STATEMENT OF FACTS

This petition is being filed pursuant to 28 U.S.C. § 351 because Judge Jane Roth is engaging in "conduct prejudicial to the effective and expeditious administration of the business of the courts," by serving on the Board of Directors of a Montana-based organization called the Foundation for Research on Economics and the Environment (FREE). The evidence summarized below and exhaustively detailed in the two attached Community Rights Counsel (CRC) reports[1] and accompanying documents, demonstrates that service on FREE's board is inconsistent with several canons of the Code of Conduct for United States Judges. The remarkably disturbing conduct of FREE during the time *American Trucking Ass'ns, Inc. v. Environmental Protection Agency,* 175 F.3d 1027, *revised, reh'g denied*, 195 F.3d. 4 (D.C. Cir. 1999), *rev'd sub nom. Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001), was pending before the D.C. Circuit vividly illustrates the need to prohibit judges from serving on boards of organizations like FREE that take money from interested parties to host judges on vacation-style trips designed to advance one side's perspective in a particular area of the law.

This petition is filed reluctantly, and only after efforts to promote reform by members of Congress, a former chief judge of the D.C. Circuit, and the American Bar Association have failed to limit the participation by judges in FREE's operations and programs. Simultaneous petitions are being filed regarding the board service of Chief Judge Douglas Ginsburg of the D.C. Circuit and Chief Judge Danny Boggs of the Sixth Circuit. Petitioner is not alleging actual impropriety by Judge Roth in any case. Indeed, petitioner expects that much of the information contained in this petition and in CRC's most recent report will have been unknown to her. Petitioner's hope is that Judge Roth will respond to this petition by resigning from membership on FREE's board, an action that would warrant dismissal of this petition pursuant to 28 U.S.C. § 352(b)(2). If she fails to resign, petitioner respectfully asks the Judicial Council to issue an opinion finding that her continued service on FREE's board constitutes a violation of 28 U.S.C. § 351.

Judge Roth's Service on FREE's Board of Directors Undermines Public Trust in the Judiciary and Reflects Adversely on Her Impartiality.

FREE is a Montana-based non-profit organization that hosts multi-day private trips for judges with lectures on environmental topics. FREE flies judges out to Yellowstone-country, Montana, hosts them at picturesque dude ranches and historic railroad hotels, pays their room and board, assembles course materials, and brings speakers from around the country to lecture to the judges. FREE assures judges that there will be plenty of "time for cycling, fishing, golfing, hiking and horseback riding." *NFF* at 14. FREE's tax filings for 2000 and 2001 indicate that it spent $273,057 for judicial seminars in 2000 and $217,580 for judicial seminars in 2001. *TJ* at 22. During those same years, judges report attending 20 and 15 FREE trips, respectively. These figures indicate that FREE is spending more than $10,000 per judge per trip. *Id.*

FREE's funding comes almost entirely from corporations, corporate-controlled foundations, and a collection of highly-ideological foundations, including Sarah Scaife Foundation (run by Richard Mellon Scaife), Charles Koch Foundation and Claude Lambe Foundation (both controlled by Charles Koch and other employees of Koch Industries) and Castlerock Foundation (run by the Coors family of

[1] Community Rights Counsel, *Tainted Justice: How Private Judicial Trips Undermine Public Trust in the Federal Judiciary* (2004) [hereinafter *TJ*]; Community Rights Counsel, *Nothing for Free: How Private Judicial Seminars are Undermining Environmental Protections and Breaking the Public's Trust* (2000) [hereinafter *NFF*].

Coors Inc.). *Id.* FREE's corporate funders—which have included Texaco, Exxon, General Electric, Koch Industries, Monsanto and Shell—are frequently involved in environmental disputes in federal court. Almost all of FREE's foundation funders also finance other organizations, such as the Pacific Legal Foundation (PLF) and the Washington Legal Foundation (WLF), that bring environmental litigation in federal court. *Id.* at 23-26. Thus, nearly every one of FREE's major funders has a clear interest in the results of environmental litigation in federal courts. FREE's funders also share the same perspective on federal environmental protections: either for pecuniary or ideological reasons, FREE's funders desire judicial rulings that limit or cut back on federal environmental protections.

FREE's seminars advance the interests of its funders. In the words of John Baden, FREE's founder and Chairman, FREE's judicial trips advance "a coherent new vision" with a "unifying theme" of "rejection of top-down, command and control environmentalism." *TJ* at 26; *NFF* at 27. According to long-time FREE trustee and frequent FREE lecturer James Huffman, FREE's trips amount to "educational programming" of judges and are designed to complement the efforts of groups like PLF and WLF, which are challenging environmental laws in federal court. *TJ* at 25-26. A sense of FREE's perspective can be gleaned from the fact that both Mr. Baden and FREE's Program Director Pete Geddes have published articles in the last 15 months that invoke the names of murderous despots such as Stalin, Hitler, and Pol Pot in condemning environmental positions. *Id.* at 28-29. Describing a message delivered to federal judges at a FREE program, FREE's John Downen writes that environmentalists seeking action to prevent global warming "hold humanity in low regard." *Id.*

The corporations that fund FREE, and groups such as PLF and WLF that are supported financially by FREE's funders, are frequently involved in litigation before judges who attend FREE seminars. *Id.* at 26-27, 42-43. FREE also allows officials of its corporate funders to participate as lecturers to federal judges at its seminars, including, in several documented cases, to a judge then presiding over a case involving the corporation. *Id.* at 23-24, 42-43. In recent years, FREE has enabled representatives of six of its corporate funders to lecture to more than 100 federal judges at 10 different FREE seminars on such topics as "The Environment: A CEO's Perspective." *Id.* at 23. Participation in these seminars also allows these representatives to spend nearly a week at a vacation resort riding horseback and even, on occasion, sharing a cabin with a federal judge. *Id.* at 21-22. In this respect, FREE's judicial seminars stand in contrast to those run by George Mason University's Law and Economics Center, which assures judges that "no corporate donor is ever allowed to interact with any program participants in any way whatsoever." *Id.* at Ch. 4 n.23.

FREE is proud of its efforts to influence the decision making of federal judges in environmental cases. As one of FREE's funders has stated, FREE is "keen to attract those [judges] with the most decision making authority in the realm of environmental law, namely, judges on the Court of Federal Claims, the Federal Circuit and the District of Columbia Circuit." *Id.* at Ch. 4 n.155. As FREE's James Huffman has said in response to criticism of FREE's seminars: "If people feel strongly about ideas and they want to influence someone in government they can—that's the way the system works." *Id.* at 26.

Judge Roth's service on FREE's board is in violation of Canon 5B(1), which prohibits judges from serving as an officer, director, or trustee of an organization where it "reflect[s] adversely upon the judge's impartiality." The companies that fund FREE are involved in important environmental cases before this Circuit. *See, e.g., Star Enterprise & Texaco v. EPA,* 235 F.3d 139 (3d Cir. 2000) (Roth, J., ruling for Texaco in a challenge to EPA's application of performance standards for petroleum refineries to two stationary gas turbines). Similarly, organizations such as WLF that are financed by FREE's funders also litigate in this Circuit on environmental matters. *See Public Interest Research Group of*

New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111 (3d Cir. 1997) (Roth J., ruling against environmental standing and in support of position advanced by WLF as amicus-appellant). Serving on the board of an organization that takes money from corporations to promote those corporations' point of view reflects adversely on Judge Roth's impartiality in environmental cases.

The formal and informal advisory opinions issued by the judiciary's Committee on Codes of Conduct confirm that Judge Roth's membership on FREE's board runs afoul of ethical mandates. These rulings prohibit judges from serving on the boards of organizations that litigate or sponsor or promote litigation. *See* Advisory Opinions 15 & 40; U.S. Judicial Conference Policy Statement, *quoted in* Advisory Op. No. 34. Recusal rules already ensure that a judge could not preside over a case in which she is a fiduciary of one of the litigants. 28 U.S.C. § 455(b). The prophylactic rule against service on boards of organizations like the Sierra Club and the ACLU prevents judges from adding the weight of their office to one side of a contentious policy issue that may ultimately come before the judge. Advisory Opinion No. 40. That is why a judge may not even sit on an advisory board of an organization such as the American Enterprise Institute—which apparently has never appeared as a party or an amicus party in federal court—if such service "would reasonably be viewed as endorsing the views of that organization on issues which are likely to come before the court." Compendium § 5.3-2(d); *see also* JEFFERY M. SHAMAN, ET AL, JUDICIAL CONDUCT AND ETHICS 302 (2000) ("Thus, judges should avoid membership in even the most praiseworthy and noncontroversial organizations if they espouse, or are dedicated to, a particular legal philosophy or position."). As a trustee of FREE, Judge Roth is reasonably viewed as endorsing FREE's position on environmental topics that come before this Circuit.

Service on FREE's board also violates Canon 2A, which requires judges to "act at all times in a manner that promotes confidence in the integrity and impartiality of the judiciary" and Canon 2B, which prohibits judicial activities that "convey or permit others to convey the impression that they are in a special position to influence the judge." Since they were first chronicled in a front-page story in a national newspaper in April 1998, FREE's programs have been criticized by members of Congress, ethics experts, a former chief judge of the D.C. Circuit, and more than 30 major newspaper editorial pages spanning the political spectrum. *TJ* at 5. There does not appear to be a single editorial page in the country that has supported FREE's judicial trips. The service of preeminent jurists like Judge Roth on FREE's Board of Directors enables FREE to continue to attract judges to its programs despite this controversy, undermining public confidence in the judiciary.

Similarly, Judge Roth's service on FREE's board conveys to the public that FREE's board members, who have included a prominent litigator, several corporate executives, and many vitriolic critics of environmental laws, are in a special position to influence her. FREE's board gives these individuals remarkable access to one of the nation's most important environmental decision makers to discuss FREE's mission to promote "rejection of top-down, command and control environmentalism." *Id.* at 26. The Committee on Codes of Conduct has interpreted canon 2B to bar a judge from attending a brown bag lunch at a law firm because of the concern that this might convey the impression that the firm is in a special position to influence the judge. Compendium § 2.10(d). The same concerns bar Judge Roth's membership on FREE's Board.

Judge Roth's service on FREE's Board lends the considerable weight of her judicial office to the positions on environmental law topics adopted by FREE, it undermines public trust in the judiciary as a whole, and reflects adversely on her own impartiality. For all these reasons, she cannot properly sit on FREE's board.

FREE's Conduct While *American Trucking Ass'ns v. EPA* was Pending Before the D.C. Circuit Suggests that FREE Manipulates Its Board Membership and Seminar Programs in an Effort to Influence the Outcome of Cases.

The *American Trucking Ass'ns v. EPA* case was one of the most important environmental cases decided in the last decade. The case involved clean air protections for soot and smog designed to protect 125 million Americans from the health hazards associated with air pollution. *TJ* at 46. When these standards were proposed, industry, fearing compliance costs in excess of $5 billion, launched what the *Washington Post* called an "extraordinary, multimillion-dollar campaign" to prevent them from going into effect. *Id.* at 47-48. When this lobbying effort failed, the industry coalition filed suit in the D.C. Circuit. In May 1999, a divided panel of the D.C. Circuit struck these regulations down. The panel's most important ruling was a 2-1 holding, written jointly by Chief Judge Douglas Ginsburg and Judge Stephen Williams, finding that the Clean Air Act provided no "intelligible principle" for setting air pollution standards and thus represented an unconstitutional delegation of legislative authority from Congress to EPA. *Id.* at 50. The Court denied rehearing en banc, with five judges voting in favor of rehearing and four against (Judges Henderson and Wald were active at the time, but did not participate, meaning that 6 votes were required for rehearing). The decision was then unanimously reversed by the Supreme Court. *Id.* at 50.

The stakes at issue in the *ATA* case are important because they illustrate that the corporations that fund FREE had every reason to want to influence the D.C. Circuit's consideration of the case. FREE's funders certainly knew about this critical case—they were very much involved in it. For example, Texaco (which gave FREE $75,000 in 1998-1999), Exxon (which gave FREE $20,000 in 1999) and Koch Industries (which gave FREE $195,000 through two company-controlled foundations in 1998 alone) were all members of the American Petroleum Institute (API), one of the lead industry petitioners in *ATA*. *Id.* at 23, 54. These same Koch foundations and David Koch also control the Citizens for a Sound Economy (CSE) Foundation, which paid for an amicus brief written by C. Boyden Gray, Chairman of the Board of CSE, focusing solely on the non-delegation doctrine. *Id.* at 54. Texaco, Exxon, and Koch all faced very large compliance costs if the clean air protections at issue in *ATA* were upheld by the D.C. Circuit.

While the *ATA* case was pending before the D.C. Circuit, FREE provided all-expense paid trips to Montana to three of the court's judges. Chief Judge Ginsburg – who serves with Judge Roth on FREE's Board – attended a FREE board meeting in July 1998 and then joined Judge Williams on the faculty of a FREE trip for judges immediately thereafter. *Id.* at 46-47, 51. The Charles Koch Foundation is listed as one of three sponsors of this program. *Id.* at 54. Judge David Sentelle, who joined Chief Judge Ginsburg and Judge Williams in voting against rehearing of *ATA,* attended an August 1998 FREE seminar for judges. *Id.* at 57-58. The Claude Lambe Foundation, also controlled by Charles Koch and Koch Industries, is listed as one of two sponsors of Judge Sentelle's trip. *Id.* at 54.

During approximately this same time period, Edward Warren—the lawyer who briefed and argued *ATA* for the industry petitioners—was added to FREE's Board of Directors. *Id.* at 51-54. After he filed his reply brief in *ATA*, and before oral argument, FREE twice brought Mr. Warren—who appears to have had no prior contact with FREE—to Montana to participate on the faculty of FREE's programs for judges, including the August 1998 program attended by Judge Sentelle. *Id.* Based on Mr. Warren's lecture topic, entitled "Applying More Harm than Good Principles in Environmental Decision Making," *id.*at 51, and a law review article he published with a very similar title, it appears that Mr. Warren's lecture closely paralleled the arguments he made in his briefs to the D.C. Circuit in *ATA*. *Id.* at

48-51. Mr. Warren resigned from FREE's Board at around the same time that the panel decided *ATA,* concerned that his presence on FREE's Board might look bad. *Id.* at 58. FREE then failed to disclose Mr. Warren's service on its board in apparent violation of federal tax laws, thus making it difficult for these facts ever to come to light. *Id.* at 51-52.

It strains credibility to suggest that FREE had no knowledge of *ATA*—the most important environmental case then pending in the country—when it selected Warren for its board and program schedules. As discussed above, many of FREE's funders plainly knew of the case because they were involved in it. Certainly also Mr. Warren and Chief Judge Ginsburg both knew about the case. No later than at oral argument, when Mr. Warren appeared before him, Chief Judge Ginsburg must have realized that he was sitting on the Board of Directors of FREE with the lead counsel for the industry petitioners in the then-pending *ATA* case. Chief Judge Ginsburg had to know that, if discovered, his role on FREE's board with Mr. Warren would raise questions about his impartiality in *ATA.* Yet there is no evidence that Chief Judge Ginsburg raised these issues with the parties in *ATA* to give them the opportunity to seek his recusal. Rather, Chief Judge Ginsburg apparently stayed silent and ruled in Mr. Warren's favor. Meanwhile Mr. Warren quietly resigned from FREE's board.

FREE's funding from corporations that had enormous stakes in *ATA* gave FREE a clear motive to try to influence the outcome of the *ATA* case. FREE's decision to add Mr. Warren to its board, which already included Judge Ginsburg, and its decision to provide Mr. Warren with the opportunity to lecture to federal judges (including Judge Sentelle) at two seminars while the *ATA* case was pending, suggests that FREE is indeed bold enough even to try to influence cases pending before Chief Judge Ginsburg. FREE's failure to report Mr. Warren's membership on their board on their tax forms suggests FREE is willing even to violate tax laws to keep their operations secret.

The Codes of Conduct Committee has flatly prohibited judges from attending private judicial seminars where there is even an "appearance of attempting to influence decision of specific cases." Compendium § 5.4-6(a). A fortiori, Judge Roth cannot serve on the board of an organization that is attempting to, or even appears to be attempting to, influence the decision of a case actually pending before a judge, particularly when interested corporations are paying the expenses the judge incurs in participating in the organization's activities.

Conclusion

One of the most disturbing aspects of FREE's conduct in the *ATA* case is that it took place just a few months after a national paper ran a highly-critical front page story on FREE's operations, a story that led to a significant amount of criticism of FREE in Congress and on editorial pages across the country. FREE plainly cannot be expected to respond to criticism by conforming its operations to the ethical restrictions that apply to federal judges. The judiciary must take steps to contain the damage that FREE's operations are doing to the reputation of the federal judiciary. The necessary first step is for this Judicial Council to rule that Judge Roth may not with propriety serve on FREE's Board of Directors.