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*Attorneys for The Barnes
Foundation*

IN RE: : **COURT OF COMMON PLEAS**
: **OF MONTGOMERY COUNTY**
THE BARNES FOUNDATION, : **ORPHANS' COURT DIVISION**
A CORPORATION :
: **No. 58,788**

**SECOND AMENDED PETITION OF THE BARNES FOUNDATION
TO AMEND ITS CHARTER AND BYLAWS**

The Barnes Foundation ("The Foundation") respectfully requests approval to amend its Charter, Bylaws and Indenture to conform to the proposed drafts that are attached to this second amended petition as Exhibits C, D and E. Approval of these changes to The Foundation's governing corporate documents is necessary to fulfill The Foundation's primary purpose of promoting "the advancement of education and the appreciation of the fine arts." In support of this second amended petition, The Foundation avers as follows:

PARTIES

1. The Foundation is a Pennsylvania nonprofit corporation, formed with a mission or corporate purpose "to promote the advancement of education and the appreciation of the fine arts." Barnes Foundation Charter (attached hereto as Exhibit A), ¶ Second; Barnes Foundation Bylaws (attached hereto as Exhibit B), Art. II & Art. IX, § 2, First Whereas cl. Its main facility is located in Lower Merion Township, Montgomery County, Pennsylvania ("the Merion Facility").

2. The Office of the Attorney General of the Commonwealth of Pennsylvania, as *parens patriae*, is a party to this proceeding. Copies of The Foundation's original petition to amend its Charter and Bylaws, and accompanying papers, were served on the Attorney General on September 24, 2002. Copies of The Foundation's amended petition to amend its Charter and Bylaws, and accompanying papers, were served on the Attorney General on June 5, 2003. This second amended petition has been served on the Attorney General, as evidenced by the Certificate of Service attached to this second amended petition.

3. Lincoln University ("Lincoln") is a Pennsylvania nonprofit corporation and a state-related university of higher learning in Chester County, Pennsylvania. On February 12, 2003, this Court granted Lincoln's petition to intervene in this matter. Copies of The Foundation's amended petition to amend its Charter and Bylaws, and accompanying papers, were served on Lincoln on June 5, 2003. This second amended petition has been served on Lincoln, as evidenced by the Certificate of Service attached to this second amended petition. Upon the filing of this second amended petition, Lincoln will withdraw from this case.

4. On February 28, 2003, Lincoln filed an answer and new matter to The Foundation's original petition. On March 20, 2003, The Foundation filed a reply to the new matter raised in Lincoln's answer. On July 23, 2003, the Attorney General filed an answer to The Foundation's amended petition. Also on July 23, 2003, Lincoln filed an answer and new matter to The Foundation's amended petition. Lincoln's answers filed on March 20, 2003 and July 23, 2003 will be withdrawn when Lincoln withdraws from this case.

JURISDICTION AND VENUE

5. This Court has jurisdiction over The Foundation under Section 711(21) of the Probate, Estates & Fiduciaries Code, 20 Pa. C.S. § 711(21), and Rule 2156(1) of the Pennsylvania Rules of Judicial Administration.

6. Venue is proper in Montgomery County pursuant to Section 726 of the Probate, Estates & Fiduciaries Code, 20 Pa. C.S. § 726, as The Foundation's registered office is located in Montgomery County.

BACKGROUND

7. The Foundation owns a large, highly regarded, and valuable collection of art that The Foundation's donor, Dr. Albert C. Barnes, collected over the course of his lifetime, a portion of which is on display in an art gallery at the Merion Facility.

8. The Foundation offers educational programs in horticulture and in art and aesthetics, using teaching methods established by Dr. Barnes and John Dewey, The Foundation's first Director of Education. During the fall of 2002, fifty-five students were enrolled in the horticulture program, and ninety-nine students were enrolled in the art and aesthetics program.

9. Article IX, Section 2 of The Foundation's Bylaws incorporate in their entirety a December 6, 1922 Indenture and Agreement between Dr. Albert C. Barnes and The Foundation, as amended ("Indenture"), which contains conditions and stipulations that limit The Foundation's ability to adequately maintain its operations.

10. The Foundation was established with an endowment provided by Dr. Barnes, but The Foundation's endowment has proved inadequate as a revenue source for operating expenses and necessary repairs and renovations.

11. In recent years, the endowment was used primarily to pay for operating expenses, including legal bills of more than \$6.5 million over the past decade. By 1999, no funds remained from Dr. Barnes' original endowment.

12. The Foundation's financial difficulties have impaired its ability to cover its general operating expenses and to meet its needs in such areas as professional staffing, conservation treatment, fund-raising, collection assessment, facilities care, and public relations.

13. The Foundation is seriously limited in the construction it may undertake at the Merion Facility and in the revenues it can generate from fund-raising at the Merion Facility or from visitor revenues due to longstanding opposition within the local community and zoning restrictions imposed on the Merion Facility.

14. The Foundation's ability to raise revenues and meet its expenses is also seriously limited by the small size of its Board of Trustees (the "Board").

15. The Foundation's current fiscal situation is dire, puts at risk The Foundation's ability to fulfill its primary purpose, and threatens The Foundation's survival. The Foundation is currently operating at a deficit and its combined losses during 2000 and 2001 were more than \$1.3 million. In a September 2002 report of The Foundation's finances, The Foundation's financial consultants reviewed its financial statements and determined that the gap between its expenses and

expected revenues for 2002 would be approximately \$800,000 or more, while the gap in future years was expected to be even greater.

16. According to The Foundation's audited financial statements for the year ending December 31, 2002, The Foundation suffered a decline in its net assets of more than \$1 million. Those financial statements also indicate that, had it not been for the \$1.55 million contribution from the philanthropic institutions assisting The Foundation in its current effort to amend its charter and bylaws (and thereby secure the relief necessary to reverse its financial decline), The Foundation would have suffered a reduction in net assets of more than \$2.5 million. In addition, according to The Foundation's financial statements for the first quarter of 2003, it has suffered an additional reduction in net assets of approximately \$450,000 in just that three-month period.

17. In light of The Foundation's fiscal situation, The Foundation's Board undertook an analysis of the steps necessary to (a) continue to serve the primary purpose of The Foundation; (b) improve The Foundation's finances; and (c) ensure The Foundation's long-term survival. This analysis included an evaluation of many of the potential options for accomplishing these goals.

18. Among the options considered by The Foundation's Board was acceptance of an offer of assistance from two leading Philadelphia philanthropic institutions, the Pew Charitable Trusts ("Pew") and the Lenfest Foundation ("Lenfest"), to help The Foundation raise approximately \$150 million to relocate The Foundation's collection currently housed at The Foundation's gallery at its Merion Facility to a new location in the City of Philadelphia and to establish a substantial endowment to ensure The Foundation's long-term fiscal health. Pew and Lenfest, assisted by the Annenberg Foundation ("Annenberg"), also committed to provide The Foundation with short-term

assistance, including operating support of approximately \$3 million, during the period in which The Foundation sought Court approval for these changes.

19. Pew and Lenfest conditioned their offer of assistance on The Foundation's commitment to change its governance documents to remove significant impediments to the successful fulfillment of The Foundation's mission and to enable advancement of that mission through new facilities and operational reforms that, subject to The Foundation's mission statement and educational obligations, would broaden the public's access to The Foundation's collection and to the educational benefits that it provides. These measures would include changes to The Foundation's governance documents to permit relocation of its main gallery to Philadelphia from the Merion Facility, removal of conditions and stipulations from The Foundation's Bylaws that restrict The Foundation's operational flexibility, and expansion of The Foundation's Board to 15 members.

20. After thoughtful consideration by its members and consideration of available options, The Foundation's Board concluded that it should accept the offer of assistance from Pew and Lenfest as the best means of solving The Foundation's financial crisis and securing The Foundation's ability to carry out its mission to promote the advancement of education and the appreciation of fine arts.

21. In reaching this decision, The Foundation concluded that it should make the changes upon which the offer of Pew and Lenfest was conditioned, both because the changes would be in the best interests of The Foundation as it enters the 21st Century and because those changes would enable it to accept the offer of Pew and Lenfest.

22. The changes that the Board has decided to seek as in the best interests of The Foundation require the approval of this Court.

23. The Foundation has entered into an agreement with Pew and Lenfest which will go into effect only if the Court approves this petition seeking approval of the changes to The Foundation's Charter and Bylaws. Under the agreement, Pew and Lenfest ("the Donors") will provide The Foundation with short-term financial aid, assisted by Annenberg in this regard, and will work with The Foundation to raise the funds necessary to: build a new facility in the City of Philadelphia in which to display The Foundation's collection currently housed in the main gallery at the Merion Facility; relocate that collection to the new facility; and establish a substantial endowment that will ensure The Foundation's financial security into the future.

24. The opportunity offered by the Donors is unlike any offer of assistance The Foundation has received in its history and would allow The Foundation to overcome its current financial predicament, ensure that The Foundation prospers for many years into the future, and permit The Foundation not only to fulfill its founder's central mission, but to expand on that mission in many ways.

25. The funding that the Donors have committed to help The Foundation raise under their offer of assistance would permit The Foundation to establish a substantial endowment, expand its programs, and improve access to its collection for both the public and scholars. A substantial endowment also would make it more likely that The Foundation could hire the necessary staff to serve the public and scholars, as well as to assess, restore, and catalogue The Foundation's art collection and archives.

RELIEF REQUESTED BY THIS PETITION

A. IN GENERAL

26. Attached to this second amended petition as Exhibit C is a revised and restated Charter of The Foundation, entitled "Amended and Restated Articles of Incorporation — Domestic Nonprofit Corporation." The Foundation requests that the Court approve The Foundation's adoption of this revised and restated Charter, which modernizes The Foundation's Articles of Incorporation for the 21st Century.

27. Attached to this second amended petition as Exhibit D is a revised and restated set of Bylaws of The Foundation. Like the revised Charter, it modernizes The Foundation's Bylaws for the 21st Century. Among other things, the revised Bylaws add provisions not included in The Foundation's present Bylaws that are important for operation of a modern nonprofit corporation, such as provisions to assure compliance with Section 501(c)(3) of the Internal Revenue Code and provisions relating to conflicts of interest. The revised Bylaws also codify in one place — a new Article I ("Purpose and Philosophy") — a number of provisions from the current Bylaws that express Dr. Barnes' philosophy and motivations for creation and maintenance of The Foundation.

28. Attached to this second amended petition as Exhibit E is an amended Indenture of The Foundation, which maintains the majority of provisions of The Foundation's Indenture of 1922, as amended at various times through Dr. Barnes' death in 1951 and as modified by various court orders since that time.

29. The proposed revised and restated Bylaws attached as Exhibit D provides that the Indenture and Charter, as amended, shall continue in effect as governing documents of The Foundation.

30. The proposed new Charter and Bylaws, and amended Indenture, remove restrictions in the current documents that prevent relocation of The Foundation's main gallery from the Merion Facility to Philadelphia.

31. The new Bylaws and amended Indenture remove some of the conditions and stipulations set forth in the present Indenture that restrict The Foundation. The Foundation therefore will have the flexibility in the future to manage its affairs in accordance with its best professional and business judgment as an educational institution, while continuing to be bound by the provisions in its Charter, Bylaws and Indenture requiring it to adhere to the central mission stated by Dr. Barnes.

32. Among the changes to the Bylaws will be expansion of The Foundation's Board of Trustees from five to fifteen members. Lincoln University, which now nominates four of The Foundation's five trustees, would nominate five persons for election to the 15-member Board. Mellon Bank no longer would nominate a person for election as a trustee. Upon adoption of the new Bylaws, the present five trustees would immediately elect three additional trustees, expanding the Board to eight members, and Lincoln would immediately nominate three new individuals for election to the Board of Trustees. Those trustees (by means of a nominating committee) then would recommend the remaining nominees for election to the Board. For the election of these final trustees on the initial expanded Board, Pew and Lenfest would jointly have the power to approve the nominations, so that they could help ensure the success of their charitable investment. Pew and Lenfest would have no such right of approval of any Board members after the initial expansion of

the Board to fifteen trustees. All Board members would be elected and approved on the basis of their record of achievements, integrity in their business and professional life or public service, and potential value to The Foundation.

33. Except as set forth in the Bylaws, the Board would have the power to amend its Bylaws by a majority vote, as do most non-profit corporate boards. Certain provisions, however, such as Article I and the Bylaws provision establishing the number of Board members (Article V, § 5.3), would only be amendable if approved by two-thirds of The Foundation's Board and the court having jurisdiction over The Foundation. The Indenture would continue to be amendable only with approval of the court having jurisdiction over The Foundation as a non-profit charitable institution.

34. Under the proposed changes, The Foundation's purpose would continue to be to promote the advancement of education and appreciation of the fine arts and horticulture. Nothing in the proposed revisions to the Charter, Bylaws or Indenture would change that purpose.

35. None of the proposed changes would alter The Foundation's existence as an educational institution. The Foundation would continue to offer educational programs in art and aesthetics and in horticulture in accordance with the theories and programs established by Dr. Barnes.

36. None of the proposed changes would remove control of The Foundation from the Board of Trustees or would relinquish The Foundation's independence to any third party, including Pew, Lenfest, or Annenberg.

37. As a nonprofit corporation, The Foundation would continue to be subject to the oversight of this Court.

B. RELIEF REGARDING EXPANSION AND STRUCTURE OF THE FOUNDATION'S BOARD

38. Paragraph 17 of The Foundation's Indenture provides that The Foundation shall be governed by a Board of Trustees having only five members. Dr. Barnes established the small size of The Foundation's Board at a time when he thought that The Foundation's original endowment (which stood at approximately \$10 million at his death in 1951) would provide sufficient funds for The Foundation's operations, but that endowment is now gone. A modern nonprofit corporation such as The Foundation requires a governing board that is larger than The Foundation's current five-member Board and that consists of members who have access to a variety of communities and resources and who can provide governance expertise. Therefore, under The Foundation's proposed amended Bylaws, the size of The Foundation's board would be expanded to 15 trustees.

39. Paragraph 17 of The Foundation's Indenture conferred on Girard Trust Company and Lincoln University the following privileges with respect to nomination of individuals for election to The Foundation's Board of Trustees after the deaths of Dr. Barnes and his wife: "the first vacancy that occurs by reason of the resignation, incapacity or death of a Trustee then in office shall be filled by the election of a person nominated by the financial institution which shall be Treasurer of Donee [Girard], and the next four vacancies which occur by the resignation, incapacity or death of Trustees who were in office at the time of the death of the survivor of Albert C. Barnes and his said wife shall be filled by election of persons nominated by Lincoln University of Lincoln University, Chester County, Pennsylvania." Paragraph 17 also provides that "vacancies occurring by the expiration of the term, death, incapacity or resignation of the Trustees nominated by the Board of Directors of such financial institution and the Board of Trustees of Lincoln University, shall be

filled by the election of a person nominated to fill such vacancy by the Board of Directors or Trustees which nominated the retiring, incapacitated or deceased Trustee, or Trustees whose term expired.” The Foundation’s Indenture thus confers on Lincoln the privilege of nominating individuals for election to four of the positions on The Foundation’s Board of Trustees.

40. Under The Foundation’s proposed amended Bylaws, Lincoln would continue to enjoy the privilege of nominating individuals for election to The Foundation’s Board of Trustees. Under the proposal, Lincoln would be the only institution outside The Foundation with a privilege to nominate individuals for election to The Foundation’s Board.

41. Because Lincoln would continue to nominate individuals for election to at least four of the positions on The Foundation’s Board, The Foundation’s proposal regarding Lincoln’s role is consistent with the terms of the present Indenture and does not constitute a deviation from the terms of the Indenture. In the alternative, this proposed structure of The Foundation’s Board under which Lincoln would have the privilege of nominating individuals for election to five of the fifteen positions on The Foundation’s Board is justified by the doctrine of deviation.

42. Dr. Barnes did not anticipate the need for The Foundation’s Board to engage in substantial fund-raising or for The Foundation’s trustees to be skilled in the areas of non-profit and/or arts institution governance. He also did not foresee the conflicts and related problems that would arise from the exercise of nomination privileges by an outside institution like present-day Lincoln, which has its own interests, educational mission, and fund-raising needs. It is imperative for The Foundation’s survival that it have an expanded Board that contains persons with the requisite access to funding sources and expertise to deal with the larger responsibilities that would accompany

The Foundation's expanded educational mission. The Foundation also must have a Board that is independent of any other institution and unencumbered by conflicting interests, a condition imposed by the Pennsylvania Non-Profit Corporation Law, 15 Pa. C.S. § 5712(a) ("A director of a nonprofit corporation . . . shall perform his duties as a director . . . in a manner he reasonably believes to be in the best interests of the corporation . . ."), and Paragraph 17 of The Foundation's Indenture ("Donee is not to be merged in or absorbed by any other institution").

43. The Foundation's proposal to expand and broaden its board without linking the majority of nominees to any other institution will protect The Foundation against potential conflicts of interest and provide better assurance of fiscal and fiduciary responsibility and integrity into the future. In order to survive and thrive in the future, The Foundation should not be under the control of persons or institutions that may have concerns or goals that vary from those of The Foundation itself. The Foundation must be able to select trustees according to criteria that it alone establishes, rather than on the basis of criteria established by other entities with their own interests and agendas. The Foundation must also be free of entanglements with other institutions that in the past have been the source of charges of conflicts of interest and misconduct. The Foundation's financial and programmatic soundness requires that the pool of talent from which it may draw its board members not be restricted to only those persons meeting the criteria applied by one outside institution.

44. Many prospective donors have expressed an unwillingness to contribute to The Foundation as long as a potential for conflicts and mismanagement remains in place, as it does when one institution retains the right to nominate a majority of the trustees for another institution's board. In their discussions with the Donors, prospective donors have made clear that an independent

self-perpetuating Board of Trustees is an essential requirement for any provision of assistance by them to The Foundation. They have insisted on the direct accountability that such independence provides.

45. Lincoln possesses no right or power of control with respect to The Foundation or its Board of Trustees that would prevent allowance of the relief sought by The Foundation.

a. Dr. Barnes' intent when he chose Lincoln in October 1950 to nominate future trustees for election by The Foundation's Board was to ensure that future nominees would be selected by an established institution of higher education that was teaching art and aesthetics according to John Dewey's philosophy and The Foundation's methods. By June 1951, however, Dr. Barnes had declared the short-lived educational experiment with Lincoln a failure and had abandoned all hope of Lincoln transforming its art and philosophy departments along the philosophical and pedagogical lines that he desired in an institution having a power to nominate Foundation trustees. The basis for Lincoln being given a role in nominating future trustees for The Foundation's Board ceased to exist after Dr. Barnes concluded that Lincoln did not achieve his goal of becoming the educational institution that adopted his and John Dewey's philosophies. In fact, since 1951, Lincoln has disparaged and declined to adopt the teaching methods that Dr. Barnes and The Foundation espoused in connection with Dr. Barnes' educational experiment.

b. Dr. Barnes was a vocal critic of politicians and was especially outraged at politicians' interference with educational programs or their attempts to run educational institutions. In 1972, in response to Lincoln's financial problems, the state legislature transformed Lincoln into a new, state-related institution that relies on public funding for approximately one-half of its entire budget. Under the Lincoln University — Commonwealth Act, 24 P.S. § 2510-404, fourteen

of Lincoln's thirty-nine voting board members are political appointees, including six executive branch appointees and eight legislative branch appointees. Although The Lincoln University — of the Commonwealth System of Higher Education is a markedly different institution from the pre-1972, private Lincoln University, the current Lincoln entity never obtained Court approval to continue the role conferred upon the 1950 Lincoln University to nominate individuals for election to The Foundation's Board of Trustees.

c. Lincoln first nominated an individual for election to The Foundation's Board in 1967. Every person nominated by Lincoln for election to The Foundation's Board from this first one in 1967 until 1999 was a present or recent member of Lincoln's own board. In 1989, following the retirement of trustees who had served since the time of Laura Barnes' death in 1966, Lincoln gained the ability to nominate four Barnes trustees, and for the next ten years The Foundation was run by a five-person Board of Trustees that included four trustees who were also members of Lincoln's own board. During this 1989-98 period, there were charges of conflicts of interest between The Foundation and Lincoln, as the lines between the two institutions were blurred. A number of Foundation trustees nominated by Lincoln acted in what they believed was the best interest of Lincoln, not The Foundation, as they were expected to do so by Lincoln. In 1998, Lincoln changed its practice of appointing Lincoln board members to The Foundation's board, following charges of conflicts of interest and exploitation of the Barnes relationship, including some criticisms in a forensic audit commissioned by Lincoln, but this change did not alter Lincoln's goal of nominating individuals who it expected to act in the best interest of Lincoln, rather than The Foundation. The current Lincoln-nominated trustees of The Foundation are the first to serve on The Foundation's Board since that change took effect and the first not to be affiliated with Lincoln's own board.

C. RELIEF REGARDING LOCATION OF GALLERY

46. The Foundation's educational program and gallery visitation operation are adversely affected by the restrictions on construction, visitors and activities imposed by the local community and zoning authorities.

47. The changes to The Foundation's Bylaws proposed in this second amended petition, including the relocation of The Foundation's gallery to Philadelphia, will enhance The Foundation's educational programs and ensure that Dr. Barnes' central purposes will be fulfilled in a way and to a degree that has heretofore not been possible.

48. If the changes sought in this second amended petition, including the relocation of The Foundation's gallery, are not made, the educational program of The Foundation may be seriously and detrimentally affected by The Foundation's continued financial difficulties and the litigation costs and distractions that have plagued The Foundation for the past decade.

49. The Foundation's second amended petition does not propose to change the composition or arrangement of the works exhibited in the gallery, the use of those works in connection with the educational programs, or the present class and seminar offerings of The Foundation.

50. If the relief sought in this second amended petition is granted, The Foundation will maintain the ensembles developed by Dr. Barnes.

51. If the relief sought in this second amended petition is granted, The Foundation will hold classes at the new gallery where the collection is housed.

52. The Foundation will maintain administrative offices at its current Merion location and will use the Merion gallery and arboretum for various purposes related to The Foundation's educational mission.

53. The Foundation intends to continue teaching, promoting and advancing the aesthetic method, theories, and principles espoused by Dr. Barnes in his writings and will maintain on a permanent basis a Barnesian Art Education Program that strictly adheres to the methods of art appreciation and theory of aesthetics developed by Dr. Barnes.

54. The Foundation's collection of art works now on display at the Merion gallery would be displayed in a larger, more user-friendly gallery, offering modern security and fire protection, added exhibition space, and a more pleasurable viewing experience for students and visitors, while maintaining Dr. Barnes' ensemble vision for display of The Foundation's art collection. The new modern facility would also offer added classrooms and ancillary services (food, storage, gallery shop, etc.) that are more appropriate for The Foundation's collection than what now is available in Merion. An expanded and modern facility also would allow The Foundation to more adequately fulfill Dr. Barnes' mission of advancing education and appreciation of fine arts.

D. OTHER RELIEF

55. As noted above, The Foundation's proposed new Bylaws remove some of the conditions and stipulations set forth in the Indenture that restrict The Foundation's administration of its art collection. These include restrictions on the staff that The Foundation can hire and the salaries that it can pay its administrators and staff (although these provisions have already been abrogated by an April 21, 1971 order of this Court); limitations on the hours that The Foundation's

gallery is open to the public; restrictions on the use of The Foundation's gallery for fund-raising events and for the exhibitions of works of art not owned by The Foundation; and the prohibition on copying of The Foundation's works of art.

56. The new Bylaws also include provisions not covered by the current Bylaws, including those that assure compliance with Section 501(c)(3) of the Internal Revenue Code and provisions relating to conflicts of interest.

LEGAL BASIS FOR THE PETITION

57. The changes requested in this second amended petition are justified by the doctrines of deviation and *cy pres*, and are consistent with the intent of Dr. Barnes, as reflected in the documents he created when he established The Foundation.

58. Dr. Barnes' Indenture and the Bylaws he developed for The Foundation make clear his central intent to promote "the advancement of education and the appreciation of the fine arts," as well as his desire that The Foundation adhere to certain core principles in support of that mission: an art gallery and arboretum were to be maintained for The Foundation's educational purposes; works of art were not to be sold from The Foundation's collection in order to raise funds; The Foundation was to be maintained perpetually as an independent educational institution teaching the principles of Dr. Barnes; and the conditions and stipulations established by Dr. Barnes were to be adhered to unless they became improper or impractical.

59. Dr. Barnes also made clear that, should it become impossible to administer the trust he left to The Foundation, the property and funds of The Foundation should be applied to an object as nearly as possible within the scope of The Foundation's central purpose. Bylaws, Art.

IX, § 2, ¶ 11. In evaluating its options for reversing The Foundation's decline, the Board followed the guidance of this provision closely. Its proposal is consistent with the intent of this provision, as well as being supported by the doctrines of deviation and *cy pres*.

60. Under the deviation doctrine, this Court may "permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust." RESTATEMENT (SECOND) OF TRUSTS § 381 (1959). Modification of certain terms of the Bylaws and Indenture are warranted to accomplish Dr. Barnes' "ultimate objective" (*In re Barnes Found.*, 453 Pa. Super. 436, 452, 684 A.2d 123, 131 (1996)) of promoting the advancement of education and appreciation of the fine arts.

61. The Foundation does not seek alteration of its central purpose and thus avers that the doctrine of *cy pres* is inapplicable. In the alternative, if the Court determines that any of the changes sought in this second amended petition relate to a central purpose of The Foundation, it should approve such changes under the doctrine of *cy pres*, as codified in Section 6110 of the Probate, Estates & Fiduciaries Code, 20 Pa. C.S. § 6110(a). Section 6110(a) provides that "if the charitable purpose for which an interest shall be conveyed outright or in a testamentary or inter vivos trust shall be or become indefinite or impossible or impractical of fulfillment, . . . the court may, on application of the trustee or of any interested person or of the Attorney General, . . . order an administration or distribution of the interest for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyor, whether his charitable intent be general or specific."

WHEREFORE, for the foregoing reasons, The Barnes Foundation respectfully requests that the Court grant the Second Amended Petition of The Barnes Foundation to Amend its Charter and Bylaws, and enter a Decree in the form attached to this Second Amended Petition.

Respectfully submitted,

Arlin M. Adams

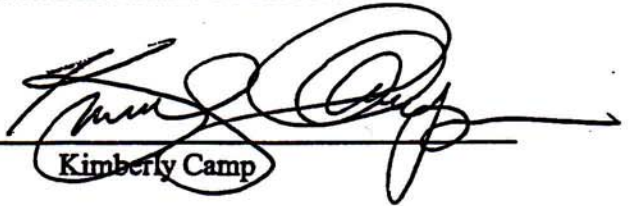
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Attorneys for The Barnes Foundation

Dated: October 21, 2003.

VERIFICATION

I, Kimberly Camp, Executive Director and Chief Executive Officer of The Barnes Foundation, verify that I have authority to make this Verification on behalf of The Barnes Foundation and that the statements made in the foregoing Second Amended Petition of The Barnes Foundation to Amend its Charter and Bylaws, are true and correct to the best of my knowledge, information, and belief. I understand that the statements made herein are subject to the penalties of the Crimes Code, 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.



Kimberly Camp

CERTIFICATE OF SERVICE

I, Bruce P. Merenstein, hereby certify that on October 21, 2003, I caused to be served the foregoing Second Amended Petition of The Barnes Foundation to Amend its Charter and Bylaws, and accompanying exhibits, by hand delivery to the following:

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