Technology of the Financial Services Committee: Testimony on the New Markets Tax Credit Program. He suggested ways to improve the program. See:

<http://financialservices.house.gov/media/file/hearings/111/printed%20hearings/111-47.pdf>

It is Mr. Cunningham's contention that a non-African American with a similar track record would receive substantially different treatment from the Respondent. There are no economists of any ethnicity or gender with anything approaching a comparable track record, however.

b. Market Related Social Returns (MRSR). These include non-transaction specific secondary and tertiary impacts on society as a whole. In this category, we include the impact changes in final product supply markets and all attendant final market factors have. To the maximum initial total monetary loss, we add the monetary value of societal impacts.

For the matter at hand, we calculate final total systemic potential monetary loss at, according to FAR®, \$16 trillion.

Cost to the Petitioner

We calculate the net cost to the Petitioner by subtracting from some appropriate fraction of this total Petitioner specific administrative costs and fees. These are trivial when compared to the Fully Adjusted Return cost of \$16 trillion.

Given the massive differential between costs to the Petitioner and costs to society, the Respondent, as mandated by Dodd-Frank, was correct to focus on the overall systemic risks and costs. It simply lacked the tools to explicitly detail that cost to the Petitioner.

Statutory Considerations

The lower Court opinion noted ten factors the Respondent must consider, including Item E - source of credit for minority communities. We note that “The Federal Deposit Insurance Corp. counted 25 black-owned banks remaining in the country last year (2015), down from 48 in 2001.”

The Respondent has the ability to consider “any other risk-related factors that [it] deems appropriate.

From a transaction cost perspective, the Respondent can consider reputational and trust related factors. As transaction-inducing or inhibiting factors, these are central to risk. While “no specific prudential standards had been established..for” MetLife when it was designated by the Respondent, the Respondent and affiliated regulatory entities, in this case the Federal Reserve, are, as noted above, simply incapable of doing so.

The Respondent, however, detailed “Interconnectedness” as a factor. This ties to reputation and trust, factors that both the Petitioner and Respondent are incapable of systematically quantifying. This makes the requirement that the cost be calculated unreasonable. It is akin to requiring one fly in a jet during the age of steam locomotion.

Guidance

Guidance provided by the Respondent to the Petitioner provided ample opportunity for the Petitioner to understand the costs at issue here. Guidance concerning Asset Liquidation stated the Petitioner holds “assets that, if liquidated, would cause a fall in asset prices.” This decline is not caused by time, but by the implications and impact on the relative value of other securities (see FAR® above).

The Respondent stated that preliminary designation analysis would be based “solely” on existing public and regulatory sources.” This was required given the Respondents lack of technical skill and inability to fully adjust returns.

Standards

While several cases cited by the lower court establish that, theoretically, Agencies cannot “simply disregard rules that are still on the books,” Agencies have done so repeatedly. As Mr. Cunningham noted before this Court in “William Michael Cunningham v. Board of Governors of the Federal Reserve System, No. 97-1256”, the Federal Reserve Board simply disregarded existing law in order to facilitate a transaction, the Travelers and Citigroup merger.

The Respondent refused to offer good reasons for the Final determination because the Respondent lacks the technical skills to fully enumerate reputational and transaction costs and simply assumed the Petitioner would wait until this skill had been developed. After all, this is a skill the Petitioner also lacks.

As part of the Final Determination, the Respondent did not project what potential losses might be generated by the Petitioner’s threat to US financial stability

because it cannot reasonably estimate, using the technology it currently has, what those losses would be. Modern financial systems are simply too opaque for the Respondent to competently assess. The development of a methodology that allows regulators to peer through this veil was, in fact, one of the reasons the Respondent was created. The lower court missed this fact.

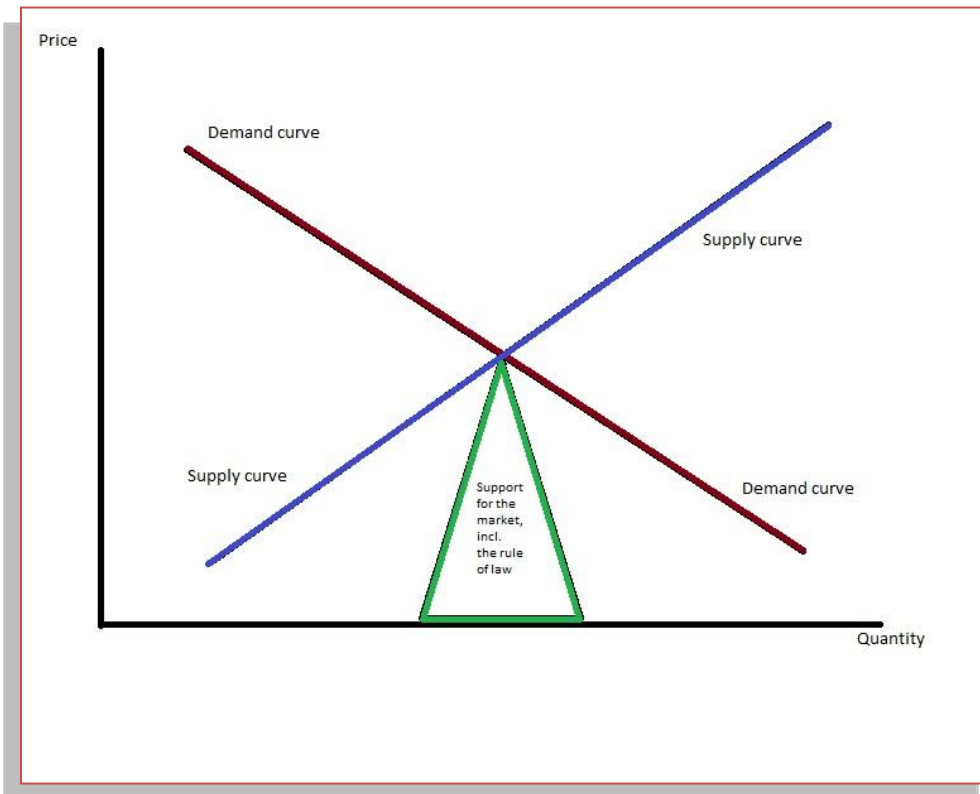
While the Respondent's behavior is characteristic of arrogant and entitled individuals operating in discriminatory organizations, this cannot be a reason to find against the Respondent given the prevalence of this behavior in most Federal agencies.

Given the above, it makes perfect sense to designate as potentially risky a relatively small set of institutions who are in a position to cause significant damage to the country's financial system until the Respondent develops a methodology to more accurately assess both the potential cost and the potential benefit of the designation at issue. After all, Petitioner cannot deny that it is part of an industry that damaged the global economy. A cautious, prescriptive approach, so widely heralded when used to classify all young black men as potential predators, surely is appropriate when reviewing large financial institutions with an actual record of causing harm. Public policy makers have a responsibility to avoid a repeat of the financial crisis. The bottom line is that policymakers have a responsibility to protect all of the people, not just the rich and the white. Any refusal to do so is a violation of the Equal Protection Clause¹⁴.

¹⁴ Fourteenth Amendment (Amendment XIV) to the United States Constitution adopted on July 9, 1868.

CONCLUSION

Regulatory incompetence and capital market institution greed helped cost the nation \$19.2 trillion,¹⁵ increased the speed with which China will overtake the U.S. in GDP terms,¹⁶ and set the stage for the eventual replacement of the US dollar as global reserve currency.¹⁷ These events tend not to be in the public interest.



Respondent's and Petitioner's preference¹⁸ for discrimination contributed to this outcome. Figure 1, left, shows a maroon demand curve, a blue supply curve, a market equilibrium, and a green triangle supporting the market. The

¹⁵ Financial Crisis Response in Charts. US Dept. of Treasury. April 13 2012. Online at: http://www.treasury.gov/resource-center/data-chart-center/Documents/20120413_FinancialCrisisResponse.pdf

¹⁶ Cunningham, William M. "The New Center of Power: China Overtakes the U.S. as the Globe's Biggest Energy Consumer." (2010):88 pp. Creative Investment Research, Inc. Creative Investment Research, Inc., 1 Aug. 2010.

¹⁷ Cunningham, William M. US Economic and Market Forecast: 2014 to 2020. Fully Adjusted Return® Analysis. Washington, DC: Creative Investment Research, 2013. Print.

¹⁸ Gary S. Becker (1957, 1971, 2nd ed.). The Economics of Discrimination. Chicago, University of Chicago Press.

green triangle represents the full set of cultural/ethical traditions and legal practices, including the ability to enforce contracts. Normally, this triangle is invisible: it is a given that markets depend upon the rule of law to function. Our models show the base of this triangle has gotten narrower over time. As a result, markets have become less stable. Regulatory capture¹⁹, ineffective prosecution, and collusion (too big to fail, etc.) have moved the triangle in the direction of supporting suppliers in the financial service marketplace. Until the generalized level of fraud and malfeasance in the financial marketplace is lowered and trust is increased, aggregate economic activity will remain at lower than normal levels.

¹⁹ George Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics*, 2, 1971:3-21.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), the typeface requirement of Fed. R. App. P. 32(a)(5), and the typestyle requirements of Fed. R. App. P. 32(a)(6). This brief contains 4,426 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and is prepared in a proportionally spaced typeface (14- point Times New Roman).

/s/ William Michael Cunningham