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Memorandum

To: Senator Chuck Schumer, Majority Leader, U.S. Senate
Senator Dick Durbin, Democratic Whip, U.S. Senate
Senator Bernie Sanders, Chair, Committee on the Budget, U.S. Senate

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Date: March 29, 2021

Re: A Statutory Measure Expanding Lower Federal Courts Meets the Byrd Rule's 'Merely Incidental' Standard

I. INTRODUCTION

Despite bipartisan consensus on the need to expand federal appellate and district courts, it is unlikely that a lower court expansion bill could survive a Senate filibuster. We write to argue that a statutory measure expanding lower federal courts could be enacted via budget reconciliation because such a measure clears the reconciliation process's highest hurdle, known as the 'merely incidental' standard of the Byrd Rule.

The Byrd Rule (codified at 2 U.S.C. § 644) is a Senate procedural mechanism that limits the types of provisions that can be included in budget reconciliation bills, which require a simple majority of Senators to pass. Though measures must satisfy six distinct elements of the Byrd Rule to be included in a reconciliation bill, the criterion known as the 'merely incidental' standard typically is the most difficult hurdle to overcome. As we show below, a statutory measure expanding federal appellate and district courts meets the Byrd Rule's 'merely incidental' standard.

First used on a temporary basis in 1985 and 1986, the Byrd Rule was extended and modified until its incorporation into the Congressional Budget Act in 1990.[1] The Senate Parliamentarian, a nonpartisan civil servant, determines whether text in a budget reconciliation bill satisfies the Byrd Rule.[2] Senators challenge provisions they oppose and the Parliamentarian, after considering legal arguments for and against, recommends whether each contested measure can be included in the bill.

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[1] *The Budget Reconciliation Process: The Senate's "Byrd Rule,"* CONG. RES. SERV. (Dec. 1, 2020). We thank Naila Awan, Kyle Bigley, Chelsey Davidson and Kayla Morin for outstanding research in the preparation of this paper, and we thank the Michael D. Palm Center for Research Translation and Social Policy at San Francisco State University for supporting this research.

[2] The current Parliamentarian is Elizabeth MacDonough, who has served in the position since 2012.

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If the Senate's Presiding Officer (here, Kamala Harris) agrees with the Parliamentarian's recommendation, then 60 votes must be cast to defeat the recommendation. Importantly, however, the Presiding Officer is not bound by the Parliamentarian's decision, as abiding is only a matter of norms.[3]

'Merely incidental' determinations require the Parliamentarian to exercise judgment, as no formal, bright-line test has been established, but our analysis of hundreds of 'merely incidental' rulings indicates that, in practice, Parliamentarians consider four factors when determining whether a measure meets the standard. Lower court expansion satisfies all four factors that Parliamentarians consider in 'merely incidental' rulings. By way of comparison, we show below that numerous measures that satisfy *some but not all* of the four factors have met the Byrd Rule's 'merely incidental' standard. In light of that comparison, there can be no doubt that lower court expansion meets the 'merely incidental' standard and hence can be included in a budget reconciliation bill.

II. Meeting the 'Merely Incidental' Standard Requires Satisfying up to Four Factors

The Byrd Rule serves as the primary limitation on the contents of budget reconciliation provisions and excludes six types of provisions from eligibility under reconciliation:

(1) "[I]f such provision does not produce a change in outlays or revenues";
(2) If, when a "provision produc[es] an increase in outlays or decrease in revenues, . . . the net effect of provisions reported by the committee reporting the title containing the provision is that the committee fails to achieve its reconciliation instructions";
(3) If the provision "is not in the jurisdiction of the committee with jurisdiction over said title or provision";
(4) "[I]f it produces changes in outlays or revenues which are merely incidental to the non-budgetary components of the provision";
(5) "[I]f it increases, or would increase, net outlays, or if it decreases, or would decrease, revenues during a fiscal year after the fiscal years covered by such reconciliation bill or reconciliation resolution"; or
(6) If the provision seeks to alter certain programs established under title II of the Social Security Act.[4]

The most complicated of these provisions is that which governs whether provisions are 'merely incidental.' The 'merely incidental' standard excludes from reconciliation eligibility any measure for which the changes to expenditures or revenues are merely incidental to the relevant provision. As the statute explains, "a provision of a reconciliation bill . . . shall be considered extraneous if such provision does not produce a change in outlays or revenues . . . [or] produces changes in outlays or revenues which are merely incidental to the non-budgetary components of the provision."[5]

The Parliamentarian's determination of whether a specific provision is merely incidental is an opaque process, and the Parliamentarian considers the motive behind a measure to determine whether its primary purpose is budgetary. A 2005 Senate Budget Committee document explains that determinations require "the exercise of judgment" of the Parliamentarian, who reserves the right to

[3] *The Office of the Parliamentarian in the House and Senate*, at 1, Cong. Res. Serv. (Nov. 28, 2018).
[4] 2 U.S.C. § 664(b)(1).
[5] 2 U.S.C. § 664(b)(1)(A), (D).

"consider each individual case on its merits."[6] Despite the lack of a clear legal standard, the Parliamentarian considers whether the primary purpose or motive of the measure is budgetary, and our analysis of hundreds of 'merely incidental' measures indicates that, in practice, four factors inform the Parliamentarian's determination of whether a measure's purpose is to "attempt to make non-budgetary policy:"

1. *Scope*: Provisions may violate this standard if they affect a limited number of taxpayers.[7]
2. *Program inception*: Provisions may violate this standard if they create new regulatory structures or programs.
3. *Budgetary impact*: Provisions may violate this standard if they have a low budgetary impact.
4. *Policy import*: Provisions may violate this standard if their ratio of policy-to-budgetary import is high.

As the fourth factor underscores, just because a certain decision is budgetary or affects mandatory spending, does not mean that it necessarily meets the 'merely incidental' standard. An additional consideration is the measure's ratio of policy-to-budgetary import, meaning the extent to which its primary purpose is to affect non-budgetary policy as opposed to outlays and revenues. Assessing a measure's ratio of policy-to-budgetary import is subjective, and one key proxy that Parliamentarians consider is the degree of controversy surrounding a measure. Measures that are highly controversial, in other words, may be understood as more policy-related than budgetary, in which case they would not meet the 'merely incidental' standard.

To be sure, increasing the number of federal judgeships in this moment would have partisan implications for Republicans and for Democrats, who hold the Senate and White House, the two institutions responsible for judicial appointments. But all budgetary decisions have partisan impacts, and provisions that are more partisan and more controversial than expanding the federal judiciary have survived the Parliamentarian's scrutiny.

In the Tax Cuts and Jobs Act of 2017, for example, Republicans effectively repealed the Affordable Care Act's individual mandate—a cornerstone of the law and of the nation's health insurance framework—via budget reconciliation. The Senate Parliamentarian initially ruled that eliminating the individual mandate was merely incidental to the budget. Accordingly, the Parliamentarian found, the elimination could not be passed via budget reconciliation.[8] To get around this determination, Republicans changed the penalty for violating the mandate to zero, effectively nullifying the individual mandate but keeping it in line with the Parliamentarian's ruling.

To take another example, Republicans tried to defund Planned Parenthood via the budget reconciliation process. In 2017, the Senate Parliamentarian ruled that a number of provisions in a

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[6] *Overcoming the Filibuster Through Budget Reconciliation*, CONG. PROG. CAUCUS CTR. (Jan. 28, 2021), https://static1.squarespace.com/static/5a5414caf9a61e90a854b98c/t/60132925adafc010ef7b88ad/1611868454197/Overcoming+the+Filibuster+Through+Budget+Reconciliation.pdf (quoting Byrd Rule Annotated, Senate Committee on the Budget, Annotations by William G. Dauster Democratic Deputy Staff Director and General Counsel, Committee on Finance [Oct. 2005]).

[7] Ellen P. Aprill & Daniel Hemel, *The Tax Legislative Process: A Byrd's Eye View*, 81 LAW & CONTEMP. PROBS. 99, 122 (2018), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=13722&context=journal_articles.

[8] Amber Phillips, *The Budget Rule You've Never Heard of that Ties Republicans' Hands on Obamacare*, WASH. PO. (Mar. 9, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/03/09/the-budget-rule-youve-never-heard-of-that-ties-republicans-hands-on-obamacare/.

Republican bill to repeal the ACA violated the Byrd Rule, including Sec. 124, which prohibited Planned Parenthood from receiving Medicaid funds for one year.[9] The Parliamentarian ruled that singling out Planned Parenthood confirmed that the provision was not budgetary, but rather served to advance the political goal of blocking funding of a specific provider of reproductive care.

After the Parliamentarian's ruling, Republicans introduced a "skinny" ACA repeal bill that aimed to eliminate core features of the ACA, and that again included an attempt to defund Planned Parenthood. In hopes of satisfying the 'merely incidental' standard, Republicans added a measure blocking funding to at least one additional abortion provider to the new, "skinny" iteration of the bill. Ultimately, in part because of the inclusion of the attempt to defund Planned Parenthood, Senators Lisa Murkowski, Susan Collins, and John McCain defeated the bill by voting against it. But the effort to defund Planned Parenthood—veiled by including another abortion provider—may have survived the Byrd Rule.

The Congressional Budget Office estimated the provision defunding Planned Parenthood would have saved $100 million.[10] Expanding the federal judiciary has a higher annual budgetary impact—between $209 and $382 million—and is far less political than provisions to defund Planned Parenthood or to gut the ACA. Those who argue that adding judges is merely incidental to the federal budget, or that doing so is simply a partisan move not meant for reconciliation, seem to overlook these historical precedents.

III. Allocating Additional Funding to Federal Judgeships is Uncontroversial and Overdue

Increasing the amount of federal funds allocated to the judiciary and expanding the number of judgeships is not controversial—Republicans, Democrats, and judges all support expansion. The Judicial Conference, a body tasked with framing judicial policy recommendations, submitted a recommendation to Congress in 2019 to create new judgeships, "as it does every two years."[11] The Judicial Conference is headed by Chief Justice Roberts and includes district and appellate judges from each circuit. The latest recommendation has since drawn bipartisan support for lower court expansion, including from Senator John Cornyn (R-Texas), who acknowledged Texas is "a big growing state [with] huge caseloads" and indicated his willingness to discuss expansion.[12] In June 2020, Senator Lindsey Graham (R-South Carolina) went on record supporting lower court expansion, stating he hoped the Senate would "take the recommendations of the Judicial Conference and put on the table more judges for the next president, whoever he may be."[13] And Rep. Darrell Issa (R-California), Republican ranking member on the House Subcommittee on Courts, agreed that the consequences of not expanding the courts could be dire, noting that

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[9] *Background on the Byrd Rule Decisions From the Senate Budget Committee Minority Staff*, https://www.budget.senate.gov/imo/media/doc/Background%20on%20Byrd%20Rule%20decisions_7.21[1].pdf.
[10] *Table 1 - Estimate of the Direct Spending and Revenue Effects of Selected Provisions from H.R. 1628, The Better Care Reconciliation Act of 2017, An Amendment in the Nature of a Substitute*, https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/hr1628selectedprovisions.pdf.
[11] "Judicial Conference Approves Package of Workplace Conduct Reforms," U.S. Courts (Mar. 12, 2019) https://www.uscourts.gov/news/2019/03/12/judicial-conference-approves-package-workplace-conduct-reforms.
[12] Jordain Carney, *Progressive Support Builds for Expanding Lower Courts*, The Hill (Feb. 23, 2021), https://thehill.com/homenews/senate/540191-progressive-support-builds-for-expanding-lower-courts.
[13] Madison Alder, *Key Republican Open to Adding Judgeships for Election Winner*, Bloomberg Law (June 30, 2020), https://news.bloomberglaw.com/us-law-week/key-republican-open-to-creating-judgeships-to-fill-post-election.

Congress has now gone its longest without significantly expanding the courts since 1789.[14]

The historical precedent for lower court expansion is clear. The modern court system was established in 1891, and Congress expanded the judiciary nearly 30 times over the next 100 years.[15] From 1961 to 1990, Congress created 425 permanent district court judgeships through six pieces of legislation, but from 1991 to 2020, Congress created just 31 new judgeships over three pieces of legislation, the latest of which added 12 judges in 2005.[16] Adding approximately 250 new judgeships is consistent with historical precedent. With the proposed expansion, approximately 280 total judgeships will have been created in the last three decades, compared to 425 in the preceding three decades.

Expanding lower courts will relieve pressure on existing judges and resources. Congress passed the last *large-scale* expansion of the judiciary in 1990, creating 69 new judgeships.[17] Since then, the U.S. population has grown by nearly a third and district court filings have increased by more than 38 percent.[18] By comparison, district judgeships have inched up by just 4 percent.[19] During that same interval, circuit court filings have increased by 15 percent.[20] Testifying before Congress in 2020, Judge Brian S. Miller, a Republican-appointed district court judge in the Eastern District of Arkansas, noted the caseload consequences of Congress's failure to expand the judiciary during the past several decades.

> Increasing caseloads lead to significant delays in the consideration of cases, especially civil cases which may take years to get to trial. . . . Delays increase expenses for civil litigants and may increase the length of time criminal defendants are held pending trial. Substantial delays lead to lack of respect for the Judiciary and the judicial process.[21]

The present resource allocation has produced a backlog, and expanding the lower courts is long overdue.

IV. Allocating Additional Funding to Federal Judgeships is Fundamentally a Budgetary Decision

Increasing the amount of federal funds allocated to the judiciary—and creating more judges along the way—meets the Byrd Rule's 'merely incidental' standard because it is at its core a budgetary decision, especially in comparison to other measures that have met the standard. As discussed in the Appendix, adding 250 federal judges would cost between $209 and $382 million annually. By comparison, as we show below, many provisions that have been included in reconciliation bills have

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[14] Mark Joseph Stern, *Congress Might Actually Expand the Courts*, SLATE (Feb. 24, 2021), https://slate.com/news-and-politics/2021/02/congress-expand-courts.html.
[15] *Id.*
[16] Cara Bayles, *Crisis to Catastrophe: As Judicial Ranks Stagnate, 'Desperation' Hits the Bench,* LAW360 (Mar. 19, 2019), https://www.law360.com/articles/1140100/as-judicial-ranks-stagnate-desperation-hits-the-bench.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Judiciary Makes the Case for New Judgeships*, United States Courts (June 30, 2020), https://www.uscourts.gov/news/2020/06/30/judiciary-makes-case-new-judgeships.
[21] *Id.*

had zero or effectively zero budgetary import.

Moreover, funding the federal judiciary is a form of mandatory spending—meaning it involves funds that Congress must spend regardless of the annual appropriations process.[22] Funds to pay the salaries of what are known as Article III judges (those nominated by the President and confirmed by the Senate per Article III of the Constitution) and funds used for some judicial retirement benefits constitute mandatory spending.[23] Reconciliation is commonly used to change mandatory spending levels.[24] The Byrd Rule's restrictions pose more of a hurdle for discretionary spending, which can be used to create new programs and policies.[25]

V. Lower Court Expansion Satisfies All Four Factors Considered in 'Merely Incidental' Rulings

A statutory measure expanding federal district and appellate courts by 250 seats meets the Byrd Rule's 'merely incidental' standard because it satisfies all four factors associated with the determination of whether a measure's purpose is budgetary. As we show below, many measures have passed through budget reconciliation—and thus cleared the 'merely incidental' standard—without satisfying all four of these factors. The clarity with which lower court expansion satisfies each individual factor; its satisfaction of all four factors as opposed to just some; and the fact that measures have met the 'merely incidental' standard even without satisfying all four factors combine to leave no doubt as to whether an expansion provision satisfies the Byrd Rule's 'merely incidental' standard.

A. Scope: Lower Court Expansion Affects 100 Percent of Taxpayers

A provision's purpose may be determined to be incidental to its budgetary import if it benefits or otherwise affects a limited number of taxpayers. A 2018 journal article noted that provisions that "affect a limited number of taxpayers" or "bestow [or terminate] benefits on a narrow group" violate the merely incidental standard because policy purposes typically inform special interest provisions.[26] Several provisions removed from the 2017 tax bill affected only a narrow set of taxpayers, including a provision that would have required foreign airlines to pay U.S. corporate income tax on a portion of their profits ($200 million revenue gain), and a provision that would have repealed the tax-exempt status of professional sports leagues, including the U.S. Tennis Association and the PGA Tour ($100 million revenue gain).[27]

In contrast, reconciliation acts have included numerous provisions benefiting or otherwise affecting only narrow and even niche segments of taxpayers. For example, all four measures below satisfied the 'merely incidental' standard, and all four measures were included in final versions of reconciliation acts:

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[22] Richard Kogan & David Reich, *Introduction to Budget "Reconciliation,"* Ctr. Budget & Priorities (Jan. 21, 2021), https://www.cbpp.org/research/federal-budget/introduction-to-budget-reconciliation.
[23] *Judiciary Appropriations, FY20*, at 10, Cong. Res. Serv. (May 18, 2020), https://fas.org/sgp/crs/misc/R45965.pdf.
[24] Kogan & Reich, *supra* note 22.
[25] *Id.*
[26] Aprill & Hemel, *supra* note 7.
[27] Overcoming the Filibuster Through Budget Reconciliation, *supra* note 6, at 4-6.

1. Yacht and recreational boat owners

   A provision of the Taxpayer Relief Act of 1997 repealed a tax on diesel fuel used in recreational boats while retaining the tax on diesel-powered trains and other vehicles.[28] This measure benefited yacht and other recreational boat owners.

2. Electric car owners

   A provision of the Taxpayer Relief Act of 1997 exempted electric and other clean-fuel motor vehicles from being classified as luxury automobiles for tax purposes.[29]

3. Alaska whaling captains

   A provision of the Taxpayer Refund and Relief Act of 1999 addressed expenses paid by certain whaling captains as recognized by the Alaska Eskimo Whaling Commission, allowing deductions of certain expenses not to exceed $7,500 per taxable year.[30]

4. Victims of Nazi atrocities

   A provision of the Economic Growth and Tax Relief Reconciliation Act of 2001 shielded victims of the Nazi regime and their estates from income tax on any restitution received.[31]

Unlike these measures, which were designed to affect very narrow groups of taxpayers, all U.S. taxpayers would be affected by an expansion of lower federal courts because salaries and benefits of Article III judges are mandatory spending. Thus, a lower court expansion bill satisfies this factor.

B. Program Inception: Lower Court Expansion Does Not Create New Programs

A provision's purpose may be determined to be incidental to its budgetary import if it creates new programs. The Parliamentarian often finds that allocating resources to existing programs is less likely to be motivated by policy import than the inception of a wholly new program, in which budgetary implications are often secondary to policy objectives. That said, numerous provisions have met the 'merely incidental' standard even though they establish new programs and hence do not satisfy this factor. For example, all eight measures below satisfied the 'merely incidental' standard of the Byrd Rule, and all eight were included in final budgetary reconciliation acts:

1. Health opportunity accounts

   A provision of the Deficit Reduction Act of 2005 created a demonstration program for health opportunity accounts and appropriated $550,000 for the period of fiscal years 2007 through 2010 to create a GAO Report evaluating the demonstration programs under this section.[32]

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[28] Taxpayer Relief Act of 1997, § 902.
[29] *Id.* § 906.
[30] Taxpayer Refund and Relief Act of 1999, § 1007.
[31] Economic Growth and Tax Relief Reconciliation Act of 2001, § 803.
[32] Deficit Reduction Act of 2005, § 6082.

2. National Clearinghouse for Long-Term Care Information

   A provision of the Deficit Reduction Act of 2005 directed the Secretary of Health and Human Services to establish a National Clearinghouse for Long-Term Care Information and appropriated $3,000,000 for each of fiscal years 2006 through 2010.[33]

3. Medicaid Integrity Program

   A provision of the Deficit Reduction Act of 2005 established a Medicaid Integrity Program under 42 U.S.C. § 1396 et seq. for the purpose of eliminating fraud, waste, and abuse in Medicaid.[34] The provision appropriated $5,000,000 for FY 2006; $50,000,000 for each of FY 2007 and FY 2008; and, for each fiscal year thereafter, $75,000,000.

4. Gainsharing program

   A provision of the Deficit Reduction Act of 2005 directed the Secretary of Health and Human Services to establish a gainsharing demonstration program "to test and evaluate methodologies and arrangements between hospitals and physicians designed to govern the utilization of . . . resources and . . . improve the quality and efficiency of care provided to Medicare beneficiaries." It appropriated $6,000,000 for FY 2006.[35]

5. Post-acute care program

   A provision of the Deficit Reduction Act of 2005 directed the Secretary of Health and Human Services to establish a demonstration program to understand "costs and outcomes across post-acute care sites." It directed the Secretary to transfer $6,000,000 from the Federal Hospital Insurance Trust Fund for FY 2006.[36]

6. Tsunami warning program

   A provision of the Deficit Reduction Act of 2005 authorized up to $156,000,000 total for the years from FY 2007 to 2012 "to implement a unified national alert system" to emergency situations, of which $50,000,000 was allocated "to implement a tsunami warning and coastal vulnerability program."[37]

7. Digital-to-analog conversion program

   A provision of the Deficit Reduction Act of 2005 authorized the Assistant Secretary of the Treasury to borrow up to $10,000,000 for both fiscal years 2008 and 2009 to create a program for low-power television stations to receive compensation toward the cost of purchasing digital-to-analog conversion devices.[38] The measure prioritizes stations in which

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[33] *Id.* § 6021.
[34] *Id.* § 6034.
[35] *Id.* § 5007.
[36] *Id.* § 5008.
[37] *Id.* § 3010.
[38] *Id.* § 3008.

the license is held by a non-profit or stations that serve rural areas of fewer than 10,000 viewers.

8. College Access Challenge Grant Program

   A provision of the College Cost Reduction and Access Act of 2007 created the College Access Challenge Grant Program to partner nonprofits and federal, state, and local governments through matching grants that aimed to increase low-income student attendance at colleges and universities. The targeted policy received $66,000,000 for each of fiscal years 2008 and 2009.[39]

Because lower court expansion would simply expand an existing structure of government by adding personnel to courts and federal circuits, it would neither create new courts nor add new programs or regulatory structures. It thus satisfies this factor of the 'merely incidental' standard.

C. Budgetary Impact: Lower Court Expansion Has A (Much) Higher Budgetary Impact Than Other Measures That Have Met the 'Merely Incidental' Standard

A provision's purpose may be determined to be merely incidental if its budgetary impact is low. Provisions that are inexpensive are less likely to affect revenues and outlays—the core focus of the Byrd Rule—than more expensive items. Parliamentarians may thus find that inexpensive items are "tagged on" to meet policy objectives rather than to materially impact the budget. That said, numerous provisions have met the 'merely incidental' standard despite having minimal or no impact on revenues or outlays. For example, all eleven measures below satisfied the 'merely incidental' standard:

1. Tobacco importation

   The 1993 Omnibus bill included an assessment on cigarette manufacturers who imported more than a quarter of tobacco used in production.[40] The assessment was designed such that manufacturers would not profitably be able to exceed the 25 percent threshold, and the underlying policy was to discourage the importation of tobacco, not to raise revenue.[41] CBO estimated that the provision would result in $6 million in revenue a year.[42]

2. Research on time limits on eligibility for assistance

   A provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 allocated $15 million per fiscal year, 1997-2002, for "research on the benefits, effects, and costs of operating different State programs" including time limits relating to eligibility for assistance.[43]

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[39] College Cost Reduction and Access Act of 2007, § 801.
[40] Aprill & Hemel, *supra* note 7, at 110.
[41] *Id.*
[42] *Id.* at 111.
[43] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 413.

3. Research on child abuse

   A provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 allocated $6 million per fiscal year, 1996-2002, to "conduct a national study based on random samples of children who are at risk of child abuse or neglect, or are determined by states to have been abused or neglected."[44]

4. Vaccines outreach

   A provision of the Balanced Budget Act of 1997 appropriated $8 million for each fiscal year 1998 to 2002 to extend the influenza and pneumococcal vaccine campaign.[45]

5. Family-to-family health information centers

   A provision of the Deficit Reduction Act of 2005 enabled the Secretary of Health and Human Services through grants and contracts to provide for special projects for the development of family-to-family health information centers. It appropriated $3 million for FY 2007, $4 million for FY 2008, and $5 million for FY 2009.[46]

6. Home-based services for elderly

   A provision of the Deficit Reduction Act of 2005 appropriated $1 million for the period of FYs 2006 through 2010 to assess best practices for home and community-based services through comparative analysis of each state and make publicly available these best practices.[47]

7. Home health payments

   A provision of the Deficit Reduction Act of 2005 appropriated $550,000 to the Medicare Payment Advisory Commission to create a MedPAC report on value-based payment adjustments for home health services.[48]Report on physicians' services

   A provision of the Deficit Reduction Act of 2005 appropriated $550,000 to the Medicare Payment Advisory Commission to create a MedPAC report on physicians' services.[49]

8. Physician investment in specialty hospitals

   A provision of the Deficit Reduction Act of 2005 directed the Secretary of Health and Human Services to develop and implement a plan regarding physician investment in specialty hospitals for a cost of $2 million for FY 2006.[50]

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[44] *Id.* § 503.
[45] Balanced Budget Act of 2007, § 4107.
[46] Deficit Reduction Act of 2005, § 6064.
[47] *Id.* § 6086.
[48] *Id.* § 5201.
[49] *Id.* § 5104.
[50] *Id.* § 5006.

9. Strengthening courts

   A provision of the Deficit Reduction Act of 2005 funded court improvement grants for child welfare improvement purposes.[51] The measure funded grants to improve data collection and training in the amount of $20 million for each of fiscal years 2006 through 2010.

10. Pell Grants

    A provision of the College Cost Reduction and Access Act of 2007 appropriated $11 million for fiscal year 2008 to Pell Grants.[52]

Lower court expansion, which has an annual cost of between $209 million and $382 million would have a much greater impact on the budget than these eleven measures, all of which met the 'merely incidental' standard and all of which were included in final reconciliation acts.

D. Policy Import: Lower Court Expansion's Ratio of Policy-to-Budgetary Import Is Lower Than Other Measures That Have Met The 'Merely Incidental' Standard

A provision's purpose may be determined to be incidental to its budgetary import if its ratio of policy-to-budgetary import is high. In 1993, the Senate Budget Committee explained in an annotated version of a bill that the drafters of the "merely incidental" standard "wished to prohibit provisions in which *policy changes plainly overwhelmed deficit changes*. For example, a nationwide abortion prohibition might marginally reduce Government spending, but would constitute a *much more significant policy change than budgetary action*."[53]

Two distinct comparisons demonstrate that lower court expansion's ratio of policy-to-budgetary import is lower than the ratio associated with other measures that have met the 'merely incidental' standard. First, many measures that were expected to have zero or effectively zero budgetary impact met the 'merely incidental' standard and were included in final budget reconciliation bills. If a measure is expected to have zero or effectively zero budgetary impact, then *by definition* its policy-to-budgetary ratio is higher than court expansion because its ratio's denominator is zero. The following seven measures—all of which all of which were expected to have zero or effectively zero impact on outlays or expenditures—met the 'merely incidental' standard.

1. Cotton competitiveness

   A provision of the Deficit Reduction Act of 2005 repealed authority to issue cotton user marketing certificates under 7 U.S.C. § 7937 (Farm Security and Rural Investment Act of 2002).[54] This provision revoked federal authority to issue certificates and effectively had zero budgetary impact, with no cost estimate in text of Act or from the CBO.

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[51] *Id.* § 7401.
[52] College Cost Reduction and Access Act of 2007, § 101.
[53] Aprill & Hemel, *supra* note 7; *see also supra* Part II.
[54] Deficit Reduction Act of 2005, § 1103.

2. Watershed rehabilitation

   A provision of the Deficit Reduction Act of 2005 canceled the authority to obligate funds under 16 U.S.C. § 1012(h)(1) as of October 1, 2006.[55] The provision, which impacted environmental policy and watershed protection, focused on the cancelation of the authority to fund projects under the Watershed Protection and Flood Prevention Act rather than reducing the Watershed Rehabilitation Program's budget.

3. Broadband access

   A provision of the Deficit Reduction Act of 2005 canceled the authority to obligate funds made available under section 601(j)(1) of the Rural Electrification Act of 1936 as of October 1, 2006.[56] This measure emphasized the revocation of federal authority to allocate funds rather than amending the program's budget. No cost estimate in the text of the Act or from the CBO.

4. Analog-to-digital transition

   A provision of the Deficit Reduction Act of 2005 amended 47 U.S.C. § 309(j)(14) (Communications Act of 1934)[57] and established a firm deadline of February 17, 2009, for analog to digital transition. It also terminated analog licenses and broadcasting and directed the FCC to require all Class A stations to only occur on channels between 2 and 36, or 38 and 51. The measure had effectively zero budgetary impact and instead impacted the analog-to-digital transition policy, and no cost estimate is available in text of the Act or from the CBO.

5. Blindness and disability determinations

   A provision of the Deficit Reduction Act of 2005 amended 42 U.S.C. § 1383b to direct the Commissioner of Social Security to review determinations of blindness and disability made by state agencies in applications for benefits.[58] This measure required review of these determinations before the state could implement the determination. The measure required the Commissioner to review a minimum of: 20 percent of determinations made in FY 2006; 40 percent of determinations made in FY 2007; and 50 percent of determinations made in FY 2008 or thereafter. This measure had no direct budgetary impact, as any budgetary reduction would come from potential reversal of state determinations for beneficiaries, and no appropriations were made for the Commissioner to enact this provision. The policy implications were quite significant in that the policy delayed a minimum of 20 to 50 percent of new beneficiaries from receiving benefits until the Commissioner could review the state determination. The policy solely affected people whom states had already determined to be blind or disabled, and no cost estimate was provided in the Act or by the CBO.

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[55] *Id.* § 1201.
[56] *Id.* § 1401.
[57] *Id.* § 3002.
[58] *Id.* § 7501.

6. Vessel tonnage limit

   A provision of the Tax Increase Prevention and Reconciliation Act of 2005 amends the terms of qualifying vessels 26 U.S.C. § 1355(a), reducing the tonnage requirements for qualifying vessels from 10,000 to 6,000 within a five-year date range.[59] This change has minimal budgetary import and amends a niche policy. No cost estimate is available from the CBO or in the text of the Act.

7. Rescinding disclosures

   A provision of the 2016 reconciliation bill rescinded disclosures after December 31, 2017. The Internal Revenue Code generally prevents the release of confidential tax information to other parties.[60] This provision limited the amount of releases (i.e., disclosures) the IRS could make. The provision had zero budgetary impact.[61]

Second, we identified measures that involved controversial, non-budgetary policy considerations and that clearly used the tax code and budget process to enact policy agendas that had little if anything to do with revenues or outlays. All four of the measures below satisfied the 'merely incidental' standard, and while all four had some budgetary impact, they were clearly intended to effect policy change, not to take budgetary action.

1. Healthy marriage promotion and responsible fatherhood

   A provision of the Deficit Reduction Act of 2005 allocated $150,000,000 each FY 2006 through 2010 to make grants to states, territories, Indian tribes and tribal organizations, nonprofits, and religious organizations for activities and programs promoting healthy marriage and responsible fatherhood under the Temporary Assistance for Needy Families program.[62]

2. Health care expansion

   The highly controversial Health Care and Reconciliation Act of 2010 included a provision that allowed adults to stay on their parents' health insurance, in particular by extending the exclusion of employer-provided coverage to adult children up to age 26 from gross income. While the provision had budgetary implications, its primary motivation was widely understood to be the expansion of health care access. The CBO did not provide a cost breakdown for this specific provision (§1004) but did provide a combined cost estimate for §§ 1001-1004, 1201 and 1401 of $160,400,000 over the 2010-2019 period.

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[59] Tax Increase Prevention and Reconciliation Act of 2005 (enacted 2006), § 205.
[60] *Disclosure Laws*, INTERNAL REVENUE SERV., https://www.irs.gov/government-entities/federal-state-local-governments/disclosure-laws.
[61] H.R. 3762, 114. Cong. § 202, To Provide for Reconciliation Pursuant to Section 2002 of the Concurrent Resolution on the Budget for Fiscal Year 2016 (H.R. 3762) (2016). This measure amends § 6103(I)(21) of the Internal Revenue Code.
[62] Deficit Reduction Act of 2005, § 7103.

3. Alaska Wildlife Refuge oil drilling

   Republicans sought to open the Alaska National Wildlife Refuge to oil drilling in the 2017 reconciliation bill despite warnings by environmental advocates of serious policy consequences including harming Arctic wildlife such as polar bears.[63] The CBO projected that the change in revenue would be slight, in that opening the land to leasing would lead to a mere $91 million annual increase in leasing revenue.[64] Nevertheless, the provision survived the 'merely incidental' Byrd Rule test.[65]

4. Religious school attendance

   The budget for fiscal year 2018 allowed deductions of "expenses for tuition in connection with enrollment or attendance at an elementary or secondary public, private, or religious school" up to $10,000 per taxable year.[66] This measure had little budgetary impact and CBO did not provide a cost estimate within the text of the Act. It did, however, have a significant policy impact by expanding the types of schools under the qualified tuition program to include religious schools.

Lower court expansion has a lower policy-to-budgetary import ratio than any of these measures, all of which nevertheless met the 'merely incidental' standard.

VI. CONCLUSION

A statutory measure expanding federal appellate and district courts by 250 seats and costing between $209 million and $382 million per year meets the Byrd Rule's 'merely incidental' standard. Parliamentarians weigh four factors to determine whether measures meet the standard, and lower court expansion satisfies all four standards. By way of comparison, numerous measures that satisfy *some but not all* of the four factors have met the Byrd Rule's 'merely incidental' standard. In light of that comparison, there can be no doubt that lower court expansion meets the standard.

To expand the federal judiciary through budget reconciliation, the provision should be attached to another expenditure or funding mechanism. And, statutory language from the most recent appropriation for the federal district courts (2020) or from the most recent, major expansion of the number of judges (1990) should be modified, for example by including a detailed budget and placing each judge's salary ($216,400 for a district court judge and $229,500 for a circuit court judge) next to each new judicial appointment.[67]

If, however, the Parliamentarian rules that a lower court expansion provision does not meet the Byrd Rule's 'merely incidental' standard, the Presiding Officer (in this case, the Vice President) should disregard the Parliamentarian's ruling. If the Presiding Officer overrules the Parliamentarian, 60 votes would be required to reverse that decision. As Senator Ted Cruz (R-Texas) noted during Republican-led attempts to repeal the ACA in 2017, "[u]nder the Budget Act of 1974, which is what

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[63] Aprill & Hemel, *supra* note 7, at 125.
[64] *Id.*
[65] *Id.*
[66] Tax Cuts and Jobs Act of 2017, § 11032.
[67] Financial Services and General Government Appropriations Act, 2020, https://www.congress.gov/bill/116th-congress/house-bill/3351/text.

governs reconciliation, it is the presiding officer, the vice president of the United States, who rules on what's permissible on reconciliation and what is not. . . . The parliamentarian advises on that question."[68] Republicans have taken more radical approaches to disagreements with the Parliamentarian in the past. In 2001, for example, former Senate Majority Leader Trent Lott (R-Miss) and then-Chair of the Senate Rules Committee Mitch McConnell (R-Kentucky) fired parliamentarian Bob Dove after he ruled against including certain provisions in reconciliation acts.

Put simply, even if the Parliamentarian ignores the precedents discussed in this policy memo, a measure expanding lower federal courts by 250 judges *can* be enacted through the budget reconciliation process, which is not subject to the filibuster, and which needs only a simple 51-vote majority to pass the Senate.

[68] Alexander Bolder, *Cruz: Let's Overrule Senate Officer to Expand ObamaCare Bill*, THE HILL (March 9, 2017) https://thehill.com/homenews/senate/323272-cruz-lets-overrule-senate-officer-to-expand-obamacare-bill.

APPENDIX: BUDGETARY IMPLICATIONS OF LOWER FEDERAL COURT EXPANSION

We used two distinct estimation techniques and data sources to ensure the robustness of our cost estimate, and we determined, based on data from the FY 2021 Congressional Budget Request, that the cost of adding 250 lower court federal judges to the judiciary would range from a low estimate of $209 million to a high estimate of $382 million.[69] The salaries and some of the benefits of the new Article III judges who would be appointed by lower court expansion, as that of all current judges, would constitute mandatory spending.

Our first calculation is based on data included in a FY 2021 Congressional Budget Request for an additional eight judges (see page 4.33).[70] That request asks for $837,500 for the salaries and benefits of each judge and supporting staff and costs. Extrapolated to 250 judges, the total annual cost would be $209 million.

Our second calculation is based on data included in the Congressional Budget Request's assessment of total costs for all district judges in the U.S. for FY 2021 (see page 4.8).[71] This approach entails summing the number of active, senior, and retired judges and then dividing total cost by that number to arrive at a total annual cost per judge of $1.529 million.[72] Based on these data, the total annual cost to add 250 lower court judges would be $382 million.

[69] FY 2021 Congressional Budget Request, https://www.uscourts.gov/sites/default/files/salaries_and_expenses_fy_2021_0.pdf.
[70] *Id.*
[71] *Id.*
[72] Note that the total cost used in this estimation includes more staff—such as magistrate judges—than our first estimation, which is why the estimated cost per judge is higher than in our first calculation.