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### Legislation would restore traditional oversight

## ABA supports FDCPA, CFPB exemptions for creditor lawyers engaged in litigation

ABA President Hilarie Bass expressed the association’s strong support this month for the “Practice of Law Technical Clarification Act of 2017,” legislation that would restore traditional state court regulation and oversight of creditor lawyers’ litigation activities.

In a [Nov. 16 letter](#) to leaders of the House Financial Services Committee and the House Judiciary Committee, Bass explained that the legislation, H.R. 1849, would clarify that the Fair Debt Collection Practices Act (FDCPA) does not apply to creditor lawyers engaged in litigation activities and that the existing “practice of law exclusion” in Section 1027(e) of the Dodd-Frank Act of 2010 covers both consumer and creditor lawyers.

In her letter, Bass explained that lawyers have been regulated for centuries primarily by the state supreme courts that license them and that the FDCPA, enacted in 1977, originally contained a complete exemption for lawyers engaged in the practice of law who collect debts on behalf of their clients. Congress voted to eliminate the broad exemption in 1986 after a small number of debt collectors who also were lawyers engaged in abusive collection practices outside of the litigation context and were shielded from FDCPA coverage.

The 1986 revisions to the FDCPA were intended to allow debtors to bring suits against creditor lawyers for their improper non-litigation collection activities, but the courts have since applied the revised act to creditor lawyers even when they are engaged in litigation. As a result, Bass said that many creditor lawyers are now routinely sued in federal or state court for their actions in state court proceedings that are alleged to be technical violations of the FDCPA.

The Dodd-Frank Act also granted the Consumer Financial Protection Bureau (CFPB) broad authority to regulate both lawyer and non-lawyer debt collectors and to enforce the FDCPA. Although Section 1027(e) exempts most consumer lawyers engaged in the practice of law from the CFPB’s authority, the current exemption may not apply to certain creditor lawyers.

Bass gave several reasons that the ABA supports the legislation.

First, Bass explained, the ABA “firmly believes that state courts, not the CFPB or debtor lawyers filing technical FDCPA suits, are in the best position to regulate and discipline creditor lawyers who are engaged in litigation activities to collect debts on behalf of their clients.” She added that over time, an extensive and effective system of judicial regulation of lawyers has developed – including admission requirements, ethical codes and disciplinary rules – which govern virtually every aspect of a lawyer’s professional life.

## LEGISLATIVE BOXSCORE

LEGISLATIVE ISSUE	HOUSE	SENATE	FINAL	ABA POSITION
<p><b>Criminal Justice.</b> H.R. 1809 and S. 860 would revise and reauthorize the Juvenile Justice and Delinquency Prevention Act (JJDP). H.R. 2480, H.R. 2473, S. 1311 and S. 1312 are aimed at combating human trafficking. H.R. 510 and S. 139 would establish a system for the use of Rapid DNA. S.1917 would reform sentencing and corrections practices. S. 1994 would implement corrections reforms. H.R. 2899 would reauthorize the Second Chance Act. HR. 1795 would reform asset forfeiture laws.</p>	<p>House passed H.R. 1809 on 5/23/17. House passed H.R. 2473 on 5/23/17. Judiciary Cmte. approved H.R. 2480 on 6/28/17. House passed H.R. 510 on 5/16/17. H.R. 2899 was referred to Judiciary Cmte. on 7/19/17. H.R. 1795 was referred to House Judiciary Cmte. on 3/29/17.</p>	<p>Senate passed S. 860 and H.R. 510 on 8/1/17. Senate passed S. 1311 and S. 1312 on 9/11/17. S. 1917 was referred to Judiciary Cmte. on 10/4/17; S. 1994, on 10/19/17.</p>	<p>President signed P.L. 115-50 (H.R. 510) on 8/18/17.</p>	<p><b>Support sentencing and correction reform. Supports JJDP and Second Chance Act reauthorization. Supports funding for federal and state indigent defense programs. Supports certain civil asset forfeiture reforms. Supports bills to combat human trafficking. Supports prompt collection and testing of DNA evidence. See page 4 and 7.</b></p>
<p><b>Immigration.</b> The president announced a new travel ban restricting entry into the country from eight countries. Federal judges temporarily blocked the ban for those seeking entry from six of the eight countries. The federal government is appealing the decisions. The president announced he is phasing out the Deferred Action on Childhood Arrivals (DACA) program by March 2018. S. 1615 and H.R. 3440, the Dream Act, would continue the program.</p>	<p>H.R. 3440 was referred to Judiciary Cmte. on 7/26/17.</p>	<p>S. 1615 was referred to Judiciary Cmte. on 7/22/17.</p>		<p><b>Supports improvements in the immigration court and adjudication system. Opposes mandatory detention and supports alternatives to detention. Supports access to counsel and due process safeguards. Supports the Dream Act. See pages 5 and 6.</b></p>
<p><b>Legal Services Corporation (LSC).</b> President's FY 2018 budget issued on 5/23/17 included no funding for LSC, which is currently funded at \$385 million under P.L. 115-31 (H.R. 244).</p>	<p>House approved \$300 million for LSC on 9/14/17.</p>	<p>Senate Approps. Cmte approved \$385 million for LSC on 7/27/17.</p>	<p>President signed P.L. 115-31 (H.R. 244) on 5/5/17.</p>	<p><b>Supports an independent, well-funded LSC.</b></p>
<p><b>Tort Reform.</b> H.R. 1215 would preempt state medical liability laws to impose caps on non-economic damages H.R. 985 would limit the ability of victims to file class action lawsuits. H.R. 720 would require mandatory monetary sanctions against lawyers who file non-meritorious lawsuits.</p>	<p>House passed H.R. 1215 on 6/28/17. House passed H.R. 985 on 3/9/17. House passed H.R. 720 on 3/10/17.</p>			<p><b>Opposes the bills. Opposes preemption of state medical liability laws and the bypassing of the Rules Enabling Act to amend the Federal Rules of Civil Procedure.</b></p>

## Chair of ABA Standing Committee on the Federal Judiciary explains “Not Qualified” rating of Trump judicial nominee

The chair of the [ABA Standing Committee on the Federal Judiciary](#) (Standing Committee) appeared Nov. 15 before the Senate Judiciary Committee to explain the ABA panel’s unanimous “Not Qualified” rating for Nebraska lawyer Leonard Steven Grasz, who was nominated in August by President Trump to serve on the U.S. Court of Appeals for the Eighth Circuit.

In a departure from the ABA panel’s testimony in the past regarding “Not Qualified” ratings for judicial nominees, Standing Committee Chair Pamela A. Bresnahan appeared a week after the Senate committee held its confirmation



**Pamela A. Bresnahan**

hearing on the Grasz nomination. In addition, the two members of the ABA committee who evaluated the nomination were not invited to appear at the table with her during the hearing to respond the questions from the senators.

Bresnahan said the 15-member Standing Committee reached a “Not Qualified” rating for Grasz because of judicial temperament concerns, specifically “lack of open-mindedness and freedom from bias.”

She emphasized that the Standing Committee’s rating of “Not Qualified,” “Qualified,” or “Well

Qualified” for a federal judicial nominee is based on information gleaned from confidential peer interviews, the writings of the nominee, and the interview or interviews of the nominee. The Standing Committee, through a nonpartisan process, investigates only the professional competence, integrity and judicial temperament of the nominee and does not consider ideology or political views.

The evaluation of the Grasz nomination was assigned to lead investigator Cynthia E. Nance, a Stand-

ing Committee member residing in the Eighth Circuit who is a professor and former dean of the University of Arkansas Law School. As part of the [written statement](#) provided at the hearing, Nance explained that she reached out to the judicial, legal and academic communities throughout the states comprising the Eighth Circuit as well as additional states. During her investigation, she noted that those she interviewed spoke highly of the quality and caliber of Grasz’s legal work and his integrity, but she received numerous statements of concern about his judicial temperament. She also noted a reluctance by members of the Nebraska Bar to participate in the evaluation.

When she recommended a “Not Qualified” rating in her informal report to the chair, a second evaluator, California lawyer Laurence Pulgram, was assigned to conduct a supplemental evaluation, including a second interview of the nominee. The results of Pulgram’s inquiries were similar to those reported by Nance, and, after interviewing the nominee, he concurred with the “Not Qualified” rating.



**ABA Standing Committee Chair Pamela A. Bresnahan (center) with lead evaluator Cynthia A. Nance (l) and second evaluator Laurence Pulgram (r)**

Bresnahan testified that when presented with the record of the nominee’s qualifications as a whole, the full ABA Standing Committee concluded unanimously (with one abstention) that Grasz lacked the traits necessary to warrant a “Qualified” rating.

She pointed out that while Grasz is one of four of President Trump’s federal judicial nominees to receive a “Not Qualified” rating, of the other 46 nominees rated by the ABA Standing Committee so far, 29 have been rated “Well Qualified” and 17 have been rated “Qualified.”

“We take great pride in the thoroughness of these evaluations,” Bresnahan said, pointing out that each Standing Committee member will spend 300 to 600 hours conducting evaluations, reading formal reports, and voting during the year.

“We believe that the Standing Committee’s ratings are helpful to the Senate, the Department of Justice and the White House,” and that “the public has come to expect that there will be a thorough, independent assessment of a nominee’s professional qualifications by their peers in the profession,” she said. ■

## ABA urges approval of asset forfeiture due process bill

The ABA commended Rep. Jim Sensenbrenner (R-Wis.) this month for leading a bipartisan effort to address due process concerns in federal civil asset forfeiture cases and urged the House Judiciary Committee to approve Sensenbrenner's bill without weakening amendments.

ABA Governmental Affairs Director Thomas M. Susman emphasized in an [Oct. 25 letter](#) that the bill, H.R. 1795, would take important steps to improve current procedures, including specific notice requirements, representation rights, and burden-of-proof standards. Enactment of the bill, known as the Detering Undue Enforcement by Protecting Rights of Citizens from Excessive Searches and Seizures (DUE PROCESS) Act of 2017, would mark the most significant major reform of federal forfeiture laws since 2000.

In his letter – sent to the leadership and members of the House Judiciary Committee, Financial Services Committee, and Energy and Commerce Committee – Susman noted that the ABA recognizes the punitive role of forfeiture in deterring crime and has adopted a Statement of Principles calling for forfeiture law reform based upon the recommendations of both prosecutors and defense attorneys.

Some of the ABA principles are part of the DUE PROCESS Act, including requiring the government to bear the burden of proof regarding whether property can be forfeited and increasing the burden-of-proof standard. H.R. 1795 would raise the burden-of-proof standard from the current “preponderance of the evidence” standard to the significantly higher standard of “clear and convincing evidence.” Another ABA principle included in the bill would extend the current timeline for property owners to contest for-

feiture actions and would establish a uniform innocent owner defense.

The bill also includes provisions recommended by the ABA during the 114<sup>th</sup> Congress that are designed to protect the interests of those involved in parallel bankruptcy proceedings. These provisions are incorporated into the portion of the bill requiring the U.S. attorney general to create two federal databases making forfeiture information available to the public: a quarterly updated database on details of each forfeiture and a real-time database assisting persons whose property has been seized.

The first provision would require the quarterly updated database to include not just information about any concurrent or related criminal proceeding against the owner of the property but also information regarding any pending case under Title 11 in which the owner of record of the property is the debtor and any pending civil case in which a receiver has been ordered to take control of the property.

The second provision would clarify that the database assisting persons whose property is seized would allow any interested party, including but not limited to any owner, creditor or lienholder, to determine whether that party has an interest in the property and to in-



**Rep. Jim Sensenbrenner**

form that party and the public on the specifics of how to contest each seizure before the forfeiture.

In a press release at the time of the bill's introduction in March, Sensenbrenner called civil asset forfeiture reform “a critical component of the overall effort to fix our broken criminal justice system.” There has been no action on H.R. 1795, which has 25 cosponsors and was referred to several committees.

In 2016, the House Judiciary Committee approved a similar bill that was supported by the ABA, but the legislation never reached the House floor for a vote. ■



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## ABA urges swift action on passage of Dream Act

ABA President Hilarie Bass emphasized to House and Senate leaders this month the urgency of congressional action to address the plight of undocumented young people impacted by the Trump administration's decision to terminate the Deferred Action for Childhood Arrivals (DACA) program in March 2018.

Bass explained in a [Nov. 1 letter](#) that the DACA program, established in 2012 by President Obama through executive action, has provided work authorization and temporary protection against deporta-

tion for nearly 800,000 young persons who were brought to the United States as children. Starting on March 8, 2018, an average of 30,000 of these "Dreamers" will begin to lose their DACA status and be subject to deportation each month.

The ABA supports the proposed Dream Act of 2017 (S. 1615 and H.R. 2440), which would provide DACA recipients and other qualified individuals an opportunity to earn legal residence and citizenship by fulfilling specific educational, work, or military service requirements. While President Trump initially indicated that he supported extending the program if provisions strengthening border security were included in the legislation, he unveiled a long list of other immigration requirements Oct. 8 that he wants to be part of any DACA bill.

"The Dream Act is consistent with American ideals of fairness and opportunity," Bass wrote. "Children should not be punished for the acts of their parents," she said, explaining that the Dreamers have grown up here, gone to school and been active in their communities, and the United States is the only home many of them have ever known. She also pointed out that there is strong public support for Dreamers and that the Dream Act has been endorsed by a lengthy list of government officials, military leaders, and educational institutions and associations, as well as businesses and civil rights and religious groups.

"While there is no question that major reforms are needed to our immigration system," she said, "the impending DACA deadline necessitates that Congress move quickly to pass the Dream Act and avoid getting entangled in a broader debate over more controversial immigration measures." ■

### ABA Standing Committee on Law and National Security hosts 27th Annual Review conference



Hundreds of participants gathered in Washington, D.C., on Nov. 16-17 for the 27th Annual Review of the Field of National Security Law. Hosted by the [ABA Standing Committee on Law and National Security](#), the conference featured panels covering numerous topics, including artificial intelligence, privacy and civil liberties, cyber operations and the law of armed conflict, the Foreign Intelligence Surveillance Act, and the future of national security law. The opening panel (shown above), which highlighted national security law in private practice, featured (from left): moderator Caroline Krass, partner, Gibson, Dunn & Crutcher; Ambassador Robert Kimmitt, senior international counsel, WilmerHale; Amy Jeffress, partner, Arnold & Porter Kaye Scholer; Don Vieira, partner, Skadden, Arps, Slate, Meagher & Flom; and Ingrid Price, associate, Covington & Burling.

## ABA opposes Trump administration's proposed mandatory performance metrics for immigration judges

The ABA, responding to proposed reforms included in the Trump administration's immigration principles and policies, is opposing any attempt to establish mandatory case completion quotas for immigration judges.

The Trump proposals, unveiled Oct. 8, include establishing "performance metrics for immigration judges" for ensuring swift border returns, and that idea was echoed a week later by U.S. Attorney General Jeff Sessions in an Oct. 16 speech to the Executive Office of Immigration Review.

"It is imperative that judges be allowed to adjudicate fairly, impartially, and with sufficient deliberation. Establishing performance metrics based solely on the number and speed of cases resolved undermines the independence of the judiciary and threatens to subvert justice," ABA President Hilarie Bass emphasized in an [Oct. 16 statement](#).

"The experience of immigration lawyers working daily within the system suggests that the estimated backlog of 600,000 immigration cases is not due to judges working inefficiently or immigration lawyers filing fraudulent claims," Bass explained, addressing criticisms leveled by Sessions in his speech. Sessions implied in his remarks that the immigration adjudication system is being "gamed" by asylum seekers, and he warned of "dirty immigration lawyers."

Bass emphasized that increased enforcement coupled with an unprecedented global refugee crisis, which has resulted in greater numbers of individuals seeking protection in the United States, has led to the increased need for resources. She explained that many immigration judges often have over 2,000 cases on their dockets and are scheduling cases into 2022. Immigration lawyers, she said, make the process both fairer and more efficient by providing advice and helping clients file complicated applications for relief.

"Blaming judges, immigration lawyers, and refugees fleeing persecution in their countries for problems in our immigration and asylum system only serves to demonize the people seeking a better life and those trying to administer justice equitably and efficiently," she emphasized. The resulting public backlash against the applicants, their lawyers and the judges who hear their cases is "unjust and un-American," she said.

Bass said the administration, instead of seeking to expedite cases in a manner that will undermine both the independence of immigration judges and public confidence in the system, needs to provide significantly increased resources – including additional immigration judges and support personnel – for the immigration courts and to support measures that increase access to counsel. ■

### Judicial Vacancies/Confirmations—115th Congress\* (as of 11/27/17)

<u>Court</u>	<u>Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	0	1
US Courts of Appeals (179 judgeships)	18	10	8
US District Courts (678 judgeships)	119	35	5
Court of International Trade (9 judgeships)	2	0	0
<b>Totals</b>	<b>139</b>	<b>45</b>	<b>14</b>

\*Includes territorial judgeships

## WASHINGTON NEWS BRIEFS

**CORRECTIONS:** Sens. John Cornyn (R-Texas) and Sheldon Whitehouse (D-R.I.) have introduced a bipartisan corrections bill based on successful criminal justice reforms that have been instituted in their home states of Texas and Rhode Island. S. 1994, the Corrections Oversight, Recidivism Reduction, and Eliminating Costs for Taxpayers in Our National System (CORRECTIONS) Act of 2017, tackles a plethora of prison reform issues, including: reducing prison spending; improving prisoner reentry; creating a National Criminal Justice Commission; and expanding recidivism-reduction programs. The bill, according to Cornyn, “fosters partnerships with faith- and community-based organizations to help better prepare low-risk offenders to become productive members of society.” Whitehouse explained, “Our bill has been an important part of bipartisan comprehensive criminal justice reform legislation in the Senate in recent years. I hope it will trigger further good-faith negotiation on sentencing and prison reform solutions.” Some of the bill’s provisions are included in more comprehensive sentencing and corrections legislation, S. 1917, which was introduced on Oct. 4 by Senate Judiciary Committee Chairman Chuck Grassley (R-Iowa), Sen. Richard Durbin (D-Ill.) and 9 other cosponsors. The ABA has an array of policies supporting criminal justice reforms, including a fairer sentencing system, recidivism reduction, and reauthorization of the Juvenile Justice and Delinquency Prevention Act.

**MINNESOTA RULES OF CIVIL PROCEDURE:** The ABA is urging the Supreme Court of Minnesota to amend the Minnesota Rules of Civil Procedure by adopting proposed amendments recommended by the Minnesota State Bar Association (MSBA) to require that 50 percent of unclaimed, undistributed funds in state class action lawsuits be donated to legal services organizations. The recommendation would amend Rule 23 and create a new Rule 23.11. In a [Nov. 17 letter](#) to AnnMarie O’Neill, clerk of appellate courts in Minnesota, ABA President Hilarie Bass noted that 22 states have such a rule and 13 of those states devote a percentage of all class action residual awards to civil legal aid organizations. ABA policy adopted in 2016 urges state, local, territorial and tribal jurisdictions to adopt court rules or legislation authorizing the awards of class action residual fund to non-profit organizations that improve access to civil justice for persons living in poverty. The policy specifies that before class action residual funds are awarded to charitable non-profit or other organizations, all reasonable efforts

should be made to fully compensate members of the class, or a determination should be made that such payments are not feasible. Bass emphasized that, according to the report accompanying the ABA policy, legal aid organizations are appropriate recipients of class action residual funds, as long as the premise of expanding access to justice is properly articulated. The court’s Advisory Committee on the Rules of Civil Procedure has recommended against adoption of the amendment, and a Dec. 19 hearing has been scheduled on this proposal and other amendments proposed by the MSBA that are intended to bring several rules into conformity with the Federal Rules of Civil Procedure.

**ARKANSAS DEATH PENALTY:** The Arkansas Supreme Court granted an emergency stay Nov. 8 that halted the scheduled Nov. 9 execution of Jack Greene, a death row prisoner who is believed to be mentally ill. ABA President Hilarie Bass asked Arkansas Gov. Asa Hutchinson in an [Oct. 25 letter](#) to reconsider the death penalty for Greene, saying there is “ample evidence that he was mentally ill at the time he committed his crime and his mental state has deteriorated such that he is currently incompetent to be executed.” She pointed out that Greene exhibited signs of mental illness for over a decade before he committed the murder for which he has been sentenced to death. “While the ABA does not take a position for or against the death penalty per se, nor is Mr. Greene’s guilt in the tragic murder of Sidney Burnett in dispute, the ABA has significant concerns about whether the death penalty is the appropriate punishment in his case in light of his severe mental illness,” she explained. Bass further urged the governor to consider how Greene’s psychotic disorder impacts his understanding of his sentence and “whether the use of the death penalty in this case will effectively further the goal of fair and proportional justice in Arkansas.” She said the ABA has a long-standing interest in promoting a fair and accurate criminal justice system and, for this reason, opposes the execution of individuals with severe mental illness present either at the time of their crime or at the time of their execution.



## ABA, other groups sign agreement with Veterans Affairs

The ABA signed a [Memorandum of Agreement](#) (MoA) Nov. 13 with the Department of Veterans Affairs (VA), the Veterans Consortium Pro Bono Program, and the National Law School Veterans Clinic Consortium that seeks to improve veterans' access to pro bono legal assistance, including expansion of VA-hosted free legal clinics and medical legal partnerships.

The parties signing the MOA agree to "work in a mutually beneficial manner to advance and improve the quality of life for our Nation's veterans."

### FDCPA

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If a creditor lawyer engages in abusive or improper conduct against a debtor in a collection lawsuit, Bass said the judge presiding over the case is in the best position to discipline the creditor lawyer, impose the appropriate sanction based on the circumstances, and protect the debtor.

Second, she pointed out that the legislation is consistent with Congress' original intent not to regulate creditor lawyers engaged in litigation or other activities that are part of the practice of law, citing a statement made in 1986 by Rep. Frank Annunzio (D-Ill.), who sponsored the bill amending the FDCPA that year.

In addition, Bass emphasized that the legislation is narrowly tailored to exempt only creditor lawyers engaged in litigation activities and is consistent with a previous Federal Trade Commission recommendations to Congress that the FDCPA be amended to "exempt from the FDCPA's provisions attorneys who pursue debtors solely through litigation (or 'similar legal practices')."

The bipartisan legislation, cosponsored by Reps. Dave Trott (R-Mich.) and Vicente Gonzalez (D-Texas), was the subject of a Sept. 7 hearing in the House Financial Services Subcommittee on Financial Institutions and Consumer Credit. The full committee could mark up the bill as early as December.

The VA's annual Community Homelessness Assessment – Local Education and Networking Groups (CHALENG) survey has revealed that the lack of access to legal representation contributes significantly to a veteran's risk of becoming and remaining homeless and that at least five out of the top 10 unmet needs of homeless veterans each year are legal needs.

These include eviction/foreclosure, child support, outstanding warrants/fine, and discharge upgrades. These legal problems often contribute to veterans' risk of homelessness and affect access to VA health care, benefits, and services.

The VA currently offers 165 free legal clinics in its VA medical centers, community-based outpatient clinics, and vet centers across the country through partnerships with local bar associations, legal aid organizations, and law school clinics.

"By signing this agreement, we are documenting a shared commitment to better facilitate veterans' access to legal services," VA Secretary David J. Shulkin said.

The ABA – which is committed to ensuring the best possible legal outcomes for veterans, their families, caregivers and survivors – supports pro bono and other free legal services, public and professional education, innovation in assessing and delivering legal support, and advocacy to remove legal barriers to due benefits, services and treatment.

ABA Associate Executive Director Holly Cook, who signed the MoA on behalf of ABA Executive Director Jack Rives, highlighted the [ABA Veterans Legal Services Initiative](#), which includes the [ABA Veterans' Claims Assistance Network](#) (VCAN).

VCAN engages lawyers to help veterans assemble their medical and documentary evidence to support their disability claims.

In addition, [VetLex](#), a new web-based project launched earlier this year by the ABA and Jones Day law firm, matches attorneys who can provide pro bono legal assistance with veterans who need their help. The project will be rolled out nationwide during 2018. ■

The monthly *Washington Letter* reports news of national public interest to the legal profession, including congressional, executive branch and ABA activities concerning the association's legislative priorities. The newsletter is published by the Governmental Affairs Office as a service to ABA members and national, state and local bar associations. Full text is available on the Internet at [http://www.americanbar.org/advocacy/governmental legislative work/publications.html](http://www.americanbar.org/advocacy/governmental_legislative_work/publications.html). ©2017 American Bar Association. All rights reserved. Please address correspondence to:

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