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MEMORANDUM

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TO: Interested Non-profits

DATE: May 2, 2017

SUBJECT: **CIVIL DISOBEDIENCE POLICIES FOR NON-PROFIT ORGANIZATIONS**

I. INTRODUCTION

Since the 2016 presidential election, protests against anticipated and actual actions by the new administration have become commonplace. Some of these demonstrations have involved civil disobedience. Many non-profits expect that civil disobedience will become an increasingly common means of challenging executive actions on a range of issues, and that personnel associated with non-profits (employees, volunteers, etc.) may wish to participate in such actions.

This memorandum examines 1) the potential ramifications to a non-profit if and when individuals associated with a non-profit engage in civil disobedience, and 2) how those ramifications may be affected by the non-profit's civil disobedience policy. Where state law is relevant, the analysis focuses on California, New York, and Washington, D.C.

II. QUESTIONS PRESENTED

1. If a non-profit's personnel participate in civil disobedience actions, is the non-profit liable for their actions, in each of the following scenarios?

   A. The non-profit encourages its personnel to participate in civil disobedience.

B. The non-profit does not prohibit its personnel from participating in civil disobedience, but requires that they do so on their private time, and not as representatives of the non-profit.

C. The non-profit prohibits its personnel from participating in civil disobedience.

2. If a non-profit's personnel participate in civil disobedience at an event for which the non-profit is a sponsor, financial or otherwise, is the non-profit liable for their actions? Does the answer change depending on whether non-profit personnel are physically present at the event?

3 If a non-profit's personnel participate in civil disobedience at an event for which the non-profit is not a sponsor, financial or otherwise, but for which non-profit personnel have played an organizing role (for example, using non-profit resources such as phones and computers), is the non-profit liable for their actions? Does the answer change depending on whether non-profit personnel are physically present at the event?

4. If a non-profit provides legal or financial assistance to its personnel defending legal charges relating to their civil disobedience, what are the legal implications to the non-profit?

5. Does the potential involvement of a non-profit's personnel in civil disobedience threaten the tax-exempt status of the non-profit?

III. EXECUTIVE SUMMARY

1. Non-profit's Liability for Civil Disobedience Actions of Its Personnel

A. A non-profit runs a significant risk of liability if it encourages civil disobedience activity.

B. A non-profit's risk is lower if it has a policy permitting civil disobedience by employees only in their private time.

C. If a non-profit prohibits civil disobedience activity, it is least likely to have liability, but liability is still possible.

2. Non-profit's Liability for Civil Disobedience at Sponsored Events

A non-profit may be liable if it is a sponsor of an event at which civil disobedience occurs, if the non-profit engages in a sufficient level of supervision or control of the event.

3. Non-profit Liability for Civil Disobedience at Non-sponsored Events

A non-profit may be liable if it is not a sponsor of an event at which civil disobedience occurs, if the non-profit engages in a sufficient level of supervision or control of the event.

4. Non-profit's Defense of Personnel Charged with Civil Disobedience

A non-profit cannot reimburse legal expenses related to the civil disobedience activities of its personnel without creating substantial institutional risk.

5. Non-profit's Tax-Exempt Status

A non-profit runs a significant risk of losing its tax-exempt status if it encourages civil disobedience activity.

IV. GENERAL ANALYSIS OF CIVIL DISOBEDIENCE LAW

1. Civil Disobedience and Nonprofit Organizations in Context

Civil disobedience is the willful violation of a law for the purpose of social or political protest.[1] It is often described as an illegal, but non-violent public protest.[2]

"Indirect" civil disobedience actions violate a law or interfere with a government policy that is not, itself, the object of the protest. Protestors violate a law, not because they believe the law itself it is unconstitutional or otherwise improper, but because doing so calls public attention to their objectives. An example might be blocking traffic to prevent trucks from logging a forest: the protesters do not object to the traffic laws, but the action calls attention to the logging activities. Indirect civil disobedience seeks to bring about change in policy through symbolic action.

"Direct" civil disobedience actions protest the existence of a law by breaking that law or by preventing the execution of that law. An example might be women who go topless in public in order to protest modesty laws that discriminate between males and females. In direct civil disobedience actions, the civil disobedience is often intended to create a "test case" for the protested law.

Nonprofits are generally held to the same standards of legal liability for negligence and other torts as are other business enterprises. In the past, states have recognized the doctrine of "charitable immunity," whereby non-profit corporations and associations organized exclusively for religious, charitable, or educational purposes are immune from negligence liability for injuries caused to a beneficiary of the charitable institution.[3] However, a majority of jurisdictions

[1] United States v. Schoon, 971 F.2d 193, 195-96 (9th Cir. 1991).
[2] For purposes of this analysis, we assume that the only civil disobedience actions at issue are non-violent.
[3] Gilbert v. Seton Hall Univ., 332 F.3d 105, 108 (2d Cir. 2003).

have since abrogated this immunity either by statute or by court decision. California[4], New York[5], and Washington, D.C.[6] are among the majority of jurisdictions that decline to provide immunity to non-profit or charitable organizations.

There is no "civil disobedience" defense to violations of the law. Civil disobedience, by definition, is the willful violation of the law in service of a perceived higher purpose. Those who engage in civil disobedience should be prepared to face the legal consequences.

Examples of plaintiffs that could have standing to claim an injury and sue a non-profit for injuries arising out of civil disobedience might include a property owner whose property suffers damage due to civil disobedience protests, or a business that has its activities interrupted by protestors. The government may also prosecute civil disobedience activities that violate criminal laws.

2. Theories of Liability

A. Vicarious Liability: Respondeat Superior in the Civil Context

Non-profits may be vicariously liable for the acts of their personnel. Under the doctrine of respondeat superior, a principal is subject to vicarious liability for the negligent, willful, or malicious acts committed by its agent acting within the scope of his or her agency.[7] An agent acts within the scope of agency when performing work assigned by the principal or engaging in a course of conduct subject to the principal's control. Conversely, an agent's act is not within the scope of agency when it occurs within an independent course of conduct not intended by the agent to serve any purpose of the principal. The fact that work is performed gratuitously does not

[4] Brown v. Merlo, 506 P.2d 212, 223 (Cal. Sup. Ct. 1973).
[5] Bing v. Thunig, 143 N.E.2d 3 (N.Y. Ct. App. 1957) (holding that hospital's liability must be governed by the same principles of law that apply to all other employers).
[6] President & Directors of Georgetown Coll. v. Hughes, 130 F.2d 810 (D.C. Cir. 1942).
[7] Johnson v. Cook Cty., 526 Fed. Appx. 692, 697 (7th Cir. 2013).

relieve a principal of liability.[8] The potential liability of a non-profit for the civil disobedience activities of its personnel will turn on whether their participation in these activities is within the scope of their responsibility, which is a fact-specific determination.[9]

Most courts use similar tests to evaluate the scope of an employer's liability, largely drawing from the Second Restatement of Agency.[10] Courts consider the following factors when determining whether an act is within the scope of employment:

- the connection between the employment and the time, place, and occasion for the act;
- the history of the relationship between employer and employee as revealed by actual practice;
- whether the employee commonly performs the act that led to the injury;
- whether an act is one of the kind that the employee is employed to perform;
- the extent of "departure from normal methods of performance";
- whether the agent is motivated to perform the act, at least in part, by a desire to serve the employer;
- whether the employer could have reasonably anticipated the act.[11]

There is no single factor that is determinative of an organization's vicarious liability.[12]

B. Vicarious Liability: Respondeat Superior in the Criminal Context

As a general rule, an organization can be vicariously liable for the criminal acts of its employees, if done on behalf of the organization and within the scope of the employees'

[8] Restatement (Third) of Agency § 7.07(b).
[9] John R. v. Oakland Unified Sch. Dist., 769 P.2d 948, 966 (Cal. Sup. Ct. 1989).
[10] Specifics relevant to each jurisdiction may be found in Appendix A.
[11] Burlarley v. Wal-Mart Stores, Inc., 75 A.D.3d 955 (N.Y. App. Div. 2010).
[12] In fact, even where the government has seen fit to provide a limited immunity to volunteers for non-profits, this immunity does not extend to the non-profits themselves. The Volunteer Protection Act ("VPA") of 1997, 42 U.S.C. §§ 14501-505 (2012), immunizes volunteers of a nonprofit organization from liability when acting within the scope of their responsibilities, so long as the harm is not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer. But the statute does not exempt the organization itself from liability for the volunteer's acts.

authority.[13] As in the civil context, the agent's conduct generally must be the kind which he is authorized to perform, must occur substantially within the authorized time and space, and must be motivated, at least in part, by the employee's desire to serve the employer or to benefit the organization.[14] An agent's relatively low status within a corporate or organizational hierarchy will not preclude potential criminal liability for the organization.[15]

C. Vicarious Liability in the Criminal Context: Collective Knowledge Doctrine

Some federal courts have expanded corporate criminal liability beyond respondeat superior principles under the "collective knowledge" doctrine. In United States v. Bank of New England, N.A., 821 F.2d 844 (1st Cir. 1987) (often described as the seminal case on the collective knowledge doctrine), the court considered the aggregate knowledge of all corporate employees and imputed it to the corporation. The court held that, because the acts of a corporation are simply the acts of all of its employees operating within the scope of their employment, a corporation could commit a crime, and gain the requisite unlawful intent or knowledge, by aggregating the acts and knowledge of all its employees, even if employees responsible for one aspect of an operation were unaware of the activities of employees responsible for another aspect of the operation.

D. The Effect of Organizational Policies on Vicarious Liability

In both the civil and criminal contexts, courts can consider the existence of an organization's internal compliance policy or program in determining whether an employee was acting within the scope of his or her employment.[16] A policy prohibiting the behavior at issue will weigh against a finding of vicarious liability, but a policy cannot provide an organization

[13] United States v. Demauro, 581 F.2d 50, 53 (2d Cir. 1978).
[14] Id. at 54 n.3.
[15] Standard Oil Co. of Tex. v. United States, 307 F.2d 120, 127 (5th Cir. 1962).
[16] United States v. Ionia Mgmt. S.A., 555 F.3d 303, 310 (2d Cir. 2009).

with an absolute "safe harbor" if other factors favor vicarious liability. If an act is of the same general nature as authorized conduct, or is similar or incidental to conduct that the employer authorized, a court may find liability.[17] Courts will sometimes hold a principal liable for its agent's actions, even if an employee's acts violated corporate policy or express instructions.[18] For example, courts have held an employer liable for an employee's torts, even if the employee's act contradicts an express company rule and confers no benefit to the employer.[19]

A court may consider a company's compliance policy in determining whether the employees were acting for the benefit of the corporation.[20] In a criminal matter, the prosecution need not prove that an organization lacked effective policies and procedures to deter and detect criminal activity by its employees,[21] but a factfinder may consider an organization's compliance program (or policy) in assessing whether an agent was acting within the scope of his agency.[22]

Finally, a compliance policy or program may provide a "political defense." Such a defense has no legal value, but could provide a basis for a jury to refuse to impose liability, even when liability might be appropriate based on traditional respondeat superior theory.

E. Racketeer Influenced and Corruption Organizations ("RICO") Act Liability

The RICO Act creates criminal and civil liability for an organization based on its personnel's actions. RICO makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to

[17] Kalil v. Johanns, 407 F. Supp. 2d 94, 97-98 (D.D.C. 2005) (citing Haddon v. United States, 68 F.3d 1420 (D.C. Cir. 1995)).
[18] United States v. Basic Const. Co., 711 F.2d 570, 573 (4th Cir. 1983).
[19] Bussard v. Minimed, Inc., 129 Cal. Rptr. 2d 675, 680 (Cal. Ct. App. 2003).
[20] Basic Const., 711 F.2d at 573.
[21] Ionia Mgmt., 555 F.3d at 310.
[22] Id.; see also Charles Doyle, Corporate Criminal Liability: An Overview of Federal Law, Congressional Research Service (2013) ("While a mere 'paper program' may be to little avail, a closely supervised, widely dispersed compliance program tailored to detect and prevent the offenses most likely to occur in the corporation's operational environment may have a real impact. An effective plan may reduce the chances of a prosecution and reduce the severity of the charges and any subsequent sentence should a prosecution occur."), *available at* https://fas.org/sgp/crs/misc/R43293.pdf.

conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."[23] Originally passed in 1970 to pursue organized crime, RICO has expanded. RICO provides for both civil remedies and criminal penalties. The acts that the statute prohibits are applicable in both civil and criminal cases.

The elements of a RICO violation are: (1) the conduct; (2) of an enterprise; (3) through a pattern of racketeering activity.[24] "Racketeering activity" is defined in a lengthy statutory provision that enumerates various criminal acts under both state and federal law. To state a claim under civil RICO, a plaintiff is required to show that a RICO offense is both the "but for" cause of his or her injury and the proximate cause as well.[25] The statute provides treble damages to civil plaintiffs who prevail in a RICO claim.[26] To have standing under RICO, a plaintiff must have been injured in his or her business or property by the conduct constituting the violation. A nonprofit organization may be an enterprise for purposes of RICO.[27] The case law on the applicability of respondeat superior to RICO claims is mixed; some cases/jurisdictions have held vicarious liability applies to RICO, and some have held it does not apply.[28]

One Supreme Court case has addressed whether RICO can be used to hold an organization liable for the civil disobedience activities of its members. In Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003), a women's rights organization and abortion clinics filed a class action alleging that individuals and organizations that opposed abortion violated RICO by

[23] 18 U.S.C. § 1962(c).
[24] Id.
[25] Hemi Grp., LLC v. City of N.Y., N.Y., 559 U.S. 1, 9 (2010).
[26] 18 U.S.C. § 1964(c).
[27] Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994).
[28] Compare Brady v. Dairy Fresh Prod. Co., 974 F.2d 1149, 1153 (9th Cir. 1992) (holding that the doctrine of respondeat superior may be applied under RICO where the structure of the statute does not otherwise forbid it), with D & S Auto Parts, Inc. v. Schwartz, 838 F.2d 964, 966 (7th Cir. 1988) (rejecting the doctrine of respondeat superior in civil RICO cases), and In re Thomson McKinnon Sec. Inc., 147 B.R. 330, 334 (Bankr. S.D.N.Y. 1992) (observing that several district courts in the Second Circuit had refused to impose vicarious liability under RICO, with the exception of a case in which the employer had knowingly benefitted from the racketeering activity).

engaging in a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity that included acts of extortion. The Court noted that obtaining property is a necessary element of an extortion claim. While there was no dispute that the defendants interfered with, disrupted, and in some instances completely deprived the plaintiffs of their property rights, the defendants' acts did not constitute extortion because they did not "obtain" respondents' property. Because the predicate acts supporting the jury's finding of a RICO violation were reversed, the Court also reversed the judgment that the defendants violated RICO.

F. Accomplice Liability: Aiding and Abetting

A person may be responsible for a crime that he or she helped another to commit, but did not personally carry out. The federal aiding and abetting statute, 18 U.S.C. § 2, states that a person who "aids, abets, counsels, commands, induces or procures" the commission of a federal offense is punishable as a principal. This provision derives from common law standards for accomplice liability. As at common law, a person is liable under § 2 for aiding and abetting a crime if he or she (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission.[29] The common law imposed aiding and abetting liability on a person who facilitated any part of a criminal venture. That principle continues to govern aiding and abetting law under § 2: almost every Court of Appeals has held that a defendant can be convicted as an aider and abettor without proof that he or she participated in each and every element of the offense.[30] Assistance that aids only one (or some) of a crime's phases or elements satisfies the statute's requirements.

[29] Rosemond v. United States, 134 S. Ct. 1240 (2014).
[30] See id.

3. Precedents for Prosecution of Nonprofits for the Civil Disobedience of Members

While there are few reported precedents, the government has prosecuted advocacy organizations for civil disobedience activity. In none of the cases was liability imposed upon the organization, but each case involved highly specific findings from which broad principles cannot be meaningfully extracted.

In United States v. Greenpeace, 314 F. Supp. 2d 1252 (S.D. Fla. 2004), various Greenpeace members boarded a cargo vessel and intended to unfurl a banner urging then-President Bush to stop the import of illegally logged mahogany from Brazil. The government charged the members with violation of a federal statute prohibiting unauthorized persons from boarding a vessel arriving at its destination. At the time, there had been only two reported cases discussing the statute or its predecessor, but those cases did not address the issues raised by Greenpeace's activity. The court cited several news articles that highlighted the unusual and questionable nature of the prosecution and reported that some believed the indictment of Greenpeace was politically motivated by the organization's criticism of President Bush's environmental policies. The court granted Greenpeace's Rule 29 motion for judgment of acquittal, finding that the prosecution's evidence was insufficient to sustain a conviction.

In United States v. Fullmer, 584 F.3d 132 (3d Cir. 2009), the appellate court reviewed the convictions of an animal rights organization and others involved in an alleged conspiracy to violate the Animal Enterprise Protection Act (AEPA); to commit interstate stalking; and to use a telecommunications device to abuse, threaten, and harass. The organization's website invited its supporters to engage in "electronic" civil disobedience (inundating the targeted company's website, e-mail servers, and telephone service, and repeatedly faxing a black piece of paper to exhaust the ink supply of the targeted company's fax machine). The court concluded that

coordinating demonstrations that occurred directly outside the homes of employees of the targeted company, and under the parameters of existing court injunctions, was not unlawful. Moreover, the organization's publication of protest tactics, without more, was also protected because although the listed protest tactics would be illegal if implemented, there was no evidence that the organization planned to imminently implement those tactics. All of these activities were not criminal because they were protected speech under the First Amendment. However, to the extent the organization's website provided links to the tools necessary to carry out civil disobedience in the form of "virtual sit-ins," those posts were clearly intended to incite imminent, lawless conduct that was likely to occur. This type of communication, the court concluded, was not protected speech.

In the civil context, the Supreme Court declined to hold a nonprofit organization liable for the protest activity of its personnel when those individuals were not acting within the scope of their authority. In N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886 (1982), the field secretary of a local chapter of the NAACP organized a boycott of white merchants in a Mississippi county. The merchants sued the NAACP and its field secretary, contending that the NAACP's field secretary was liable, in part, because he had "threatened violence on a number of occasions" against African-Americans if they did business with the boycotted merchants. The Court held that "[t]he NAACP—like any other organization—of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority." Moreover, the NAACP could be liable for conduct it knew about and specifically ratified. However, in this case, the trial court found that:

- no NAACP member had actual or apparent authority to commit acts of violence or to threaten violent conduct;

- there was no evidence that the NAACP ratified or had specific knowledge of any of the acts of violence or threats associated with the boycott;
- other than isolated incidents, the boycott was a lawful protest;
- the NAACP never authorized, and never considered taking, any official action with respect to the boycott;
- the NAACP supplied no financial aid to the boycott;
- the national organization had no involvement in the boycott; and
- the field secretary's statements did not incite imminent or lawless conduct, and thus constituted protected speech under the First Amendment.

Considering each of these factors, the Court concluded that imposing liability on the NAACP, absent a finding that the NAACP had authorized (either actually or apparently) or ratified unlawful conduct, would impermissibly burden the right of political association that is protected by the First Amendment. Applying the principles of respondeat superior, the Court held that the dispositive issue is whether an agent's actions are within the scope of his authority and that mere membership in an association is not a sufficient nexus to find liability.

In sum, the few reported precedents of government prosecutions of nonprofits for the civil disobedience of its members are somewhat reassuring, as they show that the government has not had significant success in these prosecutions. As a practical matter, it seems that the government rarely prosecutes nonprofit organizations for the civil disobedience of their members. However, the cases are too fact specific to support any broader conclusions.

V. SPECIFIC ANSWERS

1. A Non-profit May Be Liable for Civil Disobedience by Its Members

A non-profit's liability for civil disobedience actions by its personnel will depend on a court's assessment of the degree of control the non-profit has over those actions. The more that the time, place, and occasion of civil disobedience activities are divorced from the non-profit's personnel's daily work functions, the stronger the argument that the actions are not within the scope of employment. Conversely, the more control the non-profit exercises, the stronger the argument in favor of liability for the non-profit.

A. A Non-profit Runs a Significant Risk of Liability If It Encourages Civil Disobedience

If a non-profit's personnel engage in civil disobedience that benefits the non-profit, the non-profit may be vicariously liable. If a non-profit encourages its personnel to participate in civil disobedience, a court could easily conclude that the civil disobedience benefits the non-profit. Thus, criminal or civil liability is more likely if the non-profit expressly permits or encourages civil disobedience.

B. A Non-profit Reduces Its Risk If It Permits Civil Disobedience Only on Private Time

A non-profit's risk of criminal or civil liability is reduced if the non-profit adopts a policy stating that its personnel are only permitted to participate in civil disobedience during their private time. Under such a policy, it becomes more difficult to argue that any civil disobedience activities benefitted the non-profit. If civil disobedience actions occur on a non-profit's personnel's private time, it will reinforce the non-profit's argument that any civil disobedience activity was a "departure from normal methods of performance."[31] If a non-profit's personnel do

[31] Burlarley, 75 A.D.3d at 956.

not commonly engage in civil disobedience, this will strengthen the non-profit's argument against vicarious liability.

C. Prohibiting Civil Disobedience Minimizes but Does Not Eliminate Risk

Criminal or civil liability is least likely if a non-profit expressly prohibits civil disobedience. Such a policy maximizes the likelihood that a court would find that personnel who engage in civil disobedience do so outside of the scope of their responsibilities and without non-profit authority. However, courts have held employers vicariously liable for their agent's conduct even when it violates an express company rule.[32] While the cases finding such liability have usually done so in the antitrust context,[33] the reasoning in those cases is not specific to antitrust law. In fact, at least one court has concluded that cases such as United States v. Basic Const. Co. state "a generally applicable rule on corporate criminal liability despite the fact that [they] address[] violations of the antitrust laws."[34] Thus, even an express prohibition of civil disobedience activity might not preclude a court from holding the non-profit liable for civil disobedience actions by non-profit personnel, if the evidence established that the "employees [engaging in civil disobedience] were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation."[35]

[32] United States v. Basic Const. Co., 711 F.2d 570, supra; (citing United States v. Koppers Co., 652 F.2d 290, 298 (2d Cir.), cert. denied, 454 U.S. 1083, 102 S.Ct. 639, 70 L.Ed.2d 617 (1981); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004–07 (9th Cir.1972), cert. denied, 409 U.S. 1125, 93 S.Ct. 938, 35 L.Ed.2d 256 (1973); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204–05 (3d Cir.1970), cert. denied, 401 U.S. 948, 91 S.Ct. 928, 28 L.Ed.2d 231 (1971).573 (4th Cir. 1983).

[33] For example, in United States v. Basic Const. Co., 711 F.2d at 573, the Fourth Circuit held that the trial court had properly allowed the jury to consider that the company had an express policy prohibiting the conduct at issue, while also properly instructing the jury that "a corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if . . . such acts were against corporate policy or express instructions."

[34] United States v. Automated Med. Labs, Inc., 770 F.2d 399, 406 n.5 (4th Cir. 1985).

[35] United States v. Basic Const. Co., 711 F.2d at 573.

D. Practical Risks of Prosecution

If historical precedent is a meaningful guide, a non-profit is unlikely to face criminal prosecution for civil disobedience. Unfortunately, historical precedent may not be predictive of the future enforcement priorities of the new Administration. However, historically, the government has rarely filed criminal charges against nonprofit or advocacy organizations for their personnel's conduct.

2. A Non-profit May Be Liable for Civil Disobedience at Events It Sponsors or Organizes

A non-profit's liability for events at which civil disobedience activities occur will depend on the level of control the non-profit has over the event, not on whether the non-profit is a "sponsor." For example:

- A New York court held that the sponsor of a skiing event was not liable for an injury sustained by a participant because the sponsor did not supervise the running of the event and did not control the operation of the event.[36]

- A California court declined to find liability on the basis of "sponsorship" because the risk of tort liability could bring an end to most corporate sponsorship and hinder the functioning of organizations at every level.[37]

- Another California court held that a declaration of sponsorship does not establish actual control; if it did, every sponsor of a sporting event could be held liable for any injury occurring in a sporting arena.[38]

If a non-profit plays a substantial role in the supervision and control of an event where civil disobedience activities occur, this increases the likelihood of liability. However, the mere sponsorship of an event, absent supervision or control on the part of the non-profit, will likely be insufficient to establish liability.

[36] Vogel v. W. Mountain Corp., 97 A.D.2d 46 (N.Y. App. Div. 1983).
[37] McCulloch v. Ford Dealers Advert. Ass'n., 286 Cal. Rptr. 223 (Cal. Ct. App. 1991).
[38] Martinez v. Navy League of U.S., 2014 WL 4078647, at *4 (C.D. Cal. Aug. 18, 2014).

3. A Non-profit May Be Liable for Civil Disobedience at Events It Does Not Sponsor

The foregoing analysis applies equally to events that a non-profit does not a sponsor but participates in planning or organizing. The degree of control by the non-profit, rather than the presence or absence of financial sponsorship, will still be the primary factor that a court considers in assessing liability for acts of civil disobedience at the event.

4. Non-Profit Status Is at Risk If a Non-profit Reimburses Personnel for Legal Expenses

The non-profit statutes in California, New York, and D.C. provide that a non-profit may indemnify a director or officer who acted, in good faith, for a purpose reasonably believed to be in the best interests of the corporation. A non-profit may indemnify a director or officer who is a party in a criminal action or proceeding only if the director or officer had no reasonable cause to believe his conduct was unlawful.[39] The New York statute does not address indemnification for employees who are not officers or directors. The nonprofit statutes of the other relevant jurisdictions[40] are broader, addressing indemnification of corporate employees or "agents." In these jurisdictions, an employee or one who serves at the request of the corporation qualifies as an "agent." The statutes also permit a corporation to indemnify any person who is a party to a proceeding if the person acted in good faith and in a manner the person reasonably believed to be in the best interests of the corporation. In a criminal proceeding, the person also must have had no reasonable cause to believe his or her conduct was unlawful.

The statutes for each of the aforementioned jurisdictions likely do not permit reimbursing legal fees related to a criminal proceeding involving civil disobedience. An employee cannot claim that he had no reasonable cause to believe his civil disobedience was not permitted, as civil

[39] N.Y. Not-for-Profit Corp. Law § 722 (McKinney 2016), see also N.Y. Bus. Corp. Law § 722 (McKinney 2016).
[40] Cal. Corp. Code § 5238 (West 2013); 805 Ill. Comp. Stat. 105/108.75 (West 2012); D.C. Code § 29-406.51 (2013).

disobedience, by its very nature, involves unlawful conduct that the actor knows to be unlawful. If an employee knows or believes that his acts constitute crimes, the relevant statutes do not permit the non-profit to reimburse that employee (or agent) for legal expenses relating to civil disobedience activities.

Arguing that an employee had a good faith belief that civil disobedience conduct is in the best interests of the non-profit creates an additional problem: by indemnifying its personnel for legal expenses related to civil disobedience, the non-profit could be understood to be admitting that the civil disobedience actions are in the interests of the non-profit. This could increase the risk of vicarious liability and jeopardize the non-profit's 501(c)(3) status. Reimbursing such fees would also undermine any policy prohibiting or limiting civil disobedience activity. Therefore, a non-profit invites significant risk if it reimburses its personnel for legal expenses related to civil disobedience.

5. Non-profit Involvement in Civil Disobedience Will Jeopardize 501(c)(3) Status

Civil disobedience activity by a non-profit's personnel will jeopardize the organization's tax-exempt status. IRS Revenue Ruling 75-384 (1975) analyzed whether a non-profit organization formed to promote world peace and disarmament by nonviolent direct action, including acts of civil disobedience, qualified for exemption from federal income tax. The primary activity of the organization in Revenue Ruling 75-384 was protest demonstrations. Since the non-profit organization encouraged, planned, and sponsored the commission of criminal acts of civil disobedience, its activities demonstrated an illegal purpose inconsistent with charitable ends. Because criminal acts increase the burden on the government, they are contrary to charitable goals, and thus, the organization was not deemed to be operating exclusively for

charitable purposes. The IRS therefore ruled that the organization did not quality for exemption from federal income tax under § 501(c)(3) or (4).

However, an environmental organization that engaged in nonviolent demonstrations that did not constitute civil disobedience was entitled to classification as a 501(c)(3) organization. General Counsel Memorandum 38415 (June 1980), prepared by the Office of Chief Counsel of the IRS, held that an organization that provided educational materials to the public regarding environmental issues, and also engaged in nonviolent confrontation activities relating to the hunting of endangered species, is entitled to be classified as a 501(c)(3) organization. Examples of the organization's confrontation tactics included: demonstrations against persons commercially hunting or harvesting a particular endangered species, distribution of films and accounts of its confrontations with these persons to the news media, and encouraging the public to boycott products derived from hunting or harvesting. The Memorandum stated that the organization had never used or advocated civil disobedience or any other illegal method to accomplish its purposes; "confrontation" tactics that do not violate the law are neither illegal nor contrary to public policy. While there was evidence of incidents where members of the organization engaged in potentially illegal activity, there was no evidence that the organization authorized or condoned this activity. Furthermore, the Office of Chief Counsel stated that the IRS will generally not hold an organization accountable for unauthorized activities of its members. The Memorandum expressly differentiated the organization that was the subject of Revenue Ruling 75-384, whose primary activity was the sponsoring of civil disobedience. The subject organization in Memorandum 38415, by contrast, did not induce, encourage, or condone illegal acts and, therefore, was clearly distinguishable.

In order to maintain its 501(c)(3) status, the non-profit must not induce, encourage, or condone illegal acts. Arguing that the non-profit "does not induce, encourage, or condone illegal acts" is not viable if the non-profit's civil disobedience policy expressly permits or encourages participation in civil disobedience. Additionally, one could reasonably interpret a policy that does not prohibit personnel from participating in civil disobedience, but requires that they do so on their private time, as "condoning" illegal activities.[41] An outright prohibition of civil disobedience is the best policy to minimize the risk of jeopardizing the non-profit's tax-exempt status.

VI. CONCLUSION

A non-profit that explicitly or implicitly permits civil disobedience by its personnel will significantly increase its risk of criminal and civil liability, and could jeopardize its 501(c)(3) status. Explicitly prohibiting civil disobedience activity, including on private time, would significantly reduce the risk of liability or loss of tax-exempt status. A policy that prohibits civil disobedience cannot provide an absolute "safe harbor" against potential liability for the civil disobedience of a non-profit's personnel, but will reduce the risk of such liability. There is a significant risk that a non-profit could lose its tax-exempt status if it encourages or condones civil disobedience.

[41] Black's Law Dictionary (10th ed. 2014) (defining "condone" as "[t]o voluntarily pardon or overlook").

APPENDIX A

"Scope of Employment" Jurisprudence:

New York courts, consistent with the Second Restatement of Agency, consider the following factors when determining whether an act is within the scope of employment: the connection between the employment and the time, place, and occasion for the act; the history of the relationship between the employer and employee as revealed in actual practice; whether the employee commonly performs the act that led to the injury; the extent of departure from normal methods of performance; and whether the employer could have reasonably anticipated the act.[42]

California courts interpret the scope of employment similarly. An employer may be liable for an employee's torts even if the act is against an express company rule and confers no benefit to the employer.[43]

The District of Columbia also takes an expansive view of the scope of employment. Conduct will be of the kind the employee is employed to perform if it is one of the same general nature as that authorized or is incidental to the conduct authorized. The D.C. Circuit Court has construed acts to be within the scope of employment where self-interest is the predominant motive, so long as the agent is "actuated" by the principal's business purposes to any appreciable extent.[44]

[42] Burlarley, 75 A.D.3d at 956.
[43] Bussard., 129 Cal. Rptr. 2d at 679-80.
[44] Kalil, 407 F. Supp. 2d at 98.