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THE *BOOKER* MESS

MICHAEL W. MCCONNELL†

> The [Pirate] Code is more of what you would call guidelines than actual rules.
>
> – Barbossa, *Pirates of the Caribbean*[1]

Each year, over 65,000 criminal defendants are sentenced in the federal courts; about 1,200 are sentenced each week.[2] Since 1984, Congress has required sentences to be determined according to a strict and detailed set of Sentencing Guidelines. On January 12, 2005, in *United States v. Booker*,[3] the Supreme Court declared this sentencing system unconstitutional. The Justices left many questions unanswered regarding how the lower courts should treat defendants sentenced under the prior regime and how to sentence defendants in the future. These issues occupied much of the attention of federal courts during 2005. The Tenth Circuit alone rendered two en banc decisions and some 226 panel decisions (as of this writing), addressing how to deal with defendants who were sentenced before *Booker* was decided. Nationwide, this retrospective question produced a four-way circuit split and literally thousands of panel decisions. And it will require many more decisions to figure out how to apply *Booker* moving forward.

I. THE *BOOKER* DECISION

The *Booker* decision is described in detail in an article elsewhere in this issue,[4] and I will not go over the same ground. The Supreme Court delivered two different opinions in the case, both by five to four majorities, with the dissenters to each opinion joining the majority in the other. In one opinion, written by Justice John Paul Stevens, the Court held that the Sentencing Guidelines violate a criminal defendant's Sixth Amendment right to trial by jury insofar as they permit imposition of a sentence on the basis of facts found by a judge, if the sentence exceeds the maxi-

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† Judge, U.S. Court of Appeals for the Tenth Circuit; B.A., Michigan State University, 1976; J.D., University of Chicago Law School, 1979. Thanks to Michelle Spak for assistance with the empirical research and chart preparation.

1. Pirates of the Caribbean: The Curse of the Black Pearl (Walt Disney Pictures 2003).

2. *See, e.g.*, UNITED STATES SENTENCING COMMISSION, SELECTED 2004 SOURCEBOOK TABLES 14, 27 (2004), http://www.ussc.gov/ANNRPT/2004/selected_2004.pdf (65,043 defendants were sentenced in fiscal year 2004).

3. 543 U.S. 220 (2005).

4. Peter A. Jenkins, *Requiring the Unknown or Preserving Reason: United States v. Gonzalez-Huerta and the Tenth Circuit's Compromise Approach to Booker Error*, 83 DENV. U. L. REV. 815 (2006). *See also*, Amanda Farnsworth, Comment, United States v. Booker: *How Should Congress Play the Ball?*, 83 DENV. U. L. REV. 579 (2005).

mum that would be justified on the basis solely of facts found by the jury or admitted by the defendant (with the exception of the fact of a prior conviction).[5] In the other opinion, written by Justice Stephen Breyer, the Court remedied this constitutional violation by rendering the Guidelines "effectively advisory."[6] According to this opinion, it is permissible to enhance a sentence on the basis of judge-found facts so long as the district judge has discretion to impose a sentence either higher or lower than the Guidelines range, on the basis of broad statutory factors.[7] Under this new system, sentences continue to be subject to appellate review, but variances from the Guidelines will be reversed only if the resulting sentence is "unreasonable."[8]

There are two ways to read these opinions. According to one view, which I call "*Booker* maximalism," district courts are liberated to sentence criminal defendants in accordance with the judge's sense of individualized justice, with the Guidelines merely taken into "consideration" for what they are worth. In such a system, the Guidelines are like the Pirate Code in the movie *Pirates of the Caribbean*: more what you would call guidelines than actual rules. According to the other view, which I call "*Booker* minimalism," not much has changed in practical effect.

---

5. *Booker*, 125 S. Ct. at 755-56 (Stevens, J.).

6. *Id.* at 757 (Breyer, J.).

7. The Guidelines provide seven factors to be considered in imposing a sentence:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed -

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentences and the sentencing range established for -

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines-

(i) issued by the Sentencing Commission . . . subject to any amendments made to such guidelines by act of Congress . . .; and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission .. . taking into account any amendments made to such guidelines or policy statements by an act of Congress . . .;

(5) any pertinent policy statement -

(A) issued by the Sentencing Commission . . . subject to any amendments made to such policy statement by an act of Congress . . .; and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2000).

8. *Booker*, 125 S. Ct. at 756-66 (Breyer, J.).

District courts continue to be required to calculate the Guidelines sentence, which is presumed to be reasonable, and must justify any variance from the Guidelines sentence on the basis of the particulars of the case; appellate courts will ensure that they do not get too far out of line. The former version sees *Booker* as a sea change in sentencing; the latter as a modest adjustment. In this Foreword, I will address three questions, one empirical, one doctrinal, and one normative:

(1) What has been the effect of *Booker* on sentencing? In this, I will focus particularly on the Tenth Circuit.

(2) Are the *Booker* decisions coherent as a matter of constitutional doctrine?

(3) Has *Booker* improved the sentencing process as a practical matter?

II. EFFECT

To determine the effect of *Booker* on sentencing (so far), I will examine two different types of statistics. First, I will look at the results of so-called "pipeline cases," to see how many resulted in a significant change of sentence as a result of applying *Booker*. Pipeline cases are cases in which the defendant was sentenced prior to *Booker* but the case was not yet final, usually because it was on appeal. Because the Supreme Court held that the *Booker* decision must be applied to all cases on direct review,[9] the pipeline cases had to be reconsidered, because in all of them the district court treated the Guidelines as mandatory. Second, I will look at cases where the defendant was sentenced after the *Booker* decision to see whether and how the district courts are employing their new-found sentencing discretion.

The Courts of Appeals split four ways on how to deal with pipeline cases.[10] Some circuits vacated all sentences and remanded to the district courts for resentencing. This imposed a high cost on the district courts, U.S. Attorneys, public defenders, marshals, and prison authorities, because under the Rules of Criminal Procedure, resentencing entails an actual sentencing hearing (not just briefs), with counsel for both sides and the defendant in attendance.[11] Escorting an incarcerated defendant from prison to a court, which may be hundreds of miles away, presents serious security issues and costs. Other circuits partially remanded the cases to district court to determine whether resentencing would be necessary. This was a practical solution, but difficult to justify in legal terms. Other circuits, including the Tenth, examined each case individually to

9. *Id.* at 769 (Breyer, J.).

10. Those interested in more detail or citations regarding the split should consult Jenkins, *supra* note 4; *see also* Farnsworth, *supra* note 4.

11. *See* FED. R. CRIM. P. 32(i).

determine whether a remand was needed, based on whether there was anything in the record that indicated that the district judge believed the sentence was excessive (or inadequate) or that the facts would warrant a variance from the Guidelines sentence. These circuits further divided according to the legal standards to apply to this inquiry.

The Tenth Circuit, as of this writing, has decided 226 pipeline cases.[12] That may not sound like a lot of cases, but ours is a small circuit. Those 226 cases contributed to about an 11% increase in the number of criminal appeals, as compared to the preceding year. Nationwide, that would translate into a considerable increase in the burden on already overworked defense counsel, prosecutors, judges, and court staff. What was the result? As illustrated in Figure 1, the Tenth Circuit reversed the sentence in 32% of the pipeline cases and affirmed in 68%.

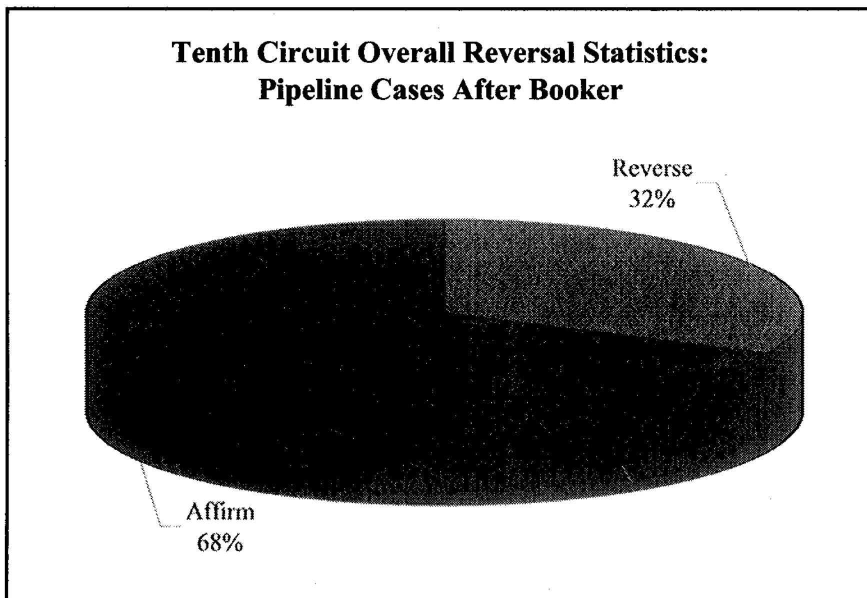

Figure 1

These aggregate numbers, however, obscure some important differences among the pipeline cases. In some of these cases, the defendant had lodged an objection to the constitutionality of sentencing under the Guidelines; these cases were reviewed to determine whether the error in sentencing method was harmless beyond a reasonable doubt.[13] Generally speaking, these were affirmed only if the district judge had made some affirmative indication that he would sentence at the same or a higher level if the Guidelines were not mandatory,[14] or the judge sentenced

12. This and all other Tenth Circuit statistics in this section are based on my own count of the cases.

13. United States v. Labastida-Segura, 396 F.3d 1140, 1142-43 (10th Cir. 2005).

14. *See, e.g.*, United States v. Serrano-Dominguez, 406 F.3d 1221, 1223-24 (10th Cir. 2005).

above the minimum specified by the Guidelines range, which indicated that the judge would not use his *Booker* discretion to go lower.[15] In other cases, the defendant did not make a relevant objection; these cases were reviewed for plain error.[16] Generally, these were reversed where the evidence in support of sentence enhancements was contested and problematical,[17] there were significant mitigating circumstances,[18] or (the most common situation) the district judge had expressed misgivings about the justice of the sentence.[19] The differences in these standards proved to be significant. Some 58% of the harmless error cases were reversed, as compared to only 15% of the plain error cases.

A further difference relates to the type of error. In slightly fewer than half of the cases, the sentence had been enhanced on the basis of judge-found facts. These were cases of "constitutional *Booker* error." In slightly more than half, the sentence was based entirely on the facts found by the jury or admitted by the defendant, and on prior convictions. These cases involved no constitutional error at all, but they were nonetheless inconsistent with *Booker*, because the remedial opinion in *Booker* rendered the Guidelines advisory. The error of treating the Guidelines as mandatory (an error committed in every case, because it was not error prior to *Booker*) is called "non-constitutional *Booker* error."[20] The reversal rate for pipeline cases involving constitutional error was 40%, while that for non-constitutional error was only 24%.

The four permutations of these case types exhibited dramatically different reversal rates, ranging from a reversal rate of 70% for constitutional error reviewed for harmlessness to a reversal rate of 7% for non-constitutional error reviewed for plain error. Figure 2 shows the differences. The nature and direction of these differences are precisely what one would predict. But the magnitude is nonetheless interesting, because it shows that standards of review make a serious difference.

But reversal rates are just the first part of the story. What matters to defendants is whether their sentences were actually changed. To determine that, we must look at what happened to the cases that were reversed and remanded. As of this writing, 44 of the 73 defendants whose sentences were reversed by the Tenth Circuit for *Booker* error have been resentenced. Of these, 32% of the defendants received the same sentence

15. *See, e.g.*, United States v. Riccardi, 405 F.3d 852, 876 (10th Cir. 2005); United States v. Paxton, 422 F.3d 1203, 1207 (10th Cir. 2005).

16. United States v. Gonzalez-Huerta, 403 F.3d 727, 732 (10th Cir. 2005) (en banc).

17. *See, e.g.*, United States v. Dazey, 403 F.3d 1147, 1178-79 (10th Cir. 2005).

18. *See, e.g.*, United State v. Trujillo-Terrazas, 405 F.3d 814, 821 (10th Cir. 2005).

19. *See, e.g.*, United States v. Williams, 403 F.3d 1188, 1199-1200 (10th Cir. 2005).

20. *Gonzalez-Huerta*, 403 F.3d at 731-32.

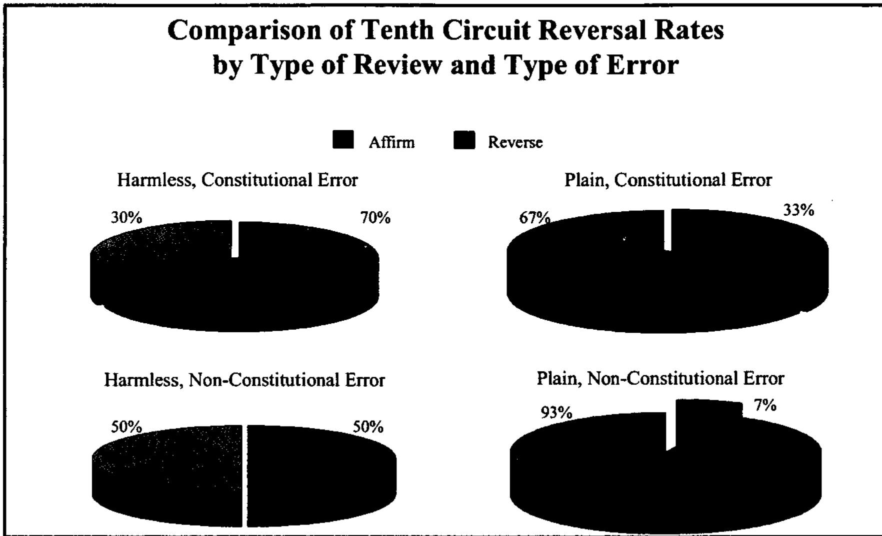

Figure 2

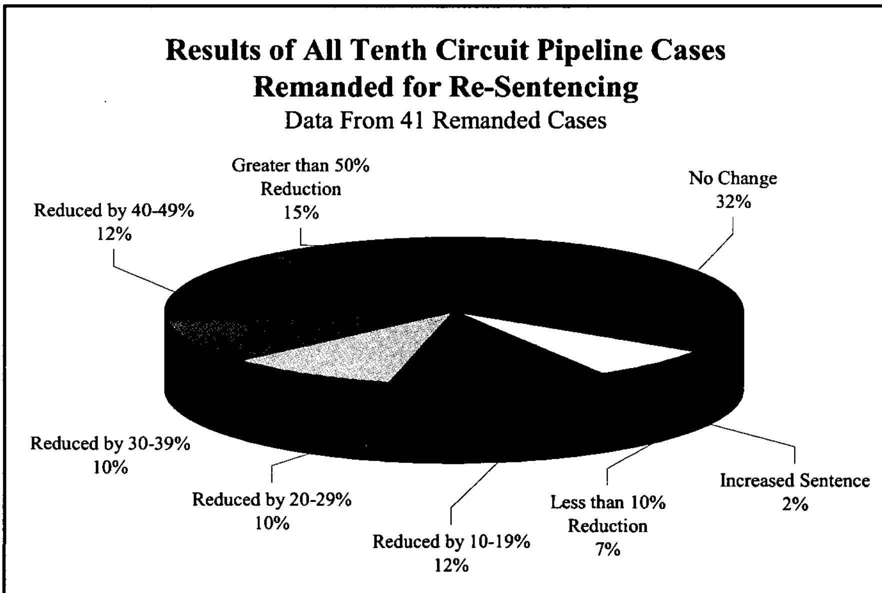

Figure 3

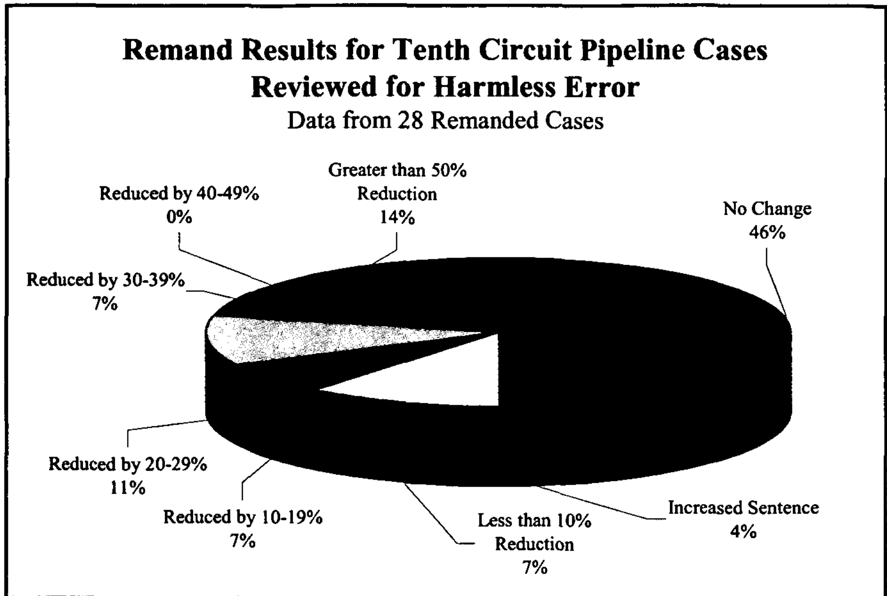

Figure 4

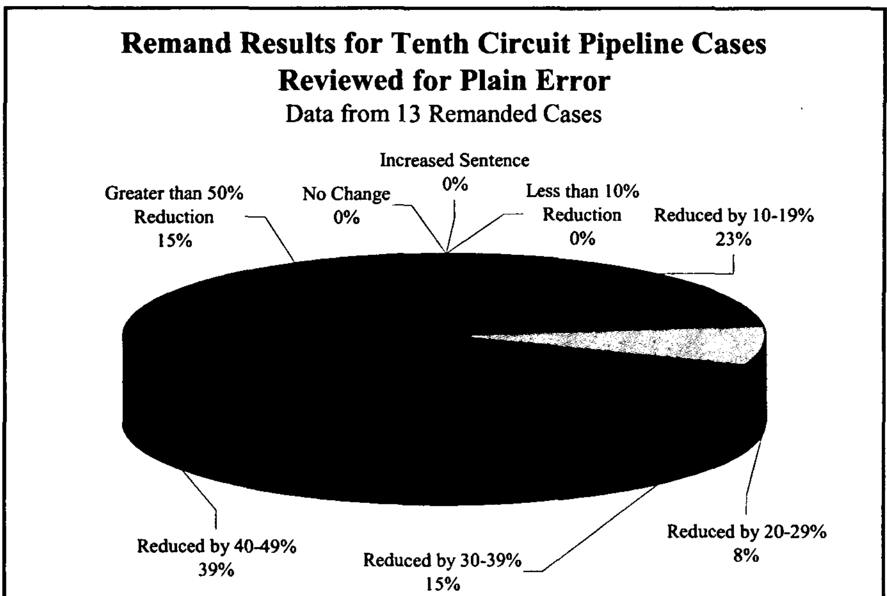

Figure 5

they received the first time. On the other hand, 27% had their sentenced reduced by over 40%. Figure 3 sets forth the results.[21]

Again, these aggregate statistics obscure the differences between types of cases. In cases reviewed for harmless error, almost half – 46%– of the defendants received the same sentence they received the first time. Figure 4 shows these results. In cases reviewed for plain error, every sentence was changed, and 54% were reduced by more than 40%, as shown in Figure 5.

In sum, taking into account sentences affirmed by the Tenth Circuit and those in which the same sentence was imposed on remand, the result of the pipeline litigation was that 16% of defendants saw reductions in their sentences. That is not a large number, but it is undoubtedly of great significance to the individuals involved.

Let us turn, then, to post-*Booker* sentencing results. Even before *Booker*, the Guidelines permitted district judges to "depart" from the Guideline ranges, either up or down, in narrow and carefully defined circumstances.[22] Most downward departures were at the request of the prosecutor, often for cooperation. Others were at the instigation of the judge, usually because the judge concluded that the Guidelines range, for some reason, failed to reflect the true seriousness of the offense. The question is whether the new-found discretion of judges to vary from the Guidelines has had much effect. I will focus on variances and departures not requested by the prosecution because those are the ones that reflect *Booker*'s expansion of judicial discretion.[23]

In the two years prior to *Booker*, nationwide, 71% of defendants were sentenced within the Guidelines range. Twenty-two percent received a downward departure at the behest of the prosecution. Only 6% received downward departures at the instigation of the district judge, and 0.78% received upward departures at the judge's instigation. After *Booker* (between Jan. 12 and Dec. 21, 2005), the rate of within-Guidelines sentencing declined from 71% to 62%. The rate of judge-instigated downward departures or variances more than doubled, from 6% to 13%. But *Booker* was a double-edged sword: the number of judge-instigated upward departures also increased significantly, from 0.78% to 1.35%. Figure 6 shows the numbers. (Note that these results come from the district courts. The Courts of Appeals have so far decided only a handful of post-*Booker* non-pipeline sentencing appeals. What we

21. Note that none of these new sentences has yet gone through appellate review. It is possible that some will be held to be unreasonable. The effect of appellate review is almost certainly to reduce the amount of change in sentencing, though it is impossible to predict by how much.

22. *See* UNITED STATES SENTENCING GUIDELINES MANUAL ch. 5, pt. K (2005), http://www.ussc.gov/2005guid/gl2005.pdf.

23. Statistics in this section come from UNITED STATES SENTENCING COMMISSION, SPECIAL POST-BOOKER CODING PROJECT 16-18 (Jan. 5, 2006), http://www.ussc.gov/Blakely/PostBooker_120105.pdf. They are current as of December 21, 2005.

are seeing, then, is a product of the culture of the district courts in the various circuits rather than of appellate decisions.).

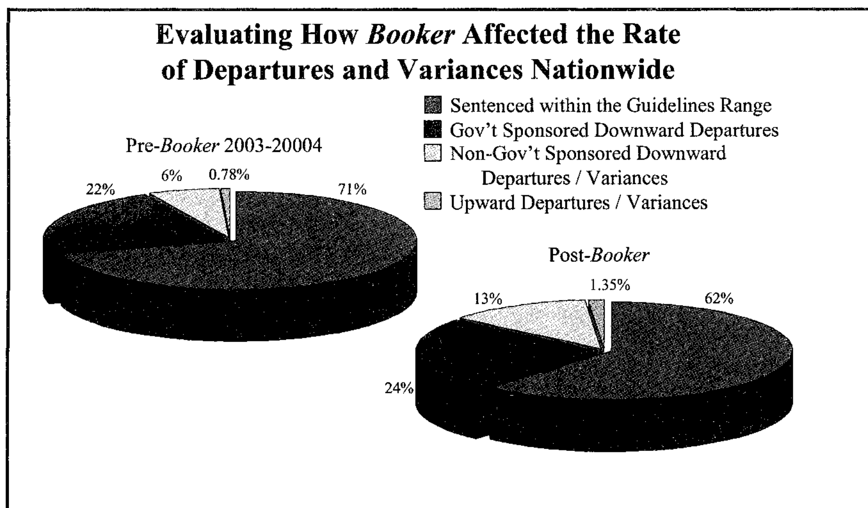

Figure 6

The changes in the Tenth Circuit have been less dramatic than in the nation as a whole. The Tenth Circuit district courts were significantly more Guidelines-compliant than the national average prior to *Booker*, and have exercised their *Booker* discretion less aggressively than their counterparts in other circuits, in both downward and upward directions. The percentage of within-Guidelines sentences in the Tenth Circuit declined from 72% to 66% – two thirds of the average national change. The percentage of downward departures and variances instigated by the district judge went from 5% to 10%, and the percentage of upward departures and variances went from 0.61% to 0.84%. Figure 7 illustrates this information.

As the following charts indicate, district courts in the various circuits have responded quite differently to *Booker*. Figure 8 shows the difference in downward departures and variances. Figure 9 shows only the difference in judge-instigated downward departures and variances.

In every circuit, there has been an increase in downward departures and variances. But the difference between circuits is striking. The district courts of the Tenth Circuit, always more Guidelines-compliant than the national norm, experienced less change than courts in most other circuits. The Fifth and the Eleventh showed a similar pattern to the Tenth. The First Circuit went from being about average in Guidelines-compliance to being the second most deviant of all Circuits. The Second, which was always far more Guidelines-variant than the other circuits, became even more so. Interestingly, the Ninth, which was more variant than the national average before *Booker*, became a little less vari-

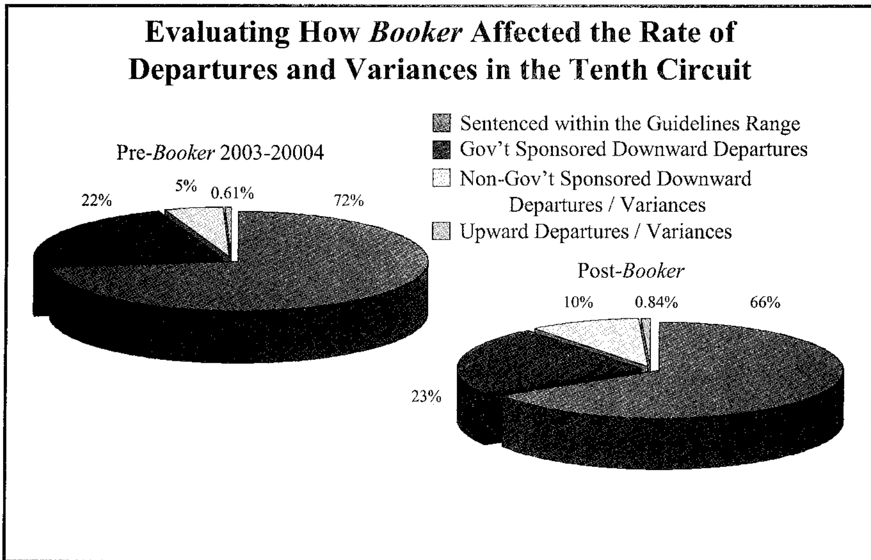

Figure 7

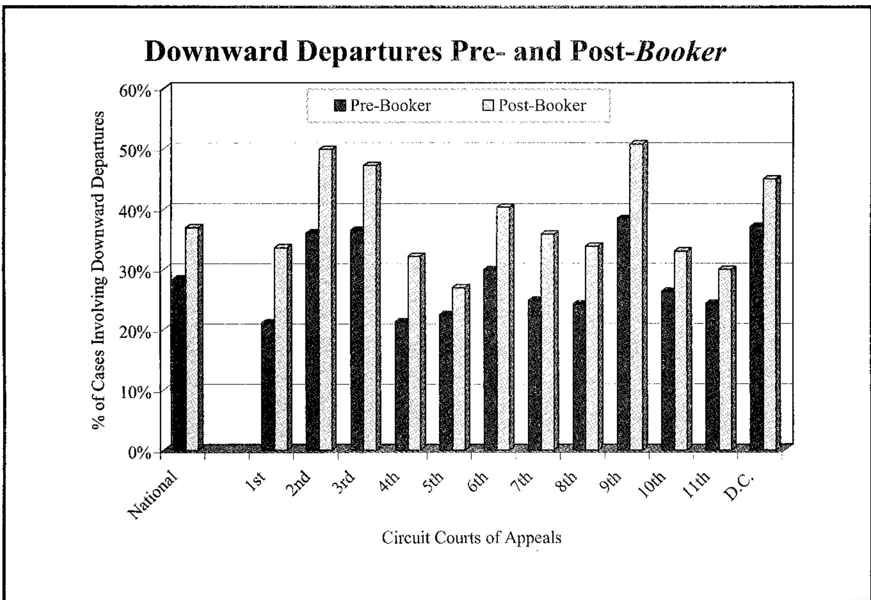

Figure 8

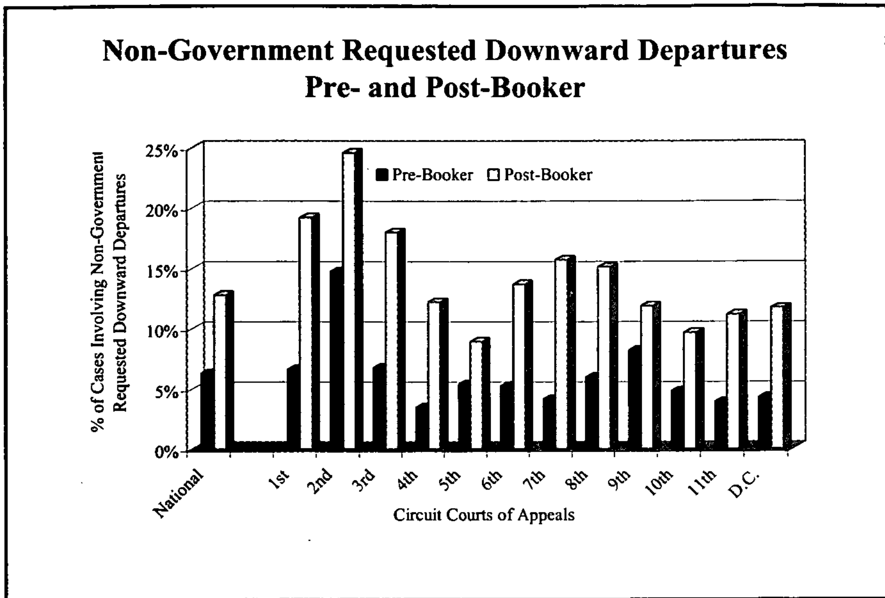

Figure 9

ant than the national average after the decision. It exhibited the smallest percentage change of any circuit in the number of departures and variances after *Booker*. It is as if the district judges in the Ninth Circuit sentence without much regard to whether the law grants them discretion. The Seventh, which was one of the most Guidelines-compliant under the old regime, soared to fourth place among the variant after *Booker*. This is the converse of the Ninth.

Upward departures and variances are much rarer, but as Figure 10 shows they too exhibit a striking difference among the circuits. The district courts in the Tenth Circuit, which were below the national average in departures under the pre-*Booker* system, showed little inclination to change. This suggests that the district courts in the Tenth Circuit tend to adhere to the Guidelines whether they have to or not, and whether the defendant or the prosecution would benefit. The district courts in the First Circuit, by contrast, which showed the greatest percentage increase in propensity to sentence below the Guidelines range, also showed by far the greatest percentage increase in propensity to sentence above the Guidelines range. This suggests that, after *Booker*, the district courts in the First tend to flex their discretion to vary from the Guidelines more than the national average both in favor of defendants and in favor of the prosecution. The Second Circuit, which exhibited higher-than-average levels of downward departures before *Booker* and the nation's highest levels of downward departures and variances after *Booker*, has been well below the national norm in upward departures and variances, both before and after the decision. This suggests that discretion in the Second Circuit

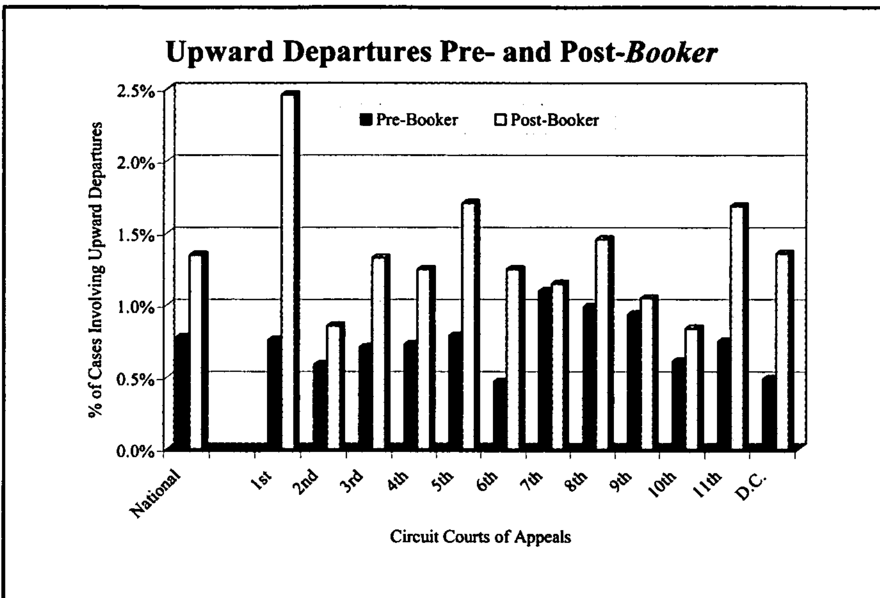

Figure 10

is principally exercised in favor of the defendant. The Fifth and Eleventh Circuits, by contrast, are below the national norm for post-*Booker* downward departures and variances, but are second and third highest in post-*Booker* upward departures and variances. They are thus the pro-prosecution *yin* to the Second Circuit's pro-defendant *yang*.

One clear effect of *Booker*, then, is to produce a greater degree of regional non-uniformity in sentencing practices.

The overall effect on sentence length, so far, has been negligible. After *Booker*, the average length of sentence has been about the same as before.[24] On the other hand, in the years before *Booker*, there had been a persistent and significant annual increase in the length of sentences. As Figure 11 shows, this increase came to a halt in 2005, presumably (though not certainly) as a result of the courts' increased discretion under *Booker*.

It is hard to evaluate the magnitudes of these changes. The effects have been larger than I personally would have guessed; but, the effects have surely been more modest than the most hopeful enthusiasts for *Booker* wanted. The lack of effect on sentence length must be particularly disappointing to those who hoped that an end to mandatory Guidelines sentencing would produce lower sentences.

24. Statistics regarding average length of sentences come from *id.* at 13-15.

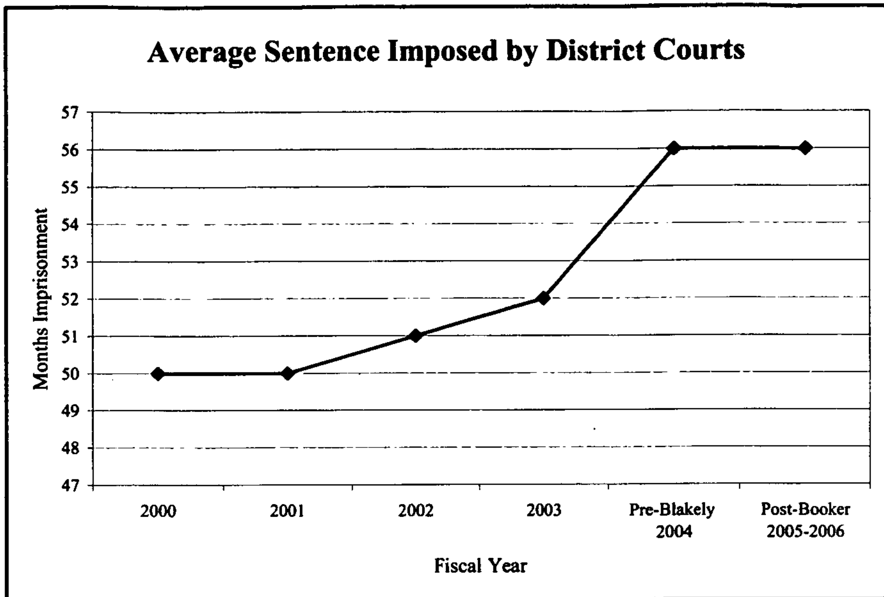

Figure 11

III. CONSISTENCY AND COHERENCE

The *Booker* opinions, taken in tandem, do not get high marks for consistency or coherence. If that seems a presumptuous thing for an inferior court judge to say about the product of his superiors, I take comfort in the fact that eight of the nine Justices agree with me that either the Sixth Amendment holding or the remedial holding is wrong, and that the two do not fit together. Five Justices joined the Sixth Amendment holding, and four of those five dissented from the remedial holding. The four dissenters from the Sixth Amendment holding, plus one, formed the majority for the remedial holding. As Figure 12 shows, only one Justice thought the two parts of the opinion could be squared, and she did not write an opinion explaining why.

The most striking feature of the *Booker* decision is that the remedy bears no logical relation to the constitutional violation. The violation, according to the Stevens majority, is that judges were permitted to make factual findings that properly were the province of the jury. The remedy according to the Breyer majority, however, was to give judges more power than they had previously. The jury verdict is no more consequential after *Booker* than it was before, but now the district judge can thumb his nose (within the bounds of reasonableness) at Congress's determination regarding the appropriate sentence for offenses of that type and circumstance. If there were a right to "sentence by judicial discretion" in the Constitution, the *Booker* decision would be on the money. How it serves to enforce "trial by jury" is another matter. Yet somehow, a case based on the proposition that judges were given too much power to sentence based on facts not found by a jury was transmogrified, as if al-

chemically, into a holding that they should have more discretion to disregard sentencing ranges set by Congress.

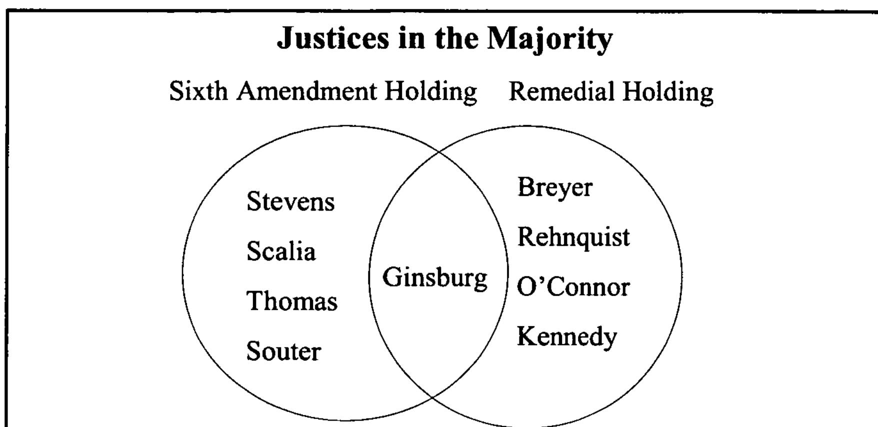

Figure 12

All the things that troubled Sixth Amendment purists about the pre-*Booker* Guidelines system are unchanged. Under the pre-*Booker* Guidelines system, defendants could be sentenced to additional years in prison for so-called "uncharged conduct" – crimes that were neither charged in the indictment nor proven to the jury. For example, a defendant convicted of a drug offense could be sentenced to extra months in prison if the judge concluded he had carried an illegal firearm, even if the firearms offense was never mentioned during the trial. But the same is true after *Booker*, the only difference being that district judges have an extra dollop of discretion to sentence above or below the resulting Guidelines range. Indeed, under the pre-*Booker* Guidelines system, defendants could even be sentenced to additional years in prison for committing crimes on which they were acquitted by the jury (the theory being that acquittal on a reasonable doubt standard is not inconsistent with guilt under a preponderance of the evidence standard, which is all the Guidelines required for enhancements). For example, in one Tenth Circuit case, the jury found that the defendant had possessed 50-500 grams of methamphetamine, and that he had not possessed more than 500 grams; nonetheless, the district judge sentenced him on the basis of his own finding that the defendant possessed over 1200 grams.[25] But defendants can still be sentenced on the basis of acquitted conduct after *Booker*, again with the sole difference being an increase in judicial discretion to go above or below the resulting range.[26] Trial by jury has no greater role in sentencing than it did before *Booker*.

Indeed, and still more remarkably, the *Booker* remedial majority held that district judges must have discretion to treat the Guidelines as

25. United States v. Magallanez, 408 F.3d 672, 682 (10th Cir. 2005).
26. *See id.* at 685.

"advisory" even in cases where the Sixth Amendment was in no way involved. Slightly more than half of the criminal defendants (based on statistics from Tenth Circuit pipeline cases) were sentenced entirely on the basis of the jury verdict, the defendant's admissions, and prior criminal history. Under the Stevens majority opinion, these sentences were entirely constitutional under the Sixth Amendment. Yet under the Breyer remedial opinion, these sentences became violations of the Sentencing Reform Act, as reinterpreted by the Court. District courts now have discretion to vary from the Guidelines even in cases where it would not violate the Constitution to obey the Guidelines.

One might interpret the remedial holding as a pragmatic attempt by supporters of the Guidelines system, four of whom dissented from the Stevens majority, to patch together a workable sentencing system as close to the Guidelines as was possible under the circumstances. Responsibility for the inconsistency between violation and remedy, according to this theory, must lie with the remedial majority, which was unwilling to accede to the force of a Sixth Amendment holding with which they disagreed. But this is not the whole story.

The inconsistency cannot be blamed solely on the remedial majority. The Sixth Amendment majority opinion itself contains the seeds of this incoherence. According to that opinion, fully discretionary sentencing is permitted under the Sixth Amendment. This is explicitly acknowledged at least three times in the opinion. If the statutory penalty applicable to the crime of distributing five kilograms or more of cocaine is ten years to life (as it is[27]), the district judge under a discretionary sentencing system could set the sentence anywhere between ten years and life, based on the judge's perception of such factors as the severity of the crime, the defendant's prospects for rehabilitation, the effects on the victims, the defendant's ties to the community or family responsibilities, or whatever other factors he deems relevant. In making these discretionary judgments, the court perforce would consider facts beyond those found by the jury. This, the Stevens majority said, comported with the Sixth Amendment: "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."[28] Indeed, the Court could hardly say otherwise: this was the system in place when the Sixth Amendment was adopted, which prevailed in the federal courts from the Founding until enactment of the Sentencing Reform Act of 1984, and which is used in a majority of states even today, without anyone ever suggesting a conflict with the Sixth Amendment. Yet the *Booker* Court never explained how such a system could be squared with its interpretation of the requirements of the Sixth Amendment. If a sentence can be

27. 21 U.S.C. § 841(b)(1)(A) (2000).

28. *Booker*, 125 S. Ct. at 750 (Stevens, J.).

based on judge-found facts under a discretionary system, why does the defendant care if his sentence is based on judge-found facts under a mandatory Guidelines system? From the defendant's perspective, the Guidelines system gives no less authority to the jury, but is less arbitrary, more predictable, with more due process, than a fully discretionary system. Under the Guidelines, the defendant has the right to know the factual basis for the sentence, to present evidence, and to challenge the sentence if the enhancement facts are not proven by a preponderance of the evidence. A fully discretionary system provides none of these protections.

Because the Sixth Amendment majority reaffirmed the constitutionality of discretionary judging, it left itself wide open to a remedial holding that enhanced judicial discretion rather than eliminating judicial factfinding. Justice Breyer's remedial majority simply took the Sixth Amendment majority's unexplained concession regarding discretionary sentencing to its logical conclusion. The remedial opinion reasoned that the Guidelines could remain in force so long as they were not formally mandatory. To be sure, the Sixth Amendment content of the holding was leached out of the remedy, but that was a logical consequence of a Sixth Amendment holding that attempted to paper over so gaping a doctrinal hole.

IV. PRACTICAL CONSIDERATIONS

Few legal observers have praised the *Booker* opinions, at least in tandem, for their logical and doctrinal quality. But many have welcomed the decision as a pragmatic adjustment that may ameliorate some of the more objectionable features of the prior Guidelines system. It is difficult to evaluate the pragmatic effects of a decision without taking sides on contentious issues. I shall simply set forth the most common criticisms of the Guidelines and ask to what extent *Booker* is responsive to them, without necessarily implying agreement with the criticisms (though I do agree with some of them). My point is that even from the perspective of critics of the Guidelines system, *Booker* offers at best a modest palliative.

It must be remembered that the Guidelines were originally the product of a remarkable cross-ideological consensus. Liberal members of Congress criticized the prior discretionary sentencing system for being arbitrary and discriminatory, suspecting that punishment depended more on the race of the defendant, the place of the offense, and the temperament of the judge than on the legitimate characteristics of the crime or the defendant. Conservative members of Congress suspected that "soft on crime" federal judges were using their sentencing discretion to mete out insufficiently punitive sentences. Advocates of the Guidelines system were united in the view that the prior discretionary system violated principles of the rule of law. The Guidelines were intended to achieve greater uniformity and fairness.

But not long after they were enacted, the Guidelines began to attract serious criticism, which became more vehement as years went by. Many critics, especially federal judges, argued that the rigidity of the Guidelines prevented judges from sentencing defendants in accordance with the justice of the particular case.[29] Others complained that the Guidelines were excessively complex and confusing, consuming vast resources in litigation, and incomprehensible to defendants or other people involved in the system.[30] Many pointed to particular anomalies in the Guidelines, such as the much-denounced treatment of a gram of crack as equivalent to 100 grams of cocaine for purposes of setting the level of punishment.[31] Others objected to the fact that defendants could receive increased sentences for offenses other than the crime for which they were convicted – and even for offenses for which they were acquitted by the jury. Perhaps most insistently, many critics complained simply that sentences under the Guidelines were excessive.[32] How has *Booker* responded to these criticisms?

A. Rigidity

There is no doubt that *Booker* has ameliorated the rigidity of the Guidelines system. District judges now have the freedom to consider factors previously deemed out of bounds, and thus to avoid some of the more evident miscarriages of justice under the Guidelines. But as the empirical portion of this article suggests, the degree of this increased flexibility may be less significant in practice than in theory. Only in about 7% of cases, nationwide, have district judges exercised their newfound discretion to sentence below the Guideline ranges.

No one can predict how appellate courts will interpret the "reasonableness" requirement, but it stands to reason that as appellate precedents pile up, the amount of district court discretion will gradually be reduced. One important question, not yet addressed by the Tenth Circuit, is whether *Booker* discretion allows district judges to vary from Guidelines ranges on the basis of generic objections to the policy choices embodied in the Guidelines, or whether – as the Court of Appeals for the First Circuit recently held - *Booker* discretion "was meant to operate only within

29. *See, e.g.*, KATE STITH & JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1236-37 (2004).

30. *See, e.g.*, Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 617 (1992).

31. *See, e.g.*, David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995). Many other anomalies are discussed in Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005).

32. *See, e.g.*, United States v. Brewer, 899 F.2d 503, 513 (6th Cir. 1990) (Merritt, C.J., dissenting) (describing the Guidelines as "a prescription for injustice because district judges can no longer prevent the imposition of inappropriately harsh sentences"); FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 156-75 (1991).

the ambit of the individualized factors spelled out in Section 3553(a)."[33] If the First Circuit's interpretation prevails, *Booker* discretion will be less significant than many district courts now assume.

The sentencing statute, 18 U.S.C. § 3553(a), treats the Guidelines range as one of a number of factors the district judge should consider in sentencing. But there are procedural and institutional considerations, built into the structure of sentencing, that nudge district judges in the direction of Guidelines compliance. Judges are required in every case to perform the Guidelines calculations and to "take them into account when sentencing."[34] The Guidelines range is widely regarded as presumptively reasonable[35] – and district judges must give cogent reasons if they intend to sentence outside the Guidelines. This has the psychological, if not the legal, effect of establishing the Guidelines range as more than just one factor among many. In practical effect, the Guidelines continue to be the benchmark for responsible judging, with variances only for unusual cases. Moreover, and more speculatively, appellate review may coerce virtual Guidelines compliance in the ordinary run of cases. Variances from the Guidelines are often appealed, and when they are appealed receive serious scrutiny; but as of this writing, no appellate court has yet reversed a within-Guidelines sentence for being unreasonable. These considerations will not prevent a determined district judge from doing what seems just, but it surely makes Guidelines compliance the path of least resistance.

B. Complexity

With respect to the arcane complexity of the Guidelines, *Booker* only makes matters worse. District courts still will need to go through the complex task of calculating the Guidelines ranges, and appellate courts still will hear appeals challenging those calculations. Then, as a result of *Booker*, on top of the Guidelines calculations district judges will have to consider the statutory factors and make judgments about variances; appellate courts will have to review these judgments for reasonableness. At first, this discretionary superstructure may seem relatively intuitive and simple, but over time, precedents governing the exercise of *Booker* discretion will develop in a common law-like fashion, and these precedents will constitute an increasingly intricate body of law governing sentencing, which must be consulted in addition to the body of law interpreting the Guidelines.

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33. United States v. Pho, 433 F.3d 53, 62 (1st Cir. 2006).

34. *Booker*, 125 S. Ct. at 767.

35. United States v. Kristl, No. 05-1067, 2006 WL 367848, at *2-3 (10th Cir. Feb. 17, 2006); United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005); United States v. Williams, No. 05-5416, 2006 WL 224067, at *1 (6th Cir. Jan. 31, 2006); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005); United States v. Guerrero-Velasquez, No. 05-30066, 2006 WL 133494, at *4 n.1 (9th Cir. Jan. 19, 2006).

C. Anomalies

Booker does nothing to eliminate the substantive anomalies associated with the Guidelines. To be sure, as of this writing, some twenty-four district courts have used their *Booker* discretion to refuse to apply the 100:1 crack-cocaine discrepancy.[36] But two courts of appeals have reversed such decisions.[37] Unless other courts of appeals or the Supreme Court go the other way, or Congress acts, the discrepancy will remain.

D. Sentences Based on Uncharged and Acquitted Conduct

As already noted, *Booker* does nothing to protect defendants from receiving enhanced sentences based on judicial findings that they committed uncharged offenses, or even offenses for which they were acquitted by the jury. A district judge who refused to take uncharged or acquitted conduct into account in calculating the Guidelines range would presumably be reversed, and whether *Booker* discretion would extend to a categorical refusal to enhance sentences based on such conduct is an open question.

E. Excessive Sentencing

Booker might eventually have the effect of reducing the length of sentences, for better or worse. Early indications are that district judges far more often exercise their discretion downward than they do upward. In the first year of post-*Booker* sentencing, however, there has been no change in the average length of sentences.

But consider Judge Paul Cassell's analysis of the problem. He argues, in an article in the *Stanford Law Review*, that Guidelines sentences as a whole reasonably reflect societal judgments regarding appropriate punishment, and that the most egregious cases of excessive sentences result not from the Guidelines but from the stacking up of statutory minimums.[38] Judge Cassell recently handed down an opinion sentencing a defendant to fifty-five years in prison for a first offense of drug distribution while carrying a firearm. Despite his view that the sentence was grossly excessive, he held that it was required under statutory minimums.[39] Judge Cassell argues that the best way to reform the sentencing

36. Gary Fields, *Judges Show More Lenience on Crack Cocaine*, WALL ST. J., Jan. 12, 2006, at 2A.

37. *Pho*, 433 F.3d at 64; United States v. Clark, No. 05-4274, 2006 WL 60273 (4th Cir. Jan. 12, 2006); *cf.* United States v. Gipson, 425 F.3d 335 (7th Cir. 2005) (holding that the district court did not act unreasonably in applying the 100:1 ratio); *but cf.* United States v. Williams, No. 05-11594, 2006 WL 68559 (11th Cir. Jan. 13, 2006) (affirming below-Guidelines sentence in a crack case on the basis of the individual circumstances, where the value of the crack involved was $350 and the Guidelines range was 188-235 months imprisonment).

38. Paul G. Cassell, *Too Severe?: A Defense Of The Federal Sentencing Guidelines (And A Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004).

39. United States v. Angelos, 345 F. Supp. 2d 1227, 1261 (D. Utah 2004). The decision was affirmed by the Tenth Circuit. United States v. Angelos, 433 F.3d 738 (10th Cir. 2006).

system would be to keep the Guidelines intact, but to repeal all statutory minimums.

And also consider the politics of sentencing. Prior to *Booker*, there was a significant movement for sentencing reform. Such conservative organizations as the Heritage Foundation, in an effort led by former Attorney General Edwin W. Meese, and Prison Fellowship, led by Chuck Colson, have joined more liberal organizations, such as the American Constitution Society, in efforts to reduce sentences that they consider excessive. But now, after *Booker*, attention in Congress has reverted to whether federal judges have too much discretion and whether they will be soft on crime. The principal statutory lever Congress has to combat lenient discretionary sentencing – now that *Booker* has made the Guidelines advisory – is the enactment of more, and more draconian, statutory minimums. If Judge Cassell is correct that mandatory minimums are the principal cause of excessive sentencing, and if Congress responds to *Booker* by enacting more mandatory minimums, we may have purchased a small increase in discretion and a marginal amelioration of the Guidelines' excesses at the price of exacerbating the worst aspect of the sentencing system.

CONCLUSION

I am inclined to think that a modest increase in the discretion of district judges, exercised judiciously, could enhance justice. In this sense, I welcome the *Booker* result, even though I cannot endorse its reasoning. But it was more important to take a serious look at the statutes governing sentencing. This is a matter for Congress. I fear that *Booker*, by putting forward an extravagant claim of constitutional principles coupled with an anemic and self-contradictory remedy, may have set back the cause of reform, to relatively little purpose.

WHY *BIVENS* WON'T DIE: THE LEGACY OF *PEOPLES V. CCA DETENTION CENTERS*

LUMEN N. MULLIGAN[†]

ABSTRACT

Interpreting recent Supreme Court precedent, the Tenth Circuit in Peoples v. CCA Detention Centers *held that a federal prisoner confined in a privately run prison may not bring a* Bivens *suit against the employees of a private prison for violations of his constitutional rights when alternative state-law causes of action are available. The author first reviews the Supreme Court's evolving* Bivens *jurisprudence and turns next to an overview of the Tenth Circuit's opinion. Third, the author argues that, despite the Tenth Circuit's new approach, putative constitutional claims brought under state-law theories of recovery will often be "re-federalized" producing uniform federal liability rules and federal jurisdiction. The author concludes that should the Supreme Court truly wish to end the practice of implying causes of action from the Constitution, it must reconsider a whole host of federal common law and jurisdictional doctrines—a course of action the Court may find unpalatable.*

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INTRODUCTION

In what may become a landmark prisoner's rights ruling, the United States Court of Appeals for the Tenth Circuit in *Peoples v. CCA Deten-*

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tion Centers[1] held that a federal prisoner confined in pre-trial detention in a privately run prison operating under contract with the United States Marshal Service may not bring a *Bivens v. Six Unknown Federal Narcotics Agents*[2] claim against the employees of the federal-contractor prison for violations of his Fifth and Eighth Amendment rights when alternative state-law causes of action are available.[3] The *Peoples* case raises several concerns. As the dissent notes, it is at least questionable whether the majority opinion: (a) conforms with Supreme Court precedent, (b) properly rejects the principle of parallelism between prisoner's rights in publicly and privately run prisons, (c) appropriately denigrates the uniformity of federal rights, and (d) deters future constitutional violations in privately run prisons.[4] Moreover, given the growth in the use of privately run federal prisons,[5] decisions such as *Peoples*, which, absent diversity, deprive federal prisoner plaintiffs of a federal forum for putative constitutional claims, may well foist portions of the substantial costs of prisoner litigation onto the state courts.[6] Finally, the *Peoples* case also raises the issue of federalization of putative constitutional tort claims, which is the focus this article.

Many jurists and scholars have leveled challenges to the propriety of implying federal causes of action directly under the Constitution since the Supreme Court first decided *Bivens*.[7] Many have argued that implying the *Bivens* cause of action directly from the Constitution violates

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1. 422 F.3d 1090 (10th Cir. 2005). Indeed, just prior to the publication of this article, the Fourth Circuit adopted the Tenth Circuit's approach to *Bivens* actions brought against employees of privately run federal prisons. Holly v. Scott, No. 05-6287, 2006 WL 60276, at *9 (4th Cir. Jan 12, 2006) (adopting *Peoples*).

2. 403 U.S. 388 (1971) (holding that federal agents acting under color of federal law may be found liable for monetary damages for violations of the Fourth Amendment). Conventionally speaking a *Bivens* action is the federal equivalent of a 42 U.S.C. § 1983 action. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 523–44 (2d ed. 1994); SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS 16–22 (1995).

3. *Peoples*, 422 F.3d at 1108.

4. *Id.* at 1108–13 (Ebel, J., dissenting).

5. *See* Richard Harding, *Private Prisons*, 28 CRIME & JUST. 265, 340-41 (2001) (concluding private prisons will continue to exist and grow in the United States not replacing public prisons, but competing with them and stimulating improvement of the total prison system); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 902-03 (2004); Peter J. Duitsman, Comment, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C. L. REV. 2209, 2218 (1998) ("The number of inmates in private prisons is expected to grow thirty percent per year.").

6. *See generally* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1557 (2003) (discussing the efficacy of the Prisoner Litigation Reform Act in reducing costs of prisoner litigation in the federal courts).

7. *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring); Carlson v. Green, 446 U.S. 14, 31–54 (1980) (Rehnquist, J., dissenting); John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89-90 (1999); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 52 (1985); Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1135-38 (1978). *But see* Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1822 (1991) (praising the Court's decision to hold individual officers liable for constitutional violations as genius).

principles of separation of powers.[8] Several commentators have noted that the ability to imply causes of action is simply beyond the powers conferred upon the federal courts altogether.[9] Others have noted a host of pragmatic concerns that arise from implying causes of action directly under the Constitution.[10] Given these many concerns, the Court has been loath to expand the scope of the *Bivens* cause of action since 1980.[11] Indeed, the Court's post-1980 *Bivens* jurisprudence may be fairly characterized as a "slow death" of the implied constitutional cause of action.[12]

In this article, I argue that the *Peoples* opinion illustrates that the Court's slow-death approach to the *Bivens* claim does not attain the goal of ending federal-court-created liability rules for constitutional torts. I contend that putative constitutional tort claims brought by federal prisoners in privately run prisons under state-law theories of recovery are often embedded with federal issues capable of conferring a federal liability rule and federal jurisdiction. I proceed as follows: Part I provides a brief outline of the Court's slow-death methodology to eliminating the *Bivens* cause of action; Part II reviews the opinion in *Peoples*; and, Part III considers two quandaries lurking in *Peoples*. First, many putative constitu-

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8. In *Carlson*, Justice Rehnquist states:

> In my view, it is 'an exercise of power that the Constitution does not give us' for this Court to infer a private civil damages remedy from the Eighth Amendment or any other constitutional provision. The creation of such remedies is a task that is more appropriately viewed as falling within the legislative sphere of authority.

Carlson, 446 U.S. at 34 (Rehnquist, J., dissenting); Davis v. Passman, 442 U.S. 228, 250 (1979) (Burger, C.J., dissenting) ("[U]ntil Congress legislates otherwise as to employment standards for its own staffs, judicial power in this area is circumscribed. The Court today encroaches on that barrier."); Merrill, *supra* note 7, at 19–24 (arguing that inferring causes of action violates the principle of separation of powers); Schrock & Welsh, *supra* note 7, at 1127–28 (same).

9. *See, e.g., Malesko*, 534 U.S. at 75 (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action – decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."); Schrock & Welsh, *supra* note 7, at 1127 (arguing that the power of judicial review does not include the power to infer causes of action).

10. *See, e.g., Bivens*, 403 U.S. at 411-12 (Burger, C.J., dissenting); *id.* at 428 (Black, J., dissenting) (asserting that *Bivens* would "choke" the courts with lawsuits and prognosticating that a *Bivens* remedy would open the door for frivolous suits that would inevitably delay an already slow path of justice); Jeffries, *supra* note 7, at 101-02 (arguing that *Brown v. Board of Education* would never have been decided if school districts had been subject to money damages and that constitutional rights would have stagnated); Schrock & Welsh, *supra* note 7, at 1146–71 (considering a detailed list of "realists" concerns).

11. The *Malesko* court noted:

> In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct.

Malesko, 534 U.S. at 70.

12. *See generally* Matthew G. Mazefsky, Note, Correctional Services Corp. v. Malesko: *Unmasking the Implied Damage Remedy*, 37 U. RICH. L. REV. 639, 661-62 (2003) (concluding that *Malesko* marks the final throws of the cause of action implied directly under the Constitution); Mariana Claridad Pastore, Comment, *Running From the Law: Federal Contractors Escape* Bivens *Liability*, 4 U. PA. J. CONST. L. 850, 867-69 (2002) (same); Andrea Robeda, Note, *The Death of Implied Causes of Action: The Supreme Court's Recent* Bivens *Jurisprudence and the Effect on State Constitutional Tort Jurisprudence:* Correctional Services Corp. v. Malesko, 33 N.M. L. REV. 401 (2003) (same).

tional torts pursued as state-law claims may be subject to preemption under the government contractor doctrine, which provides a federal liability rule and an avenue back to federal court. Second, many putative constitutional claims that are filed under state-law theories of recovery will incorporate a constitutional rule as the standard of care, which is sufficient under the "necessary construction test" to gain federal subject matter jurisdiction. Finally, I argue that the Court's slow-death approach to the *Bivens* cause of action achieves its goal of ending the era of implied constitutional causes of action in form only. In substance, many of these putative constitutional actions will be "re-federalized." I conclude that, if the Court truly wishes to end "the heady days in which [it] assumed common-law powers to create causes of action,"[13] it must reconsider a much broader scope of jurisdictional and federal common law doctrines; a prospect it may find unattractive.

I. THE SLOW DEATH OF *BIVENS V. SIX UNKNOWN FEDERAL NARCOTICS AGENTS*[14]

In *Bivens*, the Supreme Court held that a "violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct."[15] Mr. Bivens had alleged that federal agents, under color of federal law, illegally restrained him, searched his home, and arrested him.[16] The lower courts dismissed Mr. Bivens' action, agreeing with the defendants' argument that Mr. Bivens' proper remedy lay in a state-law trespass claim.[17] The Supreme Court reversed.[18]

The *Bivens* Court rejected the notion that the protections afforded under the Fourth Amendment are strictly co-extensive to those found under state law.[19] Indeed, the Court held that the Fourth Amendment is an independent check upon federal power consistently applied throughout the country, which "is not tied to the niceties of local trespass laws."[20] Moreover, the Court held that the interests protected under state-law trespass and invasion of privacy doctrines and those interests protected under the Fourth Amendment may be inconsistent with, or even hostile to, each other.[21] For example, the Court noted that to bring a state-law trespass claim the plaintiff must show that he did not allow the

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13. *Malesko*, 534 U.S. at 75 (Scalia, J., concurring).

14. 403 U.S. 388 (1971). For a fuller discussion of the *Bivens* cause of action, Professor Chemerinsky provides a thorough review. CHEMERINSKY, *supra* note 2, at 523–44.

15. *Bivens*, 403 U.S. at 389.

16. *Id.*

17. Bivens v. Six Unknown Fed. Narcotics Agents, 409 F.2d 718 (2d Cir. 1969); Bivens v. Six Unknown Fed. Narcotics Agents, 276 F. Supp. 12 (E.D.N.Y. 1967).

18. *Bivens*, 403 U.S. at 390.

19. *Id.* at 392–94.

20. *Id.* at 393–94.

21. *Id.* at 394.

defendant into the home.[22] But the Court reasoned that an officer "who demands admission under a claim of federal authority stands in a far different position" from the typical trespasser.[23] As a result, the Court concluded that, in most cases, a mere invocation of authority by a federal official will cause the average citizen to allow the official access to the home, rendering trespass doctrine an ineffective remedy against abuses of federal power.[24]

Finally, the Court held that the provision of monetary damages was the appropriate remedy for a violation of Fourth Amendment rights.[25] The Court acknowledged that it lacked a statutory basis for providing this remedy and that "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation."[26] Nevertheless, the Court held that it could imply such a cause of action directly from the Constitution when three conditions were met. First, the implication is appropriate when there is a federal statute (viz., 42 U.S.C. § 1983) granting a general right to sue for constitutional violations.[27] Second, the implication is appropriate when there are no special factors counseling hesitation, such as making a claim upon the federal fisc, weighing against extending a cause of action.[28] Third, the implication is appropriate when there is no explicit congressional declaration stating that money damages may not be awarded for constitutional violations caused by federal agents.[29]

Despite the expansive language in *Bivens* itself, the Court has held that a *Bivens* action lies against federal officers for money damages on only two other occasions.[30] In *Davis v. Passman*,[31] the Court held that plaintiff could bring a cause of action for monetary damages for violations of the Due Process Clause of the Fifth Amendment.[32] In *Carlson v. Green*,[33] the Court held that a federal claim lies against federal prison officials for violations of the Cruel and Unusual Punishments Clause of the Eighth Amendment.[34]

22. *Id.* at 394.
23. *Id.*
24. *Id.*
25. *Id.* at 395.
26. *Id.* at 396.
27. *Id.* (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)). What the Court means by "general right to sue" in this context is far from clear. Section 1983 is limited to actions against state officials. *See, e.g.*, Wheedlin v. Wheller, 373 U.S. 647, (1963) (holding federal agents are not liable under 42 U.S.C. § 1983). Thus, at the time *Bivens* was decided there was not a general right to sue federal agents for constitutional violations, merely a general right to sue state agents.
28. *Bivens*, 403 U.S. at 396.
29. *Id.* at 396–97.
30. Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980).
31. 442 U.S. 228 (1979).
32. *Id.* at 243–44.
33. 446 U.S. 14 (1980).
34. *Carlson*, 446 U.S. at 20.

Faced with a series of rebukes concerning the appropriateness of implying causes of action directly under the Constitution, the Court, since *Carlson*, has restricted the scope of *Bivens* claims.[35] In *Chappell v. Wallace*,[36] issued just three years after *Carlson*, the Court refused to hear a *Bivens* action brought by military personnel who, lacking any remedy, alleged that the unconstitutional actions of their superior officers injured them.[37] Harkening to the limitations upon implying causes action first laid out in *Bivens* itself,[38] the Court held that a special factor counseled hesitation in hearing a *Bivens* claim in such circumstances: namely "the unique disciplinary structure of the Military Establishment and Congress' activity in the field."[39] The Court, in *United States v. Stanley*,[40] later reaffirmed that a *Bivens* action is unavailable against members of the military "whenever the injury arises out of activity 'incident to [military] service.'"[41]

In addition to refusing to hear military claims, the Court now broadly allows Congress to create alternative federal remedies to a *Bivens* action.[42] In *Bush v. Lucas*,[43] the Court declined to hear a *Bivens* claim alleging First Amendment violations brought by government employees when they had access to alternative "comprehensive procedural and substantive provisions giving meaningful remedies against the United States."[44] Relying on the notion, introduced in *Passman*[45] and *Carlson*,[46] that Congress can create alternative remedies to a *Bivens* claim, the *Bush* Court ruled that the congressionally installed administrative system could supplant a *Bivens* cause of action.[47] The *Bush* Court, however, went one step further than the *Passman* and *Carlson* decisions. In *Passman* and *Carlson*, the Court reasoned that alternative congressionally created remedies to a *Bivens* action were acceptable as long as they were "viewed as equally effective" to a *Bivens* claim.[48] The Court in *Bush*, by contrast, found a congressionally created alternative remedy sufficient to bar a *Bivens* action, even though the administrative scheme's "remedies do not provide complete relief for the plaintiff,"[49]

35. *See* cases cited *supra* note 7.
36. 462 U.S. 296 (1983).
37. *Chappell*, 462 U.S. at 303–04.
38. *Bivens*, 403 U.S. at 396 (citing "no special factors counseling hesitation").
39. *Chappell*, 462 U.S. at 304.
40. 483 U.S. 669 (1987).
41. *Stanley*, 483 U.S. at 681 (citing the "incident to service" test from Feres v. United States, 340 U.S. 135, 144 (1950)).
42. *See* Bush v. Lucas, 462 U.S. 367 (1983).
43. 462 U.S. 367 (1983).
44. *Bush*, 462 U.S. at 367.
45. *Passman*, 442 U.S. at 248.
46. *Carlson*, 446 U.S. at 18–20.
47. *Bush*, 462 U.S. at 386.
48. *Carlson*, 446 U.S. at 19; *Passman*, 442 U.S. at 248.
49. *Bush*, 462 U.S. at 388. *See also* David C. Nutter, Note, *Two Approaches to Determine Whether an Implied Cause of Action Under the Constitution is Necessary: The Changing Scope of*

so long as Congress "provide[d] meaningful remedies."[50] Following this same tack, the Court in *Schweiker v. Chilicky*[51] barred *Bivens* claims filed by disabled social security beneficiaries who lacked monetary relief for emotional distress due to delays in receiving their Social Security benefits.[52] As in *Bush*, the Court relied upon Congress' creation of alternative, although not equivalent, administrative relief to prohibit the *Bivens* claim.[53]

The Court further limited who may be a proper defendant in a *Bivens* action in *FDIC v. Meyer*.[54] Here, the Court held that the logic of *Bivens* itself—which is founded upon individual, not agency, liability—does not support hearing *Bivens* claims against federal agencies.[55] The *Meyer* Court concluded that "[i]f we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government."[56] As the *Bivens* Court itself held that such a result should counsel hesitation in implying a cause of action directly under the Constitution,[57] the *Meyer* Court took this potential fiscal impact as a ground for barring a *Bivens* claim.[58]

Although the Court has spent fifteen years chipping away at the edges of the *Bivens* cause of action, prior to *Correctional Services Corporation v. Malesko*,[59] the following generalizations could be made about the Court's *Bivens* jurisprudence. First, a *Bivens* claim was considered a free-standing, generally implied, cause of action independent of state law.[60] Second, the Court considered it fundamental that federally employed agents be subject to uniform rules, be it under *Bivens* or a congressionally created alternative for constitutional violations.[61] Third, a

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the Bivens *Action*, 19 GA. L. REV. 683, 694 (1985) (contending that after *Davis* and *Carlson* the Court abandoned the "equally effective" approach).

50. *Bush*, 462 U.S. at 386.

51. 487 U.S. 412 (1988).

52. *Schweiker*, 487 U.S. at 424–25.

53. *Id.* at 429 ("Congress . . . has addressed the problems created by state agencies' wrongful termination of disability benefits" through the creation of administrative remedies).

54. 510 U.S. 471 (1994).

55. *Meyer*, 510 U.S. at 473.

56. *Id.* at 486 (internal citation omitted).

57. *Bivens*, 403 U.S. at 396 (noting that in the instant case, "we are not dealing with a question of 'federal fiscal policy . . . .'").

58. *Meyer*, 510 U.S. at 486.

59. 534 U.S. 61 (2001).

60. *Bivens*, 403 U.S. at 392–94; Robeda, *supra* note 12, at 405; Pastore, *supra* note 12, at 854; CHEMERINSKY, *supra* note 2, at 526–31. At least one commentator finds that a *Bivens* remedy is still "generally" available post-*Malesko*. *See* Erwin Chemerinsky & Martin A. Schwartz, *Section 1983 Litigation: Supreme Court Review, A Round Table Dialogue*, 19 TOURO L. REV. 625, 678 (2003) (Professor Chemerinsky asserting: "[A]lthough the Court is continuing to narrow *Bivens*, it is not overruling or signaling an overruling of *Bivens*. The core of *Bivens* is that if a federal officer violates a constitutional right, there is generally a remedy available. That has not been overturned.").

61. *See Schweiker*, 487 U.S. at 424–29 (finding uniform and comprehensive administrative relief available); *Bush*, 462 U.S. at 368 (same); *Carlson*, 446 U.S. at 23 ("the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules.");

Bivens claim could only be brought against individual defendants—not agencies of the federal government.[62] Fourth, although the Court had only explicitly approved of *Bivens* actions for violations of the Fourth Amendment, the Due Process Clause of the Fifth Amendment, and the Cruel and Unusual Punishment Clause of the Eighth Amendment, the courts of appeals considered the *Bivens* action generally available for any constitutional violation.[63] Fifth, a *Bivens* action was not appropriate when Congress provided meaningful, alternative forms of relief, even if that relief did not provide plaintiffs with complete satisfaction.[64] Finally, *Bivens* claims were precluded in the absence of affirmative action by Congress when there were special factors counseling hesitation.[65] These

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Bivens, 403 U.S. at 393-94 (holding that the Fourth Amendment "is not tied to the niceties of local trespass laws.").

62. *See Meyer*, 510 U.S. at 471. Some consider this focus upon individual liability an ingenius means of skirting sovereign immunity and like doctrine. Fallon & Meltzer, *supra* note 7, at 1822 (praising the Court's decision to hold individual officers liable for constitutional violations as genius). Others, however, see this focus on individual liability as little more than form over substance. *See* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L. J. 65-7 (1999) (arguing that as a result of governmental indemnification and government-provided defense individuals are not in practice liable under *Bivens*). Given that the Department of Justice's Constitutional and Specialized Tort Branch is devoted to defending federal officers against *Bivens* suits at public expense, Pillard's point is a strong one. *See* http://www.usdoj.gov/civil/brochure/brochure.html (last visited Jan. 30, 2006). Moreover, the key premise of the *Meyer* decision—that individual, not agency, liability is the key to deterrence—runs contrary to the fundamental tort principle of respondeat superior, as well as common sense. *Compare Meyer*, 510 U.S. at 485 ("It must be remembered that the purpose of *Bivens* is to deter *the officer*.") *with* DAN B. DOBBS, THE LAW OF TORTS 907 (2000) (considering, in the context of justifying the respondeat superior rule, that "the best deterrence is to impose liability upon the employer, who will then seek to avoid his own liability by exercising his considerable control over employees to discourage their torts.").

63. *See Carlson* 446 U.S. at 23 (Eighth Amendment); *Passman*, 442 U.S. at 228 (Fifth Amendment); *Bivens*, 403 U.S. at 388 (Fourth Amendment). The lower courts, however, have heard *Bivens* claims for a broader set of constitutional violations. *See, e.g.*, Switzer v. Coan, 261 F.3d 985, 990 (10th Cir. 2001) ("Plaintiff's allegations of unconstitutional delegation of Article III authority to law clerks and staff attorneys in pro se proceedings would appear to state [a *Bivens*] claim."); Ruff v. Runyon, 258 F.3d 498, 499 (6th Cir. 2001) (remanding a Ninth Amendment *Bivens* claim); Hammond v. Kunard, 148 F.3d 692, 694–95 (7th Cir. 1998) (upholding a Sixth Amendment *Bivens* claim against a qualified immunity challenge); National Commodity and Barter Ass'n v. Archer, 31 F.3d 1521, 1527 (10th Cir. 1994) ("We likewise hold that if claims of violations of First . . . Amendment rights are proven, then a *Bivens* remedy may be afforded to the plaintiffs for recovery of damages for such constitutional wrongs.").

64. *See Schweiker*, 487 U.S. at 424–29; *Bush*, 462 U.S. at 368, 386–88. This alternative remedy doctrine raises many issues, which are beyond the scope of this article but worthy of note. *See, e.g.*, Susan Brandes, *Reinventing* Bivens: *The Self-Executing Constitution*, 68 SO. CAL. L. REV. 289 (1995) (arguing that *Bivens* stands for the proposition that judicial enforcement of constitutional rights through monetary damages should not depend on action by Congress); Betsy J. Grey, *Preemption of* Bivens *Claims: How Clearly Must Congress Speak?*, 70 WASH. U. L. Q. 1087 (1992) (arguing that *Bivens* actions are available except where Congress clearly states its intent to supersede them); Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1129 (1989) ("It is surprising, as I have indicated, that *Bivens* decisions, while employing the form of constitutional interpretation, concede a willingness to be reversed by Congress"); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1552–53 (1972) ("[W]here the judiciary independently infers remedies directly from constitutional provisions, Congress may legislate an alternative remedial scheme which it considers equally effective in enforcing the Constitution and which the Court, in the process of judicial review, deems an adequate substitute for the displaced remedy.").

65. *See* Nichol, *supra* note 64, at 1142–53 (critiquing the Court's "special factors" approach).

factors included: (a) potential direct claims upon the federal fisc;[66] and (b) the potential to interfere with the unique nature of the military.[67]

The Supreme Court's recent *Malesko* decision may further limit the general availability of the *Bivens* action dramatically.[68] Mr. Malesko, a federal prisoner living in a privately run halfway house, had a heart condition that entitled him to use the elevator to access his fifth floor room despite the general policy requiring inmates to use the stairs.[69] One evening upon his return, an employee of the halfway house required him to climb the stairs, which resulted in Mr. Malesko suffering a heart attack.[70] Mr. Malseko then brought a *Bivens* suit alleging Eighth Amendment violations against the halfway house, which was run by a private corporation under contract with the United States Bureau of Prisons.[71] The Court held that such a suit could not be brought against federal contractors who operate prisons, providing three rationales for its decision.[72]

First, the Court stated that the purpose of a *Bivens* action is to deter individual federal officers from committing constitutional violations—not governmental agencies or corporate entities.[73] Relying heavily on *Meyer*, the Court held that "threat of suit against an individual's employer was not the kind of deterrence contemplated by *Bivens*."[74] Reasoning by analogy to *Meyer*, the *Malesko* Court stated that if corporate defendants were available for suit under *Bivens*, prisoner plaintiffs would focus their suits against the corporate employer and not the individual directly responsible for the injury.[75] The Court concluded that the logic of *Meyer* foreclosed hearing a *Bivens* action against a corporate entity.[76]

While this no-entity-liability principle was seemingly sufficient to decide the case, the Court went on to provide two more rationales for its decision.[77] The second factor provided by the *Malesko* Court as ground-

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66. *Meyer*, 510 U.S. at 486; *Bivens*, 403 U.S. at 396.

67. United States v. Stanley, 483 U.S. 669 (1987); Chappell v. Wallace, 462 U.S. 296 (1983). The courts of appeals have relied upon several other special factors to bar a *Bivens* action. *See, e.g.*, Beattie v. Boeing Co., 43 F.3d 559, 563 (10th Cir. 1994) (holding that "that the predominant issue of national security clearances amounts to such a special factor counseling against recognition of a *Bivens* claim in this case.").

68. *See, e.g.*, Mazefsky, *supra* note 12 (concluding that *Malesko* marks the final throws of the cause of action implied directly under the Constitution); Robeda, *supra* note 12 (same); Pastore, *supra* note 12 (same). *But see* Chemerinsky & Schwartz, *supra* note 60, at 678 (stating that *Malesko* does not overrule the core holding of *Bivens*).

69. *Malesko*, 534 U.S. at 64.

70. *Id.*

71. *Id.* at 63.

72. *Id.*

73. *Id.* at 71.

74. *Id* at 70; *see also Meyer*, 510 U.S. at 485 ("If we were to imply a damages action directly against federal agencies . . . there would be no reason for aggrieved parties to bring damages actions against individual officers. [T]he deterrent effects of the *Bivens* remedy would be lost.").

75. *Malesko*, 534 U.S. at 71.

76. *Id.*

77. There is a strong argument to be had that these following two rationales, then, are merely obiter dicta.

ing for its ruling was the need to maintain parity between the remedies afforded prisoners at privately operated facilities and those at government-operated facilities (the "symmetry principle").[78] Thus, the Court rejected Mr. Malesko's *Bivens* claim against the private prison, at least in part, because federal prisoners incarcerated in federally run facilities do not have plaintiff's contemplated remedy.[79] That is to say, because federal prisoners in government-run facilities may not bring a *Bivens* suit against the guard's employer (i.e., the United States or the Bureau of Prisons) federal prisoners in privately run prisons may not bring *Bivens* suits against their corporate jailors.[80] If such an asymmetry is to be imposed, the Court reasoned that Congress was better positioned to impose it.[81]

Finally, the Court reasoned that the existence of alternative remedies precluded a *Bivens* claim (the "alternative-relief principle").[82] The Court pointed to two alternative remedies available to Mr. Malesko.[83] The Court first stated, unexceptionally given its prior case law in *Bush* and *Chilicky*, that the possibility of administrative relief within the Bureau of Prisons (i.e., alternative, congressionally created, administrative relief) precludes a *Bivens* claim.[84] In a move that was quite exceptional given its rulings in *Bivens* and *Carlson* which reject the notion that state torts sufficiently protect constitutional interests, the Court stated that Mr. Malesko's claim was quintessentially one for negligence and, thus, a state-law tort claim was available to remedy his constitutional claim.[85]

The Court's over-determination of its holding in *Malesko* has only fostered confusion. Even assuming each *Malesko* factor (i.e., the no-entity-liability principle, the symmetry principle, and the alternative-relief principle) is sufficient standing alone to bar a *Bivens* claim,[86] the *Malesko* decision raises the further question of whether the existence of alternative federal remedies, alternative state-law remedies, or both

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78. *Malesko*, 534 U.S. at 71–72.

79. *Id.* at 71.

80. *Id.* at 72.

81. *Id.*

82. *Id.* (finding that Mr. Malesko was not "confronted with a situation in which claimants in [his] shoes lack effective remedies.").

83. *Id.* at 72–74.

84. *Id.* at 74; *see also* 28 C.F.R. § 542.10; *Schweiker*, 487 U.S. at 413 (holding that the existence of alternative federal remedies is sufficient, standing alone, to bar a *Bivens* suit); *Bush*, 462 U.S. at 368 (same).

85. *Compare Malesko*, 534 U.S. at 73 *with* Carlson v. Green, 446 U.S. 14, 23 (1980) ("the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules.") *and Bivens*, 403 U.S. at 393–94 (holding that the Fourth Amendment "is not tied to the niceties of local trespass laws.").

86. There are good reasons to make this assumption. *See Meyer*, 510 U.S. at 484–85 (holding that the no-entity-liability principle, standing alone, is sufficient to bar a *Bivens* action); *Schweiker*, 487 U.S. at 421 (holding that the federal alternative relief principle, standing alone, is sufficient to bar a *Bivens* action); *Bush*, 462 U.S. at 388–90 (same).

barred Mr. Malesko's *Bivens* claim.[87] If *Malesko*, properly understood, endorses the view that the existence of a state-law remedy standing alone precludes a *Bivens* action against a private defendant, then the *Malesko* Court has radically departed from its past *Bivens* jurisprudence.[88] This issue is of particular importance in *Bivens* suits against employees of privately run federal prisons because in such suits *Malesko*'s no-entity-liability principle and the symmetry principle are inapposite.[89] Moreover, given that the Bureau of Prisons' administrative remedies are available only to persons under its authority,[90] a suit brought by a federal pretrial detainee who is under the authority of the U.S. Marshal Service would test whether the existence of a state-law remedy standing alone forecloses a *Bivens* action against employees of a federal contractor running a private prison.

II. *PEOPLES V. CCA DETENTION CENTERS*[91]

The Tenth Circuit faced just such a perfect storm of facts in *Peoples*. In a case of first impression in the federal courts of appeals post *Malesko*,[92] the Tenth Circuit held that the existence of a state-law remedy

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87. *Malesko*, 534 U.S. at 72 (presenting both sets of alternative remedies as grounds for barring a *Bivens* claim).

88. *See supra* notes 60–67 and accompanying text. Indeed, prior to *Malesko*, the Courts of Appeals regularly heard *Bivens* claims against private defendants acting under color of federal law without a determination that plaintiff lacked a state-law alternative remedy. *See, e.g.*, Vector Research, Inc. v. Howard & Howard Attorneys P.C., 76 F.3d 692, 698 (6th Cir. 1996) (holding that a *Bivens* claim may be brought against a private actor if the defendant was acting under color of federal law); Schowengerdt v. Gen. Dynamics Corp., 823 F.2d 1328, 1337 (9th Cir. 1987) (same); Reuber v. United States, 750 F.2d 1039, 1057 (D.C. Cir. 1984) (same); Dobyns v. E-Systems, Inc., 667 F.2d 1219, 1222-23 (5th Cir. 1982) (same); Heinrich *ex rel.* Heinrich v. Sweet, 62 F. Supp. 2d 282, 308 (D. Mass. 1999) (same). The First Circuit, pre-*Malesko*, appears to assume that such an action is appropriate. *See* Gerena v. Puerto Rico Legal Serv., Inc., 697 F.2d 447, 449 (1st Cir. 1983). Prior to *Malesko*, three courts of appeals had declined to answer whether a plaintiff may assert a *Bivens* claim against a private actor. *See* DeVargas v. Mason & Hanger Silas Mason Co., Inc., 844 F.2d 714, 720 n.5 (10th Cir. 1988); Morast v. Lance, 807 F.2d 926, 930-31 n.5 (11th Cir. 1987); McNally v. Pulitzer Publ'g Co., 532 F.2d 69, 75-76 (8th Cir. 1976). Notably, prior to *Malesko*, only the First Circuit, in dicta, had stated that "[w]hile federal officers may, at times, be subject to suit for unconstitutional behavior . . . there is no cause of action against private parties acting under color of federal law or custom." Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927, 932 n.8 (1st Cir. 1974). As is illustrated above, however, the First Circuit appeared to reject this dicta by 1983. See *Gerena*, 697 F.2d at 449. In any event, no circuit predicated the existence of a *Bivens* claim upon the absence of a state-law remedy.

89. This question was specifically reserved by the Court. *Malesko*, 534 U.S. at 65 ("the parties agree that the question whether a *Bivens* action might lie against a private individual is not presented here."). In fact, both parties to the *Malesko* case assumed that a *Bivens* action would lie against employees of privately run prisons, which may have affected the Court's decision. *See* Brief of Petitioner, Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (No. 00-860), 2001 WL 53566, at *13; Brief of Respondent, Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (No. 00-860), 2001 WL 883679 at *8, *12.

90. 28 C.F.R. § 542.10 (2001) (Bureau of Prisons administrative remedies "do[ ] not apply to inmates confined in other non-federal facilities").

91. 422 F.3d 1090 (10th Cir. 2005).

92. *But see* Agyeman v. Corrs. Corp. of Am., 390 F.3d 1101, 1104 (9th Cir. 2004) (assuming in dicta that plaintiff may bring a *Bivens* claim against a guard at a privately run, federal, pretrial, detention center); Sanusi v. INS, 100 Fed. Appx. 49, 52 n.3 (2d Cir. 2004) (unpublished) (remanding the question). Two District Courts have substantively addressed the issue. *See* Sarro v. Cornell

standing alone forecloses a *Bivens* action against employees of a federal contractor running a private prison.[93]

Peoples is a consolidated appeal combining two suits, both brought pro se by Mr. Peoples in the District of Kansas.[94] In the first case ("*Peoples I*"),[95] Mr. Peoples brought a *Bivens* claim alleging that, while being held in pretrial detention, staff at the privately run prison failed to protect him from other inmates after he repeatedly requested protection.[96] As a result of the staff's failure to protect him, Mr. Peoples contends that other inmates beat him with padlocks, chains, and full soda cans.[97] Mr. Peoples clearly states an Eighth Amendment violation sufficient to survive a *Federal Rule of Civil Procedure* 12(b)(6) motion if he has a means of bringing the cause of action.[98] Under the Eighth Amendment, prison officials have an obligation to protect prisoners from attack by other prisoners.[99] As the Supreme Court has held, a "prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment."[100] As such, if Mr. Peoples had been housed in a government-run prison, these allegations would have given rise to a *Bivens* claim.[101] The district court in *Peoples I* reasoned, however, that because Mr. Peoples was housed in a privately run facility and a state-law tort claim was available, *Malesko* precluded a *Bivens* ac-

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Corrs., Inc., 248 F. Supp. 2d 52, 63 (D.R.I. 2003) (holding that existence of a state-law remedy standing alone does not foreclose a *Bivens* action against employees of a federal contractor running a private prison); *see also* Jama v. INS, 343 F. Supp. 2d 338, 362 (D.N.J. 2004) (adopting *Sarro*). At the time this article was written, there apparently was no scholarly treatment of this issue.

93. *Peoples*, 422 F.3d at 1103 ("Therefore, we will not imply a *Bivens* cause of action for a prisoner held in a private prison facility when we conclude that there exists an alternative cause of action arising under . . . state . . . law against the individual defendant for the harm created by the constitutional deprivation.").

94. *Id.* at 1093. Mr. Peoples did obtain counsel for his appeal of *Peoples I*.

95. Peoples v. CCA Detention Ctrs., No. Civ.A. 03-3129-KHV, 2004 WL 74317 (D. Kan. Jan. 15, 2004) (Vratil, J.) (unpublished) [hereinafter *Peoples I*].

96. *Peoples*, 422 F.3d at 1093–94.

97. *Id.* at 1094.

98. The court notes that because Mr. Peoples is a pretrial detainee, his claim is technically a Fifth Amendment due process claim. *Id.* at 1094 n.1. Nevertheless, because the standard is the same under either the Fifth or Eighth Amendment, the court, for ease of reference, refers to this failure to protect claim as an Eighth Amendment violation. *Id.* I follow the court in this regard.

99. Farmer v. Brennan, 511 U.S. 825, 833 (1994) (citation omitted, alteration omitted). For the purposes of this article, I will assume that federal contractors, and their employees, act under color of federal law when operating a federal prison. *See* Rosborough v. Mngt. & Training Corp., 350 F.3d 459, 460-61 (5th Cir. 2003) (holding, in light of Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72n.5 (2001) *and* Richardson v. McKnight, 521 U.S. 399, 413 (1997) (holding that a 42 U.S.C. § 1983 plaintiff may sue privately employed prison guards because they are state actors operating under color of state law). Neither the Tenth Circuit nor the District Courts in *Peoples* address the element of acting under color of federal law. But given the strong parallels between a *Bivens* and § 1983 action, there is good reason to believe that these courts would apply the Fifth Circuit's *Rosborough* approach in the *Bivens* context.

100. *Farmer*, 511 U.S. at 828.

101. *See, e.g.*, Benefield v. McDowall, 241 F.3d 1267 (10th Cir. 2001) (holding that deliberate exposure of federal inmate housed in a federally run penitentiary to risk of harm at hands of other inmates violates the Eighth Amendment giving rise to a *Bivens* claim).

tion.[102] The district court, therefore, dismissed the claim for lack of subject matter jurisdiction.

In the second case ("*Peoples II*"),[103] Mr. Peoples alleged three *Bivens* claims.[104] The first claim arose out of the thirteen months he spent in administrative segregation on the direct order of the Marshal Service, who considered him a flight risk.[105] Mr. Peoples did not receive written notice of the reason for his segregation upon his request and he was not allowed a hearing on his segregation status for five months, which he contended violated his Fifth Amendment due process rights.[106] Mr. Peoples also alleged that while in segregation he lacked sufficient access to legal materials and that his phone calls to his attorney were monitored, both of which he contended violated his due process rights.[107] The district court in *Peoples II* rejected the notion that *Malesko* bars a *Bivens* suit against employees of a privately run prison, but nevertheless dismissed all three due process claims on the merits for failure to state a claim upon which relief may be granted.[108]

On appeal, the Tenth Circuit first held that the *Peoples I* district court erred in treating as jurisdictional the issue of whether the existence of a state-law relief precludes a *Bivens* action.[109] The circuit relied primarily on *Bell v. Hood*[110] in its jurisdictional analysis.[111] In *Bell*, the Supreme Court held that complaints seeking to recover directly under the Constitution raise a federal question sufficient to ground subject matter jurisdiction, excepting two scenarios.[112] The Tenth Circuit concluded that neither exception set forth in *Bell* applied.[113] First, the court assumed without discussion that the *Peoples* complaints were not artfully pleaded merely to gain federal jurisdiction.[114] Second, the court quickly dispensed with the notion that Mr. Peoples' complaints were insubstantial.[115] The court concluded, then, that *Bell* directly controlled and ad-

102. *Peoples*, 422 F.3d at 1094.

103. Peoples v. Corr. Corp. of Am., No. 02-3298, 2004 WL 2278667 (D. Kan. Mar. 26, 2004) (Murgia, J.) (unpublished) [hereinafter *Peoples II*].

104. *Id.* at *1.

105. *Peoples*, 422 F.3d at 1094.

106. *Id.*

107. *Id.*

108. *Id.* at 1095.

109. *Id.* at 1095–96. Judge Ebel, who generally dissents from the majority's opinion, concurs in this aspect of the majority's decision. *Peoples*, 422 F.3d at 1108 (Ebel, J., dissenting).

110. 327 U.S. 678 (1946).

111. *Peoples*, 422 F.3d at 1095.

112. *Bell*, 327 U.S. at 681–82.

113. *See Peoples*, 422 F.3d at 1096.

114. *Id.* at 1095 (holding that complaints that "clearly appear[ ] to be immaterial or made solely for the purpose of obtaining jurisdiction" should be dismissed under FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction).

115. *Id.* at 1095 (discussing insubstantiality of the complaint); *see also Bell*, 327 U.S. at 682–83 (holding that complaints that are "wholly insubstantial and frivolous" should be dismissed under FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction).

monished litigants not to conflate the lack of a cause of action with lack of federal subject matter jurisdiction.[116]

Next, the Tenth Circuit held "that there is no implied private right of action for damages under *Bivens* against employees of a private prison for alleged constitutional deprivations when alternative state . . . causes of action for damages are available to the plaintiff."[117] The circuit recognized that this holding was in tension with the Supreme Court's *Carlson* decision.[118] Nevertheless, by adopting something akin to a last-in-time rule, which may be a questionable interpretive tool,[119] the Tenth Circuit reasoned that given the Supreme Court's evolving *Bivens* jurisprudence it was most prudent to resolve ambiguities among the Court's decisions by relying upon its most recent pronouncements on the topic made in *Malesko*.[120] The circuit concluded that "the purpose of *Bivens* is only 'to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally [as in *Carlson*], or to provide a cause of action for a plaintiff who lacked *any alternative remedy* [as in *Davis*].'"[121] As a consequence, the Tenth Circuit held that the existence of an alternative state-law remedy bars a *Bivens* claim against employees of federal contractors.[122]

The court next turns its attention, sua sponte, to the existence of alternative state-law claims for Mr. Peoples' *Bivens* suits.[123] First, it holds that Mr. Peoples could have brought his Eighth Amendment, failure-to-protect claim under Kansas common law as prison guards owe a duty of reasonable care to safeguard a prisoner in their custody from attack by

116. *Peoples*, 422 F.3d at 1095–96 n3. *See also* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 643 (2005) (arguing that federal courts err by treating factual elements of substantive federal causes of action, such as an interstate commerce or employee numerousity requirement, as going to the jurisdiction of the federal court). Although a full discussion of this issue is beyond the scope of this article, there is reason to think that the Tenth Circuit's jurisdictional analysis is wrong-headed given its case-by-case implication approach. Here, the court dismisses Mr. Peoples' claims without considering the merits of his claim or the merits of an affirmative defense. The dismissal of Mr. Peoples' claims walk and talk like a common law plea in abatement not a demurrer, corresponding more to a FED. R. CIV. P. 12(b)(1) motion than to a FED. R. CIV. P. 12(b)(6). *Cf.* Wasserman, *supra*, at 649–53 (discussing the "first phase" of litigation where jurisdictional questions are properly addressed).

117. *Peoples*, 422 F.3d at 1101.

118. *Id.*

119. *See* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("[I]t is [the Supreme] Court's prerogative alone to overrule one of its precedents.").

120. *Peoples*, 422 F.3d at 1102.

121. *Id.* at 1101 (quoting *Malesko*, 534 U.S. at 70). It is worth noting that the Tenth Circuit chose not to refer to this text from *Malesko* as a holding, but rather referenced it as "statements." This suggests, perhaps, that even the Tenth Circuit considers *Malesko*'s presentation of the alternative-remedy principle as obiter dicta. Nevertheless, from the Tenth Circuit's point of view, the status of this rationale as dicta is immaterial. *See* Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements.").

122. *Peoples*, 422 F.3d at 1101.

123. *Id.* at 1103.

other inmates.[124] The court then considers Mr. Peoples' Fifth Amendment, monitoring-of-his-phone-conversations claim.[125] The Tenth Circuit again concludes that a Kansas cause of action, this time implied from criminal statutory prohibitions, exists to remedy the alleged injury.[126] The court then dismissed both claims for failure to state a claim upon which relief may be granted because Mr. Peoples had alternative state-law causes of action.[127]

The Tenth Circuit cryptically treats Mr. Peoples two remaining Fifth Amendment claims (viz., improperly being held in segregation and inadequate access to the courts). The court states that it "need not even look to state law causes of action because we agree with the District Court that Mr. Peoples's allegations . . . do not rise to the level of a constitutional violation."[128] The court then proceeds to consider these *Bivens* claims on their constitutional merits and dismisses them under Rule 12(b)(6).[129] The court, however, does not state whether an alternative state-law cause of action exists for these claims nor does it state whether these *Bivens* claims, although failing on the merits, were appropriately brought as *Bivens* actions.[130] One suspects that the Tenth Circuit took this approach precisely because Kansas law does not provide an alternative tort remedy for these Fifth Amendment violations.[131] While this lack of clarity does not offer direction to future litigants or the lower courts, it appears fair to summarize the court's holding as producing a doctrine where *Bivens* suits must be reviewed claim-by-claim to determine whether an alternative state-law action is available. Under this regime, *Bivens* claims without a state-law analogue will (presumably) be legitimately filed and proceed to an on-the-merits review, while *Bivens* claims with a state-law analogue should be dismissed for failure to state a claim.[132]

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124. *Id.* at 1104 (quoting Washington v. State, 839 P.2d 555, 559 (Kan. Ct. App. 1992)).

125. *Id.* at 1105.

126. *Id.* at 1107–08 (*citing* KAN. STAT. ANN. §§ 21-4001 to -4002 (2005)); Kan. Op. Atty. Gen. No. 93-93 (1993)).

127. *Peoples*, 422 F.3d at 1105; *see also id.* at 1108.

128. *Id.* at 1105.

129. *Id.*

130. *See id.* at 1113 (Ebel, J., dissenting) (discussing this point).

131. Proving a negative is always difficult, but the author of this article diligently searched for an alternative Kansas remedy to the improper administrative detention and inadequate access to the courts claims against a private actor. The closest conceivable action to the administrative detention claim would be a false imprisonment claim. *See* Brown v. State, 927 P.2d 938, 940 (Kan. 1996) (providing elements of false imprisonment). The author was unable to unearth a Kansas-law analogue to the access to the courts claim.

132. The dissent strongly critiques this approach. "Thus, what we have here under the majority opinion is a framework where some, but not all, due process violations should be brought as *Bivens* actions and some should be brought as state-law tort suits." *Peoples*, 422 F.3d at 1113 (Ebel, J., dissenting). Such an approach is "an intensely fact-driven endeavor," *id.* at 1112, that is inappropriate given that the doctrinal inquiry here is whether a cause of action exists, providing "yet another reason why the majority's reasoning is flawed." *Id.* at 1113.

Assuming that the *Peoples* court[133] correctly reads *Malesko* to command this result, the Tenth Circuit faces a prima facie Supremacy Clause problem.[134] Under the traditional understanding of a *Bivens* claim as a free-standing cause of action independent of state law,[135] it could appear that the circuit has employed a "reverse preemption" doctrine whereby a state-law claim preempts a federal *Bivens* claim. That it to say, one could read *Peoples* as holding that the plaintiff had two *Bivens* claims that were preempted by the existence of Kansas tort claims. Of course, such a reverse preemption theory is doctrinal heresy.[136]

While the court does not address this issue directly, the better reading of *Peoples* illustrates that the Tenth Circuit avoids this prima facie Supremacy Clause problem. The court achieves this result by implicitly rejecting the traditional understanding of the *Bivens* claim.[137] Instead of viewing *Bivens* as implied generally, the circuit views *Bivens* actions as implied claim-by-claim. This understanding is first evidenced during the court's claim-by-claim analysis of whether analogous state-law actions exist. The court concludes each of these analyses by rendering a claim-specific ruling on whether to imply a *Bivens* cause of action.[138] This claim-by-claim approach is further evidenced during the court's discussion of the *Malesko* symmetry principle.[139] The Tenth Circuit recognizes that under its ruling federal prisoners incarcerated in privately run prisons lack a remedy (i.e., a *Bivens* suit against individual officers) that is available to federal prisoners held in government-run facilities.[140] While recognizing this as violating *Malesko*'s symmetry principle, the court states, "it was not created by this decision."[141] "An implied right," the

133. The reader will excuse this little joke.

134. U.S. CONST., art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").

135. *See supra* note 60.

136. *See, e.g.*, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 395 (1971) ("For just as state law may not authorize federal agents to violate the Fourth Amendment, neither may state law undertake to limit the extent to which federal authority can be exercised."); M'Culloch v. Maryland, 17 U.S. 316, 427 (1819) ("It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."); Roberts v. Roadway Express, Inc., 149 F.3d 1098, 1105 (10th Cir. 1998) ("If [Defendant] means to argue that Colorado's Workers' Compensation Act provides the exclusive remedy for all work-related injuries including emotional distress caused by violations of the [federal] civil rights laws, that argument is readily disposed of by the Supremacy Clause.").

137. *See supra* notes 60-67 and accompanying text (outlying the traditional understanding).

138. *Peoples*, 422 F.3d at 1105 ("Therefore, because Kansas law gives rise to a cause of action for damages for the injuries Mr. Peoples suffered as the result of the alleged deprivation of his Eighth Amendment rights, we will not imply an additional cause of action directly under the Constitution in *Peoples I*."); *Id.* at 1108 ("We conclude, then, that Mr. Peoples could have brought suit under Kansas law [for the alleged unlawful monitoring of his phone calls]. Therefore, we will not imply a *Bivens* claim as to this allegation.").

139. *Id.* at 1103.

140. *Id.* at 1102.

141. *Id.* at 1103.

court goes on to explain, "by definition, is created by the courts and cannot exist until it is judicially announced."[142]

In essence, the Tenth Circuit's view is that a *Bivens* cause of action only springs into existence when no alternative remedy is available. Prior to that moment, the federal cause of action simply does not exist. The presence of alternative state-law relief, then, does not preempt plaintiff's federal *Bivens* action under the Tenth Circuit's view, but rather the existence of the state-law relief fails to provide a condition precedent for the *creation* of the *Bivens* action by implication. Thus, state-law remedies do not displace the federal *Bivens* action under the circuit's view because in those cases where alternative state-law remedies exist there simply is no federal cause of action to displace.

While the court appears to avoid the Supremacy Clause problem, it is unclear exactly why *Bivens* claims with a state-law analogue should be dismissed as a procedural matter. While the court does make clear that such dismissals are not jurisdictional,[143] it fails to address whether the existence of alternative state-law claims acts as an element of plaintiff's claim or an affirmative defense. Neither choice is attractive. On the one hand, there appears to be little authority to treat the lack of an alternative state-law action as an element of the *Bivens* claim.[144] On the other hand, if the existence of an alternative state-law claim is an affirmative defense the reverse preemption problem rears its ugly head again, because but for the state-law defense plaintiff would have a federal cause of action. Moreover, an affirmative defense can be waived,[145] potentially leaving a federal court with the unsavory duty of litigating a "non-existent" federal cause of action.

Given the increasingly complex legal analysis imposed by the *Peoples* regime coupled with the possibility for dismissal without the court addressing the merits of a plaintiff's claim, it may be appropriate for district courts to exercise their discretion to dismiss putative *Bivens* claims without prejudice when they conclude that alternative state-law causes of action bar the claim,[146] allowing prisoner plaintiffs to refile their claims under the state–law theory. Indeed, dismissal without prejudice seems especially appropriate here as the overwhelming majority of prisoner-plaintiffs proceed pro se.[147] Of course, this ability to refile as-

142. *Id.*

143. *Id.* at 1095–96.

144. *See, e.g.*, Morgan v. United States, 323 F.3d 776, 780 (9th Cir. 2003) (holding post *Malesko* that "the elements of a *Bivens* claim [are properly pleaded] by alleging a violation of his constitutional rights by agents acting under the color of federal law.").

145. *See* FED. R. CIV. P. 8(c).

146. *See* FED. R. CIV. P. 41(a)(2).

147. *See* Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 479–80 (2002) ("The majority of prisoners proceed pro se in these actions [civil prisoner constitutional rights litigation]—ninety-six percent according to a recent survey.").

sumes that the statute of limitations will not have run, which would stymie any such attempt. Nevertheless, most state saving statutes would provide prisoner-plaintiffs an additional window of opportunity to refile a state claim if the statute of limitations had run while the *Bivens* claim was pending as long as the first dismissal is entered without prejudice.[148]

The difficulties created by the majority's application of *Malesko* do not end here. Judge Ebel, while recognizing that this was a hard case, strongly dissents and calls for the Supreme Court to take up the issue of *Bivens* suits against employees of federal contractors.[149] He begins his analysis by arguing that the majority opinion fails to give *Carlson* its due.[150] Judge Ebel argues that Supreme Court precedent does not treat alternative causes of action as fungible, but rather requires that alternatives to a *Bivens* action be alternative constitutional causes of action.[151] Next, Judge Ebel contends that the majority violates the *Malesko* symmetry principle, because a *Bivens* action against staff is available to federal prisoners in government-run facilities but not in privately run facilities. Also, in Judge Ebel's view, the majority violates the traditional parallelism between a *Bivens* action and a 42 U.S.C. § 1983 action, because a § 1983 action against staff members is available to state prisoners held in private prisons but a *Bivens* action is not available to federal prisoners incarcerated in private facilities.[152] Fourth, Judge Ebel asserts that the majority, contrary to the Court's directives in *Bivens* and *Carlson*, renders the enforcement of federal rights non-uniform by making a *Bivens* action contingent upon the vagaries of state law.[153] Finally, Judge Ebel

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148. For instance, under Kansas law:

> If any action be commenced within due time, and the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if the plaintiff die, and the cause of action survive, his or her representatives may commence a new action within six (6) months after such failure.

KAN. STAT. ANN. § 60-518 (2005). In Kansas, examples of such judgments "not on the merits" include: denial of class certification for lack of numerosity, Waltrip v. Sidwell, 678 P.2d 128, 133 (Kan. 1984); dismissal for failure to file an amended petition following a partially successful motion for a more definite statement, Barrett v. Porter, 408 P.2d 574 (Kan. 1965); dismissal without prejudice, Cox v. Trousdale, 27 P.2d 298 (Kan. 1933); and dismissal for voidable service of process, Goldsberry v. Lewis, 574 P.2d 566 (Kan. Ct. App. 1978).

149. *Peoples*, 422 F.3d at 1108 n.2 (Ebel, J., dissenting).

150. *Id.* at 1108–10.

151. *Id.* at 1109.

152. *Id.* at 1110–12.

153. *Id.* at 1112–13. The District of Rhode Island, in rejecting the claim-by-claim approach later adopted by the Tenth Circuit, offered this further critique:

> [W]hile *Malesko* indicates that the existence of state law remedies may be a factor to be considered, in applying *Bivens*, state law remedies cannot be construed as a manifestation of Congressional intent to preclude the application of *Bivens*. Indeed, making the federal remedies available to a federal prisoner at a privately operated institution contingent upon whether there are adequate alternative state law remedies would require a case by case analysis of state law and would cause the availability of a *Bivens* remedy to vary according to the state in which the institution is located, a result that *Bivens*, itself sought to avoid.

Sarro v. Cornell Corrs., Inc., 248 F. Supp. 2d 52, 63 (D.R.I. 2003).

warns that the majority's opinion will fail to deter future constitutional violations.[154]

III. LATENT FEDERAL QUESTIONS

Although Judge Ebel raises strong points, I will assume that the majority correctly construes *Malesko* as holding that the existence of a state-law remedy standing alone forecloses a *Bivens* action against employees of a federal contractor running a private prison.[155] Nevertheless, even if cases such as Mr. Peoples' are henceforth espoused under state-law theories of recovery, many will contain a federal question sufficient to re-federalize the liability rule and provide for federal jurisdiction. This path back to a federal question proceeds via two independent routes: the government contractor doctrine and the necessary construction test.

A. The Government Contractor Doctrine

Assuming the Tenth Circuit correctly interprets *Malesko* as foreclosing a *Bivens* action against employees of a federal contractor running a private prison when a state-law alternative action exists,[156] the government contractor doctrine provides an independent ground for re-federalizing prisoner constitutional claims against employees of privately run federal prisons.[157] The *Peoples* court does not address this issue.[158] Nonetheless, future prisoner plaintiffs in positions similar to Mr. Peoples may find themselves subject to a federal liability rule in a federal forum and possibly in a double bind—unable to bring a *Bivens* claim because of

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154. *Peoples*, 422 F.3d at 1113 (Ebel, J., dissenting).

155. *But see Sarro*, 248 F. Supp. 2d at 63 (holding that *Malesko* does not mandate this result).

156. Peoples v. CCA Detention Ctrs., 422 F.3d 1090, 1103 (10th Cir. 2005) ("Therefore, we will not imply a *Bivens* cause of action for a prisoner held in a private prison facility when we conclude that there exists an alternative cause of action arising under . . . state . . . law against the individual defendant for the harm created by the constitutional deprivation.").

157. For general discussions of the government contractor doctrine *see*: Kenneth G. English, Note, *Government Complicity and a Government Contractor's Liability in Qui Tam and Tort Cases*, 33 PUB. CONT. L.J. 649 (2004) (critiquing government contractor doctrine as economically inefficient); Mazefsky, *supra* note 12, at 659–61 (discussing the government contractor doctrine as it is addressed in *Malesko*); Sean Watts, Note, Boyle v. United Technologies Corp. *and the Government Contractor Defense: An Analysis Based on the Current Split Regarding the Scope of the Defense*, 40 WM. & MARY L. REV. 687 (1999) (arguing for Congressional action to resolve doctrinal confusion in this area); Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities From Exemplary Damages?*, 58 OHIO ST. L.J. 175 (1997) (critiquing the extension of government immunities to institutions such as private prisons under the government contractor doctrine); Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257 (1991) (providing an economic analysis of the government contractor doctrine); A.L. Haizlip, *The Government Contractor Defense in Tort Liability: A Continuing Genesis*, 19 PUB. CONT. L.J. 116 (1989).

158. Apparently the Tenth Circuit at one point considered a discussion of the government contractor doctrine. *Peoples*, 422 F.3d at 1108 n.13 ("As we discussed above, the government contractor doctrine is not applicable because there is nothing in the record indicating that the Marshal Service specifically ordered the monitoring of Mr. Peoples's calls to his attorney."). But the opinion lacks any "discussion above." Presumably, the court decided a full discussion of government contractor doctrine imprudent in this opinion.

the existence of an alternative state-law remedy yet finding their state-law remedy preempted by federal common law.

The Supreme Court's leading government contractor doctrine case is *Boyle v. United Technologies Corp.*,[159] where the Court held that federal common law preempts state-law tort actions against independent contractors who manufacture munitions for the federal government. In *Boyle*, a copilot of a Marine Sikorsky helicopter drowned following its crash into the Atlantic. His estate brought a successful state-law tort claim against Sikorsky, contending that the outward-opening escape hatch was ineffective in an underwater crash and that its handle was obstructed by other equipment.[160] The Court overturned the jury verdict on the grounds that the government contractor defense, as a matter of federal common law, preempted the state-law claim.[161]

The Court reasoned that federal common law preempts state law where there is a uniquely federal interest and there is a significant conflict between federal policy and the operation of state law.[162] The Court found these criteria met in *Boyle*. The Court noted that without government-contractor immunity "the contractor will [either] decline to manufacture the design specified by the government, or it will raise its price."[163] Next, the Court feared that the threat of state-law liability would interfere with the Government's legitimate balancing of safety features against military efficacy in designing war materiel.[164] The Court then fashioned a three-prong test to determine when a defendant has successfully asserted a defense under the government contractor doctrine. To wit, state-law liability for design defects in military equipment is preempted by federal common law when: (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[165]

The lower federal courts have since split on the scope of the federal contractor doctrine outside of the military supplier context.[166] A minority of courts refuse to apply the doctrine outside of military procurement cases.[167] A majority of courts, however, apply the government contractor

159. *Boyle*, 487 U.S. 500 (1988).
160. *Id.* at 503.
161. *Id.* at 512.
162. *Id.* at 507–08.
163. *Id.* at 507.
164. *Id.* at 511.
165. *Id.* at 512.
166. *See* Hazel Glenn Beh, *The Government Contractor Defense: When Do Governmental Interests Justify Excusing A Manufacturer's Liability for Defective Products?*, 28 SETON HALL L. REV. 430, 432 (1998).
167. *Id.*

doctrine in any scenario that satisfies the *Boyle* three part test.[168] As the Eleventh Circuit noted, the history of the government contractor doctrine and its general rationale lend support to the conclusion that it would be illogical to limit the availability of the doctrine solely to military contractors.[169] To this end, the doctrine has been applied to cases involving "manufacturers of letter sorting equipment for the United States Postal Service; postal vehicles; ambulances; military air conditioners; army surplus tree-trimming belts; service contracts for the Department of Energy; a security guard service for a federal building; and the Environmental Protection Agency."[170]

While the Supreme Court has not definitively held that the government contractor doctrine applies to private prisons, the *Malesko* Court suggested that it would. In a footnote citing *Boyle*, the Court stated, "Where the government has directed a contractor to do the very thing that is the subject of the claim, we have recognized this as a special circumstance where the contractor may assert [federal preemption]. The record here would provide no basis for such a defense."[171] Thus, it appears that the Court, given an appropriate set of facts, would find the government contractor doctrine applicable to suits brought by prisoners held in privately run federal prisons. Indeed, the lower courts in the *Malesko* litigation assumed that the government contractor doctrine could apply and gave the argument full consideration.[172]

Moreover, privately run federal prisons are currently attempting to use the government contractor doctrine as a bar to prisoner plaintiffs' state-law claims. Recently the Southern District of New York, sitting in diversity, considered a suit brought by two former female federal prisoners against a privately run federal prison alleging sexual misconduct by the prison's guards.[173] The plaintiffs brought two state-law causes of action—negligent hiring and retaliation.[174]

The private prison moved for summary judgment, *inter alia*, on the grounds that it was entitled to government contractor immunity.[175] The District Court assumed that the doctrine was applicable outside of the

168. *Id.*

169. Burgess v. Colo. Serum Co., 772 F.2d 844, 846 (11th Cir. 1985). *See also* Brown v. Nationsbank Corp., 188 F.3d 579, 588–89 (5th Cir. 1999) (extending the doctrine to protect persons from state-law liability when they in good faith assist the Government in law enforcement operations); Boruski v. United States, 803 F.2d 1421, 1430 (7th Cir. 1986) (applying the doctrine in "civilian relationships" where "a contractor has acted in the sovereign's stead and can prove the elements of the defense.").

170. Beh, *supra* note 166, at 432.

171. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 n.6 (2001); *see also* Mazefsky, *supra* note 12, at 659–61 (discussing the government contractor doctrine as it is addressed in *Malesko*).

172. Malesko v. Corr. Servs. Corp., 229 F.3d 374, 382 (2d Cir. 2000), *rev'd on other grounds*, 534 U.S. 61 (2001).

173. Adorno v. Corr. Servs. Corp., 312 F. Supp. 2d 505 (S.D.N.Y. 2004).

174. *Adorno*, 312 F. Supp. 2d at 505.

175. *Id.*

military supplier context, but it held that, given the facts in the instant case, the private prison could not satisfy the three-part *Boyle* test.[176]

In August 2005, the District Court for the District of Columbia heard a similar argument. In *Ibrahim v. Titan Corp.*,[177] Iraqi nationals who were held in a privately run federal prison in Iraq brought common law suits against the operator of the prison. Among other defenses, the private prison argued that the plaintiffs' common law claims were pre-empted by the government contractor doctrine.[178] The court held the doctrine applicable to private prisons, but as in the New York case, held that the facts did not support a finding that the *Boyle* three-prong test was met.[179]

Given that the federal courts currently apply the government contractor doctrine to claims brought against privately run federal prisons, many federal inmates who are denied a *Bivens* claim against guards on the basis that an alternative state-law claim exists may find they lack a viable state-law claim as well. The *Peoples* case itself provides a prime example. Recall, Mr. Peoples brought a Fifth Amendment due process claim arising out of his thirteen months of administrative segregation. This segregation was imposed by order of the Marshal Service, not by a discretionary act of the private prison.[180] If Mr. Peoples had brought this claim under a state-law theory of recovery such as false imprisonment,[181] his claim would have been highly susceptible to the assertion of the government contractor doctrine because, as the *Malesko* Court put it, the Government "directed [the private prison] to do the very thing that is the subject of the claim."[182] Indeed, the three-prong *Boyle* test, at least based upon the scant factual background provided in the *Peoples* opinion, should be met here. First, the Government, by ordering the administrative segregation, approved a reasonably precise course of conduct. Second, the private prison followed those instructions. Third, the Marshal Service was, presumably, aware of the constitutional implications of unjustifiably holding a pretrial detainee in administrative segregation.[183]

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176. *Id.* at 521; *see* Scainetti v. United States *ex rel.* Federal Bureau of Prisons, No. 01 Civ. 9970 (SHS), 2002 WL 31844920, *1 (S.D.N.Y. Dec. 18, 2002) (unpublished) (noting that the Southern District of New York previously faced nearly identical government contractor arguments and applied nearly the same reasoning); Norwood v. Esmor Inc., No. 95 Civ. 8281 (LAP), 1997 WL 65913, *4 (S.D.N.Y. Feb. 13, 1997) (unpublished).

177. 391 F. Supp. 2d 10 (D.D.C. 2005).

178. *Ibrahim*, 391 F. Supp. 2d at 16.

179. *Id.* at 17.

180. *Peoples*, 422 F.3d at 1093.

181. *See* Brown v. State, 927 P.2d 938, 940 (Kan. 1996) (providing elements of false imprisonment); *see also supra* note 131.

182. *Malesko*, 534 U.S. at 74 n.6.

183. *See* Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988). The reader will note a slight rephrasing of the *Boyle* test here given the change in context from ordering a product to ordering a course of conduct, which the author intends as mere change in the form of–not the substance of–the *Boyle* test. Courts applying the test in the prison context adopt a similar formulation of

Hence, claims such as Mr. Peoples's administrative segregation claim, if brought under a state-law theory of recovery, would likely be preempted under the government contractor doctrine.

This conclusion should not be overstated. As the Tenth Circuit has made clear in other contexts, "[t]he government contractor defense . . . [only applies] when the [contractor] has conformed to reasonably precise specifications established or approved by the government."[184] The Second Circuit has suggested this same principle applies in privately run prison cases as well. "The government contractor defense only shields a [privately run federal prison] from claims arising out of its actions where the government has exercised its discretion and judgment in approving precise specifications to which the contractor must adhere."[185] Given that the government contractor defense is essentially a claim that "[t]he Government made me do it,"[186] it is not surprising that both the Southern District of New York and the District of Columbia District Courts have denied attempts by employees of privately run prisons to invoke the government contractor doctrine absent specific evidence that the Government ordered the course of action bringing rise to the lawsuit. But this is not to say that the doctrine could never be successfully invoked in cases, such as *Peoples*, where the Government did specifically order the conduct giving rise to the suit.

Further, it is unclear what effect the preemption of state-law claims under the government contractor doctrine would have on the availability of a *Bivens* suit under the *Peoples* analysis. The Tenth Circuit adjudicated Mr. Peoples's administrative segregation claim on its constitutional merits.[187] The court thereby avoided the need to discuss preemption under the government contractor doctrine. Assuming there was an alternative state-law theory of recovery for the administrative segregation claim, such as false imprisonment,[188] the court's analysis leaves a significant question unanswered: if such a state-law false imprisonment claim were preempted by the federal contractor doctrine, would an alternative state-law remedy be rendered *unavailable*, giving rise to a *Bivens* claim? Alternatively, if the government contractor doctrine is merely an affirmative defense[189] to an otherwise generally available state-law claim, would an alternative state-law claim be *available* (but unmeritorious) and hence

the test. *See, e.g.*, Malesko v. Corr. Servs. Corp., 229 F.3d 374, 382 (2d Cir. 2000), *rev'd on other grounds*, 534 U.S. 61 (2001).

184. Ellis v. Consol. Diesel Elec. Corp., 894 F.2d 371, 372 n.2 (10th Cir. 1990).

185. *Malesko*, 229 F.3d at 382.

186. *In re* Joint E. & S. Dist. N.Y. Asbestos Litig., 897 F.2d 626, 632 (2d Cir. 1990).

187. *See supra* note 128 and accompanying text.

188. *See Brown*, 927 P.2d at 940 (providing elements of false imprisonment).

189. *See* Snell v. Bell Helicopter Textron, Inc., 107 F.3d 744, 746 (9th Cir. 1997) ("The [government] contractor defense is an affirmative defense") (note omitted); *but see* Ryan v. Dow Chemical Co., 781 F. Supp. 934, 944–45 (E.D.N.Y. 1992) (noting the considerable confusion as to whether *Boyle* lays down a "defense" or a "standard of liability.").

a *Bivens* claim inappropriate? If the former is the Tenth Circuit's approach, then the case-by-case analysis regarding the implication of *Bivens* claims has become even more complicated and fact intensive (and hence unworkable) than Judge Ebel describes in his dissent.[190] If the latter is the Tenth Circuit's approach, then prisoner plaintiffs such as Mr. Peoples are stuck in a double bind—the alternative state-law claim bars a *Bivens* claim yet the government contractor doctrine preempts their state-law claim. Either approach appears unseemly.

Finally, the *Peoples* approach will not relieve the federal courts of the burden of sorting through this conundrum, because the presentation of the government contractor defense provides grounds for removal under 28 U.S.C. § 1442(a)(1). Although the well-pleaded complaint rule generally limits jurisdiction under 28 U.S.C. § 1331 to federal questions raised in the complaint (i.e., federal defenses do not give rise to federal jurisdiction under § 1331),[191] the constitutional grant of federal jurisdiction provides a broader scope of federal question jurisdiction than is found under § 1331.[192] As the Court has noted, Congress invoked this broader scope of constitutional federal question jurisdiction by enacting § 1441(a)(1), which allows defendants, acting under color of federal authority, to remove to federal court on the basis of a federal defense, contrary to the dictates of the well-pleaded complaint rule.[193] Generally speaking, a private defendant may remove under § 1442(a)(1) if it: (a) demonstrates that it acted under the direction of a federal officer; (b) raises a federal defense to plaintiffs' claims; and (c) demonstrates a causal nexus between plaintiffs' claims and acts it performed under color of federal office.[194] Following this line of analysis, numerous federal courts have allowed private defendants to remove to federal court on the basis of the *Boyle* federal contractor doctrine.[195] Thus, *Peoples* may send

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190. *See* Peoples, 422 F.3d at 1112 (Ebel, J., dissenting).

191. *See* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986) (stating that the well-pleaded complaint rule is an interpretation of § 1331, not of Article III); Louisville & Nashville Rail Co. v. Mottley, 211 U.S. 149, 152 (1908) (establishing the rule).

192. U.S. Const. art. III, § 2 (prescribing the limits of subject matter jurisdiction for the federal courts); *see* Osborn v. Bank of the United States, 22 U.S. 738, 822–23 (1824) (holding that any federal "ingredient" is sufficient to satisfy the Constitution's federal question jurisdiction parameters), for a discussion on federal question jurisdiction, as a matter of Constitutional law, jurisdiction "arising under the Constitution, laws, or treaties of the United States," is quite broad.

193. Mesa v. California, 489 U.S. 121, 136 (1989) ("The removal statute itself . . . serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged.").

194. *See generally* 14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3727 (3d ed. 1998).

195. *See, e.g.*, McAboy v. IMO Indus., No. C05-124L, 2005 WL 2898047, *3–*5 (W.D. Wash. Oct. 27, 2005) (slip op.); *In re* Agent Orange Product Liability Litig., 304 F. Supp. 2d 442, 446–51 (E.D.N.Y. 2004); Carter *ex. rel.* Estate of Carter v. Acands, Inc., No. 3:02-CV-00009 2002 WL 31682352, *3–*5 (E.D. Tex. June 27, 2002) (unpublished); Good v. Armstrong World Indus., Inc., 914 F. Supp. 1125, 1127-28 (E.D. Pa. 1996); Guillory v. Ree's Contract Serv. Inc., 872 F. Supp. 344, 346 (S.D. Miss. 1994); Crocker v. Borden, Inc., 852 F. Supp. 1322, 1327 (E.D. La. 1994); Akin v. Big Three Indus., 851 F. Supp. 819, 823 (E.D. Tex. 1994); Pack v. AC & S, Inc., 838 F. Supp. 1099, 1103 (D. Md. 1993); Fung v. Abex Corp., 816 F. Supp. 569, 573 (N.D. Cal. 1992); *but see* Kristina

many federal-prisoner plaintiffs out in search of a state-law theory of recovery only to have many of these plaintiffs (assuming the courts eschew the double-bind difficulty outlined above) return to federal court with a federal standard of liability.

B. The Necessary Construction Test

It is not only defendants, however, who may assert that putative constitutional claims brought under the auspices of a state-law theory of recovery raise federal issues. Under the *Peoples* decision, many plaintiffs' claims may raise substantial issues of federal law in their state-law theories on the face of the complaint by invoking the Constitution as the standard of care. Under the jurisdictional doctrine famously espoused in *Smith v. Kansas City Title & Trust Co.*[196] and recently reaffirmed in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,[197] if a state law claim necessarily requires the resolution of a substantial issue of federal law, then the state-law claim will arise under 28 U.S.C. § 1331. Given that many state-law tort claims brought by federal prisoner plaintiffs against defendants acting under color of federal law will look to the constitutional standard as the appropriate duty of care, these suits may well fall within the scope of *Smith* and *Grable & Sons*, once again re-federalizing these claims.

The Court has established two independent tests for meeting the § 1331 grant of jurisdiction. The Court has long held that a suit arises under § 1331 if federal law creates the plaintiff's cause of action.[198] As this understanding of § 1331 was forcefully put forward by Justice Holmes, this view is oft referred to as the "Holmes test." The majority of federal-question-jurisdiction cases find their way into federal court by satisfying the Holmes test.[199] The Holmes test, however, best operates as a rule of inclusion not exclusion (i.e., it provides a sufficient, but not necessary, ground for federal question jurisdiction).[200] Federal question jurisdiction can also arise under § 1331 if vindication of the plaintiff's state-law cause of action necessarily requires the construction of a substantial issue of federal law ("the necessary construction test").[201] While

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L. Garcia, *The Boyle Festers: How Lax Causal Nexus Requirements and the "Federal Contractor Defense" are Leading to a Disruption of Comity under the Federal Officer Removal Statute*, 28 U.S.C. § 1442(a)(1), 46 EMORY L.J. 1629 (1997) (critiquing the practice of allowing private parties to remove to federal court by coupling the federal contractor doctrine and § 1442(a)(1)).

196. 255 U.S. 180, 199 (1921).

197. 125 S. Ct. 2363, 2367 (2005).

198. Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916).

199. *Merrell Dow*, 478 U.S. at 808.

200. *See* T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.); *see also* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9 (1983).

201. *Grable & Sons*, 125 S. Ct. at 2366–68; *Merrell Dow*, 478 U.S. at 808–09; *Smith*, 255 U.S. at 199; *see also* Lumen N. Mulligan, Note, *No Longer Safe at Home: Preventing the Misuse of Federal Common Law of Foreign Relations as a Defense Tactic in Private Transnational Litigation*, 100 MICH. L. REV. 2408, 2415 (2002) (employing the moniker "necessary construction test" for this font of federal question jurisdiction).

the Supreme Court instructs that the necessary construction test should be applied with caution as this realm of jurisdiction lies at the outer reaches of § 1331,[202] and that the imbedded question of federal law must be substantial,[203] the Court itself and the courts of appeals continue to apply the doctrine.[204]

Indeed, for nearly one hundred years, the Supreme Court has recognized that federal question jurisdiction will lie over state-law claims that raise significant federal issues, of which the *Smith* case is the classic example.[205] In *Smith*, a stockholder sued in federal court to enjoin his corporation from purchasing bonds issued pursuant to the Federal Farm Loan Act.[206] The plaintiff's theory of the case was that such a purchase would constitute a breach of fiduciary duty under Missouri law because the corporation could only purchase bonds "authorized to be issued by a valid law" and that the Federal Farm Loan Act was unconstitutional.[207] Although the plaintiff pursued a state-law cause of action, the Court held

202. *Merrell Dow*, 478 U.S. at 810.

203. Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808 (1988) (holding that plaintiff's right to relief must necessarily depend upon the "resolution of a substantial question of federal law"); *Smith*, 255 U.S. at 199 (holding that cases that present issues merely colorable as federal or unreasonably relying upon federal law are not proper grounds for federal question jurisdiction).

204. *See, e.g.*, *Grable & Sons*, 125 S. Ct. at 2368 (taking federal question jurisdiction over a quiet title action as resolution of the state-law claim required a determination of whether the Internal Revenue Service had given adequate notice of sale); U.S. Express Lines Ltd. v. Higgins, 281 F.3d 383, 388–91 (3d Cir. 2002) (taking federal question jurisdiction over malicious prosecution claim that required the construction of federal maritime law); Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 25–27 (2d Cir. 2000) (finding federal question jurisdiction lies in case to overturn arbitration award based upon negligent interpretation of federal law); Torres v. S. Peru Copper Corp., 113 F.3d 540, 542–43 (5th Cir. 1997) (finding federal question jurisdiction lies in case involving state tort claim that could affect foreign mining industry, because the case implicated significant foreign policy considerations); Additive Controls & Measurement Sys., Inc. v. FlowData, Inc., 986 F.2d 476, 477–79 (Fed Cir. 1993) (taking federal question jurisdiction over state-law business tort when ownership of federal patent was the decisive issue); Garvin v. Alumax of S.C., Inc., 787 F.2d 910, 911–15 (4th Cir. 1986) (finding federal question jurisdiction over state tort claim against manufacturer and owner of a ship loader because plaintiff's ability to proceed in the face of a state law immunity defense turned on plaintiff's asserted claim that the immunity defense was preempted by the Federal Longshoremen's and Harbor Workers' Compensation Act); W. 14th St. Commercial Corp. v. 5 W. 14th Owners Corp., 815 F.2d 188, 192–96 (2d Cir. 1984) (finding federal question jurisdiction over claim for declaratory judgment that defendant breached a lease in violation of the Federal Condominium and Cooperative Abuse Relief Act even though that Act provided no federal cause of action); *see also* WRIGHT ET AL., *supra* note 194, § 3564; Note, *Mr. Smith Goes to Federal Court: Federal Question Jurisdiction over State Law Claims Post-*Merrell Dow, 115 HARV. L. REV. 2272, 2291–93 (2002) [hereinafter *Mr. Smith*] (arguing that the necessary construction test should be delimited by the principles of comity between federal and state courts and unique federal competency); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1788–94 (1992) (providing a thorough analysis of the necessary construction test). This is not to say that the application of this doctrine is without confusion or frustration. *See* Almond v. Capital Props., Inc., 212 F.3d 20, 23 (1st Cir. 2000) ("The Supreme Court has periodically affirmed this basis for jurisdiction [i.e., the necessary construction test] in the abstract . . . , occasionally cast doubt upon it, rarely applied it in practice, and left the very scope of the concept unclear.").

205. *Grable & Sons*, 125 S. Ct. at 2367.

206. *Smith*, 255 U.S. at 195.

207. *Id.* at 198.

that if on the face of the complaint plaintiff's right to relief depends upon the construction of a significant issue of federal law, then federal question jurisdiction arises under the predecessor statute to 28 U.S.C. § 1331.[208] In so doing, the Court found that a plaintiff could avail himself of a federal forum on a state-law theory of recovery without being diverse from the defendant because plaintiff's Missouri cause of action necessarily required the court to pass upon the constitutionality of a federal act.

Despite the potential for the necessary construction test to be the exception that swallowed the rule, the Supreme Court has not "treated 'federal issue' as a password opening federal courts to any state action embracing a point of federal law."[209] Indeed, it has consistently held that the necessary construction test "must be read with caution."[210] To this end, the Court has required that the imbedded federal issue in the state-law claim be a substantial one in order to invoke federal question jurisdiction under the necessary construction test.[211] Further, the Court recently clarified that presenting a substantial federal issue imbedded in a state-law cause of action is not sufficient for jurisdiction to arise under § 1331.[212] The federal courts must also consider congressional intent before taking jurisdiction under the necessary construction test.[213] As the Court put it, "the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331."[214]

While these limitations on the application of the necessary construction test are considerable, many putative constitutional torts, such as those in the *Peoples* case, could be re-federalized under the necessary construction test. Consider again Mr. Peoples's Fifth Amendment due process claim arising out of his thirteen months of administrative segregation. If Mr. Peoples had brought this claim under a state-law theory of recovery such as false imprisonment,[215] it may well have raised an actually disputed and substantial issue of federal law.[216]

208. *Id.* at 199; *see also* Kaighn Smith, Jr., *Federal Courts, State Power, and Indian Tribes: Confronting the Well-Pleaded Complaint Rule*, 35 N.M. L. REV. 1, 10 (2005) (discussing *Smith*).

209. *Grable & Sons*, 125 S. Ct. at 2368.

210. *Merrell Dow*, 478 U.S. at 809.

211. *See Grable & Sons*, 125 S. Ct. at 2367; City of Chi. v. Int'l Coll. of Surgeons, 522 U.S. 156, 164 (1997); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808 (1988); *Merrell Dow*, 478 U.S. at 814; *Franchise Tax Bd.*, 463 U.S. at 27–28; Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 117–18 (1936); *Smith*, 255 U.S. at 199; Shulthis v. McDougal, 225 U.S. 561, 569 (1912).

212. *See Grable & Sons*, 125 S. Ct. at 2367.

213. *See Mr. Smith*, *supra* note 204, at 2290–91 (foreshadowing the *Grable & Sons* Court's comity discussion).

214. *Grable & Sons*, 125 S. Ct. at 2367; *see also Franchise Tax Bd.*, 463 U.S. at 8.

215. *See Brown*, 927 P.2d at 940 (providing elements of false imprisonment).

216. *Grable & Sons*, 125 S. Ct. at 2368.

Under Kansas law, for example, false imprisonment may be brought to remedy "any unlawful physical restraint by one of another's liberty, whether in prison or elsewhere."[217] Thus, a necessary element for plaintiff to prove is that defendant acted unlawfully. In many states, it is settled that to bring a claim of false imprisonment against a defendant acting under color of law, plaintiff must prove that defendant violated the constitutional standard of care set by the Fourth Amendment.[218] In these states, then, because an element of the state-law false imprisonment claim necessarily requires the court to make a determination of whether defendant's actions comported with the strictures of the Fourth Amendment, a substantial federal issue will be raised.[219] Moreover, this necessary construction of constitutional law is not unique to false imprisonment claims against defendants acting under color of law; many putative constitutional torts brought under other state-law theories will raise similar questions of constitutional law.[220] Of course, mere reference to federal law as part of a state-law claim is insufficient to implicate federal question jurisdiction under the necessary construction test.[221] Similarly, ministerial application of federal law in a state-law analysis is insufficient to invoke federal question jurisdiction under § 1331 pursuant to the

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217. Arceo v. City of Junction City, 182 F. Supp. 2d 1062, 1086 (D. Kan. 2002) (quoting Gariety v. Fleming, 245 P. 1054, 1055 (Kan. 1926)).

218. *See, e.g.*, *Ex parte* Duvall, 782 So. 2d 244, 246–48 (Ala. 2000) (holding state-law torts of assault, unlawful arrest, false imprisonment and conspiracy barred as a matter of law because officer met the Fourth Amendment's probable cause standard when detaining plaintiff); Susag v. City of Lake Forest, 115 Cal. Rptr. 2d 269, 278–79 (Cal. Ct. App. 2002) (holding that state-law claims of battery, intentional infliction of emotional distress, and false imprisonment fail as a matter of law because plaintiff "did not meet his burden of producing evidence showing they used physical force against or exerted authority over him that resulted in a 'seizure' under the Fourth Amendment."); State v. Hall, 716 A.2d 335, 337 (Md. Ct. Spec. App. 1998) (holding existence of constitutional probable cause bars state-law claim of false imprisonment); Sanducci v. City of Hoboken, 719 A.2d 160, 166 (N.J. Super. App. Div. 1998) (dismissing plaintiff's state-law false imprisonment claim because defendant met the constitutional probable cause standard); Renk v. City of Pittsburg, 641 A.2d 289, 293 (Pa. 1994) (false imprisonment plaintiff must show that defendant's actions were unlawful, which often amounts to whether defendant acting under color of law had probable cause). One must not mistakenly find, however, that because a defendant is liable for a state-law false imprisonment claim that defendant is necessarily liable under the Fourth Amendment. Baker v. McCollan, 443 U.S. 137, 146–47 (1979) ("Just as '[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,' false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.").

219. In other states this issue is an affirmative defense. *See, e.g.*, Miller v. City of Jacksonville, 603 So. 2d 1310, 1312 (Fla. Dist. Ct. App. 1992); Broughton v. State, 335 N.E.2d 310, 315 (N.Y. 1975) (noting that under New York law, "[j]ustification may be established by showing that the arrest was based on probable cause."). In these jurisdictions, a privately employed federal prison guard may well have a sufficient federal defense to remove to federal court under 28 U.S.C. § 1442(a)(1). *See supra* Part III.A.

220. *See, e.g.*, *Ex parte Duvall*, 782 So.2d at 246–48 (holding state-law torts of assault, unlawful arrest, and conspiracy barred because officer acted with probable cause); *Susag*, 115 Cal. Rptr. 2d at 278–279 (holding that plaintiff's claims of battery and intentional infliction of emotional distress fail because defendant acted with probable cause).

221. *See, e.g.*, Barbara v. N.Y. Stock Exch., Inc., 99 F.3d 49, 53–55 (2d Cir. 1996) (holding federal approval of Stock Exchange rules insufficient to take federal question jurisdiction in a state-law tort case); Greenblatt v. Delta Plumbing & Heating Corp., 68 F.3d 561, 570–71 (2d Cir. 1995) (holding mere reference to federal labor laws that endorse collective bargaining agreements insufficient to take federal question jurisdiction over a contract claim).

necessary construction test.[222] But in cases where the constitutionality of defendant's conduct will be a central element of a plaintiff's state-law cause of action, the federal question is substantial.[223]

Furthermore, hearing putative constitutional claims brought by federal prisoners in federal court under the necessary construction test would not displace the congressionally mandated division of labor between the state and federal courts.[224] When state-law causes of action, like those under consideration here, incorporate federal law as controlling an element of the claim, these claims are categorized as hybrid causes of action.[225] Prior to *Grable & Sons*, some courts of appeals held the existence of a federal private right of action as the definitive factor for divining congressional intent on the propriety of taking federal question jurisdiction over hybrid claims.[226] *Grable & Sons*, however, makes clear that the existence of a federal private right of action is not required before taking federal question jurisdiction under the necessary construction test.[227] Rather, the relevant question is whether taking jurisdiction over the claim "would . . . materially affect, or threaten to affect, the normal currents of litigation."[228] This boils down to a gate-keeping function. The Court will not allow the necessary construction test to flood the federal courts, absent specific congressional approval or diversity, with suits that are traditionally the exclusive reserve of the state courts.[229] Following the *Grable & Sons* decision, the lower courts, while being

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222. *See, e.g.*, Dunlap v. G&L Holding Group, Inc., 381 F.3d 1285, 1291-93 (11th Cir. 2004) (holding federal law requiring certain banking contracts to be in writing insufficient to take federal question jurisdiction over a contract claim); Bailey v. Johnson, 48 F.3d 965, 968 (6th Cir. 1995) (holding that referencing a federal table of drugs insufficient to take federal question jurisdiction over a state statutory claim).

223. See *Merrell Dow*, 478 U.S. at 814 n.12 (noting jurisdiction was appropriate in *Smith* because the federal issue raised was a constitutional one); *Smith*, 255 U.S. at 199 (holding plaintiff's state-law claim, which necessarily requires inquiry in to constitutionality of federal act, arises under 28 U.S.C. § 1331); Almond v. Capital Prop., Inc., 212 F.3d 20, 22-24 (1st Cir. 2000) (taking federal question jurisdiction and noting that the federal interest is high where "important constitutional issues" are presented and low "where a state tort claim merely incorporate[s] a federal fault standard."); Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEXAS L. REV. 1781, 1788 (1998) ("In *Smith*, the decision as to the constitutionality of the federal act would determine the continued vitality of the statute [and] all federal programs or conduct that were based on the statute."). *But see Mr. Smith*, *supra* note 204, at 2288 (critiquing this constitutional law versus statutory law dichotomy).

224. *See Grable & Sons*, 125 S. Ct. at 2368 (imposing this requirement for taking jurisdiction under the necessary construction test).

225. *See* Pauline E. Calande, Note, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 YALE L.J. 1144, 1148-57 (1985) (discussing creation of hybrid state law claims).

226. *See, e.g.*, Zubi v. AT&T Corp., 219 F.3d 220, 223 n.5 (3d Cir. 2000) (holding the federal courts may not take federal question jurisdiction over state-law claims absent a federal private right of action). *See also* TCG Detroit v. City of Dearborn, 206 F.3d 618, 622 n.2 (6th Cir. 2000); Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1212 (9th Cir. 1998); PCS 2000 LP v. Romulus Telecomm., Inc, 148 F.3d 32, 35 (1st Cir. 1998); Seinfeld v. Austen, 39 F.3d 761, 764 (7th Cir. 1994); Rogers v. Platt, 814 F.2d 683, 688 (D.C. Cir. 1987).

227. *Grable & Sons*, 125 S. Ct. at 2369–70.

228. *Id.* at 2371.

229. *Id.*

careful not to open the doors of the federal courts to claims traditionally heard in the state courts, have injected a new-found life into the necessary construction test.[230]

In the context of federal prisoner litigation, federal jurisdiction under the necessary construction test as delineated in *Grable & Sons* appears especially appropriate because this litigation has long taken place in federal court and Congress clearly envisions that the federal courts will bear the brunt of federal prisoner litigation. Prior to the passage of the Prisoner Litigation Reform Act[231] ("PLRA") in 1996, excluding habeas corpus claims, the federal courts heard upwards of 40,000 prisoner-plaintiff civil suits a year—approximately one-fifth of the overall civil federal docket.[232] While the PLRA has limited the number of prisoner suits on the federal docket significantly, it has not altered the underlying fact that prisoner litigation is primarily conducted in the federal courts—with approximately seventy-five percent of all prisoner civil litigation taking place in a federal forum.[233] While Congress has sought to limit the flood of perceived frivolous prisoner litigation, it has done so with the clear intention that the federal courts will retain jurisdiction over these claims. For example, the PLRA's limitations on prisoner suits are limited to federal claims over which the federal courts could take federal question jurisdiction. [234] Moreover, Congress has enacted numerous other devices to control litigation by prisoner plaintiffs—from summary dismissal of frivolous cases[235] to discovery rules[236]—that further evidence that it envisions taking federal jurisdiction over large amounts of prisoner litigation in the federal courts. Further, as the Court in *Carl-*

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230. *See* Broder v. Cablevision Sys. Corp., 418 F.3d 187, 194–96 (2d Cir. 2005) (applying *Grable & Sons* and taking jurisdiction over state-law contract claim that required construction of federal cable television law because taking this jurisdiction would not upset the flow of litigation in state and federal courts); Municipality of San Juan v. Corporacion Para El Fomento Economico De La Ciudad Capital, 415 F.3d 145, 148 n.6 (1st Cir. 2005) (applying *Grable & Sons* and taking jurisdiction over state-law contract claim that required construction of HUD regulations); Hayes v. American Airlines, Inc., No. 04CV3231CBAJMA, 2005 WL 2367623, *3–*4 (E.D.N.Y. Sept. 27, 2005) (unpublished) (applying *Grable &Sons* and taking jurisdiction over state-law unjust enrichment claim because taking this jurisdiction would not upset the flow of litigation in state and federal courts); *In re* Zyprexa Products Liability Litig., 375 F. Supp. 2d 170, 172–73 (E.D.N.Y. 2005) (applying *Grable & Sons* and taking jurisdiction over state-law restitution claim); *Mr. Smith*, *supra* note 204 at 2292–93; Redish, *supra* note 204, at 1793 (arguing that federal question jurisdiction over hybrid claim should lie to "increase the level of state-federal judicial interchange in the shaping and development of the relevant federal statute.").

231. Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 to 1321-77 (Apr. 26, 1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997-1997h (2005)).

232. Schlanger, *supra* note 6, at 1557 (this includes both state and federal prisoner suits).

233. *Id.* at 1573 n.52 ("a very gross estimate might be that about a quarter of what prison and jail officials think of as inmate litigation is currently filed in state court.").

234. 18 U.S.C. § 3626(d) (2005) ("The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.").

235. *See* 28 U.S.C. § 1915A (2005) (screening prisoner cases for frivolousness prior to serving defendant).

236. *See* FED. R. CIV. P. 26(a)(1)(E)(iii) (no required disclosures in prisoner-plaintiff cases).

son[237] noted, Congress has approved of the *Bivens* cause of action (albeit after the fact) as a complementary theory of recovery to the Federal Torts Claims Act.[238] In furtherance of this congressional acceptance of federal jurisdiction over *Bivens* claims, Congress created the Constitutional Torts Branch of the Department of Justice, which defends these actions exclusively in federal court.[239] As these factors illustrate, there should be little concern that taking federal jurisdiction over putative constitutional torts espoused under a state-law theory of recovery "would . . . materially affect, or threaten to affect, the normal currents of litigation" envisioned by Congress.[240]

Under *Grable & Sons*, then, many putative constitutional claims filed by federal prisoners espousing a state-law theory of recovery may be re-federalized. These hybrid cases will often raise substantial issues of constitutional law and taking federal jurisdiction over them will not materially alter the balance of federal-court versus state-court litigation. In so doing, courts will in effect employ a uniform federal standard of care and a federal forum will be accessible—as is the case for claims re-federalized under the government contractor doctrine. In substance, then, the goals the *Bivens* Court set out—uniform rules of liability enforceable in a federal court—will often be advanced in putative constitutional tort litigation against federal actors, even as the form of the *Bivens* action withers.[241]

CONCLUSION

There can be little doubt that the current Supreme Court considers implying federal causes of action from federal statutes or the Constitution beyond its powers.[242] The Tenth Circuit in its *Peoples* decision

237. Carlson v. Green, 446 U.S. 14, 19–20 (1980).

238. The Federal Torts Claim Act is codified at 28 U.S.C. § 2680(h) (2005). As part of the Senate Report, Congress considered the interaction of the FTCA and *Bivens*:

> [A]fter the date of enactment of this measure, innocent individuals who are subjected to raids . . . will have a cause of action against the individual Federal agents and the Federal Government. Furthermore, this provision should be viewed as a counterpart to the *Bivens* case and its progenty [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).

S. REP. NO. 93-588 at 3 (1973).

239. *See Pillard*, *supra* note 62, at 66 n.6 (discussing the numbers of *Bivens* suits filed and their defense).

240. *Grable & Sons*, 125 S. Ct. at 2371.

241. *See Carlson*, 446 U.S. at 23 ("[T]he liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules."); Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 393-94 (1971) (holding that the Fourth Amendment "is not tied to the niceties of local trespass laws."). *See also supra* Part I discussing slow death of the *Bivens* cause of action.

242. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action - decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition");

grasps the Court's directive and takes it (nearly) to its logical conclusion by foreclosing a *Bivens* action against employees of a federal contractor running a private prison when an alternative state-law action exists.[243] Nevertheless, this victory for the opponents of implied federal causes of action may be Pyrrhic. As I endeavored to illustrate above, many putative constitutional claims brought by federal prisoner plaintiffs under state-law theories of recovery may be re-federalized either as a matter of federal common law, under the government contractor doctrine, or pursuant to Byzantine jurisdictional doctrine, via the necessary construction test.

All this is to illustrate a broader point. Sharply distinguishing between federal common law and implied rights of action for the purpose of eliminating the latter is impracticable as these concepts differ only as a matter of degree, not as a matter of kind.[244] First of all, most scholars consider the *Bivens* action to be merely a species of federal common law,[245] rendering the federal common law versus implied cause of action distinction moot. Even if one does not consider *Bivens* an instance of federal common law, numerous scholars have argued that there is no meaningful difference between the "legitimate" practice of inferring a federal liability rule sufficient to confer federal question jurisdiction without congressional pre-approval as a matter of federal common law[246]

Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (abandoning the power of federal courts to imply federal causes of action from statutes).

243. Peoples v. CCA Detentions Ctrs., 422 F.3d 1090, 1105 (10th Cir. 2005).

244. *See* Merrill, *supra* note 7, at 4–6 (contending that federal common law and implied causes of action differ only as a matter of degree).

245. *See, e.g.*, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 405 (Harlan, J., concurring) (noting that the federal common law in *Bivens* arose not directly from the Constitution, but rather from the combination of the Court's historical ability to provide a remedy for the violation of individual liberties and an interpretation of 28 U.S.C. § 1331); Grey, *supra* note 64, at 1104 ("Most commentators contend that the Constitution does not require the *Bivens* remedy, but rather that it is a creature of federal common law"); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1172-73 (1986); Merrill, *supra* note 7, at 48–49 (considering whether federal courts may decide implied remedies "in the manner of 'a common law tribunal'") (quoting Bush v. Lucas, 462 U.S. 367, 378 (1983)); Henry P. Monaghan, Foreword, *Constitutional Common Law*, 89 HARV. L. REV. 1, 23–25 (1975) (concluding that the *Bivens* action is a species of federal common law).

246. The Court clearly accepts federal common law as a legitimate practice. *See, e.g.*, Boyle v. United Tech. Corp., 487 U.S. 500, 527 (1988) (adopting federal common law liability rule for federal military contractors to state products liability action); Illinois v. City of Milwaukee, 406 U.S. 91, 99-100 (1972) (adopting federal common law liability rule regarding interstate nuisance); Zschernig v. Miller, 389 U.S. 429 (1968) (holding, as a matter of federal common law, that an Oregon statute that required probate courts to evaluate the normative value of foreign political systems, under the guise of reciprocity, before transferring property to foreign next of kin invalid as an intrusion upon the federal government's exclusive right to conduct foreign affairs even though the president and Congress had failed to act); Banco de Nacional de Cuba v. Sabbatino, 376 U.S. 398, 438 (1964) (adopting federal common law liability rule for issues involving foreign affairs); Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943) (adopting federal common law liability rule that one who seeks to raise laches as defense against United States in suit to recover payment on forged commercial paper must prove actual damage resulting from United States' delay in notifying of forgery); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 461-62 (1942) (adopting federal common-law rule that one who makes fraudulent note to bank later insured by FDIC may not raise a claim of lack of consideration in FDIC action to enforce note); Hinderlider v. La Plata River & Cherry Creek

and the "illegitimate" practice of inferring a federal liability rule sufficient to confer federal question jurisdiction without congressional preapproval by inferring a cause of action.[247]

The *Peoples* case proves this point. Under the *Peoples* regime, the implied *Bivens* cause of action against employees of private federal prisons is expunged from the federal courts in form only, not in substance. Uniform federal rules of liability will come to govern many constitutional violations committed by privately employed custodians of federal prisoners by other means. The slow death of the *Bivens* cause of action, then, has only made application of these uniform federal judge-made rules conceptually more difficult to apply; it does not eliminate them. Should the Supreme Court truly desire to end the substance—not merely the form—of the implied federal cause of action, it may well need to excise huge swathes of federal common law and fonts of jurisdiction. But such a pill may be too bitter to swallow.[248]

Ditch Co., 304 U.S. 92, 110 (1938) (adopting federal common law liability rule regarding water ways).

247. *See, e.g.*, George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs - Have the* Bivens *Dissenters Prevailed?*, 64 IND. L. J. 263, 266 (1989) (concluding that "all forms of judicial lawmaking by federal courts - whether presented as constitutional adjudication, statutory interpretation or federal common law - are essentially the same and should be placed under the general rubric of federal common law."); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 889–90 (1986) (concluding that there is no meaningful difference "between the creation of federal common law and the ordinary interpretation of federal enactments"); Merrill, *supra* note 7, at 4–6.

248. *See, e.g.*, Donald L. Doernberg, *Juridical Chameleons in the "New Erie" Canal*, 1990 UTAH L. REV. 759, 810–11 (1990) (contending that federal common law must exist to implement the Constitution and federal legislation); CHEMERINSKY, *supra* note 2, ch. 6; Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964). *But see* Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 356-57 (1992) (concluding that because federal common law has no principled limits it must be abandoned).

LET'S TALK ABOUT SEX DISCRIMINATION: THE TENTH CIRCUIT'S DECISION IN *DICK V. PHONE DIRECTORIES CO.*

INTRODUCTION

The term "sexual harassment" popularly conjures an image of a dedicated but vulnerable young woman who is working in a male-dominated field. Under the threat of firing, she is forced to endure late-night sexual rendezvous in a dimly lit high-rise office with her predatory male boss. While striking, this image represents only one facet of what Congress and the Supreme Court considers sexual harassment.

Today, under Title VII of the Civil Rights Act of 1964 (Title VII),[1] the broad federal statutory scheme that addresses discriminatory employment practices, sexual harassment encompasses claims with no tangible economic loss to the victim and is no longer limited to traditional man-woman relationships. Since the Supreme Court decided the seminal case *Oncale v. Sundowner Offshore Services*[2] in 1998, same-sex hostile work environment harassment claims are actionable under Title VII.[3] A sexual hostile work environment claim alleges that the conditions of the plaintiff's work environment are altered due to severe and pervasive sexual harassment by co-workers.[4] Under *Oncale*, a plaintiff bringing a sexual hostile environment claim must meet two requirements. First, the harassment must be severe enough to discriminate.[5] Second and most importantly, the discrimination must be "because of . . . sex."[6] The "because of sex" language demands that the discrimination against an employee must be motivated by her sex. If this element is not met the plaintiff has not been the victim of sex discrimination in violation of Title VII, regardless of how unpleasant her work environment is.[7] *Oncale's* emphasis on this causation element in sexual harassment cases has resulted in a very limited scope of interpretation for same-sex harassment issues.

The United States Court of Appeals for the Tenth Circuit recently addressed same-sex harassment for the first time in *Dick v. Phone Directories Co.*[8] In *Dick*, the Tenth Circuit held that a same-sex sexual harassment hostile work environment claim satisfies the "because of sex" requirement if the plaintiff proves that her harasser's actions were moti-

1. 42 U.S.C.A. § 2000e (West 2005).
2. 523 U.S. 75 (1998).
3. *Oncale*, 523 U.S.at 78.
4. *See* Meritor Sav. Bank FSB v. Vinson, 477 U.S. 57, 67 (1986).
5. *Oncale*, 523 U.S. at 81.
6. *Id.* at 78.
7. *See* Taken v. Okla. Corp. Comm'n, 125 F.3d 1366, 1369 (10th Cir. 1997).
8. 397 F.3d 1256 (2005).

vated by sexual desire.[9] This contrasts with other circuits, which have alternatively required a showing that the same-sex harasser is a homosexual in order to satisfy the "because of sex" requirement.[10] This article will analyze the Tenth Circuit's holding in light of other Circuits' approaches, and will demonstrate why, within the restrictive confines of *Oncale*, the Tenth Circuit's approach best articulates the goals of Title VII: prevention and deterrence of harassment in the workplace.[11] The article will further argue that the Supreme Court's narrow definition of the term "because of sex" in Its *Oncale* decision fails to adequately prevent all types of sex discrimination.

Part I of this article will examine the unusual roots of the sexual harassment doctrine, focusing on the development of the hostile work environment claim. Part II will explore *Oncale* and its progeny. Part III will summarize the facts and the holding of *Dick*. Part IV will first argue that although superficially, *Oncale* expanded the scope of Title VII by expressly recognizing same-sex harassment claims, its emphasis on causation actually limits the scope of sexual harassment claims. Despite this restriction, the Tenth Circuit found the broadest possible interpretation of *Oncale* in *Dick*. Finally, Part IV will conclude with the argument that a broader interpretation of "sex" under Title VII is needed to address work-place harassments that remain unpunishable under *Oncale's* current guidelines.

I. SEXUAL HARASSMENT DEFINED

Title VII states that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[12] The House of Representatives added the term "sex" to the enumerated list of prohibited discriminatory motives in the eleventh hour of debate on the bill, in an attempt to defeat the entire amendment the day before it passed.[13] Because of the last-minute nature of the amendment, there was very little legislative history to aid the courts in interpreting what constitutes discrimination based on sex.[14] In addition, there was no clear legislative intent to prohibit any kind of sex discrimination in the workplace,

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9. *Dick*, 397 F.3d at 1264. The Tenth Circuit also noted that *Oncale* provides that the inference of sexual harassment can be drawn without showing the harasser was motivated by sexual desire when the issue does not involve "explicit or implicit proposals of sexual activity." *Id.* at 1263.

10. *Id.* at 1264.

11. Julie A. Seaman, *Form and (Dys)function in Sexual Harassment Law: Biology, Culture, and the Spandrels of Title VII*, 37 ARIZ. ST. L.J. 321, 432 (2005).

12. 42 U.S.C.A. § 2000e-2(a)(1) (West 2005).

13. *See* Linda Kelly Hill, *The Feminist Misspeak of Sexual Harassment*, 57 FLA. L. REV. 133, 144-45 (2005).

14. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986).

and the term was virtually meaningless in the early years after Title VII was passed.[15]

Initially, "sexual harassment" had no relationship with the vague idea of "sexual discrimination" that was theoretically prohibited by Title VII.[16] In fact, the term "sexual harassment" was coined outside the legal spectrum by the feminist group Working Women United, who defined sexual harassment as "the treatment of women workers as sexual objects."[17] While accurate, this definition failed to define any disparate treatment of women and therefore, remained outside the aegis of Title VII.[18]

A. Feminism and the Importance of Gender

Feminists have long controlled the theory of sexual harassment.[19] In the simplest terms, feminists initially argued (and continue to do so today) that there is a disparate level of male power in society because males control gender roles.[20] Today, conventional sexual harassment wisdom accepts as true that sex and gender are two separate ideas.[21] Sex is considered a product of nature, while gender is a function of culture.[22] Sex refers to the biological nature of men and women, while gender is a fabricated social construct that suggests the biological differences between men and women dictate the societal role each must play.[23] Feminists focus on this notion of gender as a fictional construction and assert that gender and gender roles have been created by men for the purpose of subordinating women.[24] This male control over gender has resulted in a pervasive patriarchal "gender hierarchy" in the workplace.[25] Within this framework of unequal power, feminists view sexually harassing practices as a means to subordinate women, and therefore, discriminate against them.[26] Feminists, in their definition of sexual harassment, focus on harassment based on one's gender.

1. Catharine MacKinnon

Professor Catharine MacKinnon, described as one of the foremost architects of the sexual harassment doctrine,[27] is credited for bringing

15. *See* Hill, *supra* note 13, at 144–45.
16. *See id.* at 145.
17. *Id.*
18. *See id.*
19. *See id.*
20. *See* Seaman, *supra* note 11, at 358.
21. *See* Katherine Franke, *The Central Mistake in Sexual Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 1 (1995).
22. *See id.*
23. *See* Seaman, *supra* note 11, at 356, 358.
24. *See id.* at 358.
25. *See* Hill, *supra* note 13, at 140.
26. *See id.* at 155.
27. *See* Seaman, *supra* note 11, at 421.

sexual harassment under the auspices of Title VII by expressly highlighting the discriminatory consequences of sexual harassment.[28] She defined sexual harassment as, "the unwanted imposition of sexual requirements in the context of a relationship of unequal power."[29] By naming women as subordinates in the gender-based disparate power structure of the American workplace, Professor MacKinnon was able to cast the necessary discriminatory hue over sexual harassment.[30]

Armed with this definition, Professor MacKinnon defined two types of sexual discrimination. The first she called *quid pro quo*: where an employer conditions employment benefits on sexual favors.[31] Here, Professor MacKinnon was able to identify the sex discrimination easily: only women are being forced to provide sexual favors in return for what should be a natural employment right.[32] Second, she found sexual discrimination existed in a "hostile work environment."[33] She viewed this as a counterpart to a *quid pro quo* claim because working in an environment filled with "pervasive intimidation, ridicule, and insult" served to subordinate women at the hands of their male counterparts.[34] Professor MacKinnon found sexual discrimination in *quid pro quo* cases through men expressly using their superior gender role to exert power over women, while she found sexual discrimination in a hostile environment because she saw in such instances men implicitly wielding sex "differences" as a subordinating power over their female co-workers.[35]

B. The Hostile Work Environment Sexual Harassment Claim

While a *quid pro quo* sexual harassment claim is unique to sex-specific offenses and fairly straightforward in its requirements, the sexual hostile work environment claim is more ambiguous. The formal legal recognition that a hostile environment could be a type of sexual harassment was a later development that arose from two distinct logical arguments.[36] First, the doctrine grew from Professor MacKinnon's feminist argument that a hostile work environment had the same discriminatory effect as the "classic" *quid pro quo* sexual harassment case.[37] Second, previous to the express judicial recognition of the sexual hostile environment claim, it was widely recognized that a racial discrimination claim based on hostile work environment was actionable.[38] The sexual

28. *See* Hill, *supra* note 13, at 145.
29. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979).
30. *See* Hill, *supra* note 13, at 146.
31. MACKINNON, *supra* note 29, at 32.
32. *Id.*
33. *Id.* at 2.
34. *Id.*
35. *See* Hill, *supra* note 13, at 146.
36. *See* Seaman, *supra* note 11, at 417.
37. *See id.*
38. *See id.*

hostile environment claim developed in part as a logical analogy to this accepted standard.[39]

1. The Gender Subordination Argument

A *Quid pro quo* sexual discrimination case casts the injury in terms of concrete choices a woman must make: comply with her supervisor's demands for sexual favors, or suffer an adverse employment action.[40] A hostile work environment claim, on the other hand, presents a more subtle type of injury—one that affects an employee's performance, the likelihood of her advancing, or even the chances of her choosing to remain at her position.[41] Professor MacKinnon and other feminists argued that despite the ambiguity, a hostile environment created from an "an aggregation of words and conduct . . . [had the effect of] exclud[ing] or control[ing] the victim or victims, often through humiliation or fear."[42] In addition, because men remain in the dominate position in the gender hierarchy of the workplace, it is women that suffer the harassment.[43] This disparate treatment creates a discriminatory result from the harassment.[44]

2. The Racial Harassment Analogy

The first hostile environment harassment claim was recognized by federal courts in *Rogers v. EEOC*.[45] In *Rogers*, the plaintiff claimed her employer, an optometrist, treated patients preferentially according to their race.[46] In a now familiar holding, the Fifth Circuit held that the phrase "terms, conditions, or privileges of employment" is necessarily an expansive concept; one that should be interpreted broadly.[47] Within such a broad interpretation, the court went on to find that "[working in an atmosphere permeated with] extreme racial . . . bigotry or ridicule implicated a 'term or condition' of employment sufficient to trigger Title VII protection regardless of whether a tangible employment action was taken."[48]

Soon after *Rogers*, various appellate courts extended this reasoning to a sexual hostile work environment claim.[49] However, while both racial and sexual hostile environment claims needed to demonstrate that the harassment was severe enough to interfere with the terms or conditions of employment, this threshold was much more ambivalent in the

39. *See id.*
40. *See id* at 422.
41. *See id.*
42. *Id.* at 424.
43. *See* Hill, *supra* note 13, at 145.
44. *See id.*
45. 454 F.2d 234 (5th Cir. 1971).
46. *Rogers,* 454 F.2d at 240.
47. *Id.* at 238.
48. Seaman, *supra* note 11, at 417.
49. *See* Bundy v. Jackson, 641 F.2d 934, 943 (D.C. Cir. 1981); *see also* Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982).

sexual context.[50] Some courts complained that the same sexual behavior that may be unwelcome in one context could be perfectly appropriate in another.[51] Others expressed concern about the subjective nature of the sexual claim, noting that it largely depended on the singular interpretation of "harassment" by the victim.[52] These concerns combined to make the threshold for determining whether a claim for sexual hostile environment existed higher than its racial harassment counterpart.[53]

3. *Meritor Savings Bank v. Vinson*[54]

In *Meritor Savings Bank v. Vinson*, the Supreme Court first endorsed the viability of a hostile work environment sexual harassment claim by enlisting both the feminist reasoning as well as the logical analogy of the racial hostile environment claim.[55] The resulting broad reading of Title VII was similar to the interpretation in *Rogers*,[56] but also focused exclusively on the paradigmatic dominant man versus victimized woman sexual harassment case, therefore embracing the feminist framework of a gender based hierarchy.[57]

Meritor involved Plaintiff Mechelle Vinson, who worked as a teller at the Defendant bank. During her four year employment, it was undisputed that Ms. Vinson was promoted from teller to head teller to assistant branch manager based on merit alone.[58] However, after Ms. Vinson was fired for taking an excessively long sick leave, she brought suit against her former employer, claiming that during her four year employment, she was subjected to more or less constant sexual harassment by her supervisor, Mr. Taylor, and that this harassment created a hostile work environment.[59] Her allegations included repeated touching and fondling, many occasions of sexual intercourse (to which Ms. Vinson allegedly acquiesced for fear of losing her job), and episodes where Mr. Taylor followed her into the women's restroom and exposed himself to her.[60]

During trial, Mr. Taylor denied all allegations, but the trial court never endorsed either party's story.[61] Instead, the court held that even if Ms. Vinson's version of the facts were true, she did not experience sexual discrimination under Title VII because she did not suffer a tangible economic loss.[62] The Court of Appeals for the District of Columbia Cir-

50. *See* Seaman, *supra* note 11, at 419.
51. *See id.* at 420.
52. *See id.*
53. *Id.*
54. 477 U.S. 57 (1986).
55. *Meritor*, 477 U.S. at 66–67.
56. *Id.*
57. *See* Hill, *supra* note 13, at 148.
58. *Meritor*, 477 U.S. at 59-60.
59. *See id.* at 60.
60. *Id.*
61. *Id.* at 61.
62. *See id.*

cuit reversed.[63] Relying on a previous holding of a case[64] it had recently decided, the court found that it was possible to find sexual discrimination based on sexual behavior that created a hostile work environment.[65] The Supreme Court affirmed, using various justifications for locating a hostile environment claim.[66]

The Court in *Meritor* pointed toward the language of Title VII itself.[67] It held that "the phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[68] This is similar to the language the Fifth Circuit used in *Rogers.*[69] The broad interpretation of the "terms and conditions" language in Title VII underlined the Court's acceptance of the racial harassment analogy.[70] However, the Court's presumption of a male harasser and a female victim demonstrated that the Court was also embracing MacKinnon's male subordination framework.[71]

II. *ONCALE V. SUNDOWNER OFFSHORE SERVICES*[72] AND SAME-SEX HARASSMENT

A. *Brief Overview of Same-Sex Claims Between* Meritor Savings Bank v. Vinson[73] *and* Oncale

Meritor left many questions unanswered, including whether hostile environment same-sex harassment claims were actionable under Title VII. Prior to the Supreme Court's decision in *Oncale*, Circuits approached the problem in various ways. In *Doe v. City of Belleville,*[74] the Seventh Circuit held that the presence of a hostile environment sufficed to establish a valid claim under Title VII even if the harasser and the harassed were of the same sex.[75] *Doe* involved sixteen-year-old twin boys who were routinely harassed by their co-workers at a cemetery.[76] H. Doe, one of the plaintiffs, was routinely called a "bitch" and asked

63. *Id.* at 62.

64. The Court of Appeals relied on *Bundy v. Jackson*, 641 F.2d 934, 943–44 (D.C. Cir. 1981) (finding an actionable sexual harassment claim based on the finding of a hostile work environment).

65. *Meritor*, 477 U.S. at 62.

66. *Id.* at 63.

67. *Id.* at 64.

68. *Id.* (quoting Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 (1978) (citation omitted)).

69. *See Rogers*, 454 F.2d at 238 ("[T]he phrase 'terms, conditions, or privileges of employment' in Section 703 [of Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.").

70. *See* Hill, *supra* note 13, at 148.

71. *Id.*

72. 523 U.S. 75 (1998).

73. 477 U.S. 57 (1986).

74. 119 F.3d 563 (7th Cir. 1997).

75. *Doe*, 119 F.3d at 577-78.

76. *Id.* at 566.

whether he was a boy or a girl.[77] After enduring months of taunts such as these and repeated threats of assault, both twins quit after a co-worker grabbed H. Doe's testicles in order to "finally find out if H was a girl or a guy."[78] The Seventh Circuit found the claim actionable, noting that the act of grabbing another's testicles must be related to sex regardless of either party's sex.[79] Such a low standard for establishing the causal element has been referred to as a "sex per se" standard, because if something was even remotely sexual, it was considered as satisfying the causation requirement.[80] The Seventh Circuit specifically stressed that the most important test under Title VII was not why the victim has been harassed, but whether the conditions of his or her work environment has been altered.[81]

In addition, it is significant that the Seventh Circuit considered references to the victim's gender as satisfying the causation requirement.[82] This suggests that the Seventh Circuit considered the term "sex" under Title VII to include both one's biological sex as well as one's gender. In *Doe*, the victim was not harassed because he was a male, but because he failed to meet the appropriate gender stereotype of a male.[83]

The Fifth Circuit approached the issue differently and held in *Garcia v. Elf Atochem North America*,[84] that Title VII addressed only sex discrimination against women.[85] Specifically, the Fifth Circuit found that a male employee's claim that his male supervisor at a Texas chemical plant sexually harassed him were not colorable under Title VII.[86] The Court reasoned that the purpose of Title VII was to prevent discrimination against women only, and therefore did not support claims of same-sex harassment.[87]

B. The Oncale *Decision*

The Supreme Court resolved this circuit split in 1998 when it addressed the issue of same-sex harassment in *Oncale*. *Oncale* involved a male plaintiff, Joseph Oncale, who worked as a roustabout with an all-male eight-man crew on an oil platform in the Gulf of Mexico.[88] During the course of his employment, co-workers subjected Mr. Oncale to se-

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77. *Id.* at 576-77.
78. *Id.* at 577.
79. *Id.* at 580.
80. *See* Hill, *supra* note 13, at 151.
81. *Doe*, 119 F.3d at 578.
82. *Id.* at 577 ("In view of the overt references to H.'s *gender* and the repeated allusions to sexual assault, it would appear unnecessary to require any further proof that H.'s *gender* had something to do with this harassment; the acts speak for themselves in that regard.") (emphasis added).
83. *See id.*
84. 28 F.3d 446 (5th Cir. 1994).
85. *See, e.g.*, *Garcia*, 28 F.3d at 451-52.
86. *Id.* at 451-52.
87. *Id.*
88. *Oncale*, 523 U.S. at 77.

vere and ongoing sexually-related humiliations, including having a bar of soap inserted into his anus while forcibly restrained and threats of rape.[89] The District Court, acting under the guidelines of *Garcia*, found that Mr. Oncale had no claim, and the Fifth Circuit affirmed.[90]

Justice Scalia, writing for the unanimous majority, found that Title VII's prohibition of discrimination "because of sex" applies to both men and women.[91] Scalia admitted that while same-sex harassment cases were "assuredly not the principal evil Congress was concerned with when it enacted Title VII," it was nonetheless within the scope of Title VII to cover "comparable" evils as well.[92] The "critical" issue, according to Scalia, was whether the harassment resulted in discrimination; namely, if "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[93] In other words, Scalia held that the essential determination under a Title VII claim was not whether harassment had occurred, but whether the harassment occurred because of the sex of the victim.[94]

The majority opinion went on to define various "evidentiary routes" of finding an inference of discrimination because of sex. First, it noted that such an inference was "easy to draw" in a typical male-female situation because such circumstances usually involve explicit or implicit proposals of sexual activity and similar proposals would not be made to members of the same sex.[95] Scalia suggested that the same "chain of inference" would be available in same-sex harassment claims if the harasser was a homosexual.[96]

89. *See* Jennifer A. Drobac, *The* Oncale *Opinion: A Pansexual Response*, 30 MCGEORGE L. REV. 1269, 1273 (1999).

90. *Oncale*, 523 U.S. at 77.

91. *Id.* at 78 (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983)).

92. *Id.* at 79.

93. *Id.* at 80 (quoting Harris v. Forklift Sys. Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

94. Despite this new express recognition of causation, the Court nonetheless reiterated the importance of the requirement that the harassment be sufficiently severe or pervasive so as to create an *objectively* hostile work environment – that is, behavior so egregious that it rises well above routine interactions between members of the opposite sex. *Id.* at 81. Scalia noted that, taken together, these two requirements would effectively prevent Title VII from becoming a "general civility code" for the workplace. *Id.* In fact, this emphasis of severity has been echoed in numerous cases involving Title VII discrimination claims. *See, e.g.*, Dick v. Phone Directories Co., 397 F.3d 1256 (10th Cir. 2005); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001); Shepherd v. Slater Steels Corp., 168 F.3d 998 (7th Cir. 1999).

95. *Oncale*, 523 U.S. at 80.

96. *Id.* Scalia also defined two other "evidentiary routes" that can be used to determine that the discrimination was based on sex. He found that a showing that the harasser was motivated by "general hostility" to his or her sex in the same workplace could satisfy the requirement that the discrimination occurred because of sex. *Id.* Finally, one can satisfy this causal element by showing, through direct comparative evidence, that the harasser treated men and women differently in a mixed-sex workplace. *Id.* at 81.

Oncale deviated from previous Title VII rulings in that it emphasized the intent of the harasser in finding causation in a discrimination claim.[97] Under *Oncale*, it was no longer enough to merely find that a hostile work environment that was sexual in nature existed, as the Seventh Circuit had done in *Doe*.[98] In fact, the same day the Court issued its *Oncale* opinion, it vacated the Seventh Circuit's holding in *Doe*.[99] Under the new *Oncale* regime, the hostile environment must be present *because* of the victim's sex; the harassment need not have any sexual overtones as long as it is motivated by the victim's sex.[100]

C. *Circuit Interpretations of* Oncale

Faced with the explicit requirement that a plaintiff bringing a same-sex harassment claim must show his harasser's motivation stemmed from the plaintiff's sex, the Circuits have differed only slightly in interpreting the first evidentiary route of *Oncale's* holding. The Seventh Circuit, in *Shepherd v. Slater Steels Corp.*,[101] found that in order for a plaintiff to demonstrate that she was discriminated against because of his sex, the plaintiff needed to bring evidence that suggested that the harasser was a homosexual.[102] In *Bibby v. Philadelphia Coca Cola Bottling Co.*,[103] the Third Circuit held differently, stating that in order to satisfy the "because of sex" element, the victim need only prove that the harasser sexually desired her.[104] The Third Circuit reasoned that such a showing was more than enough for a reasonable jury to deduce that the sexual discrimination was motivated by the victim's sex.[105] Finally, some circuits have used a combination of both – requiring that the plaintiff show "credible evidence" that the harasser was a homosexual *and* that the harasser sexually desired the plaintiff.[106]

III. *DICK V. PHONE DIRECTORIES CO.*[107]

In *Dick v. Phone Directories Co.*, the Tenth Circuit followed the Third Circuit's lead, finding that a plaintiff in a same-sex hostile work environment harassment claim could satisfy the first evidentiary route articulated in *Oncale v. Sundowner Offshore Services*[108] by demonstrating that her harasser was motivated by sexual desire.[109] This differs from

97. *See* Hill, *supra* note 13, at 159.
98. *See id.* at 160–61.
99. *Id.*
100. *Oncale*, 523 U.S. at 79-80.
101. 168 F.3d 998 (7th Cir. 1998).
102. *Shepherd*, 168 F.3d at 1009.
103. 260 F.3d 257 (3d Cir. 2001).
104. *Bibby*, 260 F.3d at 262.
105. *Id.*
106. *See* LaDay v. Catalyst Tech., Inc., 302 F.3d 474, 478 (5th Cir. 2002).
107. 397 F.3d 1256 (10th Cir. 2005).
108. 523 U.S. 75 (1998).
109. *Dick*, 397 F.3d at 1264.

the Seventh and the Fifth Circuits' holdings that the plaintiff mush furnish "credible evidence" that her harasser is a homosexual.[110]

A. Facts

In *Dick*, the plaintiff, Ms. Diane Dick, worked as a sale representative in the Vernal, Utah office of Defendant Phone Directories Company (PDC).[111] After approximately three years, Ms. Dick's immediate supervisor was fired, and PDC hired Ms. Laura Bills as the Vernal office manager and Ms. Dick's immediate supervisor.[112] Ms. Dick alleged that Ms. Bills and her co-workers began to sexually harass her about a month after Ms. Bills was hired, and that this harassment continued for about six months.[113]

Ms. Dick claimed the harassment was spearheaded by Ms. Bills and three female coworkers.[114] Ms. Dick's allegations of the harassment included episodes where one of her co-workers, Ms. Camie Hinkle, would approach Ms. Bills and another female co-worker from behind and make "sexual gestures with her body toward them."[115] Ms. Hinkle would also place her foot in Ms. Bills' lap and say, "Yo buff b*tch. How does that feel? Yo, buff b*tch. You like that."[116] Ms. Hinkle also hung a replica of a penis from the ceiling and brought a pillow into the office, on which she and other co-workers would kneel when making references to oral sex.[117]

However, the only gestures directed toward Ms. Dick involved two attempts by Ms. Hinkle to pinch Ms. Dick's breasts, but Ms. Dick told her to "get away" from her.[118] In addition, Ms. Hinkle once shoved a replica of a penis in Ms. Dick's face while they were visiting a novelty sex shop over the lunch hour.[119] Other allegations include another co-worker pointing to a collection of stuffed cats on Ms. Dick's desk and saying she had a "pussy;" another questioning Ms. Dick about a sex toy used by lesbians; and the fact that Ms. Dick was repeatedly referred to as "Ivanna Dick" or "Granny Dick" on a regular basis.[120]

At trial, the district court granted summary judgment for PDC regarding Ms. Dick's Title VII hostile work environment same-sex harassment claims because Ms. Dick had failed to prove the harassment was

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110. *See id.* at 1265.
111. *Id.* at 1260.
112. *See id.*
113. *See id.*
114. *Id.*
115. *Id.* at 1261.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*

because of her sex.[121] The district court required Ms. Dick to show that there was both credible evidence that her harassers were homosexual and that they were motivated by sexual desire in order to meet *Oncale's* first evidentiary route.[122] The Tenth Circuit reversed, holding that a showing that Ms. Dick's harassers were motivated by sexual desire was enough to satisfy the causation requirement.[123]

B. Holding

The Tenth Circuit noted all three "evidentiary routes" laid out in *Oncale*, and concluded that Ms. Dick relied on the first route in making her case, which required a showing that her harassers sexually desired her.[124] The court ceded that at "first blush," the first evidentiary route suggests the requirement that the plaintiff demonstrate that her harasser was a homosexual.[125] In eliminating this requirement, the court noted that the first route clearly encompasses conduct that is motivated by sexual desire.[126] It arrived at this conclusion because the *Oncale* Court prefaced its discussion of the other two evidentiary routes by explicitly stating that they do not require a showing of sexual desire.[127] It stated, "[i]t directly follows, then, that the Court considered conduct that was motivated by sexual desire to meet the requirements under the first evidentiary route."[128]

The Tenth Circuit asserted that a plaintiff need not demonstrate that her harasser is a homosexual in order to establish that the harassment was motivated by sexual desire.[129] It reasoned that often, a heterosexual harasser may nonetheless propose sexual activity with a victim in a harassing manner.[130] In such circumstances, there would be no corroborating evidence beyond the harassment itself that the harasser was a homosexual, yet the harassment would still be a result of the harasser's sexual desire.[131] The Court noted that in such situations, proving the sexual orientation of a person could be extremely difficult.[132]

Despite this holding, the question still remained whether Ms. Dick had provided a genuine issue of material fact as to whether her harassers were motivated by sexual desire.[133] The Court initially noted that the district court, in granting summary judgment to PDC, relied heavily on

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121. *Id.* at 1262.
122. *See id.* at 1264.
123. *Id.*
124. *Id.* at 1264; *see also supra* notes 95-96 and accompanying text.
125. *Dick*, 397 F.3d at 1264.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 1265.
130. *Id.*
131. *See id.*
132. *Id.*
133. *Id.*

evidence that Ms. Dick was harassed because her co-workers disliked her.[134] Such evidence included statements from Ms. Dick's own deposition to the effect that she thought her co-workers would just do "things like that" to upset her.[135]

The Tenth Circuit, however, reasoned that while the evidence could support a finding that Ms. Dick was harassed because she was not liked, a reasonable jury could also find that she was harassed because of sexual desire.[136] As evidence, the Court cited the incidents wherein Ms. Hinkle attempted to pinch Ms. Dick's breasts, as well as Ms. Hinkle's same-sex advancements toward Ms. Bills (placing her foot in her lap), which could suggest that any advances made toward Ms. Dick were also a result of sexual desire.[137]

While the Tenth Circuit did find that a question of material fact existed as to whether Ms. Dick was sexually harassed, it was equally quick to point out that the question of whether the harassment was "severe or pervasive enough" to qualify as discrimination under Title VII had yet to be answered.[138] Therefore, the Tenth Circuit reversed the district court's decision that her harassment was not based on sex because the court used the wrong test, and remanded the case for a determination of whether the discrimination was based on sex, as well as whether the harassment was severe enough to create an abusive work environment.[139]

IV. ANALYSIS

It is difficult to find much leeway in *Oncale v. Sundowner Offshore Services*'s[140] holding.[141] Indeed, despite the variations in the different circuit interpretations of the first evidentiary route, they all share the same underlying element, which is a showing that the harasser was motivated by sexual desire.[142] Some circuits, in order to find sexual desire, additionally require that the plaintiff show that the harasser is a homosexual.[143] By avoiding this additional requirement, the Tenth Circuit established in *Dick v. Phone Directories Co.*[144] a more practical and theoretically stable burden of proof than its sister circuits.[145]

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134. *Id.*
135. *Id.*
136. *Id.* at 1266.
137. *Id.*
138. *Id.*
139. *Id.* at 1267.
140. 523 U.S. 75 (1998).
141. *Oncale*, 523 U.S. at 80-81 (outlining the possible ways a same-sex plaintiff could prove discrimination because of sex.).
142. *See id* at 80.
143. *See* Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999); LaDay v. Catalyst Tech. Inc, 302 F.3d 474, 478 (5th Cir. 2002).
144. 397 F.3d 1256 (10th Cir. 2005).
145. *See* Drobac, *supra* note 89, at 1278–81.

This Part will first explain the limitations that *Oncale*'s holding placed on same-sex harassment claims by focusing on the causation element of the harassment claim. It will then illustrate why, within the framework of such limitations, the Tenth Circuit's approach to *Oncale*'s first evidentiary route most adequately meets Title VII's broad goals. This is because first; a showing of the harasser's homosexuality is both difficult to prove and is inconclusive of a finding that the harasser sexually desired the victim. Second, the Tenth Circuit's broad interpretation of the facts set a low standard to satisfy the controversial causation requirement and shifts the focus back to the effects of the harassment rather than its cause. Finally, this Part will suggest a further method to expand the reach of *Oncale's* holding to the greatest number of same-sex claims by implicitly including the social construction of gender within the meaning of "because of sex."

A. The Limitations in "Because of Sex"

On its face *Oncale* purports to expand Title VII by expressly recognizing same-sex harassment claims.[146] However, several authors have argued that *Oncale's* emphasis on causation actually severely limits the scope of sexual hostile work environment claims, both same-sex and otherwise.[147] One example of *Oncale's* restrictive effect on same-sex claims can be seen in the final result of *Oncale* itself.[148] On remand, Joseph Oncale found his case had been rendered toothless because his harassers were not homosexual, and thus were not motivated by sexual desire.[149] The other two evidentiary avenues—a showing of hostility to all men in general and that men and women were treated disparately—were also closed to Mr. Oncale, because he worked on an all-male oil platform.[150]

Jennifer Drobac, in her article *The Oncale Opinion: A Pansexual Response*, went further, looking beyond the final result in *Oncale* and asserting that an entire subsection of sexual harassment claims—not only same-sex harassment claims—exist that are arguably no longer actionable under *Oncale*.[151] She argued that *Oncale* invalidated claims wherein workplace behavior such as hanging nude pictures of women everywhere, was sexual harassment.[152] Such behavior pre-*Oncale* was found to be actionable under Title VII because it created a barrier to women in the workplace by sending a message that women do not belong, and can

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146. *Id.* at 1279.
147. *See* Hill, *supra* note 13, at 160; Drobac, *supra* note 89, at 1270.
148. *See* Hill, *supra* note 13, at 162.
149. *Id.* Note that in the Fifth Circuit, a plaintiff bringing a same-sex harassment suit must furnish "credible evidence" that his harassers are homosexual. *See supra* note 106 and accompanying text.
150. Hill, *supra* note 13, at 162.
151. Drobac, *supra* note 89, at 1277.
152. *Id.*

only belong if they are willing to subvert to the gender stereotype hanging on the wall.[153] Ms. Drobac reasoned that these claims were actionable because it was the behavior itself that discriminated and an inquiry into the motivation of the harasser was unnecessary.[154]

B. Why the Tenth Circuit's Approach Best Satisfies Title VII's Goals

The Supreme Court has held that the two main goals of Title VII are to prevent and remedy employment discrimination in the workplace.[155] In addition, the Court has suggested that Title VII aims to encourage employees to bring sexual harassment complaints to their employer's attention.[156] By making the elements of a sexual harassment claim more difficult to meet in *Oncale*, the Court failed to effectuate these previously articulated goals. However, the Tenth Circuit adopted a broad interpretation of *Oncale's* requirements, and in so doing, was able to better satisfy Title VII's goal of addressing all types of employment discrimination than the circuits who strictly interpreted *Oncale.*

1. The Dangers of Requiring a Showing of Homosexuality

The requirement that the plaintiffs of a same-sex harassment case show that their harassers were homosexual can have unjust results, some of which were emphasized in the final result of *Oncale* itself.[157] Other problems with such a requirement include the possibility that only bona fide homosexuals could ever be found guilty of sexual harassment in same-sex cases.[158] In reality, many self-proclaimed heterosexuals "may find erotic and sexually stimulating the same-sex sexual advances and aggressions [such as those] committed against Joseph Oncale."[159]

A second problem with such a requirement, one that the Tenth Circuit articulated clearly, is that proving homosexuality is often very difficult.[160] In illustrating the problems associated with discerning what exactly constitutes credible evidence of homosexuality, one author cited a case where a woman discovered, after twenty-five years of marriage to a man, that she was a lesbian.[161] Alternatively, people who appear more masculine or feminine than "traditional" gender stereotypes dictate may

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153. *Id.*

154. *Id.* at 1276.

155. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998).

156. *See* Ann M. Henry, Comment, *Employer and Employee Reasonableness Regarding Retaliation Under the* Ellerth/Faragher *Affirmative Defense*, 1999 U. CHI. LEGAL F. 553, 568.

157. *See supra* notes 148-50.

158. Drobac, *supra* note 89, at 1280.

159. *Id.*

160. *Id.* at 1280–81; *see also supra* Part III.B (discussing the Tenth Circuit's justifications in eliminating the requirement that the harasser be homosexual).

161. Drobac, *supra* note 89, at 1280-81.

be more susceptible to erroneously being labeled a homosexual when in fact they are not.[162]

These examples demonstrate that limiting actionable same-sex claims that follow *Oncale's* first evidentiary route to those that can furnish credible evidence that the harasser is a homosexual exclude an array of potential claims. Under such a requirement, it is possible for same-sex harassers who are not homosexual to avoid liability. In addition, the ambiguity of people's sexuality often makes finding credible evidence a very difficult task. By eliminating such a requirement, the Tenth Circuit broadened the scope of same-sex harassment suits that are actionable through *Oncale's* first evidentiary route.

2. A Return to the Seventh Circuit's "Sex Per Se" Standard?

The Court's approach in *Oncale* has been characterized as one that fundamentally rejected the Seventh Circuit's "sex per se" standard, which was articulated in *Doe v. City of Belleville*.[163] While the Seventh Circuit found any sexual conduct satisfied the causal requirement of Title VII's "because of sex" language, the *Oncale* Court stressed a much more stringent causation requirement.[164] The former standard allowed the Seventh Circuit to focus on the harassment itself, rather than the superfluous question of why the harassment was perpetrated in the first place.[165] In addition to rejecting the requirement that the plaintiff offer credible evidence that her harasser is a homosexual, the Tenth Circuit, with its expansive interpretation of the facts in determining whether the harassment was motivated by sexual desire, was able to reconcile the Seventh Circuit's emphasis on the effects of the harassment with the tougher causation requirement in *Oncale*.

Specifically, the Court interpreted seemingly mild incidents as indicative of sexual desire.[166] This includes the "same-sex sexual conduct" that Ms. Bills and Ms. Hinkle engaged in around the workplace.[167] It also includes Ms. Hinkle's attempts to touch Ms. Dick's breasts.[168] It is significant that the Tenth Circuit found harassing behavior that was motivated by sexual desire in acts that merely suggest sexual desire because it mirrors the language used by the Seventh Circuit in *Doe*.[169] Such a

162. *Id.* at 1281.

163. Hill, *supra* note 13, at 151–52; *see also supra* Part II.A (discussing the Seventh Circuit's opinion in *Doe*).

164. *See* Hill, *supra* note 13, at 151–52.

165. *Id.*

166. *See id.*

167. *See id.*

168. *See id.*

169. *Compare* Doe v. City of Belleville, 119 F.3d 563, 580 (7th Cir. 1997) ("Frankly, we find it hard to think of a situation in which someone intentionally grabs another's testicles for reasons entirely unrelated to that person's gender.") *with Dick*, 397 F.3d at 1266 ("Ms. Hinkle touched, on more than one occasion, one of the most intimate parts of Ms. Dick's body–an act seldom carried out without some sort of sexual motivation.").

holding makes meeting *Oncale*'s causal requirement of the first evidentiary route more plausible in the Tenth Circuit than in other circuits.

This intimates that in the Tenth Circuit, a similar "sex per se" standard as the now-defunct one the Seventh Circuit employed in *Doe* is present. Granted, there are several differences. The most notable is that under *Oncale*, it is necessary to demonstrate the harasser's motivation by sexual desire, and a mere showing of sexually-related conduct is not enough to satisfy Title VII.[170] However, the Tenth Circuit reconciled this new requirement with the Seventh Circuit's broad causal standard by finding that *any* sexual conduct[171] could be indicative of harassment motivated by sexual desire. Instead of finding conduct that is sexual in nature satisfies the causal requirement, the Tenth Circuit found that any conduct indicative of sexual desire satisfies the causal requirement.[172]

The low Tenth Circuit standard for satisfying the causal requirement allows for more focus on effects of the harassment itself. Thus, a court can take the time to examine thoroughly a much more pertinent question: how severe and pervasive is the harassment? This is a more desirable outcome because the material question becomes one of whether harassment occurred in the first place, not why the harassment occurred. This is consistent with a main Title VII goal: avoiding harm to protected classes in the workplace.[173] By focusing on the effects of the behavior in question rather than the reason why it is happening, courts are more able to address any harm that discriminating behavior may inflict.

C. Beyond Sex

This article has argued that the Tenth Circuit interpreted *Oncale's* language in an expansive way.[174] However, it is possible to further expand *Oncale* to reach the greatest number of harassment victims.[175] Today, there remain many sex discrimination claims that are not directly causally linked to the victim's biological sex—and are therefore not actionable under Title VII—but still result in an undeniably hostile environment. Often these people are harassed because of their perceived gender role or their sexual orientation.[176]

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170. *See Oncale*, 523 U.S. at 80.

171. "Sexual conduct," as used by the Tenth Circuit in *Dick*, refers to conduct that is suggestive of sexual intercourse. *See Dick*, 397 F.3d at 1266 ("The record contains sufficient evidence from which a jury could find that her harassers' conduct was motivated by sexual desire. . . . [For example,] Ms. Hinkle and Ms. Bills engaged in same-sex sexual conduct with other people in the workplace . . . [and] Ms. Hinkle allegedly rubbed Ms. Bills' crotch while asking Ms. Bills if she liked it . . . .").

172. *Id.*

173. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999) ("The statute's 'primary objective' is 'a prophylactic one'; it aims, chiefly, 'not to provide redress but to avoid harm.'").

174. *See supra* Part III.B (discussing the Tenth Circuit's analysis in *Dick*).

175. *See supra* Part IV.A (discussing various writers' criticisms of the *Oncale* opinion).

176. *See* Drobac, *supra* note 89, at 1280-84.

This remainder of this article will argue that *Oncale's* decision to define the word "sex" to only include one's biological sex and not one's gender has resulted in limiting potential sexual harassment claims. It will demonstrate how this narrow definition conflicts with the underlying arguments for the sexual harassment doctrine as well as the Court's previous sexual harassment jurisprudence. Finally, it will suggest that a broader interpretation of "sex" may create some actionable claims which involve discrimination based on one's sexual orientation.

One of the strongest criticisms of *Oncale* stems from its narrow interpretation of the word sex.[177] *Oncale*'s narrow interpretation of what constitutes discrimination based on sex implies that the term "sex" refers only to biological sex.[178] The inherent danger in such a holding is that while the Supreme Court may not choose to recognize discrimination because of one's gender as sex discrimination, it is nonetheless true that our culture has been conflating one's biological sex to one's gendered behavior for centuries.[179] Same-sex harassment often occurs because the harasser takes issue with the victim's failure to meet his or her traditional gender role, and not his or her biological sex in the strictest sense.[180]

1. Conflict with Historical Arguments

By implicitly assuming in *Oncale* that all men are masculine and all women are feminine, Justice Scalia effectively eliminated harassment claims by effeminate men or masculine women.[181] Such a narrow interpretation is at odds with both of the underlying arguments that originally supported the recognition of a hostile environment sexual harassment claim. First, feminists aimed to eliminate *gender-based* stereotyping.[182] Feminists understood differences existed between men and women on a physiological level, but resented (and continue to resent) the assumption that such physical differences automatically resigned women to inferior societal roles.[183] The sex of women was never the issue, it was the gender roles that they were expected to fill because of their sex.[184] By declaring that the harasser must have issue with the actual sex of the victim,

177. *See id.* at 1269.

178. *See id.* (arguing that the *Oncale* Court never used the word "gender," whereas in previous opinions, it used "sex" and "gender" interchangeably); *see also Oncale*, 523 U.S. at 80 ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.") (quoting Harris v. Forklift Sys., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). This suggests that the *Oncale* court believes that the only pertinent motivation for harassment is one's biological sex.

179. *See* Drobac, *supra* note 89, at 1281.

180. *See id*, at 1281-82.

181. *Id.*

182. *See* Hill, *supra* note 13, at 140.

183. *See id.*

184. *See id.*

the Court fails to address motivations that might stem from disgust at a victim's failure to meet traditional gender roles.[185]

Second, *Oncale* relied on an analogy to racial harassment in finding that same-sex sexual harassment was viable under Title VII.[186] In condoning the use of this racial analogy in the context of same-sex sexual harassment, Justice Scalia wrote that, "in the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race."[187] As Scalia himself recognized, it is entirely possible that a racial harasser may use racial epithets against people of several races, and still be guilty of racial discrimination.[188] In light of this reliance on such an analogy, it is illogical to claim that a male sexual harasser who harasses men based on their gender is not actionable under Title VII.[189] In such a situation, the environment, such as one inundated by racial epithets, is still hostile even though it is more likely the harasser was motivated by the victim's gender rather than his or her sex.

2. Conflict with Precedent

Not only does the narrow interpretation of sex in *Oncale* fail as a policy matter, it seriously conflicts with another of the Supreme Court's own cases, *Price Waterhouse v. Hopkins*.[190] In *Price Waterhouse*, the plaintiff Ann Hopkins was denied a partnership in an accounting firm based in part on her failure to act "feminine."[191] The Supreme Court, in an opinion written by Justice Brennan, found that her claim was actionable, because she was able to fulfill the "because of sex" requirement by showing that her employer relied on gender-based considerations in coming to its decision regarding her promotion.[192] Justice Brennan wrote, "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute."[193] This strongly suggests that Justice Brennan thought that gender considerations were included in the word "sex' in Title VII.

In addition to embracing gender in the definition of sex, the *Price Waterhouse* majority specifically decried the need for the plaintiff to

185. *See* Drobac, *supra* note 89, at 1281-82. *See also* Franke, *supra* note 21, at 34-35. Ms. Franke, one of the leading feminist scholars today, has argued that in addition to reinforcing the "gender hierarchy" in the workplace, sexual harassment has a dual aim: to produce masculine (hetero)sexual men, and feminine (hetero)sexual women. *Id.* Therefore, according to Ms. Franke's paradigm, individuals of either gender who refuse or fail to conform to stereotypes can be victims of sexual harassment. *Id.*

186. *Oncale*, 523 U.S. at 78-79.

187. *Id.* at 78.

188. *See* Drobac, *supra* note 89, at 1279.

189. *Id.*

190. 490 U.S. 228 (1989).

191. *Price Waterhouse*, 490 U.S. at 235.

192. *Id.* at 241–42.

193. *Id.* at 239.

identify a "precise causal role" in the discriminatory action.[194] The Court supported its broad definition of causation by noting that Congress rejected an amendment that would prohibit discrimination "*solely* because of" sex.[195] This conflicts with *Oncale's* explicit emphasis on causation.

3. Discrimination Based on Sexual Orientation?

Courts across the country agree that discriminating based on one's sexual orientation is "a noxious practice, deserving of censure and opprobrium," and is "morally reprehensible."[196] However, Congress has repeatedly rejected attempts to amend current legislation to include a cause of action for discrimination based on sexual orientation.[197] A legislative solution may be difficult to attain at this point in time.

However, many of the claims that legislation forbidding discrimination based on sexual orientation would address can potentially become actionable through a broad interpretation of the term sex. This is because at least in part, gay men and women are discriminated against because they fail to meet the gender stereotypes that their sex requires them to meet.[198] Although such a solution does not address the entire spectrum of discrimination based on sexual orientation, it potentially provides redress to gay men and women who are harassed largely because they fail to act in a sufficiently feminine or masculine manner.

CONCLUSION

Oncale v. Sundowner Offshore Services[199] limits the ability of many to bring same-sex hostile work environment suits although it purported to expand Title VII. However, under the Tenth Circuit's broad interpretation of the first evidentiary route in *Dick v. Phone Directories Co.*,[200] the same-sex plaintiff has a better chance of successfully combating workplace sexual harassment. Despite this step forward, there remain other methods for effectively addressing all sexual discrimination in the workplace, but it would require the Supreme Court to take a more expansive approach to the term "sex" under Title VII than it articulated in *Oncale.*

Katherine Roush[*]

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194. *Id.* at 241.
195. *Id.* (internal quotations omitted).
196. Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001) (quoting Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) and Higgins v. New Balance Athletic Shoe Inc., 194 F.3d 252, 259 (1st Cir. 1999)) (internal quotations omitted).
197. *See, e.g.*, *Bibby*, 260 F.3d at 265.
198. *See* Franke, *supra* note 21, at 35.
199. 523 U.S. 75 (1998).
200. 397 F.3d 1256 (10th Cir. 2005).

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ERISA'S CASUALTIES: FORMER EMPLOYEES DUPED INTO EARLY RETIREMENT—WITH FRIENDS LIKE ERISA WHO NEEDS ENEMIES?

INTRODUCTION

The Employee Retirement Income Security Act of 1974 ("ERISA")[1] is a federal statutory scheme that regulates most voluntary group pension and health plans in private industry.[2] One of the main purposes of ERISA is to "promote the interests of employees and their beneficiaries in employment benefit plans"[3] and protect against private sector mismanagement of employee benefit plans.[4]

However, ERISA provides only limited remedies compared to previously available state law remedies.[5] Essentially, ERISA permits the recovery of benefits and possible attorney fees, but does not allow for extra contractual or punitive damages, and precludes a trial by jury.[6] As construed, this comprehensive scheme, enacted for the benefit of employees, has turned out to shield employers and insurers more than those it was designed to protect.[7] In one commentator's opinion, Congress must have been "asleep at the switch" when it stated that "ERISA's predominant purpose is to be the protection of the rights of beneficiaries of medical and retirement plans while simultaneously eliminating traditional remedies."[8]

This article discusses the split among eight circuits as to the treatment of a particular class of ERISA claimants who sometimes lack even the limited remedies available under ERISA – former employees who

1. 29 U.S.C. §§ 1001–1461 (2000).

2. U.S. Dep't of Labor, Health Plans & Benefits, Employee Retirement Income Security Act – ERISA, http://www.dol.gov/dol/topic/health-plans/erisa.htm (last visited Jan. 18, 2006); ERISA covers both employee pension plans and employee welfare plans. 29 U.S.C. § 1002(1)–(3) (2000).

3. Ryan W. Greene, *The Evolving Standard for ERISA Preemption of State Law Under Recent United States Supreme Court Precedent*, FIND LAW, July 1, 1999, http://library.findlaw.com/1999/Jul/1/126249.html. More than 85% of American workers have private health insurance plans that are affected by ERISA. *Id.*

4. *Id.* (noting that in 1963 when the Studebaker Automotive plant closed its doors, it left over 10,000 employees without pension benefits because the plan was inadequately funded).

5. Hon. William M. Acker, Jr., *Can the Courts Rescue ERISA?*, 29 CUMB. L. REV. 285, 287, 295 (1998) (noting that extra-contractual damages and jury trials are unavailable under ERISA); *see* Drinkwater v. Metro. Life Ins. Co., 846 F.2d 821, 825 (1st Cir. 1988); Blake v. Unionmutual Stock Life Ins. Co. of Am., 906 F.2d 1525, 1526 (11th Cir. 1990).

6. Acker, *supra* note 5, at 295 (noting that since Congress did not mention whether disputes were to be resolved by a jury or judge, this left the courts to decide whether jury trials are appropriate in ERISA actions, the courts have determined that they are not available); *see, e.g.*, Adams v. Cyprus Amax Minerals Co., 149 F.3d 1156, 1158 (10th Cir. 1998).

7. Acker, *supra* note 5, at 287 (noting that the "real beneficiaries of ERISA, if any, turn out to be the fiduciaries, the administrators, the employers and the insurers.").

8. *Id.* at 295.

claim that their termination was fraudulently induced to deprive them of more valuable benefits than had they remained employed. Five circuits avoid the prospect of a remediless wrong by allowing the "but for" test for standing under ERISA,[9] while the other three preclude defrauded retirees from seeking redress based on claims of fraudulent inducement into early retirement with inferior benefits.[10]

Part I of this article offers a general background as to the purpose of ERISA and an interpretation of its two forms of preemption: conflict and complete. Part II discusses the split among the circuits as to the issue of standing for former employees to sue under ERISA, and how the Tenth Circuit has sided in its recent decision of *Felix v. Lucent Technologies, Inc.*[11] Part III addresses the Tenth Circuit's *Felix* decision and its reasoning for siding with the minority view. Part IV addresses the lack of remedies for former employees and suggests what Congress and the Supreme Court might do to make ERISA more true to its original purpose. This article concludes by underscoring the particular unfairness to former employees and no doubt unintended benefits to employers who mistreat their workers.

I. GENERAL BACKGROUND

"Congress enacted ERISA to 'protect . . . the interests of participants in employee benefit plans and their beneficiaries' by setting out substantive regulatory requirements for employee benefit plans and 'to provide for appropriate remedies, sanctions, and ready access to the Federal courts.'"[12] The central purpose of ERISA is to provide a "uniform regulatory" scheme covering employee pension and welfare plans.[13] Toward that end, ERISA includes expansive conflict preemption provisions "to ensure that employee benefit plan regulation would be 'exclusively a federal concern.'"[14] As construed, ERISA provides the sole remedy for those with standing to sue under it.[15] ERISA involves two preemption provisions[16] and the distinction between the concept of com-

9. Felix v. Lucent Tech. Inc., 387 F.3d 1146, 1159 (10th Cir. 2004) (stating the First, Second, Fifth, Sixth, and Eighth Circuits allow former employees to gain standing to sue under ERISA while using a "but for" test for standing); *see also* Adamson v. Armco Inc., 44 F.3d 650, 654–55 (8th Cir. 1995); Swinney v. Gen. Motors Corp., 46 F.3d 512, 518–19 (6th Cir. 1995); Mullins v. Pfizer, Inc., 23 F.3d 663, 667–68 (2d Cir. 1994); Vartanian v. Monsanto Co., 14 F.3d 697, 702–03 (1st Cir. 1994); Christopher v. Mobil Oil Corp., 950 F.2d 1209, 1220–21 (5th Cir. 1992).

10. *Felix*, 387 F.3d at 1159; *see also* Raymond v. Mobil Oil Corp., 983 F.2d 1528, 1535 (10th Cir. 1993); Sanson v. Gen. Motors Corp., 966 F.2d 618, 619 (11th Cir. 1992); Mitchell v. Mobil Oil Corp., 896 F.2d 463, 466 (10th Cir. 1990); Santon v. Gulf Oil Corp., 792 F.2d 432, 433 (4th Cir. 1986).

11. 387 F.3d 1146 (10th Cir. 2005).

12. Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004) (citing 29 U.S.C. § 1001(b) (2000)).

13. *Aetna Health*, 542 U.S. at 208.

14. *Id.* (citing Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981)).

15. *Id.* at 208–209.

16. Felix v. Lucent Tech. Inc., 387 F.3d 1146, 1153-54 (10th Cir. 2004).

plete preemption under Section 502(a) and Section 514's "conflict preemption" is critical to understanding courts' application of the preemption doctrine.[17]

Judicial construction of available remedies has resulted in very limited remedies for claims subject to ERISA. While many courts have recognized this injustice, they profess helplessness to do anything about it.[18] Contrary to ERISA's original purpose, it has become an "impenetrable shield[] that insulate[s] plan sponsors from any meaningful liability for negligent or malfeasant acts committed against plan beneficiaries."[19] Ironically, the courts that interpret this statute are exempt from ERISA.[20]

Judges have been decrying the restriction of available remedies and lack of deterrents to misbehaving insurers and employers, but they do no more than appeal to Congress to restrain the law.[21] In the Ninth Circuit's *Olson v. General Dynamics Corp.*,[22] Judge Reinhardt, recognizing that ERISA preempted plaintiff's state law claims, found the plaintiff's lack of a federal or state remedy unfortunate.[23] Judge Reinhardt noted that prior to the passage of ERISA, the plaintiff would have been entitled to state remedies for his fraud and misrepresentation claims; unfortunately, his lack of remedy is not unique.[24]

More recently, in *Aetna Health Inc. v. Davila*,[25] the United States Supreme Court held that the respondent's state claims fell within the scope of Section 502(a) of ERISA, and therefore were completely preempted, justifying removal to federal court.[26] Justice Ginsburg notes with concern that "virtually all state remedies are preempted," and since very few federal remedies are available, a "regulatory vacuum exists."[27] However, Congress has taken no action.

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17. *Id.*

18. *See* Olson v. Gen. Dynamics Corp., 960 F.2d 1418, 1423–25 (9th Cir. 1991) (Reinhardt, J., concurring); *Aetna Health*, 542 U.S. at 222 (Ginsburg & Breyer, JJ., concurring).

19. Difelice v. Aetna U.S. Healthcare, 346 F.3d 442, 456 (3d Cir. 2003) (Becker, J., concurring).

20. "The provisions of this [title] [ERISA] shall not apply to any employee benefit plan if . . . a governmental plan . . . or a church plan." 29 U.S.C. § 1003(b)(1)–(2) (2000); *see* 29 U.S.C. § 1002(32)–(33) (2000).

21. *See Sanson* 966 F.2d at 623 (Birch, J., dissenting); *Difelice*, 346 F.3d at 452; *Aetna Health*, 542 U.S. at 222.

22. 960 F.2d 1418 (9th Cir. 1991).

23. *Olson*, 960 F.2d at 1423.

24. *Id.*

25. 542 U.S. 200 (2004).

26. *Aetna Health*, 542 U.S. at 222.

27. *Id.*

A. Section 514[28] Conflict Preemption Under ERISA

Section 514 provides in pertinent part that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan covered by ERISA."[29] A State law relates to an ERISA plan "if it has a connection with or reference to such a plan"[30] and is therefore preempted unless it falls within an exception of Section 514.[31] This broadly-worded provision has been repeatedly observed as "clearly expansive" by the Supreme Court,[32] stretching and contracting like a rubber band.[33] However, the Court has also simultaneously recognized that the "term 'relate to' cannot be . . . 'extend[ed] to the furthest stretch of its indeterminacy' or else 'for all practical purposes preemption will never run its course.'"[34] Essentially, preemption means "that once state remedies are eliminated, ERISA provides the only remedy, which is either a pallid remedy or no remedy."[35]

Judge Becker of the Third Circuit has taken notice of the mischief that ERISA's broad preemption brings, noting that:

> Lower courts have struggled to maintain some semblance of equity notwithstanding the enormous breadth of the preemption test . . . the price of all this has been descent into a Serbonian bog wherein judges are forced to don logical blinders and split the linguistic atom to decide even the most routine cases.[36]

ERISA remedies pale in comparison to state law claims that are now preempted for relating to a plan.[37] Courts, in determining whether a State law is related to ERISA, and is thus preempted, look to the objectives of ERISA and the nature and effect the state law has on the ERISA plans.[38]

This type of federal preemption under Section 514 is a defense and cannot by itself establish federal question jurisdiction. Thus, it is not sufficient to authorize removal to the federal court system.[39] On the other

28. 29 U.S.C. § 1144 (2000).
29. Egelhoff v. Egelhoff, 532 U.S. 141, 141 (2001).
30. *Id.* (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983)).
31. Some courts have recognized an exception to Section 514 ERISA conflict preemption occurs when the "state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability." *Felix*, 387 F.3d at 1154.
32. *Id.* at 1153.
33. Acker, *supra* note 5, at 289 (noting that "[a] survey of cases indicates that the words 'relate to' stretch and contract like a rubber band").
34. *Felix,* 387 F.3d at 1153 (citing *Eglehoff*, 532 U.S. at 146).
35. Acker, *supra* note 5, at 287 (calling ERISA preemption "super duper preemption" because ERISA affords plaintiffs either pallid remedies or no remedies).
36. *Difelice*, 346 F.3d at 454. "A Serbonian bog is a mess from which there is no way of extricating oneself." *Id.* at 454 n.1.
37. Jayne E. Zanglein, *Closing the Gap: Safeguarding Participants' Rights by Expanding the Federal Common Law of ERISA*, 72 WASH. U. L.Q. 671, 671 (1994).
38. *Egelhoff*, 532 U.S. at 147.
39. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987).

hand, Section 502(a),[40] as discussed below, provides a civil enforcement cause of action that completely preempts a state cause of action seeking the same relief.[41] Thus, a claim falling within the scope of 502(a) presents a federal question providing grounds for removal.[42] If the plaintiff moves to remand, the defendant will only need to show a substantial federal claim.[43]

B. Section 502(a) Complete Preemption under ERISA

The preemptive reach of ERISA's civil enforcement provision, Section 502(a), is powerful.[44] When state laws are preempted under Section 514, remedies may be available under Section 502(a).[45] ERISA provides a federal cause of action under Section 502(a) which contains six subsections that determine who can bring a civil action.[46] In *Metropolitan Life v. Taylor*,[47] the Court held that ERISA Section 502(a) converts state causes of action into federal claims "for the purposes of determining the propriety of removal."[48] ERISA's civil enforcement mechanism has "extraordinary preemptive power" that "converts an ordinary state common law complaint into one stating a federal claim as an exception to the well-pleaded complaint rule."[49] Claims falling within the scope of ERISA Section 502(a) are thus removable to federal court.[50]

Defendants (employers, administrators, or fiduciaries) want ERISA to govern the claims against them because of ERISA's severely limited or absent remedies.[51] However, the plaintiff-employee would rather proceed under a state law theory that "provides what ERISA was supposed to provide."[52] When complete preemption does not apply, federal district

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40. 29 U.S.C. § 1132(a) (2000).

41. Giles v. Nylcare Health Plans, Inc., 172 F.3d 332, 336–37 (5th Cir. 1999). Section 502(a) provides a cause of action to any plan beneficiary or participant to recover benefits due under the terms of the pension plan, to enforce rights under the terms of the plan, or to clarify rights to future benefits under the terms of the plan. 29 U.S.C. § 1132(a) (2000).

42. *Giles*, 172 F.3d at 337. The Court further expanded the doctrine of complete preemption in *Aetna Health Inc., v. Davila*, stating "where no legal duty (state or federal) independent of ERISA or the plan terms is violated, then the suit falls 'within the scope of' ERISA § 502(a)(1)(B) . . . then the individual's cause of action is completely preempted by ERISA § 502(a)(1)(B)." *Felix*, 387 F.3d at 1155 (citing Aetna Health Inc. v. Davila, 542 U.S. 200 (2004)).

43. *Giles*, 172 F.3d at 337.

44. Section 502(a) provides a cause of action to any plan beneficiary or participant to recover benefits due under the terms of the pension plan, to enforce rights under the terms of the plan, or to clarify rights to future benefits under the terms of the plan. 29 U.S.C. § 1132(a) (2000).

45. Remedies available under ERISA are liquidated damages, benefits owed to the participant under the terms of the plan, enforcement of rights under the plan, to clarify future benefits, equitable relief, and to enforce provisions of the plan. 29 U.S.C. § 1132(a).

46. 29 U.S.C. § 1132(a).

47. 481 U.S. 58 (1987).

48. *Aetna Health*, 542 U.S. at 201; *see also* Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560 (1968).

49. *Aetna Health*, 542 U.S. at 209 (quoting *Metro. Life*, 481 U.S. at 65–66).

50. *Metro. Life*, 481 U.S. at 66; *Giles*, 172 F.3d at 337.

51. Acker, *supra* note 5, at 287.

52. *Id.*

courts are without removal jurisdiction.[53] Therefore, they cannot resolve any dispute regarding conflict preemption, and must remand to state court, where the preemption issue can be determined.[54] It is likely the court will dismiss state law claims under Section 514. In a diversity action, the federal court could determine that there was no complete preemption under Section 502(a), and then also dismiss state law claims as preempted by Section 514.[55]

II. THE CIRCUIT SPLIT ON FORMER EMPLOYEE ERISA STANDING

The split among the circuits appears to rest principally upon their interpretations of the Supreme Court's discussion of who is a "participant" with standing to sue under ERISA in *Firestone Tire & Rubber Co. v. Birch.*[56] A plaintiff must be within the statutory definition of "participant" to fall within the scope of Section 502(a)(1) – (3), in order to bring a suit under ERISA.[57] Former employees must qualify as participants to file suit for fraudulent inducement into early retirement, in hopes of restoring the benefits they would have been entitled to.[58] In *Firestone,* the Court observed that a former employee can only gain participant standing if they have a "reasonable expectation of returning to covered employment or who have a colorable claim to vested benefits . . . ."[59]

The majority of circuits have interpreted *Firestone* broadly, not as the only way for a plaintiff to have standing to sue, but as one avenue.[60] Looking at congressional intent and the original purposes of ERISA, the majority of circuits feel that a grave injustice would be served if *Firestone* were narrowly interpreted as the only way a plaintiff could be a participant.[61] In contrast, the minority circuits narrowly interpret *Firestone* to hold that participant status is both a question of subject matter jurisdiction and standing, finding that Section 502 gives the court jurisdiction only if plaintiff's standing as participant is as defined in *Firestone.*[62]

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53. *Felix*, 387 F.3d at 1158.

54. *Id.*; *see also Metro. Life*, 481 U.S. at 63 (noting that a state cause of action that is preempted by ERISA and within the scope of 502(a) of ERISA might fall within the *Avco* rule); Warner v. Ford Motor Co., 46 F.3d 531, 534 (6th Cir. 1995) (holding that Section 514 does not create a federal cause of action itself); *Giles*, 172 F.3d at 336 (holding that state claims that are not within the scope of 502(a), even if preempted are not removable).

55. 28 U.S.C. § 1332 (2000).

56. 489 U.S. 101 (1989).

57. *See Firestone*, 489 U.S. at 117–18; *see* 29 U.S.C. §§ 1132(a)(1)–(6) (2000).

58. *Felix*, 387 F.3d at 1158.

59. *Firestone*, 489 U.S. at 117 (internal quotes omitted) (quoting Saladino v. I.L.G.W.U. Nat'l Ret. Fund, 754 F.2d 473, 476 (2d Cir. 1985)).

60. *See, e.g.*, Swinney v. Gen. Motors Corp., 46 F.3d 512, 518 (6th Cir. 1995).

61. *See Swinney*, 46 F.3d at 518; Christopher v. Mobil Oil Corp., 950 F.2d 1209, 1221 (5th Cir. 1992).

62. *See Felix*, 387 F.3d at 1160 n. 14 (holding that the "requirement of [section] 502 is 'both a standing and a subject matter jurisdictional requirement.'") (citing Santon v. Gulf Oil Corp., 792 F.2d 432, 434 (4th Cir. 1986)); *see also* Miller v. Rite Aid Corp., 334 F.3d 335, 340 (3d Cir. 2003).

As former employees who are voluntarily terminated from their employment based on their employer's and plan administrator's misrepresentations, they cannot achieve participant standing under ERISA to file a claim.[63] Since the plaintiffs are no longer employees, they cannot recover for benefits owed to them or enforce their rights under the plan, nor do they have any right to future benefits.[64] Therefore, to recover benefits that they would have received had they not been fraudulently induced into retirement, they must achieve participant status via another avenue.[65] A "but for" test for standing has been accepted by the majority of circuits.[66] This test is based upon the theory that "but for" the defendant's wrongful actions, the plaintiffs would have still been participants under the plan.[67] However, circuits are split over whether plaintiffs have standing to bring a cause of action under ERISA by making a "but for" claim.[68]

A. The Majority View: Fraud Confers "But For" Test for Standing Under ERISA

Five circuits now permit former employees to sue under ERISA, if plaintiffs can make a "but for" claim for standing through allegations of premature termination of employment induced by employer fraud.[69]

In *Christopher v. Mobil Oil Corp.*,[70] the plaintiff was unable to achieve standing to sue because he could not show a colorable claim for vested benefits or a reasonable expectation of returning to covered employment.[71] The Fifth Circuit felt that *Firestone* could not "reduce the standing question to a straightforward formula applicable in all cases."[72] It added, "[this] seems particularly so in cases involving allegations of discharge."[73] Rather, the court observed, "it would seem more logical to say that but for the employer's conduct alleged to be in violation of ERISA, the employee would be a current employee with a reasonable expectation of receiving benefits . . . ."[74]

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63. *Felix*, 387 F.3d at 1159.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* (noting the Fourth, Eleventh, and Tenth Circuits are in the minority and have rejected the "but for" exception in determining participant standing).
69. *Felix*, 387 F.3d at 1159 (noting that the "First, Second, Fifth, Sixth, and Eight Circuits have held that former employees may sue under ERISA if they make a 'but for' claim of this sort").
70. 950 F.2d 1209 (5th Cir. 1992) (dealing with the issue of former employees who claimed deprivation of benefits through fraudulent inducement to retire).
71. Christopher v. Mobil Oil Corp., 950 F.2d 1209, 1221 (5th Cir. 1992); *see Firestone*, 489 U.S. at 101.
72. *Christopher*, 950 F.2d at 1221.
73. *Id.*
74. *Id.*

In *Vartanian v. Monsanto Co.*,[75] the First Circuit held that former employees have standing to sue under ERISA if they can show that "but for" their employer's wrongful conduct, they would have been a participant for purposes of standing.[76] The *Vartanian* court held that an employee who was denied a reasonable opportunity to make an informed decision about when to retire, as a result of his supervisor's misrepresentations and the fact that he received benefits, could not "be used to deprive him of 'participant' status . . . ."[77] Determining that the former employee had standing to sue under ERISA, the First Circuit notes that the Supreme Court's discussion of *Firestone* states that the "term 'participant' was developed outside of the 'standing' context and therefore, does not mandate a finding" that one who is not a participant because no longer employed, has no standing to seek relief.[78]

Examining the legislative history of ERISA, the *Vartanian* court noted Congress' intent that the federal courts would "construe the Act's jurisdictional requirements broadly in order to facilitate enforcement of its remedial provisions . . . ."[79] To find that the plaintiff lacked standing to sue under ERISA would "frustrate Congress's intention to remove jurisdictional and procedural obstacles to such claims," and deprive an employee of standing "even where the employer's breach of fiduciary duty takes the form of misrepresentations that induced the employee to retire and receive the payment of benefits."[80]

The Second Circuit, in *Mullins v. Pfizer, Inc.*,[81] following the view of the First and Fifth Circuits, adopted this same exception in the case of former employees.[82] The court held that it was "more consistent with legislative intent to afford standing in the present context[,]" and furthermore, that to "hold otherwise would have the anomalous effect of allowing a fiduciary 'through its own malfeasance to defeat the employee's standing.'"[83]

75. 14 F.3d 697 (1st Cir. 1994).

76. *Vartanian*, 14 F.3d at 702.

77. *Id.* at 703.

78. *Id.* at 701 (citing *Christopher*, 950 F.2d at 1221 ("*Firestone* . . . [cannot] be read to reduce the standing question to a straightforward formula applicable in all cases.")).

79. *Id.* at 702 (noting that "[t]he enforcement provisions have been designed specifically to provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations of the [Act].") (citing S. REP. NO. 93-127, at 3 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4871).

80. *Id.* (noting that a holding like this "would enable an employer to defeat the employee's rights to sue for a breach of fiduciary duty by keeping his breach a well guarded secret until the employee receives his benefits or, by distributing a lump sum . . . before the employee can file suit.").

81. 23 F.3d 663 (2d Cir. 1994).

82. *Mullins*, 23 F.3d at 668. The former employee in *Mullins* voluntarily retired because of material misrepresentations by his plan administrator. *Id.* at 665.

83. *Id.* at 668 (agreeing with the First Circuit in its determination that the "basic standing issue is whether the plaintiff is 'within the zone of interests ERISA was intended to protect[]'").

The Eighth Circuit joined the majority view in *Adamson v. Armco, Inc.*[84] The Eighth Circuit recognized the plaintiff's standing when "'but for the employer's conduct alleged to be in violation of ERISA,' the employee or former employee would be a plan participant."[85]

In *Swinney v. General Motors, Corp.*,[86] the Sixth Circuit held that "so long as a former employee would have been in a class eligible to become a member of the plan but for the fiduciary's alleged breach of duty, he 'may become eligible' for benefits under the plan and is therefore a 'participant' . . . for the purposes of standing."[87]

Acknowledging the Tenth and Fourth Circuit holdings that a "person who terminates his right to belong to a plan cannot be a 'participant' in the plan,"[88] the *Swinney* court adhered to the proposition that ERISA was not intended to allow a "fiduciary to circumvent his ERISA-imposed fiduciary duty in this manner."[89] The *Swinney* court also found that in rejecting the "but for" tests for standing, the minority courts interpret the Supreme Court's *Firestone* decision "too strictly,"[90] observing that while *Firestone*, although it provides guidance, "is not necessarily dispositive."[91]

B. The Minority View Rejects "But For" Test for Standing

The Tenth Circuit is illustrative of the minority view, rejecting the "but for" claim and requiring former employees to have either an expectation of returning to covered employment, or a "colorable claim to vested benefits" to achieve participant status under the statute.[92] The Tenth Circuit's reasoning in its earlier decisions of *Mitchell v. Mobil Oil Corp.*[93] and *Raymond v. Mobil Oil Corp.*[94] foretold its rejection of the "but for" exception. The court found the early retiree in *Mitchell* without participant standing under ERISA Section 502(a), reversing the jury's finding of fraud and damages awarded.[95] The court held that the definition of "participant" does not include former employees who received a

84. 44 F.3d 650, 654–55 (8th Cir. 1995) (adopting this exception in Howe v. Varity Corp., 36 F.3d 746 (8th Cir. 1994)).

85. *Adamson*, 44 F.3d at 654.

86. 46 F.3d 512 (6th Cir. 1995).

87. *Swinney*, 46 F.3d at 519.

88. *Id.* at 518 (recognizing that without this exception a "fiduciary could defeat an employee's standing to bring an ERISA action by duping him into giving up his right to participate in the plan").

89. *Id.* at 519.

90. *Id.* (reemphasizing that *Firestone* should not be interpreted to "reduce the standing question to a straightforward formula").

91. *Id.* at 518.

92. *Felix*, 387 F.3d at 1159.

93. 896 F.2d 463 (10th Cir. 1990).

94. 983 F.2d 1528 (10th Cir. 1993).

95. *Mitchell*, 896 F.2d at 474. The Tenth Circuit set aside a jury verdict of "$405,962.76 in back-pay damages; $86,000 as compensation for the 20% reduction in Mr. Mitchell's lump-sum benefit; and, $96,740.82 in front-pay damages." *Id.* at 466.

lump-sum payment of all that had vested at the time they left covered employment.[96]

While *Mitchell* did not specifically reject a "but for" test, it rejected a very similar argument—"'that Mobil's violation of ERISA entitled [him] to additional benefits which he would have received had Mobil's [misrepresentations regarding the] amendments to the Plan not compelled him to retire [early].'"[97] The *Mitchell* court determined that, notwithstanding the fraudulent conduct of the defendant, the plaintiff lacked standing to sue under ERISA because he did not have a colorable claim to vested benefits, and had neither sought reinstatement nor had expectations of returning to covered employment.[98]

Following *Mitchell*, the *Raymond* court determined that Raymond had no claim for vested benefits because he had received all plan benefits to which he was entitled at the time of retirement. Therefore, Raymond lacked standing to sue under ERISA, regardless of the wrongdoings of his employer.[99] In its holding, the court stated, "'[t]o say that but for Mobil's conduct, plaintiffs would have standing is to admit that they lack standing and to allow those who merely *claim* to be participants to be deemed as such.'"[100]

In the Eleventh Circuit's *Sanson v. General Motors Corp.*,[101] the plaintiff argued that "but for" GM's fraudulent misrepresentations, he would have continued his employment and therefore should be considered a participant with standing to sue under ERISA.[102] The *Sanson* court held that the alleged fraudulent misrepresentations related to Sanson's retirement benefits available under GM's plan, and therefore were preempted under Section 514.[103] Because the plaintiff did not satisfy ERISA's definition of participant, he had no claim under it either, regardless of whether or not a remedy would be available.[104]

In *Stanton v. Gulf Oil Corp.*,[105] the Fourth Circuit, in its rejection of the "but for" exception, held that the effect of allowing a "but for" test would be to "impose participant status on every single employee who *but for* some future contingency may become eligible."[106] The court noted

96. *Id.* at 474.
97. *Felix*, 387 F.3d at 1160 n.13 (quoting *Mitchell*, 896 F.2d at 474).
98. *Id.*
99. *See Raymond*, 983 F.2d at 1531, 1533.
100. *Felix*, 387 F.3d at 1160 (quoting *Raymond*, 983 F.2d at 1536).
101. 966 F.2d 618 (11th Cir. 1992).
102. *Sanson*, 966 F.2d at 619.
103. *Id.* at 621.
104. *Id.* (relying on a restrictive interpretation of 502(a)). In *Pilot Life*, the Court stated that an inadequate remedy under ERISA is an insufficient reason to overcome the express language of the statute. *Id.* at 622.
105. 792 F.2d 432 (4th Cir. 1986).
106. *Stanton*, 792 F.2d at 435 (stating that "[n]either caselaw nor other provision of ERISA supports such a reading of 'participant[]'").

that neither case law nor ERISA supported such an interpretation of "participant," holding that the protections of ERISA are tied to current participants only.[107]

In rejecting a "but for" test for standing, the minority circuits leave plaintiffs without a remedy at both the state and federal level.[108] Lacking participant status, plaintiffs will not be permitted to bring an ERISA claim, and at the same time, will find their state law claims preempted because they are "related to" their plan.

III. ERISA, COMPLETE PREEMPTION, AND *FELIX V. LUCENT TECHNOLOGIES, INC.*[109]

In *Felix v. Lucent Technologies, Inc.*, the Tenth Circuit unquestionably rejected the concept of a "but for" test for standing that allows former employees to file suit under ERISA as participants. As discussed below, this decision may leave former employees without a remedy in either state or federal court.

A. Facts

Plaintiff Aaron Felix worked for Lucent Technologies' Oklahoma City Works ("OKCW") manufacturing facility.[110] Lucent decided to sell its manufacturing facilities, including OKCW, or merge them with similar companies.[111] On February 19, 2001, Lucent offered, pursuant to a memorandum agreement with The International Brotherhood of Electrical Workers ("IBEW"), a new benefits package to its retirement-eligible employees who elected to retire early—a payment equal to 110% of their termination allowance, plus a "special pension benefit" of $11,000.[112] For those employees who were not retirement-eligible, Lucent offered to "provide a transactional leave of absence by adding five years to the age and/or service to make the employee pension-eligible . . . ."[113] Any employees who wished to accept this offer had to do so by May 29, 2001, and leave employment on June 30, 2001.[114] On several occasions, Lucent representatives stated that this offer was a "one-time, non-

107. *Id.*

108. *See, e.g.*, *Raymond*, 983 F.2d at 1531, 1533; *Sanson*, 966 F.2d at 621; *Mitchell*, 896 F.2d at 474; *Stanton*, 792 F.2d at 435.

109. 387 F.3d 1146 (10th Cir. 2005).

110. *Felix*, 387 F.3d at 1151–52.

111. *Id.* at 1151.

112. *Id.* (desiring to make OKCW more attractive to prospective buyers or merging companies, Lucent decided to reduce the number of its long-term employees; $11,000 represents the amount the employee was entitled to under a pending National Labor Relations Board award against Lucent).

113. *Id.*

114. *Id.* Lucent distributed written material and held many meetings at OKCW during which Lucent representatives outlined the benefits being offered. *Id.*

negotiable, final offer that was a take-it-or-leave it proposal" and that there would be no additional offers of any additional benefits.[115]

In reliance upon the representations that this was a "take-it-or-leave-it" one-time offer and that delaying retirement "would not gain the employee[s] additional benefits" in the future, Felix and over one thousand other eligible employees accepted the offer and retired effective June 30, 2001.[116] Subsequently, Celestica, Inc. agreed to take over the operations of OKCW and hire its remaining employees on November 30, 2001. Contrary to the representations Lucent had made prior to May 29, 2001, Lucent offered a new benefits package to retirement eligible employees on October 1, 2001.[117] This package was identical to the previous offer with one exception: it contained an additional payment of a "special one-time pension benefit" of $15,000.[118]

Plaintiffs brought a class action suit in state court for fraud claming that they relied on Lucent's intentional misrepresentations that encouraged Plaintiffs to retire early and accept the lower benefits package.[119] In making the decision to retire early, they had no opportunity to discover the truth regarding the misrepresentations until after they had received their vested benefits.[120] The Plaintiffs requested damages for the additional $15,000 benefit that was later offered to retirement-eligible employees and the value of an additional year of service that was lost by accepting June 30, 2001 as a retirement date.[121]

Lucent removed the case to federal court under the complete preemption doctrine of Section 502 of ERISA[122] and moved to dismiss for failure to state a claim.[123] Plaintiffs filed a motion to remand, asserting lack of complete preemption and, therefore, lack of federal question subject matter jurisdiction.[124] Plaintiffs, only seeking damages for state law fraud and not seeking an ERISA remedy, appealed.[125]

115. *Id.* This was reiterated in a newsletter distributed by IBEW on Mar. 21, 2001, in which the union president flatly stated, "I assure you there will not be any additional incentives for retirement." *Id.* at 1152.

116. *Id.* at 1152.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1150, 1152.

121. *Id.* at 1152. (alleging that a "significant number of plaintiffs with a short time to their respective anniversary dates lost an additional year of service by accepting the June 30th retirement date." Arguing each year was worth approximately $4,000 in the "special pension payment plus a reduction in the amount of the respective pension over the life of each pension"). *Id.* at 1152 n.3.

122. *Id.* at 1150 (removing based on both ERISA and the Labor Management Relations Act ("LMRA")).

123. *Id.*

124. *Id.* at 1152.

125. *Id.* at 1150 (appealing only the motion to dismiss not the motion to remand).

B. Tenth Circuit's Analysis

The appeal focused on the issue of whether the Plaintiffs' state law claims fell within the scope of Section 502(a) and were therefore completely preempted, thereby justifying removal.[126]

To exercise proper removal jurisdiction under Section 502 of ERISA, it must be determined that the Plaintiffs have standing as a "participant or beneficiary" under the terms of their plan, in order to enforce their rights under the plan.[127] ERISA defines participant in pertinent part as: "[A]ny employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer."[128]

Interpreting this definition in *Firestone Tire & Rubber Co. v. Bruch*,[129] the Supreme Court held that a former employee participant must show a "colorable claim to vested benefits" or an expectation to return to covered employment and fulfill eligibility requirements.[130] The Court defined "'colorable claim' to vested benefits" as including situations where: (1) the plaintiff will "prevail in a suit for benefits," or (2) fulfill eligibility requirements in the future.[131]

The *Felix* plaintiffs did not contend that they were entitled to additional benefits under their plan.[132] They argued instead that they were "fraudulently induced to take early retirement," and sought money damages from their former employer (the difference in benefits received and those that would have been received had they not been duped into retiring when they did).[133] The *Felix* court held that because Plaintiffs were not claiming that they were (or were likely to become) eligible for additional benefits under the terms of their plan, or that vested benefits were improperly withheld, but rather asked for damages based on their employer's fraud, their state law fraud claims did not fall within Section 502(a).[134] Therefore, the Tenth Circuit panel held that under the well-pleaded complaint doctrine, preemption under Section 514, a defense to Plaintiffs' state law claims, alone will not support removal.[135]

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126. *Id.*

127. *Id.* (defining beneficiary as a "person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder"); *see* 29 U.S.C. § 1002(8) (2000)).

128. 29 U.S.C. § 1002(7) (2000).

129. 489 U.S. 101 (1989).

130. *Felix*, 387 F.3d at 1159; *see* Raymond v. Mobil Oil Corp., 983 F.2d 1528, 1533 (10th Cir. 1993).

131. *Firestone*, 489 U.S. at 117–18.

132. *Felix*, 387 F.3d at 1159.

133. *Id.*

134. *Id.* at 1162-63.

135. *Id.* at 1158.

In sum, the Court found that the *Felix* Plaintiffs lacked a "colorable claim for vested benefits,"[136] and had no reasonable expectation for returning to covered employment, because they did not seek reinstatement either by contractual right or theory.[137]

C. The Tenth Circuit's Rejection of the "But For" Test for Standing Under ERISA Leaves Open Uncomfortable Possibilities

Ironically, the Tenth Circuit's rejection of Lucent's argument of complete preemption[138] was to Lucent's benefit.[139] The Tenth Circuit criticized the "but for" circuits as "mistakenly assum[ing] that [removal] jurisdiction depends only on the traditional notion of 'standing,'" holding that the ability to sue under Section 502(a) involved "both standing and a subject matter jurisdictional requirement."[140]

The court also relied on its prior holdings in *Mitchell v. Mobil Oil Corp.*,[141] *Raymond v. Mobil Oil Corp.*,[142] and *Boren v. Southwestern Bell Telephone Co., Inc.*[143] Like those cases, the *Felix* plaintiffs received all plan benefits to which they were entitled at the time of their retirement and, therefore, had no "'colorable claim' that additional benefits had 'vested' or 'will vest.'"[144] The court pointed out that in *Raymond,* it held that the "receipt of the full extent of [plaintiffs'] vested benefits' was a crucial fact."[145] Absent a claim for benefits, Plaintiffs are merely seeking damages based on their fraud and misrepresentation claims, not "vested benefits improperly withheld."[146] To allow this "but for" test for ERISA standing, the court reasoned, would be tantamount to allowing those who "merely *claim* to be participants to be deemed as such."[147] Having re-

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136. *Id.*; *see Raymond*, 983 F.2d at 1536.

137. *Felix*, 387 F.3d at 1162.

138. Id. at 1159-61 ("but for [Lucent's] wrongful actions, [Plaintiffs] would have been entitled to the additional benefits under the plan")

139. *Id.* at 1159.

140. *Id.* at 1160 (noting the "'express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties outlined in § 502'") (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 21 (1983)).

141. Mitchell v. Mobil Oil Corp., 896 F.2d 463 (10th Cir. 1990).

142. Raymond v. Mobil Oil Corp., 983 F.2d 1528 (10th Cir. 1993).

143. Boren v. Southwestern Bell Telephone Co., Inc., 933 F.2d 891 (10th Cir. 1991); *Felix*, 387 F.3d at 1159.

144. *Felix*, 387 F.3d at 1160.

145. *Id.* (internal quotations omitted).

146. *Id.* (internal quotations omitted) (rejecting a "but for" test for ERISA standing when noting there is no controlling case law or statutory language that supports a "but for" exception "to find ERISA standing where plaintiff is not technically entitled to additional benefits under the pension plan").

147. *Id.* Additionally, the court observed that its holdings in *Mitchell* and *Raymond* were consistent with its prior decision in *Boren*, 933 F.2d 891 (10th Cir. 1991) (holding improperly withheld vested benefits.) Following *Raymond* the court held that the plaintiff in *Alexander v. Anheuser-Busch Cos.* a former employee, who did not have a reasonable expectation of returning to his employment, would only have standing only if he could show a "colorable claim for vested benefits." *Felix*, 387 F.3d at 1160. Because the plaintiff's pre-existing medical condition was plainly excluded by his plan, he could not show that he had a colorable claim and, therefore, lacked standing to sue under ERISA. *Id.* (citing *Alexander*, 990 F.2d at 539 (10th Cir. 1993)).

jected this argument in both *Mitchell* and *Raymond*, the court refused it again.[148] Aware that this decision left open the "uncomfortable possibility" that plaintiffs, while lacking standing to sue under ERISA, may "be preempted in state court under [Section] 514 from asserting a state claim, leaving them with no remedy," the court did not consider that outcome a concern of the federal judiciary, asserting that the "unavailability of a remedy under ERISA is not germane to a preemption analysis."[149]

IV. ANALYSIS

Felix v. Lucent Technologies, Inc.[150] is the latest decision in a trilogy of Tenth Circuit opinions that reject the "but for" test for standing under ERISA with regard to former employees fraudulently induced into early retirement.[151] As a result, these former employees who lack standing to sue under ERISA Section 502(a) may find their state claims preempted under Section 514 conflict preemption, leaving them without any remedy.[152] Having received benefits on termination, no longer employed, and without expectations of returning to covered employment, early retirees do not qualify as participants under ERISA. By rejecting the "but for" test for standing, they are precluded from filing a claim in federal court, thereby requiring their case to be remanded back to state court where they will be on a collision course with the broad sweep of ERISA conflict preemption. The impact of these decisions leaves former employees with no recourse in either federal or state court. The same result could occur in an action based on diversity jurisdiction.[153]

A. Lack of an ERISA Remedy Does Not Affect Conflict Preemption at the State Level

The Tenth Circuit acknowledges the plaintiff's lack of remedy as a "valid concern," but not one for the federal judiciary.[154] This point of view is consistent with its prior decisions in which the Tenth Circuit has noted that "the unavailability of a remedy under ERISA is not germane to preemption analysis."[155] *Mitchell* is a particularly bothersome opinion in that it allows the wrongdoings of employers and plan administrators to

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148. *Felix*, 387 F.3d at 1160.

149. *Id.* at 1162 (citing Cannon v. Group Health Serv. of Okla, Inc., 77 F.3d 1270, 1274 (10th Cir. 1996)).

150. 387 F.3d 1146 (10th Cir. 2005).

151. *See* Mitchell v. Mobil Oil Corp., 896 F.2d 463, 466 (10th Cir. 1990); *see* Raymond v. Mobil Oil Corp., 983 F.2d 1528–29 (10th Cir. 1993).

152. *Felix*, 387 F.3d at 1162 (noting that this opinion "leaves open the uncomfortable possibility that Plaintiffs may lack standing to sue under ERISA but will then be preempted in state court under § 514 from asserting a state claim, leaving them with no remedy"); *see* Houdek v. Mobil Oil Corp., 879 P.2d 417 (Colo. Ct. App. 1994) (holding that plaintiff's state law fraud claims were preempted for relating to an ERISA plan, leaving no remedy).

153. *See supra* Part III.B.

154. *Felix*, 387 F.3d at 1162.

155. *Id.* (citing Cannon v. Group Health Serv. of Okla., Inc., 77 F.3d 1270, 1274 (10th Cir. 1996)).

go unchecked as long as the employee receives all of the lesser benefits to which they were entitled when duped into early termination. While courts are aware that their interpretation of the preemption clause "leaves a gap in remedies within a statute intended to protect participants in employee benefits plans," this lack of remedy did affect their analysis.[156]

The Tenth Circuit justified this harsh result with its interpretation of congressional intent.[157] The court notes that Congress intended the civil enforcement mechanisms of ERISA "to be exclusive, and the 'policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants . . . were free to obtain remedies under state law that Congress rejected in ERISA.'"[158] Seemingly attempting to sugarcoat the grim outcomes afforded by this decision, the court points out that this lack of a remedy is not as bad as it may initially appear.[159] In some factual situations, plaintiffs may be able to bring a cause of action under other subsections of 502(a) that are not of issue in the instant case; for example, cases regarding a breach of a fiduciary duty, or claims for equitable relief under the catch all provision of 502(a)(3).[160] However, with *Felix*, it appears that the court is unwilling to "second-guess" Congress' policy decisions, even in light of the harsh outcome or in the threat of preemption of the plaintiff's state claims.[161]

In *Cannon v. Group Health Serv. of Okla., Inc.*,[162] a holding consistent with its earlier decisions, the Tenth Circuit was not persuaded that ERISA should not be allowed to preempt state causes of action if no alternative remedy is available.[163] Recognizing that this is an issue of first impression, the *Cannon* court noted that no case law supports the idea that "an exception to ERISA's express preemption clause exists when ERISA provides no remedy."[164] Once again asserting a refusal to rewrite ERISA, the court noted that although the Supreme Court has not ad-

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156. Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1333 (5th Cir. 1992) ("While we are not unmindful of the fact that our interpretation of the preemption clause leaves a gap in remedies within a statute intended to protect participants in employee benefits plans, the lack of an ERISA remedy does not effect preemption analysis").

157. *Felix*, 387 F.3d at 1162.

158. *Id.* at 1162–63 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987)).

159. The court in *Raymond* stated that an argument could "certainly be made that the fraud claims plaintiffs have made in this case are such 'laws of general applicability' thus falling within the recognized exception to ERISA preemption. Raymond v. Mobil Oil Corp., 983 F.2d 1528, 1538 n.14 (10th Cir. 1993). However, upon remand the Colorado Court of Appeals held the fraud claims preempted by ERISA, leaving the former employees without a remedy. Houdek v. Mobil Oil Corp., 879 P.2d 417, 421 (Colo. Ct. App. 1994).

160. *Felix*, 387 F.3d at 1163.

161. *Id.* (refusing to second-guess Congress' policy choices and holding Plaintiffs are not participants within the scope of 502(a)(1)).

162. 77 F.3d 1270 (10th Cir. 1996).

163. *Cannon*, 77 F.3d at 1272.

164. *Id.* at 1274 (noting that this is a case of first impression about whether ERISA may preemption state common law claims if no alternative remedy is available under ERISA; however, this fact had no bearing on the court's analysis of preemption).

dressed this issue, the Tenth Circuit has – the fact that a state law claim may be preempted does not "necessarily mandate that there be an ERISA remedy."[165] Furthermore, the "proper focus for preemption analysis should be on the nature of the claim for relief, not whether a particular plaintiff has a potential remedy under ERISA."[166] Finally, the Tenth Circuit insisted that "Congress, and not this court, is the appropriate forum for such policy arguments."[167]

B. *"Uncomfortable" Possibilities: Wronged Plaintiffs Left Without Remedies*

Other jurisdictions have held that ERISA preempts state law claims even if the plaintiff is left without a remedy.[168] One court noted that a lack of remedy does not preclude ERISA application and "ERISA preempts state law claims even if the plaintiff is left without a remedy."[169] This line of judicial opinions paves the way for particularly bleak results.

In a dissenting opinion in *Sanson v. General Motors Corp.*[170] Judge Birch argued the case represented the "point at which the preemption tide should be stayed."[171] Judge Birch acknowledged that the *Sanson* opinion "favors a finding of preemption,"[172] but was troubled by the contradiction between the underlying purpose of ERISA, to protect employees and beneficiaries and the decisions that are being implemented by the courts.[173] He stated, "A finding of preemption in this case not only fails to further any such protective policy, it conceivably offers an unscrupulous employer a method of avoiding employee benefit 'burdens' . . . . and stands the entire statutory scheme on its proverbial head."[174] Perhaps verbalizing the thoughts of many other judges, Judge Birch noted that he finds it "difficult to comprehend, in a common sense way, how a law enacted to protect the very class of individual into which the appellant squarely fits can be construed to deny him such a preexisting remedy."[175] This judicial construction is "disappointingly pernicious to the very goals

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165. *Id.*; *see* Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1333 (5th Cir. 1992) ("The lack of an ERISA remedy does not affect a pre-emption analysis."); *see* Cromwell v. Equicor HCA Corp., 944 F.2d 1272, 1276 (6th Cir. 1991) ("Nor is it relevant to an analysis of the scope of federal preemption that appellants may be left without a remedy."); *see* Hospice of Metro Denver, Inc., v. Group Health Ins., 944 F.2d 752, 755 (10th Cir. 1991) ("We are aware that preemption normally is not dependent on the availability of ERISA remedies.").

166. *Cannon*, 77 F.3d at 1275.

167. *Id.* at 1274.

168. *See* Zanglein, *supra* note 37, at 673.

169. *Id.* (citing Dockter v. Aetna Life Ins. Co., No. 91-56029, 1993 WL 55150, at *2 (9th Cir. March 3, 1993), *cert. denied*, 114 S.Ct. 310 (1993)).

170. 966 F.2d 618 (11th Cir. 1992).

171. *Sanson*, 966 F.2d at 623 (Birch, J., dissenting).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 623 n.2.

and desires that motivated" what Congress set out to accomplish in the first place.[176]

Another case with a harsh outcome is *Olson v. General Dynamics Corp.*[177] Here, the Ninth Circuit found that because the Supreme Court has interpreted ERISA's preemption provision so broadly, it was "difficult to see how Olson's fraud claim could be found not to 'relate to' an employee benefit plan."[178] In his concurrence, Judge Reinhardt noted that: "[b]ecause of the passage of ERISA, Olson is left without a remedy. Unfortunately his fate is not unique."[179]

In *Aetna Health Inc., v. Davila,*[180] acknowledging that the Court's decision was consistent with governing case law, Justice Ginsburg joined the decision of the Court, but at the same time joined the "'judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime.'"[181] Noting that plaintiffs "adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief,"[182] Justice Ginsburg, appealed to Congress for "fresh consideration" of the availability of damages and remedies under ERISA.[183]

As illustrated above, the ERISA statute, initially designed to safeguard employee retirement benefit plans, has, "all too frequently, been used to deprive employees of rights they previously enjoyed under state law . . . ."[184] Allowing employers to engage in outright fraud without legal consequences – so long as the former employees received all benefits that had vested by the time of their departure, it is of no moment that they were told a lie to get them to retire early mocks that purpose.

C. The Former Employee Fraud Cases Present a Conflict Ripe for Supreme Court Resolution

The Supreme Court has not yet addressed the issue of whether the "but for" test for standing will afford former employees participant standing under ERISA. Whether the Supreme Court will side with the

176. Acker, *supra* note 5, at 285 (citing *Sanson*, 966 F.2d at 625 (Birch, J., dissenting)).
177. 960 F.2d 1418 (9th Cir. 1991).
178. Olson v. Gen. Dynamics Corp., 960 F.2d 1418, 1421 (9th Cir. 1991).
179. *Id.* at 1423 (Reinhardt, J., concurring).
180. 542 U.S. 200 (2004).
181. *Davila*, 542 U.S. at 222. (quoting Difelice v. Aetna U.S. Healthcare, 346 F.3d 442, 453 (3d Cir. 2003) (Becker, J., concurring)) (alteration in original).
182. *Id.* (noting a "regulatory vacuum" exists where "virtually all state law remedies are preempted ").
183. *Id.* at 223. "[The] 'gaping wound' caused by the breadth of preemption and limited remedies under ERISA, as interpreted by this Court, will not be healed until the Court 'start[s] over' or Congress 'wipe[s] the slate clean.'" *Id.* (quoting Cicio v. Does, 321 F.3d 83, 106, 107 (2nd Cir. 2003)). "The vital thing . . . is that either Congress or the Court act quickly, because the current situation is plainly untenable." *Id.* (quoting *Difelice*, 346 F.3d at 467).
184. Zanglein, *supra* note 37, at 713.

majority or minority views depends on how it views its own *Firestone Tire & Rubber Co. v. Birch*[185] decision.

If the Court narrowly construes the definition of participant, as applied to former employees, to include only those with either a reasonable expectation of returning to covered employment or a colorable claim to vested benefits, the minority view will likely be validated.[186] However, if the Court adopts a more expansive concept of participation, former employees would not be deprived of participant standing and status to sue under ERISA.[187]

The Court has had the opportunity to interpret the definition of participant under ERISA in *Firestone.* The Court, in a sense, rejected the "but for" test for standing by holding that one can only be a participant under the definition provided by the statute, if she has a reasonable expectation of returning to covered employment, or if she can show a colorable claim to vested benefits.[188] This would seem to exclude all former employees, fraudulently induced into early retirement, that have received their benefits, even though those benefits were results of misrepresentation.

The Supreme Court's opinion in *Varity Corp. v. Howe*[189] addresses former employees who claimed to be defrauded.[190] The *Varity* plaintiffs were considered participants or beneficiaries under the plan and were suing for equitable relief to redress a fiduciary violation.[191] At first glance it looks like the Supreme Court might be amenable to a "but for" test, however, this case is qualitatively different in several respects. The principal differences are: (1) the plaintiffs were reinstated as participants in their plan; (2) the plaintiffs had a colorable claim for vested benefits because they did not receive the benefits promised; and (3) the plaintiffs brought their cause of action under ERISA Section 502(a)(3) for a breach of fiduciary duty.[192]

D. Finding Justice for Defrauded Employees

The plight of these fraud victims, stranded without a remedy, violates the basic principle: for every wrong there is a remedy. Current judicial opinions subvert the original purpose of ERISA – to protect employee rights and provide a uniform regulatory scheme for employee

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185. 489 U.S. 101 (1989)

186. *See* Felix v. Lucent Techs., 387 F.3d 1146, 1159 (10th Cir. 2004).

187. Vartanian v. Monsanto Co., 14 F.3d 697, 703 (1st Cir. 1994).

188. *Firestone*, 489 U.S. at 117.

189. 516 U.S. 489 (1996).

190. *Varity*, 516 U.S. at 494 (noting that the district court found that Varity and Massey, acting as ERISA fiduciaries had harmed the plan's beneficiaries through deliberate deception).

191. *Id.* at 507 (noting that Varity concedes that plaintiffs are participants or beneficiaries).

192. *Id.* at 494–95 (noting the district court ordered Massey to reinstate its former employees into its own plan); *see also* 29 U.S.C. § 1104(a)(1) (2005).

welfare and pension plans.[193] It does not seem possible that by enacting ERISA, Congress intended to allow a wrongdoer to profit from his wrongdoing; however, this is precisely what is happening in the case of many former employers fraudulently induced into early retirement.[194] This is a serious anomaly that demands a solution and is "begging for congressional or judicial repair."[195]

1. Congressional Reform

The most direct paths through ERISA's preemption thicket would be congressional amendments.[196] Congress should narrow Section 514 preemption to allow state remedies where employer/plan administrator wrongdoing is involved. There should be no preemption when an employer/plan administrator manipulates the plan, or misrepresents to its employees the benefits that will or will not be available to them in the future, thereby inducing employee reliance. Congress "must exempt from ERISA's preemption provision unfair claims practices regulated by state insurance law, tort claims of fraudulent misrepresentation, and tort claims of negligence relating to the administration of an employee benefit plan."[197]

Additionally, Congress can rectify the lack of remedies available to former employees by modifying ERISA to permit remedies under Section 502 in situations involving extra-contractual and punitive damages.[198] This would allow former employees to recover the benefits they would have been entitled to, had they not been lied to. Without these modifications to ERISA, the wrongdoings of employers, plan administrators, and insurers will not be adequately deterred.[199]

Many members of the judiciary are urging a congressional fix. Judge Becker, in *Difelice v. Aetna*, ordered the clerk of the Third Circuit Court of Appeals to send his concurrence to the Solicitor of the Department of Labor, urging congressional reform of ERISA.[200] Judge Becker is concerned that ERISA's failure to change with the times has "rendered it incapable of protecting employees;" therefore, Congress must act

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193. *See* Zanglein, *supra* note 37, at 713

194. *See Id.*

195. Robert Simpson, Note and Commentary, *Another Trip into the Great Swamp: The Seventh Circuit's Preemption of Illinois Unclaimed Property Act under ERISA*, 7 CONN. INS. L.J. 227, 229 (2000).

196. Jane D. Bailey, *Tenth Circuit Survey: ERISA Preemption*, 74 DENV. U. L. REV. 473, 473 (1997) (stating "[a]ny court forced to enter the ERISA preemption thicket sets out on a treacherous path.") (quoting Gonzales v. Prudential Ins. Co., 901 F.2d 446, 451–52 (5th Cir. 1990)).

197. Zanglein, *supra* note 37, at 713.

198. *Id.* at 722.

199. *Id.*

200. Shannon P. Duffy, *Becker Calls on Congress, Justices to Fix ERISA*, LEGAL INTELLIGENCER, Oct. 16, 2003, at 1 (noting Judge Becker sent his opinion to the Senate Committee on Health, Education, Labor and Pensions, the House Committee on Education of the Workforce, committee chairs, and the ranking members, chief majority counsel, and the minority counsel of both Houses).

without haste in attempting to "prevent further injustice."[201] Judge Becker acknowledges that ERISA included a detailed plan for its protection of pension plans; however, it has fallen short in its protection of welfare plans, particularly health insurance.[202] He notes that although welfare plans are subject to less regulation than pension plans, ERISA's preemption provisions apply equally to both welfare and pension plans,[203] resulting in a complete bar from state law for many workers' claims that relate to their health insurance.[204] Judge Becker finds it "unlikely that Congress intentionally created this so-called 'regulatory vacuum,' in which it displaced state-law regulation of welfare benefit plans providing no federal substitute."[205]

2. Judicial Redirection

The courts cannot rewrite ERISA, but they can examine congressional intent more closely. Allowing a fraud-feasor protection from fraud is not a way to make benefits more widely available, and this is surely not an original congressional intent.[206] Congress originally intended that courts should adopt broad remedies to restore ERISA violations, while providing "'the full range of legal and equitable remedies available in both state and federal courts . . . .'"[207] A look at legislative history shows that Congress intended federal courts "'to shape legal and equitable remedies to fit the facts and circumstances of the cases before them, even though the remedies may not be specifically mentioned in ERISA itself.'"[208]

Because of the lack of remedies available to plaintiffs, a growing minority of courts have found an "insufficient relationship between the claim and an ERISA plan to trigger preemption, thus leaving state law remedies [intact]."[209] Additionally, some courts have even fashioned common-law ERISA remedies that duplicate the preempted state law remedy.[210]

The Court needs to rethink its interpretation of ERISA's preemption provisions, and could reconsider that its prior holdings all allow for the possibility of recovering compensatory damages.[211] The Supreme Court

201. *Id.* (discussing Judge Becker's concurrence in *Difelice*, 346 F.3d 442 (2003)).
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *See* Zanglein, *supra* note 37, at 718
207. *Id.* (quoting H.R.REP. No. 93-533 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4655).
208. *Id.* (quoting H.R. REP NO. 101-247, pt.1. (1989)).
209. Acker, *supra* note 5, at 290; *see, e.g.*, Taoumajian v. Frailey, 135 F.3d 648, 656 (9th Cir. 1998); Forbus v. Sears Roebuck & Co., 30 F.3d 1402, 1407 (11th Cir. 1994).
210. Acker *supra* note 5, at 290; *see* Cisneros v. Unum Life Ins. Co. of America, 134 F.3d 939 (9th Cir. 1998); Ingersoll Rand v. McClendon, 498 U.S. 133 (1990).
211. Duffy, *supra* note 200 (discussing Judge Becker's concurrence in *Difelice*, 346 F.3d 442 (2003)).

needs to take a more active role "in reconciling conflicts between the circuits and in filling in the congressionally created interstices by some consistent, fair and logical jurisprudence."[212]

3. State Action

ERISA's Savings Clause exempts from conflict preemption those state laws, whether statutory or decisional, that regulate insurance.[213] States can pass laws that regulate insurance without falling victim to ERISA preemption.[214] Additionally, state legislatures can pass laws that regulate insurance to make relief more widely available. "[B]ecause most areas of insurance 'relate to' employee benefit plans in some way and would fall under general ERISA preemption, the Insurance Savings Clause was necessary to avoid preemption of all state insurance laws."[215] This is not a new remedy but allows more rights by proscribing what insurers can and can not do.[216] State laws can provide that health insurance must provide a certain set of requirements.[217] This can help make ERISA less harsh.[218] States should enact legislation to make the appellate process more hospitable for plaintiffs.

State insurance regulators have already taken action to impose policy changes and pass regulations that will allow claimants new rights.[219] California recently announced that it would fine UnumProvident (the nation's largest disability insurer) $8 million, require the company to reopen more than 26,000 California cases, and that it alter its policies in the state to provide for "greater consumer protections."[220] For example, California plans to require UnumProvident to change its language in all new California policies, and "force the company to remove limitations on benefits for 'self reported' conditions such as migraine headaches . . . ."[221]

Without legislative reform at the federal or state level, Congress' original intent to safeguard the rights of employees participating in ERISA plans will be undermined, and in many cases, plaintiffs will be left without a remedy. In addition, California will require Unum to re-

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212. Acker, *supra* note 5, at 286; *see Davila*, 542 U.S.at 208 (Ginsburg, J., concurring).

213. 29 U.S.C.S. § 1144(b)(2)(A) (2005) (stating in the Insurance Savings Clause that no part of ERISA "shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities"); *see* Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329, 336 n.1 (2003).

214. Matthew O. Gatewood, *The New Map: The Supreme Court's Guide to Curing Thirty Years of Confusion in ERISA Savings Clause Analysis*, 62 WASH. & LEE L. REV. 643, 648 (2005).

215. *Id.* at 649.

216. *See id.*

217. *Id.* at 648.

218. *See id.*

219. *See* Peter G. Gosselin, *State Fines Insurer, Orders Reforms in Disability Cases*, L.A. TIMES, Oct. 3, 2005, at A1.

220. *Id.*

221. *Id.*

strict its usage of a twenty four-month limitation on benefits for "mental and nervous conditions."[222] The California State Insurance Department has stated that it will discuss these new requirements with other disability insurers and will "take regulatory action against those who refuse to adopt the policy changes."[223]

CONCLUSION

In rejecting the "but for" test for standing under ERISA in *Felix v. Lucent Technologies, Inc.*,[224] the Tenth Circuit allowed for what it termed the "uncomfortable" possibility that former employees, defrauded into leaving their jobs and without standing to sue under ERISA, will be faced with loss of any remedy in state court by the expansive conflict preemption of Section 514. As a consequence, the plan administrator or employer may commit wrongdoings that will go unpunished in a court of law. The majority of jurisdictions have avoided this unfair consequence by allowing the "but for" test for standing under ERISA in situations where a former employee is attempting to file suit.

An employee's decision to retire in the unforeseen presence of fraud is not an informed decision and is a wrong that should be remedied in the courts. The lack of remedy in these types of situations is ironic; ERISA was designed to shield participant's rights, but has instead become the employer's sword, destroying all rights regarding conduct that are deemed to "relate to" an ERISA plan.[225] ERISA was designed to protect participants, not to provide immunity to those who would defraud them.[226]

Alexa Roberts[*]

222. *Id.* (noting that UnumProvident had repeatedly been accused of wrongly categorizing claimants as suffering from such conditions to reduce what it must pay them).

223. *Id.* ("What we are saying to any company operating in this area of insurance . . . is it has to stop screwing people").

224. 387 F.3d 1146 (10th Cir. 2005).

225. President Ford summed up ERISA when he signed it into law on Labor Day 1974, "This legislation will alleviate the fears and the anxiety of people who are on the production lines or in the mines or elsewhere, in that they now know that their investment in private pension funds will be better protected." Donald L. Barlett & James B. Steele, *The Broken Promise*, TIME, Oct. 31, 2005, at 32, 42.

226. *See* Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1329, 1333 (5th Cir. 1992).

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SHOULD SPECIAL EDUCATION HAVE A PRICE TAG? A NEW REASONABLENESS STANDARD FOR COST

INTRODUCTION

The increasing cost of educating disabled children is one of the most pressing concerns among educators today.[1] According to the most recent national study, the total spending on special education students was $50.0 billion compared to only $27.3 billion for regular education during academic year 1999–2000.[2] Another study reported the national average of per pupil expenditures for special education as $12,525, which was ninety-one percent more than the general education population per pupil expenditure of $6,556.[3] Between 1995 and 2003, the number of students classified as needing special education services jumped from roughly 4.5 million nationwide to approximately 6.3 million, a thirty-eight percent increase.[4]

A circuit split exists surrounding the best test to employ when determining the most appropriate classroom placement of a special education student under the Individuals with Disabilities Act (IDEA).[5] One of the most controversial issues surrounding the circuit split concerns if and how the cost of a particular placement to a school district should factor into the decision of which learning environment is most appropriate for the child.[6] This article first provides a brief legislative history of IDEA which has strongly influenced the emergence of the three different circuit tests. Second, this piece describes the evolution of the three tests including their strengths and weaknesses as well as the Tenth Circuit's recent adoption of one of the tests in *L.B. ex rel. K.B. v. Nebo School District.*[7] Third, it discusses the court's failure in *Nebo* to articulate practical standards and argues that the Tenth Circuit erred in failing to include cost as one of its factors. Finally, this article proposes a new cost standard for

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1. Telephone Interview with Pam Biscelgia, Legal Assistant, Denver Pub. Sch., in Denver, Colo. (Dec. 16, 2005).

2. Thomas Parrish, American Inst. for Research, Accountability in Special Education Finance 4 (Apr. 11, 2003), http://www.eprri.org/Presentations/Session5.ppt; e-mail from Thomas B. Parrish, Dir., Ctr. for Special Educ. Fin., American Inst. for Research (Dec. 19, 2005, 07:13:00 MDT) (on file with author). Prior to this study, another national study had not been conducted for fifteen years. *Id.*

3. Jay G. Chambers, et. al., Total Expenditures for Students with Disabilities, 1999-2000: Spending Variation by Disability, Report 5, Special Educ. Expenditure Project 6 (June 2003), http://www.csef-air.org/publications/seep/national/Final_SEEP_Report_5.pdf.

4. Nat'l Ctr. for Educ. Statistics, http://nces.ed.gov/ccd/bat (data taken from statistical table using "Build a Table" tool provided at web site) (on file with author).

5. 20 U.S.C. §§ 1400-1500 (2005).

6. *See* Theresa M. Willard, *Economics and the Individuals with Disabilities Education Act: The Influence of Funding Formulas on the Identification and Placement of Disabled Students*, 31 IND. L. REV. 1167, 1178 (1998).

7. 379 F.3d 966 (10th Cir. 2004).

the courts to consider in placing a disabled child in the most suitable learning environment.

I. THE LEGISLATIVE HISTORY OF IDEA

In 1975, the United States Congress enacted the Individuals with Disabilities Education Act.[8] Replacing the Education for all Handicapped Children Act of 1975,[9] Congress passed IDEA to address its increasing concerns that disabled children did not share the same educational rights as their nondisabled classmates.[10] Congress aimed to remedy this inequity by allocating federal funding to states that complied with the Act's principal goal of ensuring that all disabled students receive a "free and appropriate public education (FAPE) . . . in the least restrictive environment (LRE)."[11] In defining LRE, Congress expressed a strong preference that disabled students obtain instruction in a "regular" education classroom wherever possible: "to the maximum extent possible, children with disabilities . . . [must be] educated with children who are not disabled . . . ."[12] The LRE requirement would in rare circumstances permit placements in segregated or pull-out classrooms for students with more severe disabilities.[13]

The 1997 Amendments to IDEA had two goals: (1) "to strengthen the [LRE] requirement," and (2) to develop and improve the role and rights of the family in determining what that LRE should be.[14] The IDEA mandate established procedural safeguards to both protect the rights of the disabled and establish realistic expectations for the schools.[15] To better accomplish the task of identifying the most suitable LRE for a child, the school district must write and revise what is called

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8. 20 U.S.C. §§ 1400-1500 (2005).

9. Pub. L. No. 94-142, 89 Stat 773 (1975).

10. Willard, *supra* note 6, at 1167.

11. Brian L. Porto, Annotation, *Application of 20 U.S.C.A. § 1412(a)(5), Least Restrictive Environment Provision of Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400 et seq.*, 189 A.L.R. FED. 297 (2004); *accord* Anne E. Johnson, *Evening the Playing Field: Tailoring the Allocation of the Burden of Proof at IDEA Due Process Hearings to Balance Children's Rights and Schools' Needs*, 46 B.C. L. REV. 591, 591 (2005).

12. 20 U.S.C. § 1412(a)(5)(A). This section of IDEA describes the statute's goal to "include" or "mainstream" disabled children into the regular classroom:

> To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate school, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in the regular with the use of supplementary aids and services cannot be achieved satisfactorily.

Id.

13. Roncker v. Walter, 700 F.2d 1058, 1065 (6th Cir. 1983) (holding that placement of a disabled child in a segregated special education class in a public school may satisfy the LRE provision, depending on the child's needs).

14. Sarah E. Farley, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities Under the IDEA*, 77 WASH. L. REV. 809, 816–17 (2002) (quoting 20 U.S.C. 1414(d)(1)(B)(ii) (1997) and citing S. REP. NO. 105-17, at 4 (1997), H.R. REP. NO. 105-95, at 3 (1997)).

15. Johnson, *supra* note 11, at 594.

an "individualized education program" (IEP) for every special education student.[16] Then, a team of parents, special educators, regular classroom teachers, an administrator, and other service providers meet to consider the child's present abilities and needs before designing tailored annual learning goals and deciding the most appropriate LRE setting.[17]

What IDEA failed to do, however, was to adequately fund its initiative.[18] Although Congress is authorized under the IDEA to pay for forty percent of special education funding to the states,[19] in the state of Colorado, for example, in 2004, the federal government contributed only seventeen percent.[20] This funding shortfall coupled with rapidly increasing numbers of disabled students being classified has sparked an ongoing debate.[21] A central issue of that debate involves conflicting interpretations of whether cost ought to play a role in a child's LRE placement.[22]

Today, IDEA compliance issues such as this have divided the circuits.[23] Nevertheless, the Supreme Court has not visited the topic of IDEA mandates in over twenty years and has never decided the issue of LRE and placement.[24] In *Board of Education v. Rowley*,[25] the Court developed a two-part test to evaluate whether a school district had met the IDEA standard for providing a "free appropriate public education" (not LRE) when it failed to provide a sign-language interpreter for a hearing impaired child.[26] In the first part of the test, the Court focused on whether the district was in compliance with the procedural requirements of IDEA.[27] Since the Court determined that the district had complied with the procedural requirement, it then had to evaluate the second prong.[28]

In part two of the test, the Court assessed whether the school had designed an IEP that afforded the student the opportunity to receive an

16. Farley, *supra* note 14, at 814.
17. *Id.* at 814–15.
18. *See* Willard, *supra* note 6, at 1179.
19. *Id.*
20. Telephone Interview with Charman Paulmeno, Supervisor, Grants Fiscal Mgmt. Services Unit, Colo. Dep't of Educ., in Denver, Colo. (Dec. 19, 2005).
21. *See* Willard, *supra* note 6, at 1177.
22. Kevin D. Stanley, *A Model for Interpretation of Mainstreaming Compliance Under the Individuals with Disabilities Educ. Act: Bd. of Educ. v. Holland*, 65 U. MO. KAN. CITY L. REV. 303, 310–11 (1996).
23. Farley, *supra* note 14, at 818–19.
24. Stanley, *supra* note 22, at 306–07.
25. 458 U.S. 176.
26. *Rowley*, 458 U.S. at 181, 206-07.
27. *Id.* at 207 n.27. To satisfy this requirement, the school district must prove that "the State has adopted the state plan, policies, and assurances required by the Act . . . [and] . . . created an [individualized education program] for the child in question which conforms with the requirements of § 1401(19)." *Id.*
28. *See id.* at 206–07.

appropriate education.[29] The Court determined that the hearing-impaired child was performing above average and that the district was providing her with personalized instruction and extra services for her needs.[30] In concluding that the district had provided the child an appropriate education, the Court also indicated that a sign language interpreter was not necessary since the child was progressing well without one.[31] Although the *Rowley* test is not directly applicable to the issue of LRE placement,[32] it did lay a foundation for the three tests that would soon emerge among the circuits to determine a special education student's LRE.[33]

II. A THREE-WAY SPLIT

A. Background: LRE Provisions §§ 1212(a) & 1214

IDEA's failure to articulate a clear standard for what a school district must do to provide an "appropriate" education for a disabled child prompted the Supreme Court to respond in kind in the *Rowley* decision.[34] Conversely, IDEA's failure to offer clear standards to aid districts in deciding what sort of placement constitutes a disabled child's LRE has left the circuits to their own devices for three decades since the Act was passed. [35] The circuits have therefore developed three distinct tests to interpret and apply the IDEA in cases that challenge a school district's LRE placement of a disabled child. [36] In various applications, all three tests consider the benefits that the child receives in the regular classroom and the potential disruption the child's presence may cause to the learning of other students in the classroom.[37] The language in two of the tests explicitly considers cost in evaluating placement, while the language in the other test does not.[38]

While the tests share several commonalities, a split exists where the circuits have been unable to come to a consensus on which factors to use and when to apply them.[39] The circuit split translates into inconsistent interpretation of IDEA's LRE, resulting in inconsistent placements across the country.[40] In other words, "[t]his difference could result in

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29. *Id.* Some factors the court considered to evaluate part two of the test included how well the handicapped student's education parallels the expectations at the corresponding regular grade level and to see if the student is able to earn passing grades. *Id.* at 207 n.28.
30. *Id.* at 184–85.
31. *Id.*
32. *See* A.W. v. Nw. R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir. 1987).
33. *See* Joseph A. Patella, *Missing the "IDEA": New York's Segregated Special Education System*, 4 J.L. & POL'Y 239, 240–42 (1995).
34. *See* Stanley, *supra* note 22, at 305, 07.
35. *See* Willard, *supra* note 6.
36. Stanley, *supra* note 22, at 310.
37. *See generally* Farley, *supra* note 14, at 837–39 (comparing the educational benefits and disruptive impact associated with supplementary aids and services in regular education with those of a more segregated setting).
38. *See* Stanley, *supra* note 22, at 308–10.
39. *See* Farley, *supra* note 14, at 818–19.
40. *Id.* at 809–10.

completely different placements being found 'appropriate' for the same student."[41] For example, a special education student from a military family might find himself in a self-contained classroom segregated from regular education students in one part of the country one year, and in a mainstream education classroom with a classroom assistant and supplemental therapy in another state the next year.[42] Similarly, where cost is a factor at issue, the resulting disparaging placements are magnified.[43] While Massachusetts has placed over sixty percent of the state's mentally retarded population into regular mainstream classrooms, Kentucky, Tennessee, Michigan, and Ohio have only mainstreamed ten percent of their mentally retarded children.[44] The inconsistent interpretations between the three tests thus undermine the IDEA's goal of granting equal protection to special education students across the country.[45]

B. The Roncker *Test*

In 1983, the Sixth Circuit developed the first test in *Roncker v. Walter*.[46] The issue in *Roncker* surrounded whether the district's placement of a nine year old boy with severe mental retardation and seizures was his LRE.[47] The district court upheld the school district's "LRE" placement in a self-contained classroom with exclusively mentally retarded students, even though the placement did not allow the child to interact with non-disabled peers.[48] On appeal, the court held that "[in] a case where a segregated facility is considered superior, the court should determine whether the services which make the placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act."[49] Heeding Congress's "strong preference" for mainstreaming, the court reasoned that IDEA mandates that disabled students receive regular classroom instruction unless the benefits of the segregated classroom would far outweigh those in the mainstreamed setting.[50]

In determining whether a school district's placement of a student is the LRE, the court articulated three factors: (1) the benefits to the disabled child of receiving regular education classroom instruction as compared to those received from the special education instruction in a segregated classroom; (2) the potentially disruptive impact of the disabled child on the teacher and students in the regular classroom; and (3) the

41. Stanley, *supra* note 22, at 311.
42. *See* Farley, *supra* note 14, at 818–19.
43. *See* Stanley, *supra* note 22, at 310–11.
44. *Id.* at 311.
45. *See id.*
46. 700 F.2d 1058; Willard, *supra* note 6, at 1172.
47. *See Roncker*, 700 F.2d at 1060.
48. *Id.* at 1061.
49. *Id.* at 1063.
50. *Id.*

cost of mainstreaming.[51] To evaluate the cost factor, the court considered whether the expense of such extensive supplemental aid required for the child to be mainstreamed was so significant that it would mean taking away funding that other district students also needed.[52] The court indicated that it retained some discretion in deciding "whether one program is excessively expensive in comparison to another." [53] However, in its holding, the court did not directly discuss the issue of cost and failed to articulate a clear standard for assessing whether one program is too expensive or not.[54]

Following the Sixth Circuit's lead, the Eighth Circuit adopted the *Roncker* test in *A.W. v. Northwest*,[55] stressing the cost factor in its holding that placing the student in a mainstreamed classroom was not feasible due to the expense.[56] Because the child's handicap was so severe, the court concluded that the child was not benefiting from mere observation of other students in the mainstream classroom.[57] More importantly, providing the child's education in a regular setting would require the costly hiring of a specially trained teacher for this one student in the school.[58] Citing *Roncker's* suggestion that cost is "a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children,"[59] the court upheld the district's placement because the minimal benefit of the child's placement in the mainstream setting was outweighed by the "reduction in unquestioned benefits to other handicapped children which would result from an inequitable expenditure of the finite funds available."[60]

Additionally, the Fourth Circuit approved the *Roncker* test in *Devries v. Fairfax County School Board*[61] in 1989. There, the court upheld a vocational placement over the seventeen-year-old autistic boy's local high school even though it was a segregated placement and thirteen miles away.[62] The court applied *Roncker's* reasoning: "In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act."[63]

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51. *See id.*
52. *See id.*
53. *Id.* at 1066.
54. *See id.* at 1059–64.
55. 813 F.2d 158 (8th Cir. 1987).
56. *See A.W.*, 813 F.2d at 163.
57. *A.W.*, 813 F.2d at 161–62.
58. *Id.*
59. *Id.* at 163.
60. *Id.* at 162–63.
61. 882 F.2d 876, 878–80 (4th Cir. 1989).
62. *Devries*, 882 F.2d at 880.
63. *Id.* at 879 (quoting *Roncker*, 700 F.2d at 1063).

C. The Daniel R.R. *Test*

Six years after the *Roncker* decision, the Fifth Circuit developed an alternative test for LRE in *Daniel R.R. v. State Board of Education.*[64] Here, the court pointed to the statutory language of IDEA's LRE definition as the basis for its two-part evaluation of special education services:

> To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[65]

The first part of the inquiry investigates whether the child could receive an FAPE in the regular classroom setting.[66] If a regular classroom is not possible and the school intends to place the child in a more restrictive classroom, the second part seeks to ensure that the child is still placed in the LRE.[67]

Under the first prong of the test, the court assesses four factors: (1) whether education in the regular classroom can be achieved successfully with the incorporation of "supplementary aids and services;" (2) the benefits to the child in achieving goals on her IEP in the regular classroom; (3) the overall experience and benefits to the child in the mainstream setting as compared to the segregated classroom situation; and (4) the impact that the child's disability would have on the regular classroom including the other students' abilities to learn and the teacher's ability to effectively teach without disruption.[68]

The court in *Daniel R.R.* upheld the school district's decision to remove Daniel, a six-year-old boy with Down's Syndrome to a self-contained classroom, because application of the factors in the first prong of the test indicated that this would be to his benefit and the benefit of other students.[69] The court concluded that the regular kindergarten teacher made "genuine and creative efforts to reach Daniel, devoting a substantial – indeed, a disproportionate – amount of her time and divert[ing] much of her attention away from the rest of the students."[70] Finding that the child's handicap had impeded his development, the court

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64. 874 F.2d 1036 (5th Cir. 1989).

65. 20 U.S.C. § 1412 (2005); *Daniel R.R.*, 874 F.2d at 1048. "The term 'supplementary aids and services' means aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate." 20 U.S.C. § 1401 (2005).

66. *Daniel R.R.*, 874 F.2d at 1048.

67. *Id.* at 1050.

68. *Id.* at 1048–49.

69. *Id.* at 1050.

70. *Id.*

concluded that he was unable to benefit academically.[71] Furthermore, the court determined that the benefits of the special education classroom outweighed the only benefit of the regular classroom—which was interaction with nondisabled peers.[72] Finally, the court felt that the child's presence in the classroom was disruptive to the other children, especially given the disproportionate amount of time the teacher had to spend on him.[73]

Having determined that the child could not successfully receive instruction in a mainstreamed classroom under the first prong of the test, the court then moved to the second prong to ensure that the child would still be properly placed in his LRE.[74] The court considered whether the school district, in placing the child in a self-contained setting, had complied with IDEA by taking immediate steps to include the child in mainstreamed activities such as gym, art, or lunch to the maximum extent possible.[75] Under the second prong of the test, the court found that the school district had indeed taken appropriate and timely steps to mainstream the student by including him with regular education students for recess and lunch.[76]

In addition, the Fifth Circuit in *Daniel R.R.* chose not to include cost as an explicit factor in its test.[77] However, the court may have left open the possibility that cost might be relevant on occasion in its suggestion that the *Daniel R.R.* factors were not "an exhaustive list."[78] In its only mention of cost, the court cited *Roncker*, but quickly dismissed it as a non-issue in *Daniel R.R.*, since neither party broached the issue.[79]

The Third Circuit was next to apply the *Daniel R.R.* test in *Oberti v. Board of Education*,[80] noting that the language in the two-pronged test more closely connected to the wording in IDEA.[81] Specifically, the court approved how the test stressed the importance of mainstreaming "to the maximum extent appropriate" and required IEPs to address "each child's specific needs."[82] In 1991, the Eleventh Circuit also adopted the *Daniel R.R.* test in *Greer v. Rome City School District*.[83] Subsequently, as the courts reviewed more and more cases, they began articulating and delineating more specific standards for each of the factors in the test.[84] For

71. *Id.*
72. *Id.* at 1050–51.
73. *Id.* at 1051.
74. *Id.*
75. *Id.*
76. *Id.* at 1051.
77. *Id.* at 1049 n.9.
78. *Id.* at 1048.
79. *Id.* at 1049 n.9.
80. 995 F.2d 1204 (3d Cir. 1993).
81. *Oberti*, 995 F.2d at 1215.
82. *Id.*
83. 950 F.2d 688, 696 (11th Cir. 1991).
84. *See generally* Farley, *supra* note 14, at 825-28.

example, where the school district had not made a good faith effort to actually provide supplemental services or include the student in a mainstream class at all, the district court in *Girty v. School District of Valley Grove*[85] held that the school district failed factor one of prong one.[86] The court found that the school district had not made "reasonable" efforts to accommodate the child in a regular education classroom.[87]

To date, the Second Circuit has not formally adopted one test over the others, although in *Briggs v. Board of Education*,[88] the court overturned a district court decision relying on *Roncker*.[89] However, in *Mavis v. Sobol*,[90] the Second Circuit was one of the first courts to identify that a correlation between the student's level of disruption (factor three) and the level of supplemental aids potentially exists (factor one) in *Daniel R.R.*[91] Because the school district had not shown that the student in the case had been adequately provided with aids known to reduce disruptive tendencies, the court held that the school district failed the third factor of the *Daniel R.R.* test, and therefore, could not "rely on Emily's asserted behavioral difficulties as justification for removing her from a regular classroom."[92]

D. The Rachel H. *Test*

In *Sacramento City Unified School District v. Rachel H.*,[93] the Ninth Circuit combined features of the *Roncker* and the *Daniel R.R.* tests to produce the last major test, commonly referred to today as the *Rachel H.* test.[94] At issue in *Rachel H.* was the appropriate placement of a moderately retarded eleven-year-old.[95] The district's proposal split her time between regular and special education classes, while the parents advocated for a full-time regular education placement.[96] Holding for the parents, the district court did not adopt one of the two earlier tests outright—and did so without any explanation.[97] Instead, it identified the four key factors as being: (1) the "educational benefits" in a regular classroom with additional "aids and services" compared to the benefits in the special education classroom; (2) "the nonacademic benefits" of working with non-disabled students; (3) whether the student's presence creates a negative or disruptive impact on the instruction and learning process of

85. 163 F. Supp. 2d 527 (W.D. Pa. 2001).
86. *Girty*, 163 F. Supp. 2d at 534–36.
87. *Id.* at 534–35.
88. 882 F.2d 688 (2d Cir. 1989).
89. Farley, *supra* note 14, at 827 n.198.
90. 839 F. Supp. 968 (N.D.N.Y. 1993).
91. Farley, *supra* note 14, at 828.
92. *Mavis*, 839 F. Supp. at 991.
93. 14 F.3d 1398 (9th Cir. 1994).
94. Stanley, *supra* note 22, at 312.
95. *Rachel H.*, 14 F.3d at 1400.
96. *Id.*
97. Farley, *supra* note 14, at 829.

the regular education students; and (4) the cost required to provide the supplemental aids and services to include the child.[98]

The school district argued that the four factors indicated that inclusion was the LRE for the moderately retarded girl.[99] The court concluded that (1) with the aid of supplemental services, Rachel could receive a satisfactory education in the regular classroom;[100] (2) the child's self esteem would improve in the mainstream setting; (3) she was not disruptive to the learning environment;[101] and finally, (4) the court found that the district had not met its burden to prove excessive cost of the inclusion.[102]

On appeal, the Ninth Circuit upheld the lower court's decision and officially adopted the four factors as the appropriate test.[103] In its evaluation, the court emphasized that the district had failed to provide any evidence whatsoever that the cost of educating the student in the regular classroom was considerably more expensive than the district's placement.[104] The court further noted that the district's estimate of cost was inflated and inaccurate:

> By inflating the cost estimates and failing to address the true comparison, the District did not meet its burden of proving that regular placement would burden the District's funds or adversely affect services available to other children. Therefore, the court found that the cost factor did not weigh against mainstreaming Rachel.[105]

Since *Rachel H.*, one district court in the Seventh Circuit has applied but not adopted the *Rachel H.* test.[106] Additionally, the Ninth Circuit has further clarified and distinguished the meaning of the first factor from the other circuit tests in *Seattle School District v. B.S.*[107] In *B.S.* the court approved a broad interpretation of the phrase "educational benefit" to mean "academic, social, health, emotional, communicative, physical and vocational needs."[108] Where the child's severe emotional disorder had resulted in several hospitalizations, the court held that the regular classroom was an inappropriate placement despite the student's strong academic performance, because the child did not receive any nonaca-

98. *Bd. Of Educ. v. Holland*, 786 F. Supp. 874, 878 (E.D.Cal. 1992).
99. *Holland*, 786 F. Supp. at 884.
100. *Id.* at 880.
101. *Id.* at 882–83.
102. *Id.* at 883–84.
103. *Rachel H.*, 14 F.3d at 1404 (noting "this analysis directly addresses the issue of the appropriate placement for a child with disabilities").
104. *Id.* at 1402.
105. *Id.*
106. D.F. v. Western Sch. Corp., 921 F. Supp. 559 (S.D. Ind. 1996).
107. 82 F.3d 1493, 1500 (9th Cir. 1996).
108. *B.S.*, 82 F.3d at 1500.

demic benefits.[109] Thus, the court indicated that the scope of "educational benefit" should include more than mere "academic benefit."[110]

III. TENTH CIRCUIT ADOPTS THE *DANIEL R.R.* TEST IN *L.B. EX REL. K.B. V. NEBO SCHOOL DISTRICT*[111]

The circuit feud continues with the Tenth Circuit's recent adoption of the *Daniel R.R.* test.[112] The Third, Fifth and Eleventh Circuits also remain loyal to this test.[113] The Fourth, Sixth, and Eighth Circuits continue to follow *Roncker*, and the Ninth and Seventh Circuits employ the *Rachel H.* test.[114] In *L.B. ex rel. K.B. v. Nebo School District*, the Tenth Circuit upheld the LRE placement of an autistic student in a private preschool supplemented heavily by thirty-five to forty hours of one-on-one home instruction, in spite of the disproportionately high costs.[115] However, on remand, the court seemed to dismantle its own argument that cost was irrelevant when it directed the district court to consider the reasonableness of costs and placements in deciding how to reimburse the parents for their expenses.[116] Perhaps, the court's own contradiction suggests that the *Daniel R.R.* test is fine in theory but not in practice.

In *Nebo*, the plaintiffs-appellants had an autistic preschool-aged child.[117] The school district devised an IEP as required under IDEA and placed the child in a preschool with a population consisting of more than fifty percent handicapped students.[118] Although the district had considered a mainstream placement, it identified the more restrictive preschool as the best option for the autistic child.[119] However, the school district did offer to increase the percentage of non-disabled students in the child's classroom for her benefit.[120] The district justified its placement because the school taught special skill levels, many of which would have met the goals and needs in the child's IEP.[121]

Additionally, the school planned to provide the child with speech and occupational therapy sessions for several hours each week, and as many as fifteen hours of behavioral therapy.[122] However, although both parties recognized the need for behavior therapy, appellants argued that their daughter would only be able to master her IEP goals with thirty-five

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109. *Id.*
110. *Id.*
111. 379 F.3d 966 (10th Cir. 2004).
112. *Nebo*, 379 F.3d at 977.
113. Stanley, *supra* note 22, at 310.
114. *Id.*
115. *Nebo*, 379 F.3d at 979, 968–69.
116. *Id.*
117. *Id.* at 968.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* (the specific type of behavioral therapy was called Applied Behavioral Analysis).

to forty hours of it per week.[123] The forty hours also included ten mainstream hours at the preschool.[124] Unhappy with the district's placement, the appellants opted instead to unilaterally enroll their daughter in a private preschool at their own expense for those ten hours, and they proceeded to hire at-home behavioral therapists to complete the remaining thirty hours.[125]

Appellants then requested a due process hearing for reimbursement of the cost of the ABA instruction.[126] The hearing officer determined that the school district's IEP and proposed fifteen hours of supplemental aids and services constituted the appropriate LRE under IDEA.[127] Alleging violations of IDEA, appellants next filed a complaint in the United States District Court in the District of Utah against the district for failing to place their daughter in her LRE.[128] The parties filed cross-summary judgment motions, and the district court held for the school district.[129] On appeal, the appellants again argued that the district court erred in concluding that the school district had correctly identified their daughter's LRE.[130] Overturning the decisions of the hearing officer and the district court, the court concluded that the preschool with disabled students was not the child's LRE.[131]

In *Nebo*, the Tenth Circuit carefully decided to adopt the *Daniel R.R.* test. Reflecting on the *Rachel H.* test, the court noted that this test shared much in common with the *Daniel R.R.* test, but that *Rachel H.* differed because it considered cost in addition.[132] The court summarized this distinction: "These circuits' LRE tests acknowledge the fiscal reality that school districts with limited resources must balance the needs of each disabled child with the needs of other children in the district."[133] In declining to adopt the *Roncker* approach, the court criticized *Roncker* as appositive only "in cases where the more restrictive placement is considered a superior educational choice. This feature makes the *Roncker* test unsuitable in cases where the least restrictive placement is also the superior educational choice."[134] Seeking to adopt a test that the circuit could use in any situation, the court approved the *Daniel R.R.* test.[135] In apply-

123. *Id.*
124. *Id.*
125. *Id.* at 968–69.
126. *Id.* at 969.
127. *Id.*
128. *Id.* at 970.
129. *Id.*
130. *Id.* at 974–75.
131. *Id.* at 975.
132. *Id.* at 976.
133. *Id.* at 977.
134. *Id.*
135. *Id.*

ing the test, the court also emphasized that the list of factors was not exhaustive and concluded that no factor by itself was dispositive.[136]

In its analysis of the first factor of the *Daniel R.R.* test, the court found by a preponderance of the evidence that the benefits the child realized from the private mainstream preschool outweighed those she would have derived from public preschool.[137] The record revealed that the child was actually the most advanced student academically in her mainstream classroom using the supplemental aids and assistance.[138] However, the court reasoned that since the child's needs were almost entirely social, her LRE was more likely the private mainstream setting.[139] The nonacademic benefits significantly outweighed those she could have received at the public school.[140] Finally, while the child struggled with some behavioral problems, the court concluded such outbursts did not disrupt the regular classroom.[141]

Additionally, in discussing its adoption of the *Daniel R.R.* test, the court stated it would not consider cost as a factor in this case since the school district had not raised it as an issue: "[b]ecause costs are not at issue in this case, however, this court adopts and applies . . . only the non-cost factors . . . ."[142] This language suggests that if the court determined that cost was an issue in a case, it would invoke cost as factor in its decision.[143] However, with as much as $63,800 at stake out of the district's maximum preschool budget of $400,000, cost was certainly a relevant issue.[144] In fact, despite an explicit directive that cost was irrelevant in this case, in the final paragraph of the opinion the court remanded the case to the district to decide what expenses should be reimbursed to the family.[145]

IV. ANALYSIS

Each of the three circuit tests brings a unique approach to identifying a child's LRE. However, all three tests share two factors: (1) the benefits to the disabled child and (2) the child's potential disruption to other students in the classroom.[146] Cost has proven to be the most controversial factor both in terms of whether its application is appropriate and what test to use.[147] Many courts have consistently stressed that cost alone is generally not a strong enough reason to determine a disabled

136. *Id.*
137. *Id.* at 978.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 977.
143. *See id.*
144. *Id.* at 972–73.
145. *Id.* at 979.
146. Farley, *supra* note 14, at 820, 823–24, 829–30.
147. *See generally* Stanley, *supra* note 22, at 310–11.

child's LRE.[148] On the other hand, balancing the placement's benefits to the child against the potential disruption to the other children, is also insufficient if the cost places an undue burden on the district and in turn, the other students' education in the district.[149] Accordingly, none of the tests alone are ideal, such that if the Supreme Court decides to hear a case on this issue, it should harness the best elements from each test to design an improved version.

In adopting the *Daniel R.R.* test, like many of the previous circuits, the Tenth Circuit in *K.B. v. Nebo School District*[150] did not articulate practical standards for the two common factors to aid in subsequent applications. The *Nebo* court's failure to adequately consider cost in its initial LRE analysis coupled with its brief mention of reimbursement at the last minute also signified the court's realization that excluding cost from the test is fine in theory, but not in practical application. The benefits and disruption factors when weighed against cost create a new reasonableness standard that the Supreme Court should adopt.

A. An Interpretation of Nebo*'s Application of the Two Common Factors*

1. Factor One: Benefits to the Disabled Child of the Mainstream Classroom

The *Nebo* court, in adopting the *Daniel R.R.* test, chose to consider the academic and nonacademic benefits separately for purposes of analysis.[151] This distinction was noteworthy because it allowed for a more detailed analysis and recognized that academic performance is not the only measure of a child's progress.[152] In evaluating the benefits to the autistic child, the court considered both the impact of the non-disabled students in the mainstream setting and the supplemental aids and services to the child.[153] The court's analysis was lacking in two respects. First, the court did not offer specific criteria to assist later courts in applying the factors. Second, it did not outline a practical method to assess how much of the benefit could be attributable to the mainstream environment versus the supplemental aids and services. The consequence of not having explicitly outlined criteria is that there is no practical way to evaluate how much supplemental support is required to achieve maximum benefit.

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148. Willard, *supra* note 6, at 1178–79.

149. *See generally* Stanley, *supra* note 22, at 317.

150. 379 F.3d 966 (10th Cir. 2004).

151. *Nebo*, 379 F.3d at 977–78.

152. Farley, *supra* note 14, at 838. A child with mental retardation, for example, may achieve few if any academic benefits from the mainstream experience but will likely benefit tremendously from the social interaction and mobility. Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1049 (5th Cir. 1989). The *Rachel H.* court added the language, "in a regular classroom, supplemented with appropriate aids and services" as a more specific point of comparison to the academic benefits the child will receive in the special education classroom. Bd. of Educ. v. Holland, 786 F. Supp. 874, 878 (E.D. Cal. 1992).

153. *Nebo*, 379 F.3d at 978.

Accordingly, the Tenth Circuit's reasoning in *Nebo* that the academic benefits to the autistic child were more superior in the private mainstream classroom than they would be in the public classroom is not persuasive.[154] The court emphasized that the child was the most academically advanced student in the mainstream classroom.[155] The court apparently assumed that the larger numbers of lower performing students in the public school would directly correlate with a decline in her academic performance in such a classroom.[156] This reasoning is flawed because advanced learners who would benefit from the opportunity to be challenged are present in every classroom, and yet the school district is not able to move them to another classroom.[157] In fact, tracking students according to ability has been proven to be detrimental to students' self esteem and performance.[158] Rather, students function best in heterogeneous environments.[159]

The court also failed to articulate a standard for attributing the academic benefits of a "mainstream" placement. The public preschool classes contained more than fifty percent special education students in a classroom.[160] Previously, the school district expressly offered to reduce the ratio of disabled students in the autistic child's class.[161] Many "regular" classroom populations are also comprised of as many as thirty or forty percent special education students.[162] Furthermore, those regular education classrooms were taught by a teacher who likely has no background in special education instruction unlike the teachers specially trained to work with handicapped students at the public preschool.[163] Although the evidence demonstrated that the autistic child had been successful in her mainstream classroom, the court failed to discern how much of her progress was attributable to the thirty-five to forty hours of one-on-one instruction she received a week—and how much was influenced by the presence of additional non-disabled students.[164] The court seemed to ignore this reality altogether given the fact that she spent only ten hours a week at the private preschool.[165]

With regard to the nonacademic benefit, the court's rationale was more convincing. It focused on the child's specific disability in the area of social interactions and reasoned that the mainstream classroom, in

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154. *Nebo*, 379 F.3d at 978.
155. *Id.*
156. *See id.*
157. Telephone Interview with Kristy Hurt, Special Education Teacher, Skinner Middle School, Denver Pub. Sch., in Denver, Colo. (Nov. 2, 2005).
158. *Id.*
159. *Id.*
160. *Nebo*, 379 F.3d at 968.
161. *Id.*
162. Hurt, *supra* note 157.
163. *Id.*
164. *See Nebo*, 379 F.3d at 968, 978.
165. *Id.* at 968.

surrounding her with non-disabled students with normal mannerisms, provided a more effective social learning environment for her.[166] The court further identified the presence of role models and a more suitable gender ratio to support its conclusion.[167] Interestingly, as almost a caveat to this decision, the court qualified its analysis of the benefits and quoted a case from the Third Circuit:

> This court does not mean to imply that only an exclusively mainstream environment meets the IDEA's LRE mandate for all children. School officials are not required to provide an exclusively mainstream environment in every case, and partial integration may well constitute the provision of an LRE to the 'maximum extent appropriate.'[168]

The court seemed to imply that it would not always decide in favor of a mainstream placement, almost as if realizing the potential ramifications of this decision as precedent.

The Tenth's Circuit's conclusion that the child with autism would benefit from the private mainstream classroom was accurate with regard to her social benefit but less apparent as to her academic benefit. The Court failed to articulate how necessary or beneficial the extra thirty-five to forty hours of supplemental services were to the child.[169] In fact, it did not even mention these additional supports in its application of the *Daniel R.R.* test.[170] The *Nebo* court's decision would have been more effective if it had distinguished the benefit of interacting with non-disabled peers from the benefit of the supplemental behavioral therapy.

2. Factor Two: Potential Disruption in the Regular Classroom

Whereas the aim of the "benefits" factor centers around the potentially positive effects on the child in question, the "disruption" factor focuses more intently on the potentially negative effects on the other regular education students in the classroom and the teacher in the placement decision. The Second Circuit has identified a relationship between the amount of supplemental aids and services provided to a child and how disruptive a child is; with the use of supplemental aids and services there may be less disruption.[171] The *Nebo* court failed to provide specific guidelines to comprehensively account for disruption to the regular stu-

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166. *Id.* at 978.
167. *Id.*
168. *Id.* at 978 n.17 (quoting T.R. v. Kingwood Bd. of Educ., 205 F.3d 572, 579 (3d Cir. 2000)); *Daniel R.R.*, 874 F.2d at 1045).
169. *See Nebo*, 379 F.3d at 977–79.
170. *See id.*
171. Mavis v. Sobol, 839 F. Supp. 968, 991 (N.D.N.Y. 1993).

dents as well as the teacher, and guidelines to evaluate appropriate levels of services required to achieve minimal disruption.[172]

The *Nebo* court upheld the parents' request for thirty-five to forty hours of behavioral therapy as a necessary supplemental aid. The court did so because the child demonstrated significant progress—not because it identified forty hours as a limit to how many hours the child needed. It is true that the school district must attempt to implement "positive behavior strategies, interventions, and supports to address the behavior" before placing a student with behavior problems in a more restrictive environment.[173] However, it would have been more helpful to later courts if the Tenth Circuit had established criteria for determining if the child could function with fewer supplemental hours.

The Tenth Circuit also did not articulate a standard for when a "disruption" could infringe on the other students' learning in the class.[174] In general, the courts have not offered guidance in this area, other than to say that the school must demonstrate a reasonable attempt to offer effective supplements calculated to remedy the disruption.[175] The *Nebo* court acknowledged that the autistic child "had some behavioral problems such as tantruming," but was quick to discount them, indicating that this behavior did not seem problematic in the regular classroom.[176] It is difficult to know why the court determined that tantrums were not possibly disruptive.

The *Nebo* court further failed to devise a standard to address the aspect of disruption involving the teacher's ability to instruct the class despite the presence of the disabled child.[177] The Fifth Circuit in *Daniel R.R.* held that "although regular education instructors must devote extra attention to their handicapped students, we will not require them to do so at the expense of their entire class."[178] In contrast, the *Nebo* court did not incorporate this language in its holding on this issue and did not mention at all whether the child's behavior was or was not disruptive to the teacher's ability to instruct the other students.[179]

Overall, the *Nebo* court simply did not offer a clear justification for how or why it decided to dismiss disruption as a non-issue in this case. Had it followed the Second Circuit, the *Nebo* court might have found a correlation between the autistic child's minimal disruptions in the mainstream setting and the significant number of hours of extra therapy both

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172. *See Nebo*, 379 F.3d at 978.
173. Farley, *supra* note 14, at 839.
174. *See Nebo*, 379 F.3d at 978.
175. Farley, *supra* note 14, at 839.
176. *Nebo*, 379 F.3d at 978.
177. *See generally* Stanley, *supra* note 22, at 315–16.
178. *Daniel R.R.*, 874 F.2d at 1051.
179. *See Nebo*, 379 F.3d at 978.

in and outside the school day that she received.[180] Unlike the child in the Second Circuit case who had not benefited from extensive or effective supplemental aids and services and was therefore disruptive to the other students and the teacher,[181] the child in *Nebo* was at the opposite end of the spectrum having received so many hours of one-on-one therapy.[182] It is only possible to speculate whether she would have been more disruptive with fewer hours of support. Accordingly, the Tenth Circuit's cursory analysis of the disruption factor, only three sentences in length, failed to identify any useful guidelines for future decisions.[183]

B. Accounting for Cost

Whether and, more importantly, how cost should factor into the equation continues to be a source of significant debate.[184] The *Roncker* court acknowledged the financial burden that mainstreaming a child may impose on a school district.[185] Although subsequent applications of the *Daniel R.R.* test have factored cost, the language of the test itself as delineated by the Fifth Circuit makes no mention of cost.[186] Furthermore, the *Rachel H.* test recently marked a return to a consideration of cost.[187] However, the opinion offers little guidance on whether this factor should be weighed as heavily as the benefits and disruption factors.[188]

The Tenth Circuit mistakenly failed to consider cost in the *Nebo* decision. Generally, other circuits have applied cost as a factor in two different ways.[189] First, some courts have balanced the costs of educating one child against the educational and financial needs of other children in the district.[190] Second, some courts allow school districts to use cost as a defense when balancing the cost of a placement against the appropriateness of that placement.[191]

1. Four Reasons Why Cost Should Be a Factor

First, costs of educating special needs children have increased dramatically in the past three years.[192] Those expenditures are more likely

180. *See Mavis*, 839 F. Supp. at 989–91.
181. *Id.* at 991.
182. Nebo, 379 F.3d at 978.
183. *Id.*
184. *See generally* Willard, *supra* note 6, at 1177–78.
185. *See* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983).
186. Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991). *See Daniel R.R.*, 874 F.2d at 1049–50.
187. *Holland*, 786 F. Supp. at 879–80.
188. *See id.*
189. Willard, *supra* note 6, at 1178.
190. *E.g., Greer*, 950 F.2d at 697.
191. *See, e.g., Roncker*, 700 F. 2d at 1064. *See* Willard, *supra* note 6, at 1178.
192. Biscelgia, *supra* note 1. Nationally, the percentage of K-12 special education enrollments continued to rise every year from 1976 until 1997, with a proportional increase of nineteen percent from 1987–1998. Thomas P. Parrish, *Special Education - At What Cost to General Education?*, The CSEF Resource, Winter 1999–2000, Ctr for Special Educ. Finance,

due to increased enrollment of special education students and a decrease in federal funding, rather than a function of an actual increase in per pupil special education expenditures.[193] The Tenth Circuit failed to account for this practical reality in its decision.

Second, the link between special education placement and the ability of the school to qualify for supplemental funding creates a financial incentive for schools to place students in more restrictive environment.[194] A recent study examined the relationship between state formulas that distribute funds based on school district placements and the state's use of restrictive placements for children with disabilities.[195] While states that had the highest number of self-contained placements used funding formulas based on placements, states with the lowest number of segregated placements did not fund according to placement.[196] This study may indicate that school districts have a real incentive to classify more students as "special ed," since doing so means receiving additional state funding.[197] Decisions like *Nebo* produce an even more compelling reason for districts to classify more students as "special ed" since the estimated costs of the autistic child's supplemental aids and service constituted as much as $63,800, approximately one-sixth of the district's total preschool budget.[198]

Third, the courts have interpreted legislative intent to imply that cost should be a relevant consideration in LRE placement. In noting that IDEA directs the states to determine "priorities for providing a free appropriate public education to all handicapped children," the court in *Barnett v. Fairfax County School Board.*[199] indicated that Congress intended for the court to balance the needs of a disabled child against competing economic realities.[200]

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http://www.ldonline.org/ld_indepth/special_education/at_what_cost.html (last visited Jan. 28, 2006). In Vermont, a legislative commission set up in 1998 reported that cost-containment must become a state-wide priority because increased expenditures are not sustainable. *Id.* California's special education population has nearly doubled from 1990 to 1999. *Id.* (quoting Amy Pyle, *Davis Asked to Help End Special Education Funding Dispute*, L.A. TIMES, Nov. 1, 1999, at A3.). An analysis of nine school districts over more than twenty years reveals that general education expenditures had plunged from eighty to fifty-nine percent with special education gains from four to seventeen percent. *Id.*

193. Parrish, *supra* note 2, at 3. Recent studies in New York revealed that ninety percent of increased special education funding correlated with higher enrollments. *Id.* at 2. A study in Wisconsin indicated that virtually all revenue increases for special education had resulted from higher enrollments as well. *Id.*

194. Willard, *supra* note 6, at 1181.

195. Willard, *supra* note 6, at 1184.

196. *Id.*

197. *See generally id.*

198. *Nebo*, 379 F.3d at 973.

199. 927 F.2d 146, 154 (4th Cir. 1991).

200. *Barnett*, 927 F.2d at 154 (quoting 20 U.S.C. § 1412(3) (1991) (current version at 20 U.S.C. § 1412 (2005))).

Fourth, there is a practical limitation to how much a school can afford in order to pursue the maximum benefits for the child.[201] Even before the development of the circuit tests, the Supreme Court in *Rowley* implied a limit to special needs costs: "to require . . . the furnishing of every special service necessary to maximize each handicapped child's potential is . . . further than Congress intended to go."[202]

Accordingly, cost is a practical issue facing school districts that Congress and the Supreme Court have acknowledged to be a relevant concern.

2. Two Standards the Courts Have Articulated Relating to Cost

Although most circuits agree cost cannot be ignored altogether, its role as a factor in placement decisions has been the subject of much debate.[203] No one wants to tell a special needs child she does not deserve a quality education, but the courts have been clear that the most expensive placement is not always the most appropriate for a number of reasons.[204] The courts have tended to analyze cost in two different ways.[205] One approach balances cost for one child against the costs of educating other children.[206] The second approach weighs the cost of a child's placement against the appropriateness of the placement itself.[207]

a. Balancing the Costs of One Child Against the Needs of the Others

The courts adopting this method seem to recognize the realities of IDEA as a largely unfunded mandate.[208] A study conducted in the 1990s concluded that "the cost of educating disabled students . . . is threatening the ability of the educational institution to educate nondisabled students in many districts and, therefore, is placing the entire public education edifice potentially at risk."[209] The state of Colorado paints a bleak picture of this reality. The Colorado Department of Education has reported that the federal government provides only seventeen percent of the requisite special education funding required for such students in Colorado schools, with local dollars responsible for the bulk of expenditures covering seventy percent and only eleven percent coming from the state.[210]

201. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 199 (1982).
202. *Id.*
203. Willard, *supra* note 6, at 1178; Stanley, *supra* note 22, at 310–11.
204. *See generally* Stanley, *supra* note 22, at 316-17.
205. *Id.* at 310–11.
206. *Id. E.g.*, *Greer*, 950 F.2d at 697.
207. Stanley, *supra* note 22, at 310–11.
208. Biscelgia, *supra* note 1.
209. Parrish, *supra* note 2, at 1 (quoting Bruce Meredith & Julie Underwood, *Irreconcilable Differences? Defining the Rising Conflict Between Regular and Special Education*, 24 J.L. & EDUC. 195, 213 (1995).
210. Paulmeno, *supra* note 20.

Accordingly, some courts have created a balancing test that considers the cost of the disabled student's education against the needs of other students in the district.[211] In *Greer v. Rome City*, the court articulated this standard: "when the cost of educating a handicapped child in a regular classroom is so great that it would significantly impact the education of other children in the district, then education in a regular classroom is not appropriate."[212] The Eighth Circuit, adopting the *Roncker* test in *A.W. v. Northwest*, applied a variation of the test which compares instead the disabled child's expenses against the expenditures for other disabled children, excluding impacts on the general education population.[213] The court agreed with the district court's finding that:

> [T]he severity of the child's handicap was such that the interaction with non-handicapped students would . . . require removal of a teacher from the state facility to provide the student with a properly certified teacher. Due to limited available funding, the teacher would not be replaced at the state school. Thus, the program provided to the other handicapped students would be adversely affected by the increased student/teacher ratio. The court concluded the benefit to the student from mainstreaming was insufficient to justify a reduction in benefits to other handicapped children; the parents' proposed placement in the district would have resulted in a disproportionate expenditure of available funds.[214]

The school district in *Rachel H.* made a similar argument. According to the district, her placement would result in over a $100,000 loss in state funding for special education funding unless she was placed in special education classes for at least fifty-one percent of the day.[215] Ultimately, the *Rachel H.* court was not persuaded by the school district's argument.[216] In holding for the parents, the court reasoned that the cost of mainstreaming her was not significant.[217] It also refused to place her in a more restrictive setting that would not offer her the benefits she could reap in a regular classroom, despite the financial burden potentially imposed on the district, and ultimately other disabled students.[218]

In its LRE placement analysis, the *Nebo* court deliberately ignored cost as a factor on the grounds that the district claimed it was not at issue in its original decision-making process.[219] The court ignored cost even though the expense of educating the autistic child in the regular class-

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211. *Greer*, 950 F.2d at 697.
212. *Id.*
213. *A.W.*, 813 F.2d at 163–64.
214. Leslie A. Collins & Perry A. Zirkel, *To What Extent, If Any, May Cost be a Factor in Special Education Cases?*, 71 ED. L. REP. 11, 22 (1992); *A. W.*, 813 F.2d at 160–63.
215. *Holland*, 14 F.3d at 1402, 1404.
216. *Id.* at 1404.
217. *Id.* at 1402.
218. *Id.* at 1402, 1404.
219. *Nebo*, 379 F.3d at 977.

room with the forty hours of supplemental aids and services equated almost one sixth of the district's entire preschool budget of $400,000, and even though both the district and the parents' expert indicated that only twelve to fifteen hours of additional support for the child would have likely accommodated her.[220] The court did point out that in some circuits, "LRE tests acknowledge the fiscal reality that school districts with limited resources must balance the needs of each disabled child with the needs of other children in the district," but drew the unlikely conclusion that costs are simply not an issue in this case.[221]

In acknowledging the discrepancy in the cost to educate the child in comparison to the remainder of the budget to provide for all other special needs children, the *Nebo* court seemed to follow the *Rachel H.* court.[222] The school in *A.W.* identified a specific need and argued that holding for the one child would specifically deprive the other special needs children.[223] *A.W.* can be distinguished from *Rachel H.* and *Nebo* in that in *A.W.*, the school district specifically identified how placement in the LRE for the handicapped plaintiff would deprive other disabled children from the appropriate student-teacher ratio.[224] Whereas the *Rachel H.* and *Nebo* court considered a nebulous dollar figure, the *A.W.* court confronted concrete inequity. Perhaps that resulted in the different holding.

b. Cost as a Defense: Balancing Cost Against the Appropriate Placement

Like the courts in the previous section suggested, the *Roncker* court concluded that cost is an appropriate factor because excessive spending on one disabled child can withhold needed funds from other handicapped students.[225] However, *Roncker* applied a slightly different standard.[226] The court permitted school districts to use cost as a defense provided that the district could prove that it had allocated its funds to render services to the child along an appropriate continuum of different placements.[227] The court held that the school's individual education program committee must choose from a continuum of ten different possible LREs when evaluating a particular student.[228] At the same time, the court in

220. *Id.* at 973.
221. *Id.* at 977.
222. *Nebo*, 379 F.3d at 979; *Holland*, 14 F.3d at 1402; *see generally* Willard, *supra* note 6, at 1183–84.
223. *A.W.*, 813 F.2d at 161–62; *Nebo*, 379 F.3d at 979; *Holland*, 14 F.3d at 1402, 1404.
224. *Id.*
225. *Roncker*, 700 F.2d at 1063.
226. *Id.* at 1062.
227. *Id.* at 1063.
228. *Id.*; *see also* Harley A. Tomey, III, *IEP: Individualized Education Program The Process, Virginia Department of Education*, http://www.ldonline.org/ld_indepth/iep/iep_process.html (last visited Jan. 28, 2006). The continuum ranges from option 1 that offers direct instruction and/or consultation services within the regular classroom, to option three providing direct instruction within the regular classroom and content instruction in a special education classroom, to option seven

Roncker, refused to consider cost or the merits of an alternative placement when the child had never been placed in a fully mainstreamed setting.[229] Although the *Daniel R.R.* test does not emphasize cost as a factor, its first factor is similar to this approach in requiring that a school demonstrate it took sufficient steps to accommodate the child's needs in the regular classroom before removing her.[230]

This second approach to a cost analysis mirrors the language of that IDEA which mandates states provide a "free and appropriate education" to all handicapped children.[231] As the court in *Rowley* indicated, "appropriate" does not require a school to completely optimize these services, as long as the child is benefiting educationally from the program in place.[232] The courts have often considered cost when weighing two different placement or service options. If a second service or placement option exists that would also provide a free and appropriate education at a lower price, the courts have sometimes opted for such an alternative.[233]

At issue in *Barnett* was whether a center placement for a hearing impaired student was an acceptable alternative to a placement in her neighborhood school that did not offer the appropriate services to meet the child's special needs.[234] Although the neighborhood school was truly the LRE, the Fourth Circuit concluded that the center school could best meet the child's needs.[235] Rather than evaluate cost in terms of other students in the district, the court here considered cost against the appropriate placement in determining that the center placement was "appropriate" even though it was not the best possible education the school district could offer with unlimited funding.[236]

Similarly, in *Detsel v. Board of Education*,[237] the court declined to provide a severely handicapped child with close supervision by a highly trained nurse due to the excessive burden of cost.[238] In *Clovis Unified-School District v. California Office of Administrative Hearings*,[239] the court considered two different placements, a residential home costing $50,000 and a psychiatric facility costing $150,000.[240] In finding for the

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offering separate private day school for students with disabilities, to option ten, a hospital setting. *Id.*

229. *Roncker*, 700 F.2d at 1063.

230. *Daniel R.R.*, 874 F.2d at 1048.

231. 20 U.S.C. § 1412(a)(1)(A) & (a)(5)(A).

232. Bd. of Educ. v. Rowley, 458 U.S. 176, 198-201 (1982).

233. Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514, 517 (6th Cir. 1984) (finding that where two placements are proposed, but only one is appropriate, cost is irrelevant and therefore, should not factor into the decision).

234. *Barnett*, 927 F.2d at 154.

235. *Id.*

236. *Id.*

237. 820 F.2d 587 (2d Cir. 1987).

238. *Detsel*, 820 F.2d at 588.

239. 903 F.2d 635 (9th Cir. 1990).

240. Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings, 903 F.2d 635, 639 (9th Cir. 1990).

school district's recommendation of the residential home, the court acknowledged a limit that a district must spend to adequately meet a child's special needs.[241]

The Tenth Circuit in *Nebo* had two placement options much like the cases discussed above, both of which were arguably appropriate on the continuum, as required by *Roncker* and IDEA.[242] In fact, homebound placement is actually the ninth most restrictive environment which is where the child spent most of her instructional time with the forty hours of one-on-one instruction in the parent's preferred placement.[243]

In applying this cost analysis to the *Nebo* decision, it is first necessary to determine whether the autistic child had the opportunity to be mainstreamed to the fullest amount possible.[244] At first glance, the court said she did not because the public preschool placement was not the LRE.[245] However, the answer to this question is more complicated and somewhat more difficult given the split-nature of her time, which actually closely parallels the district court's placement in *Roncker* that the appellate court rejected.[246] Unlike the parents in *Roncker* who were unhappy with the placement in a segregated setting at another school coupled with transportation to a mainstream setting midday for lunch and integration, the autistic child's parents in *Nebo* favored the split-time arrangement with the additional time in what was primarily a homebound setting.[247] In fact, although homebound placement is actually the ninth most restrictive placement option, it was where she spent most of her instructional time with the forty hours of one-on-one instruction in the parent's preferred placement.[248] This intensive forty-hour training plus the private school tuition presented a much costlier option.[249]

The child's alternative placement proposed by the school district is actually a LRE in that it offered ten hours of instruction in a setting with approximately half non-disabled students with support from trained therapists for ten to fifteen hours a week, including some on campus and some at home hours.[250] This option is also much more cost efficient than the private school, and had the *Roncker, Detsel, Clovis* or *Barnett* courts decided this case, it might have come out differently.

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241. Collins & Zirkel, *supra* note 214, at 23.
242. *Nebo*, 379 F.3d at 976, 978.
243. Biscelgia, *supra* note 1.
244. *Roncker*, 700 F.2d at 1065 (Kennedy, J., dissenting).
245. *Nebo*. 379 F.3d at 977–78.
246. *Id.* at 972–73; *Roncker*, 700 F.2d at 1063.
247. *Nebo*, 379 F.3d at 968; *Roncker* 700 F.2d at 1059, 1061.
248. *Nebo*, 379 F.3d at 972–73; Tomey, *supra* note 228.
249. *Nebo*, 379 F.3d at 972–73.
250. *Id.* at 968.

In the end, the school district erred in not arguing cost as its defense.[251] On appeal, the school district's special education director claimed that "cost never entered into [its] decision to provide services" and that the district "never said it would not provide a particular service solely because of cost concerns."[252] Although cost is never the only reason to decline services, it is a factor that should not be ignored by the Tenth Circuit or a school district.[253] To pretend cost is irrelevant is to deny other children the services they deserve without an all-out court battle and to pretend that some placements are just as effective without all the bells and whistles.

C. A New Reasonableness Standard for Cost: The Beetle, Not the Cadillac of Placement

The courts cannot continue to ignore the practical realities of implementation issues in the classroom coupled with the economic realities of an unfunded mandate. The last time the Supreme Court spoke directly on the issue in *Rowley* was over two decades ago.[254] The court at that time was cognizant that "to require . . . the furnishing of every special [education] service necessary to maximize each handicapped child's potential is . . . further than Congress intended to go."[255] In other words, in terms of practical application, the Court's holding implies that it would be impossible to arm every special needs child with the "Cadillac placement" on the continuum of services.[256] A more appropriate and realistic placement to strive for would be the "Volkswagon beetle placement."[257] The beetle is a metaphor for the quality of placement a school district can be expected to deliver.[258] The idea of IDEA is to ensure that the special education students have the supplemental services—the gas, if you will—they need to drive a beetle.[259]

Ultimately, the beetle represents a "reasonableness" standard which would enable districts to "use cost as a defense against 'unreasonable' demands, provided a continuum of appropriate [placement] options are available to children with disabilities."[260] The courts must of course use tailored judgment for each individual child since what may be a reason-

251. Biscelgia, *supra* note 1.
252. *Nebo*, 379 F.3d at 972–73.
253. Willard, *supra* note 6, at 1178–79.
254. *See generally Rowley*, 458 U.S. 176.
255. *Id.* at 199.
256. Biscelgia, *supra* note 1.
257. *Id.* All too often, by the time cases like this one get appealed, the child is already experiencing such high achievement that removal seems inappropriate even though the supplementary services are excessive. *Id.* Somewhere the courts need to draw the line between achievement and exceptional achievement. *Id.*
258. Biscelgia, *supra* note 1.
259. *Id.*
260. Janet R. Beales, *Special Education: Expenditures and Obligations*, Policy Study No. 161, Reason Foundation, Los Angeles, Cal. (July 1993) *available at* http://www.rppi.org/education/ps161.html.

able or even an essential demand for one child could be unreasonable for another child.[261] Additionally, a reasonableness standard such as this should sidestep placing a specific limitation on price; rather, in determining appropriate placement, the district and the court should balance the academic and nonacademic benefits to a student against the necessary supplemental services required to prevent disruption in the regular classroom and the costs of providing those services.[262] The price tag will inevitably depend on the costs of the necessary supplements and services that will enable the child in the beetle to function adequately in the LRE.[263]

Indirect support for such a reasonableness standard also comes from the Supreme Court's guidance in *Florence County School District v. Carter*[264] and *Burlington v. Department of Education*[265] on a related cost issue—private school tuition reimbursement to parents who have unilaterally withdrawn their child from a public school placement and enrolled her in a private school.[266] Citing to those decisions, the *Nebo* court indicated that the parents were entitled to receive reimbursement for "the reasonable cost of the services provided to [their daughter] in support of her mainstream preschool education."[267] However, in addressing the issue of reimbursement, the *Nebo* court tried to argue that it was a completely separate issue from cost and its relation to LRE:

> Whereas the issue of the allegedly unreasonable cost of [the autistic child's behavioral therapy] was not presented to the district court in the context of LRE, it was presented in the context of equitable considerations under *Burlington* and *Carter*. As a consequence, in the latter context this issue has not been waived.[268]

Nevertheless, the end result of reimbursement is actually just the same as cases decided under *Rachel H.* or *Roncker*—the district loses the money that could have gone to support other special needs children.[269] The substantive debate surrounding cost and reimbursement is the same even if the school district did not procedurally raise the issue of cost in district court.[270] The Tenth Circuit's decision to disguise cost as reimbursement in the final page of the opinion demonstrates further that the court, in

261. *Id.* at 33.
262. *Id.* at 24; *Mavis*, 839 F. Supp. at 991 (emphasizing that a strong correlation exists between the amount of supplemental aids and services provided and how disruptive a child is).
263. Biscelgia, *supra* note 1.
264. 510 U.S. 7 (1993).
265. 471 U.S. 359 (1985).
266. *See Florence*, 510 U.S. at 11, 15.
267. *Nebo*, 379 F.3d at 978.
268. *Id.* at 979.
269. *See generally* Willard, *supra* note 6.
270. Biscelgia, *supra* note 1.

deciding not to consider cost in the analysis section, later realized that practically speaking, cost was at issue.[271]

Interestingly, in articulating criteria for the lower court to evaluate the reasonableness of the reimbursement cost, the *Nebo* court relied on the Supreme Court's suggestion in *Burlington* and *Carter*.[272] Although reimbursement may be a different issue, there is a significant amount of overlap. Thus, these Supreme Court decisions and *Nebo* can inform the development of a new reasonableness test for cost and LRE placement. The *Nebo* court reiterated two sub-factors, identical to the two addressed by different circuits at length in the preceding two sections.[273] First, the court asked the district court to consider whether the reimbursement for two school years would "impose a disproportionate burden on Nebo's preschool budget."[274] Second, the court directed the lower court to evaluate the cost and the appropriateness of placement on remand:

> [T]he district court should consider equitable factors such as whether [the autistic child] needed forty hours of [behavioral therapy] per week in order to succeed in her mainstream classroom. In considering this equitable factor, the district should give due deference to [the expert's] finding that [the child] needed only twenty to thirty hours of at-home [therapy].[275]

Unintentionally, the *Nebo* court's discussion of reimbursement frames the proposed reasonableness standard.[276] Unlike the theoretical constructs of the court's opinion and its failure to spell out clear standards for the benefits, disruption and cost factors, the Tenth Circuit essentially charged the district court with assessing the benefits and costs of placement.[277]

In application, since the district court's remanded opinion has not been released, it is only possible to speculate as to how the *Nebo* decision and LRE placement might have come out differently had the court applied its own standards for reasonableness. In its initial decision, the *Nebo* court upheld the "Cadillac placement" in placing the child in a private mainstream preschool and providing her with forty hours of one-on-one instruction (the Cadillac of class size).[278] The mainstream school placement and the forty hours of supplemental aids and services did come with a hefty price tag of up to $63,800 annually.[279]

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271. *Nebo*, 379 F.3d at 978–79.
272. *Id.*
273. *Id.* at 979.
274. *Id.*
275. *Id.*
276. *See* id.
277. *Id.*
278. *See generally id.* at 970.
279. *Id.* at 973.

A more reasonable placement would have considered the two sub-factors as suggested by the *Nebo* court.[280] First, based on cost alone, it is likely that the cost of tuition at approximately $60,000 annually plus reimbursement for two previous years at $120,000 would impose a significant hardship on the district's ability to fund services for other disabled children out of a budget of $400,000.[281]

Second, a consideration of cost as it relates to the appropriateness of the placement identifies a possible alternative "beetle placement" in lieu of the parents' "Cadillac placement." A *Nebo* expert testified that the child had shown significant progress with only twenty hours over a four-month period.[282] Since this autistic child was the most academically advanced in a class of regular non-disabled students, such a high level of performance suggests that the supplemental services required to keep her from being disruptive and enable her growth were perhaps over the top.[283]

While the district erred in placing her at the public preschool where she might regress under the potential negative influence of other disabled children's behavior and mannerisms,[284] an alternative, more reasonable placement exists. This alternative ("beetle") placement would continue placement at the private school with only twenty hours of behavioral therapy a week since expert testimony indicated that she had been successful during a four-month period with this amount of support. Accordingly, this placement balances the excessive cost of the personal instruction tutoring against both costs to other children and the cost of her placement against its appropriateness.

CONCLUSION

With the cost of special education continuing to rise, the Tenth Circuit and others will continue to face more and more cases concerning cost as an issue.[285] The *Nebo* court was unable to ignore cost altogether because of its practical realities. Most courts have recognized a need to evaluate LRE placement with cost in mind. The *Nebo* court's discussion of reimbursement alluded to two sub-factors many circuits have already considered in previous decisions. The first sub-factor is important because it forces the courts to consider how choosing the Cadillac place-

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280. *Id.* at 979.

281. *Id.* at 973, 978–79.

282. *Nebo*, 379 F.3d at 973.

283. *Id.* at 978.

284. *Id.* at 973.

285. Biscelgia, *supra* note 1; *See* Complaint at 1, 6, Thompson R2-J Sch. Dist. v. Luke P., No. 1:05-cv-02248-WDM (10th Cir. Nov. 04, 2005). The Thompson School District in Berthoud, Colorado, is appealing a hearing officer's approval of the parents' decision to withdraw their autistic child from the district and enroll him in a residential placement private school in Boston. *Id.* at 6. The district and the parents disagree on the appropriate LRE placement, and cost is a major issue since the parents are seeking $137,000 in tuition reimbursement for the private school placement. *Id.*

ment may burden the school district and ultimately reduce services offered to other students in the district. The second sub-factor juxtaposes cost with the benefits and disruption factors. The reasonableness standard does not undermine IDEA's objective to identify a child's LRE. Rather, it reinforces the Supreme Court's interpretation of IDEA in *Rowley* that school districts are not required to provide the Cadillac to every child. What the reasonableness standard has the power to accomplish is bridging the abstract, theoretical approach of the circuit tests with the practical realities that school districts face.

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McCauley v. Halliburton Energy Services, Inc.: Treatment of a Motion to Stay Proceedings Pending an Arbitrability Appeal

Introduction

Arbitration is a method of dispute resolution "involving one or more neutral third parties who are agreed to by the disputing parties and whose decision is binding."[1] The arbitration proceeding is distinct from litigation and its underlying purpose is to "encourag[e] dispute resolution without resort to the courts."[2] Arbitration is an attractive form of dispute resolution because it "leads to the efficient resolution of disputes without resort to the time and expense of litigation."[3]

Although arbitration is an efficient form of dispute resolution, a party cannot be forced to arbitrate in the absence of an arbitration agreement.[4] Generally, the parties, subject to such an agreement, will choose to arbitrate on their own. However, when a party is resolute on trying to avoid arbitration, "a federal district court may be required to ascertain whether an arbitration clause contained in an agreement between or among the involved parties requires that the dispute be submitted to arbitration."[5] When a party to an arbitration agreement files a motion to compel arbitration, the federal district court will determine whether to grant or deny the motion.

When a motion to compel arbitration is granted, the parties are required to submit to arbitration to resolve their disputes. When the motion to compel arbitration is denied, the Federal Arbitration Act (FAA) permits the moving party to appeal. Several issues arise in this scenario. How should the district court, which denied the motion to compel arbitration, proceed? Should the district court grant a motion to stay the proceedings pending the arbitrability appeal? Or, should the district court deny a motion to stay and proceed with the case on the merits?

The former is in line with the purpose of arbitration—to save time and money by avoiding litigation, but the latter has favorable arguments as well—namely to avoid frivolous appeals in an effort to stall the litigation process. When a district court denies a party's motion to compel arbitration, circuits are divided on whether proceedings should be stayed

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1. BLACK'S LAW DICTIONARY 112 (8th ed. 2004).
2. 6 C.J.S. *Arbitration* § 6 (2005).
3. James R. Foley, *Recent Development: Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.*, 13 OHIO ST. J. ON DISP. RESOL. 1071, 1071 (1998).
4. 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 203.12 (3d ed. 2005).
5. *See* Foley, *supra* note 3, at 1071.

during an appeal of that decision. Recently, the Tenth Circuit, in a case of first impression, addressed this issue. In *McCauley v. Halliburton Energy Services Inc.*,[6] the Tenth Circuit adopted the approach of the Seventh and Eleventh Circuits and held that a motion to stay proceedings in the district court should be granted pending an arbitrability appeal.[7]

Part I of this article discusses the arbitration process; the Federal Arbitration Act, the four-prong test for determining whether a court should generally stay proceedings, the growing popularity of arbitration in the United States, and the circuits' opposing views on whether to grant a stay pending an arbitrability appeal. Part II of this article discusses the recent Tenth Circuit case of *McCauley v. Halliburton*. Finally, Part III presents two main arguments supporting the holding in *McCauley*. First, procedurally, a stay should be granted because a district court lacks jurisdiction to continue with a case on the merits pending an arbitrability appeal; and second, allowing for a stay is consistent with the FAA and the purpose of arbitration generally. Finally, I address whether the issue will likely reach the United States Supreme Court.

I. BACKGROUND

A. Arbitration—Alternative Dispute Resolution

Arbitration is one of several alternative processes that parties can use to resolve disputes. The main reason parties agree to arbitrate is to avoid the time and expenses that often accompany the litigation process. Furthermore, unlike litigation, arbitration is private, and thus appeals to those wishing to keep their disputes out of the public eye. Arbitration can be defined as a private process where one or more neutrals renders a decision after hearing arguments and reviewing evidence.[8] Generally, in arbitration, the neutral's decision is binding unless the parties contract in such a way as to allow for an appeal of the decision.[9] However, most often arbitration is used as a binding dispute resolution procedure.

There are several steps in the arbitration process. First, the parties generally agree to arbitrate in the event that a dispute arises. Parties usually do so by entering into an arbitration agreement. Once a dispute arises there are six standard stages in the arbitration process.[10]

The first step in the arbitration process is the initiation—one party will submit a "demand" or "notice" to the other party stating that, pursuant to the parties' agreement, arbitration shall be used to settle a given dispute.[11] If both parties agree to arbitrate, then the parties enter the sec-

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6. 413 F.3d 1158 (10th Cir. 2005).
7. *McCauley*, 413 F.3d at 1163.
8. JOHN W. COOLEY, THE ARBITRATOR'S HANDBOOK 2 (1998).
9. *Id.*
10. *Id.*
11. *Id.*

ond stage of the arbitration process, preparation, where the parties prepare for the case.[12] However, if one party refuses to arbitrate or honor the arbitration agreement, the moving party may, pursuant to the Federal Arbitration Act, file a motion to compel arbitration in any district court with jurisdiction over the matter.[13] If the motion is granted, the parties are required to arbitrate and the second stage, preparation, begins. In the preparation stage, the parties will prepare for the arbitration hearing.[14] This may include pre-hearing discovery if necessary.[15] However, if the motion to compel arbitration is denied, the moving party may appeal the denial of the motion to compel arbitration.[16]

The third and forth stages of the arbitration process are the pre-hearing conference and hearing.[17] In the pre-hearing conference the parties and the arbitrator deal with administrative tasks such as scheduling the arbitration.[18] The hearing is an evidentiary-type hearing where both parties present their evidence to the arbitrator.[19]

Finally, the fifth and sixth stages of the arbitration process are the decision-making stage and the award stage.[20] Upon the completion of the hearing, the arbitrator will decide the dispute. Often this is done immediately upon completion of the hearing, but no more than thirty days after the hearing.[21] Once a decision is made, the arbitrator will render a decision in the form of an award, which generally, unlike litigation, is binding with no option for appeal.[22]

B. The Federal Arbitration Act

In 1925, Congress enacted the Federal Arbitration Act[23] (FAA) "to ensure that arbitration agreements would be given the same legal effect as other contracts"[24] and "to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by the widespread

12. *Id.*
13. *See infra* Part I.B.
14. *Id.*
15. Because one of the main qualities of arbitration is the expediency of the process, often times pre-hearing discovery in arbitration is limited. The limitations of discovery are usually established by the arbitrator, but nonetheless, discovery in arbitration is very rarely as extensive as the discovery process in litigation. *See* COOLEY, *supra* note 8, at 30.
16. *See infra* Part I.B.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. 9 U.S.C.S. § 1 - 16 (2005).
24. Thomas G. Stenson, *Punitive Damages Under the Federal Arbitration Act: Have Arbitrators' Remedial Powers Been Circumscribed by State Law*, 7 ST. JOHN'S J. LEGAL COMMENT. 661, 661 (1992).

unwillingness of state courts to enforce arbitration agreements."[25] Furthermore, following the enactment of the FAA the United States Supreme Court has required courts to "rigorously enforce" arbitration agreements.[26]

Under Section 4 of the FAA, a party to an arbitration agreement may petition any United States district court, with proper jurisdiction, for an order to compel arbitration.[27] When determining the arbitrability of a dispute, the court must decide "whether the parties agreed to arbitrate and, if so, whether the scope of that agreement encompasses the asserted claims."[28] If the district court is satisfied that the dispute shall be resolved through arbitration, the court will order the parties to proceed to arbitration.[29] On the other hand, if the district court denies a party's Section 4 motion to compel arbitration, Section 16(a) of the FAA allows for an interlocutory appeal of the order denying arbitration.[30] Allowing such an appeal demonstrates the FAA's "liberal policy favoring arbitration."[31] Specifically, the FAA, allowing such an appeal, supports the policy favoring arbitration "by permitting interlocutory appeals of orders favoring litigation over arbitration . . . ."[32] Conversely, the FAA does not allow interlocutory appeals of orders favoring arbitration over litigation in the presence of an arbitration agreement.[33]

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25. Southland Corp. v. Keating, 465 U.S. 1, 13 (1984) (citing Metro Indus. Painting Corp. v. Terminal Constr. Corp., 287 F.2d 382, 387 (2d Cir. 1961)).

26. Catherine Burnham, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit*, 73 GEO. WASH. L. REV. 767, 769 (2005) (quoting Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987)).

27. The FAA states:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C.S. § 4 (2005).

28. MOORE ET AL., *supra* note 4, § 203.12 (quoting Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional, 991 F.2d 42, 44 (2d Cir. 1993)).

29. 9 U.S.C.S. § 4 (2005).

30. 9 U.S.C.S. § 16(a)(1)(C) (2005) (This section was enacted by Congress in 1988 and reads, "An appeal may be taken from an order denying an application under section 206 of this title to compel arbitration.").

31. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991) (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)).

32. MOORE ET AL., *supra* note 4, § 203.12 (quoting Forsythe Int'l S.A. v. Gibbs Oil Co. of Texas, 915 F.2d 1017, 1020 (5th Cir. 1990)).

33. The rationale behind this idea goes directly to Congress' intent in enacting the FAA. Congress desired courts to honor arbitration agreements and give then the same legal effect as other contracts. Stenson, *supra* note 24, at 661. Allowing an appeal of an order favoring arbitration over litigation, in the presence of an arbitration agreement, would undermine this purpose, as one must assume that parties understand the implications of an arbitration agreement if they willingly form a contract which includes such an agreement (of course, this statement is directed more towards commercial contracts between parties of equal bargaining power rather than consumer contracts where companies clearly have unequal bargaining power over consumers who, in most cases, do not choose to enter arbitration agreements when they purchase a service or good).

The FAA is explicit about courts enforcing valid arbitration agreements, and equally explicit about allowing for an appeal of a district court order denying a party's motion to compel arbitration. However, the FAA does not instruct courts on whether a stay of proceedings in the district court should be granted pending an arbitrability appeal,[34] which one can assume has led to the circuit split on this issue. Among the circuits that have addressed this issue, two dominant approaches and supporting arguments have developed. The Second and Ninth Circuits refuse to stay proceedings on the merits while the Seventh and Eleventh Circuits take the position that an automatic stay should be granted pending an arbitrability appeal.

C. Stay of Proceedings Generally: The Four Prong Test

Simply put, a stay postpones or halts court proceedings and judgments.[35] If a motion to stay is granted, the district court postpones proceeding with the case. However, if the motion is denied, the moving party may appeal. Section 3 of the FAA calls for the district court to grant a stay of proceedings when a motion to compel arbitration is granted and the parties are ordered to arbitrate.[36] However, the FAA does not expressly address whether a stay should be granted pending an appeal of an arbitrability determination.

Traditionally, a four-prong test has been used to determine whether a stay should be granted pending the appeal. In *Hilton v. Braunskill*,[37] the Supreme Court established a four-prong test for determining whether a stay of proceedings should be granted pending an appeal.[38] The four factors are:

> [W]hether the stay applicant has made a strong showing that he is likely to succeed on the merits; whether the applicant will be irreparably injured absent a stay; whether issuance of the stay will substantially injure the other parties interest in the proceeding; and where the

34. *See* Foley, *supra* note 3, at 1071 (citing C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp., 716 F. Supp. 307, 309 (W.D. Tenn. 1989)).

35. BLACK'S LAW DICTIONARY 1453 (8th ed. 2004).

36. The FAA states:

> If any suit of proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit of proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C.S. § 3 (2005).

37. 481 U.S. 770 (1987).

38. *Hilton*, 481 U.S. at 776.

> public interest lies.[39] This four-prong test is applied widely throughout the federal courts, and is not limited to issues of arbitrability.[40]

However, the different circuits have applied the test in different ways by favoring some factors over others.[41] For example, some circuits give more weight to the likelihood of success on the merits, and yet other circuits allow a strong showing on one factor to compensate a weak showing on another factor.[42]

Although the four-prong test is widely used to determine whether a stay of proceedings should be granted, the application of the four-prong test in the context of arbitrability is being abandoned by some circuits. Specifically, as discussed elsewhere,[43] the Seventh and Eleventh circuits have abandoned the four-prong test, and instead have held that an automatic stay should be granted pending an arbitrability appeal.

D. The Growing Popularity of Arbitration as a Dispute Resolution Procedure

Recent data suggest that arbitration is becoming an increasingly popular form of dispute resolution in the United States.[44] However, according to a 2004 study conducted by the National Arbitration Forum, very few people use post-dispute arbitration agreements to arbitrate, leaving pre-dispute arbitration agreements as the only real avenue for parties to gain access to arbitration.[45] This fact, coupled with the increasing popularity of arbitration, suggests that more and more arbitration agreements are being created and used. This is very important in the context of how courts handle arbitrability issues. Below, data is presented on the public's general awareness and knowledge about the use of arbitration; on the use of arbitration to resolve disputes arising from consumer transactions; and on the use and benefits of arbitration for resolving commercial contract disputes.

1. General Awareness and Knowledge about the Use of Arbitration

Recent data indicates that the general awareness and knowledge about the use of arbitration is increasing.[46] As an update to a 1999 study, data from the 2004 study conducted by the National Arbitration forum suggests that Americans are increasingly finding arbitration to be a pre-

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39. *Id.*
40. Foley, *supra* note 3, at 1076.
41. *Id.*
42. *Id.*
43. *See infra* Part I.F.
44. NAT'L ARBITRATION FORUM, THE CASE FOR PRE-DISPUTE ARBITRATION AGREEMENTS: EFFECTIVE AND AFFORDABLE ACCESS TO JUSTICE FOR CONSUMERS, EMPIRICAL STUDIES & SURVEY RESULTS 13 (2004), http://www.arbitration-forum.net/resources/articles/emprcl_study_04/emprcl_full_04.pdf.
45. *Id.*
46. *Id.*

ferred method of dispute resolution over litigation.[47] In 1999, 59% of individuals surveyed stated that they would choose arbitration over litigation in a lawsuit for monetary damages.[48] In 2003, 64% of individuals surveyed said they would choose arbitration.[49] While this is only a 5% increase, the more astounding finding is that in 1999, 50% of individuals surveyed felt it was worthwhile to initiate a lawsuit.[50] In 2003, only 34% felt initiating a lawsuit was worthwhile.[51] Clearly, these figures suggest that the general mindset concerning dispute resolution is heading away from litigation in favor of arbitration.

2. The Use of Arbitration for Consumer Transaction Disputes

Generally speaking, consumers are increasingly favoring arbitration for resolving consumer disputes. Although the data from the 2004 National Arbitration Forum survey pertaining to arbitration and consumer transactions focused on securities arbitration, it is nevertheless a telling indicator for the trends concerning arbitration and consumer transaction disputes. One reason why arbitration may be gaining popularity amongst consumers is because the consumer win rate is greater in arbitration as opposed to in court. Specifically, a 2002 report, by Professor Michael Perino of St. John's University School of Law, contained within the 2004 National Arbitration Forum survey, states that the consumer win rate in arbitration from 1980 to 2001 was 52.56% while the consumer win rate in federal court in 2000 was only 32%.[52] This suggests that consumers enjoy a 20% greater win rate when they choose to resolve their disputes using arbitration as opposed to litigation. This is a large percentile difference, and surly is enough to increase the attractiveness and popularity of arbitration as a means of resolving consumer transaction disputes.

Moreover, and perhaps more importantly for the credibility of arbitration as a dispute resolution procedure, a study surveying responses of investor-participants to the arbitration process found that 91% of respondents stated that the arbitration process was handled fairly and without bias.[53] This is encouraging because a process must be credible and fair if people are going to use it with confidence. At least from this data, arbitration appears to be a procedure that consumers are starting to believe in and trust.

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47. *Id.*
48. *Id.*
49. *Id.* at 10.
50. *Id.*
51. *Id.*
52. *Id.* at 8.
53. *Id.*

3. The Use of Arbitration for Resolving Commercial Contract Disputes

Finally, there is a trend that more companies are not only beginning to use arbitration, but that using arbitration also has substantial benefits for these companies. A study released in October 2003 by the American Arbitration Association (AAA), which included interviews with 254 corporate general counsel, associate general counsel, and the like from over one hundred Fortune 1000 organizations, found that arbitration is becoming increasingly popular for resolving commercial contract disputes.[54] Of those interviewed, 85% reported using arbitration to resolve these types of disputes.[55] Additionally, the study found that companies relying on arbitration or mediation to resolve disputes were more successful at "preserving business relationships" and keeping their costs down.[56] With this, respondents indicated that, because they approached dispute resolution from a broader risk and business management perspective, they were "stretched to the limit" 20% less than those who were less focused on preserving relationships while settling their disputes.[57]

E. The Second and Ninth Circuits

The Second and Ninth Circuits have both held that there should not be a stay of proceedings on the merits while a motion to compel arbitration is pending. The following discusses the facts, procedural history, and rationale from both.

1. The Second Circuit: *Motorola Credit Corp. v. Uzan*[58]

In *Motorola Credit Corp. v. Uzan*, the plaintiffs, Motorola Credit Corporation (Motorola) and Nokia Corporation (Nokia) sued the defendants, members of the Uzan family of Turkey and the companies the family controls, Telsim and Rumeli Telefon.[59] In 1998, Motorola lent Telsim $360 million to purchase cellular infrastructure and equipment from Motorola Ltd., and $200 million so Telsim could acquire a national cellular license for Turkey.[60] In subsequent years, Motorola provided more financing for Telsim eventually totaling roughly $2 billion.[61] As collateral for these loans Motorola received a substantial portion of Telsim's outstanding shares.[62] Throughout the time of this financing, Mo-

54. Press Release, American Arbitration Association, Groundbreaking Study Finds Companies that Use ADR to Manage Conflicts Excel in Controlling Costs, Preserving Relationships: Playing to Win Can be a Losing Strategy, Data Indicates (Oct. 15, 2003), http://www.adr.org (follow "Press Room" hyperlink; then follow "Press Releases" hyperlink).

55. *Id.*

56. *Id.*

57. *Id.*

58. 388 F.3d 39, (2d Cir. 2004).

59. *Motorola Credit Corp.*, 388 F.3d at 42-43.

60. *Id.* at 43.

61. *Id.*

62. *Id.*

torola signed several agreements providing that the parties agree to arbitrate any dispute arising under the agreement in front of a three arbitrator panel in Switzerland, in accordance with the laws of Switzerland.[63]

Motorola and Nokia brought suit against the defendants on various claims including fraud.[64] Subsequently, the district court denied the defendants motion to compel arbitration and refused to stay the proceedings pending an appeal of the denial of the motion to compel arbitration.[65] Ultimately, the plaintiffs received an award of nearly $4.2 billion dollars in compensatory and punitive damages.[66] The defendants appealed claiming several errors, including that the district court erred in not granting the motion to compel arbitration and that the district court was without jurisdiction to proceed with the case on the merits while the appeal of the denied motion to compel arbitration was pending.[67]

On appeal, the Second Circuit found that the district court properly denied the defendants' motion to compel arbitration and that the district court was not divested of jurisdiction to proceed on the merits while the appeal to the denial of the motion to compel arbitration was pending.[68] Ultimately, the court vacated the district court's award of punitive damages and remanded for a new calculation of punitive damages.[69]

2. The Ninth Circuit: *Britton v. Co-op Banking Group*[70]

In *Britton v. Co-op Banking Group*, the plaintiffs alleged that Liebling, among other defendants, participated in a "securities fraud scheme by selling a fraudulent tax shelter investment."[71] The plaintiffs purchased securities from defendants, Gold Depository and Loan Company, a Co-op Banking Group company.[72] The contract of sale for these securities included an arbitration provision.[73]

After filing the original complaint, the plaintiffs subsequently filed three amended complaints.[74] During the time the plaintiffs continued to amend their complaint, Liebling attempted to informally reach a settlement with the plaintiffs.[75] When settlement appeared unlikely, Liebling contacted the plaintiffs and demanded arbitration pursuant to the arbitration provision in the contract of sale for the securities.[76] The plaintiffs

63. *Id.*
64. *Id.* at 44.
65. *Id.* at 45.
66. Motorola Credit Corp. v. Uzan, 274 F. Supp, 2d 481, 583 (S.D.N.Y. 2003).
67. *Motorola Credit Corp.*, 388 F.3d at 49.
68. *Id.* at 49.
69. *Id.* at 65-66.
70. 916 F.2d 1405 (9th Cir. 1990).
71. *Britton*, 916 F.2d at 1407.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 1407-08.

refused to arbitrate, so Liebling filed a motion pursuant to the FAA[77] seeking to compel arbitration.[78] The district court denied Liebling's motion to compel arbitration reasoning that he waived his right to arbitration by actively pursuing litigation.[79] Liebling appealed the denial of the motion to compel arbitration, and filed a motion to stay proceedings.[80] The district court denied Liebling's motion for a stay of proceedings pending his appeal to the denial of the motion to compel arbitration.[81] During the time Liebling was seeking arbitration and subsequently a stay of the proceedings, the plaintiffs continually pushed for discovery.[82] Liebling resisted, which ultimately resulted in a default judgment entered against Liebling.[83] To this, Liebling argued that, because an appeal was filed, the district court lacked jurisdiction to enter a default judgment against him.[84]

3. Analysis—Second and Ninth Circuit Holdings

The Second and Ninth Circuits hold that a motion to stay proceedings should not be granted pending an arbitrability appeal. In *Motorola Credit Corp.*, decided in 2004, the Second Circuit followed the Ninth Circuit's rationale and holding in *Britton*, decided in 1990. Therefore, the following analysis of the Second and Ninth Circuits holdings will focus on the rationale of the Ninth Circuit in *Britton*.

Judge Fletcher, writing the *Britton* opinion, gave two main reasons for refusing to stay proceedings while the arbitrability appeal was pending. First, Judge Fletcher explained the general rule, filing a notice of appeal divests the district court of jurisdiction, does not apply to an arbitrability appeal because the issue of arbitrability is completely independent of the merits of the case.[85] In support of this contention, Judge Fletcher quotes *Moore's Federal Practice*, which states that "where an appeal is taken from a judgment which does not finally determine the entire action, the appeal does not prevent the district court from proceeding with matters not involved in the appeal."[86] Therefore, the district court retains jurisdiction, and the court may proceed with the merits of the case.[87]

The second reason Judge Fletcher provides for refusing to stay proceedings is that allowing an automatic stay pending an arbitrability ap-

77. 9 U.S.C.S. § 4 (2005).
78. *Britton*, 916 F.2d at 1408.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 1411.
85. *Id.*
86. *Britton*, 916 F.2d at 1411 (quoting MOORE ET AL., *supra* note 4, § 203.11)).
87. *Britton*, 916 F.2d at 1412.

peal would "allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration."[88] Based on these two reasons, the Ninth Circuit in *Britton* held that a motion to stay proceedings should not be granted pending an arbitrability appeal.[89] Subsequently, for identical reasons, the Second Circuit adopted the same holding.[90]

F. The Seventh and Eleventh Circuits

The Seventh and Eleventh Circuits have both held that there should be a stay of proceedings on the merits while a motion to compel arbitration is pending. The following discusses the facts, procedural history, and rationale from both.

1. The Seventh Circuit: *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*[91]

In *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, the plaintiff, Bradford-Scott Data Corp. (Bradford-Scott), entered into an agreement to distribute computer software written by VERSYSS Incorporated.[92] Bradford-Scott and VERSYSS entered into two contracts, the Vertical Value-Added Reseller Agreement (VAR) and the Master License Agreement.[93] The VAR agreement contained an arbitration clause, covering "any dispute or controversy between the parties . . . relating to this Agreement."[94] The Master License Agreement had a narrower arbitration clause covering only "payments dispute[s] concerning license or support fees."[95] Subsequent to entering into the software distribution agreement and executing the VAR and Master License Agreements, VERSYSS was acquired by Physician Computer Network (PCN), which offered a software package competing with the VERSYSS software Bradford-Scott licensed.[96]

Shortly after PCN acquired VERSYSS, Bradford-Scott filed suit against PCN and VERSYSS, claiming that VERSYSS violated its obligations under the Master License Agreement due to the acquisition and subsequent conduct of PCN and VERSYSS.[97] Ultimately, the district court concluded that the dispute was not arbitrable.[98] In response, PCN and VERSYSS appealed the arbitrability determination under Section 16(a)(1)(A) of the FAA and requested a stay of proceedings pending the

88. *Id.*
89. *Id.*
90. *Motorola Credit Corp.*, 388 F.3d 39 at 54.
91. 128 F.3d 504 (7th Cir. 1997).
92. *Bradford-Scott*, 128 F.3d at 504.
93. *Id.*
94. *Id.* at 505.
95. *Id.*
96. *Id.* at 504.
97. *Id.* at 505.
98. *Id.*

appeal.[99] The district court refused to stay the proceedings.[100] However, based on the reasons discussed in the analysis,[101] the Seventh Cicruit held that a stay should be granted pending the arbitrability appeal.

2. The Eleventh Circuit: *Blinco v. Green Tree Servicing*[102]

In *Blinco v. Green Tree Servicing*, Jack and Deborah Blinco, in a putative class action, claimed that Green Tree Servicing (Green Tree) failed to give notification of a transfer of the servicing of their loan in violation of the Real Estate Settlement Procedures Act.[103] Since an arbitration clause was included in the note executed by Jack Blinco, Green Tree moved the district court to compel arbitration and to stay the litigation.[104] The district court denied the motion to compel arbitration and the motion to stay.[105] Pursuant to the FAA,[106] Green Tree appealed the denial of the motion to compel arbitration.[107] Upon Green Tree's appeal, the district court refused to stay proceedings pending the appeal, which resulted in Green Tree asking the Circuit Court for relief.[108] The district court's rationale for denying the stay pending the arbitrability appeal was that, although the appeal was not frivoulous, the district court did not want "to set a precedent of placing cases on hold while defendants seek interlocutory appeals of the court's order."[109] The district court stated that a delay of discovery and proceedings pertaining to class certification was unnecessary, and further stated that a stay was unnecessary because the appeal would be decided before trial.[110] However, based on the reasons discussed in the analysis,[111] the Eleventh Circuit held that a stay should be granted pending the arbitrability appeal.

3. Analysis—Seventh and Eleventh Circuit Holdings

On the issue of granting a stay of proceedings on the merits while an appeal to a denied motion to compel arbitration is pending, the Seventh and Eleventh Circuits held that the district court should not proceed on the merits, and therefore grant motions to stay the proceedings. In *Blinco*, a case decided in 2004, the Eleventh Circuit followed the rationale and holding of the Seventh Circuit in *Bradford-Scott*, which was decided in 1997. Thus, the analysis of the Seventh and Eleventh Circuit

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99. *Id.*
100. *Id.*
101. *See infra* Part I.F.3.
102. 366 F.3d 1249 (11th Cir. 2004).
103. *Blinco*, 366 F.3d at 1250.
104. *Id.*
105. *Id.*
106. 9 U.S.C. § 16(a)(1)(A) (2005).
107. *Blinco*, 366 F.3d at 1250.
108. *Id.*
109. *Id.*
110. *Id.* at 1251.
111. *See infra* Part I.F.3.

holdings will focus on the rationale of the Seventh Circuit in *Bradford-Scott*.

In *Bradford-Scott*, Judge Easterbrook, writing the opinion for the court, began by stating the district court's reason for denying a stay pending appeal of the arbitrability determination was "untenable."[112] The lower court reasoned that the denial of the motion to compel arbitration was unappealable, and therefore held that a stay of the proceedings pending appeal should not be granted.[113] Judge Easterbrook responded to the lower court's decision by making note of Section 16(a)(1)(A) of the FAA, which expressly authorizes an appeal to a denied motion to compel arbitration.[114] After establishing that the appeal was proper under the FAA, Judge Easterbrook continued by stating that the "appellant's request would fail at the outset" if the four-prong test of *Hilton v. Braunskill*[115] was used to determine whether a stay should be granted.[116] Instead, Judge Easterbrook stated that the court shall "approach the subject from a different perspective . . . asking not whether appellants have shown a powerful reason why the district court must halt proceedings, but whether there is any good reason why the district court may carry on once an appeal has been filed."[117]

In essence, Judge Easterbrook announced a departure from applying the four-prong test, and instead rationalized that the district court should grant a stay in these cases because an appeal divests the district court of jurisdiction over the matter. He opined, "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control . . . ."[118]

According to the Seventh and Eleventh Circuits, this approach makes sense and is in line with the purpose of arbitration. First, as Judge Easterbrook stated in *Bradford-Scott*, "[c]ontinuation of proceedings in the district court largely defeats the point of the appeal and creates a risk of inconsistent handling of the case by two tribunals."[119] This "inconsistent handling" could lead to the worst and most inefficient outcome: "to litigate the dispute, to have the court of appeals revise and order the dispute arbitrated, to arbitrate the dispute, and finally return to the court to have the award enforced."[120] An arbitration clause reflects the parties'

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112. *Bradford-Scott*, 128 F.3d at 505.
113. *Id.*
114. *Id.*
115. *See supra* Part I.C.
116. *Id.*
117. *Id.*
118. *Id.* (citing Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982)).
119. *Bradford-Scott*, 128 F.3d at 505.
120. *Id.* at 506.

intentions to avoid litigation and opt for non-judicial dispute resolution that is faster and less expensive.[121] Potential exposure to the "worst possible outcome" completely defeats the underlying purposes of arbitration.[122] Allowing for an immediate appeal under Section 16(a) of the FAA helps to cut duplication losses and maintain the purpose and benefit of arbitration.

Judge Easterbrook also addressed the reasons why the Second and Ninth Circuits are incorrect for denying a stay of proceedings during an appeal of the arbitrability determination.[123] The Second and Ninth Circuits first argue that because arbitrability is completely separate from the merits of the case, it therefore does not affect any proceedings to resolve the issue on the merits.[124] Judge Easterbrook responds to this position by stating, "[a]n appeal authorized by section 16(a)(1)(A) presents the question whether the district court must stay its own proceedings pending arbitration. Whether the litigation may go forward in the district court is precisely what the court of appeals must decide."[125] In other words, the issue on appeal, arbitrability, is directly related to whether the district court can hear the case, and therefore the proceedings must be stayed.

The second reason the Second and Ninth Circuits refuse to issue stays is because an automatic stay would allow "crafty" litigants to file frivolous appeals to disrupt the district court.[126] Judge Easterbrook admits that this is a serious concern, but a problem easily avoided because an appellee may ask that the frivolous appeal be dismissed.[127] He stated, "[e]ither the court of appeals or the district court may declare that the appeal is frivolous, and if it is the district court may carry on with the case."[128] The Supreme Court and Tenth Circuit have made suggestions on how to combat this problem. For example, in *Abney v. United States*,[129] the Supreme Court stated that policies can be put in place giving certain appeals expedited treatment as courts of appeals have the supervisory power "to establish summary procedures and calendars to weed out frivolous claims."[130] Moreover, in *United States v. Hines*,[131] the Tenth Circuit held that a frivolous appeal may be dismissed if the district court (1) after a hearing and, (2) for substantial reasons given, (3) found the claim to be frivolous.[132] Furthermore, the *Hines* court held that upon such a procedure and finding the "[district] court should not be held

121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. 431 U.S. 651 (1977).
130. *Id.* at 662 n.8
131. 689 F.2d 934 (10th Cir. 1982).
132. *Id.* at 937.

divested of jurisdiction."[133] However, in *Apostol v. Gallion*,[134] the Tenth Circuit cautioned that dismissing a motion because it is frivolous is anomalous, and therefore must be used with restraint.[135]

In summary, in contrast to the Second and Ninth Circuits, the Seventh and Eleventh Circuits hold that a district court shall grant a stay of proceedings pending an arbitrability appeal because during appellate review, the district court is divested of jurisdiction, and therefore cannot proceed on the merits. Moreover, although measures can be put in place to discourage litigants from filing frivolous appeals, it is important that courts use restraint in making such a dismissal.

II. *MCCAULEY V. HALLIBURTON ENERGY SERVICES, INC.*[136]

A. Facts and Procedural History

Rodney McCauley is a former employee of Halliburton Energy Services Inc.[137] Mr. McCauley and Halliburton are parties to an agreement to arbitrate all claims that fall within the scope of Halliburton's Dispute Resolution Program (DRP).[138] Mr. McCauley was injured while applying foam insulation to the exterior of a bulk tank owned by Halliburton.[139] Subsequent to his injury, Halliburton decided to terminate Mr. McCauley.[140]

As a result of the injuries he sustained from the accident and Halliburton's subsequent action of terminating him, Mr. McCauley sued Halliburton for negligence, fraud and deceit, intentional infliction of emotional distress, and wrongful termination.[141] Additionally, Mr. McCauley's family brought actions for loss of consortium.[142]

The United States District Court for the Western District of Oklahoma granted Halliburton's motion to arbitrate all claims except the negligence and consortium claims.[143] In denying the motion to arbitrate on the negligence and consortium claims, the district court held that they arose from work Mr. McCauley performed as an independent contractor and outside the scope of his employment.[144] Subsequently, Halliburton appealed the denial of the motion to compel arbitration as permitted by the FAA.[145] Halliburton then moved the United States Court of Appeals

133. *Id.*
134. 870 F.2d 1335 (7th Cir. 1989).
135. *Id.* at 1339.
136. 413 F.3d 1158 (10th Cir. 2005).
137. *McCauley*, 413 F.3d at 1159.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*

for the Tenth Circuit to stay proceedings in the district court pending the arbitrability appeal.[146] The Tenth Circuit granted Halliburton's motion and held that the district court was divested of jurisdiction by "Halliburton's filing of its notice of appeal."[147]

B. Tenth Circuit's Rationale in Reaching Its Holding

The Tenth Circuit held that an automatic stay of proceedings shall be granted pending a non-frivolous appeal the denial of a motion to compel arbitration.[148] The Tenth Circuit's holding mainly hinged on the argument by the Seventh and Eleventh Circuits that an appeal on an arbitrability issue divests the district court of jurisdiction, which warrants an automatic stay.[149] In determining that this approach was sound, the Tenth Circuit looked to its own precedent addressing divestiture. In *Stewart v. Donges*,[150] the Tenth Circuit held that a district court was automatically divested of jurisdiction pending a non-frivolous appeal to the denial of a motion for summary judgment based on qualified immunity.[151] In *Stewart*, the Tenth Circuit stated:

> The divestiture of jurisdiction occasioned by the filing of a notice of appeal is especially significant when the appeal is an interlocutory one . . . . The interruption of the trial proceedings is the central reason and justification for authorizing such an interlocutory appeal in the first place. When an interlocutory appeal is taken, the district court [only] retains jurisdiction to proceed with *matters not involved in that appeal*.[152]

Furthermore, the court held that "a finding of frivolousness enabled the district court to retain jurisdiction and to proceed to trial absent intervention by the court of appeal."[153]

In *McCauley*, the Tenth Circuit found this line of reasoning persuasive for two reasons. First, Section 16(a) appeals are similar to appeals based on denial of qualified immunity because a failure to grant a stay pending either type of appeal denies or impairs the appellant's ability to obtain its "legal entitlement to avoidance of litigation, either constitutional entitlement to qualified immunity or the contractual entitlement to arbitration."[154] Second, the *Stewart* holding is persuasive because it addresses the possible misuse of interlocutory review by allowing a district

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146. *Id.*
147. *Id.* at 1163.
148. *Id.* at 1162.
149. *Id.* at 1160-61.
150. 915 F.2d 572 (10th Cir. 1990).
151. *Stewart*, 915 F.2d at 573.
152. *Id.* at 575-76.
153. *Id.* at 576.
154. *McCauley*, 413 F.3d at 1162.

court to deny frivolous appeals and continue absent intervention by the court of appeals.[155]

Relying on the divesture principle used by the Seventh and Eleventh Circuits and the previous Tenth Circuit panel in *Stewart*, the Tenth Circuit held that a non-frivolous appeal to a denied motion to compel arbitration warrants an automatic stay of proceedings.[156]

III. ANALYSIS

The following sections will discuss whether the Tenth Circuit's holding in *McCauley v. Halliburton Energy Services, Inc.*[157] is in line with Tenth Circuit precedent; whether the Tenth Circuit's holding is in line with the purpose of arbitration and the FAA; and finally, the likelihood of the issue reaching the Supreme Court.

A. The Tenth Circuit's Holding and Tenth Circuit Precedent

Although this was a case of first impression in the Tenth Circuit, the *McCauley* holding is in line with Tenth Circuit precedent. In addition to relying on the rationale of the Seventh and Eleventh Circuits, the Tenth Circuit relied on past precedent by referencing *Stewart v. Donges.*[158] In *Stewart*, the Tenth Circuit discussed the divesture principle whereby an interlocutory appeal, such as an arbitrability appeal, divests the district court of jurisdiction to proceed with the case on the merits.[159] Based on this argument, the Tenth Circuit in *McCauley* concluded that the district court does not have jurisdiction to proceed with a case on the merits pending an arbitrability appeal.[160] So, procedurally, granting a stay is the appropriate course of action based on the divesture principle whereby an interlocutory appeal divests the district court of jurisdiction to continue with the case.

B. The Tenth Circuit's Holding and the Purpose of Arbitration

Parties enter into pre-dispute arbitration agreements because arbitration is an attractive dispute resolution procedure. The attributes of arbitration include: (1) allowing parties to resolve their disputes faster and with less effort; and (2) fostering a less expensive dispute resolution process. According to a 2004 study by the National Arbitration Forum, 78% of respondents found faster recovery in arbitration and 59.3% found arbitration less expensive than litigation.[161] With this established, it be-

155. *Id.*
156. *Id.*
157. 413 F.3d 1158 (10th Cir. 2005).
158. 915 F.2d 572 (10th Cir. 1990).
159. *Stewart*, 915 F.2d at 575-76.
160. *McCauley*, 413 F.3d at 1162.
161. NAT'L ARBITRATION FORUM, *supra* note 44, at 3.

comes useful to determine whether a stay of proceedings pending an arbitrability appeal corresponds with the two purposes of arbitration.

1. Resolving Disputes Faster and With Less Effort

Pending an appeal, the district court may require that the parties proceed with the case on the merits. If the appellate court determines that the motion to compel arbitration was properly denied by the district court then essentially no time and effort was lost by proceeding with the case on the merits because the parties' would have been ordered to litigate regardless. However, if the appellate court decides that the district court erred in denying the motion to compel arbitration, then proceeding with the case on the merits is useless. In this scenario, not only have the parties wasted their time and effort by proceeding with the litigation process, but the district court has clogged its docket with proceedings that are essentially nullified by the appellate court's decision. Moreover, the parties then must arbitrate and possibly submit the issue to the district court again to have the award enforced.[162] This situation does not provide for an efficient resolution of the issues—a main purpose of arbitration. On the other hand, if a stay of proceedings is granted pending the arbitrability appeal, the district court may continue with other matters and the parties can avoid wasting the time and effort of proceeding with a case on the merits that will inevitably be ordered to arbitration.

2. Fostering a Less Expensive System

If the district court does not grant a stay of proceedings, the parties are required to proceed with the case on the merits. Again, if the appellate court determines that the district court properly denied the motion to compel arbitration then there is no consequence to not staying the proceedings. However, if the appellate court determines that the district court erred in not granting the motion to compel arbitration then the parties must incur the expenses of proceeding with the case, the expenses associated with arbitration, and possibly the expenses of having the district court enforce the arbitrator's award. The parties are incurring expenses that would have been avoided had a stay been granted. This is not in line with the purpose of arbitration—to resolve issues in a manner that is less expensive than litigation.

Parties generally enter into pre-dispute arbitration agreements because they find the arbitration process attractive. The approach of the Tenth Circuit, to grant an automatic stay, allows the parties to avoid the

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162. The FAA states:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award . . . .

9 U.S.C.S. § 9 (2005)

time, effort, and expenses associated with litigation, which the parties intended to avoid in the first place by entering into a pre-dispute arbitration agreement.

C. *The Tenth Circuit's Holding and Congressional Intent in Enacting the FAA*

It seems logical that courts interpret a statute consistent with Congress' intent when the plain language is unclear. Congress enacted the FAA so courts would give the same legal effect to arbitration agreements as is given to other contracts,[163] and to ensure that parties' desire for arbitration would not be undermined by federal and state courts that are unwilling to enforce arbitration agreements.[164] In other words, Congress' intent in enacting the FAA was to encourage the use of arbitration by making pre-dispute arbitration agreements enforceable. While Congress' intent is clear, the FAA remains unclear on whether to grant a stay pending an arbitrability appeal. As a result, it seems appropriate to analyze the outcome of a district court that grants a stay pending an arbitrability appeal and a district court that does not grant a stay in an effort to determine which approach is in line with Congress' intent in enacting the FAA.

A district court undermines the parties' preference for arbitration by refusing to grant a stay and ordering the parties to begin the litigation process. If parties enter into a valid pre-dispute arbitration agreement an assumption can be made that the parties contracted with the intention of avoiding litigation. If a district court can order the parties to continue with the case on merits, regardless of whether an arbitration agreement exists, it detracts from the legal effect that courts were intended to give arbitration agreements and discourages the use of arbitration.

In contrast, by granting a stay, a district court is acting in line with Congress' intent in enacting the FAA. By granting a stay, a district court is not only acknowledging the fact that an arbitration agreement should have the same legal effect as other contracts by allowing the parties to act in a manner consistent with their contracted preference, but also encouraging arbitration by not undermining the parties' preference for avoiding litigation. Granting a stay pending an arbitrability appeal is in line with the purpose of the FAA.

D. *The United States Supreme Court*

The criterion for an issue reaching the Supreme Court is stringent, as the Court grants certiorari in relatively few cases. However, the Court will often review an issue that is in conflict among the circuits and that is

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163. *See* Stenson, *supra* note 24, at 661.

164. Southland Corp. v. Keating, 465 U.S. 1, 13 (1984) (citing Metro Indus. Painting Corp. v. Terminal Constr. Corp., 287 F.2d 382, 387 (2d Cir. 1961)).

a legal issue of national importance.[165] Including the Tenth Circuit's decision in *McCauley*, only five circuits have addressed the issue of whether to grant a stay pending an appeal to an arbitrability determination. With *McCauley*, three circuits hold that an automatic stay should be granted and two circuits hold that a stay should not be granted. The issue is unresolved in five circuits, the D.C. circuit, and the federal circuit.

The issue will likely reach the Supreme Court in the future. First, there is a clear conflict among the circuits on this issue as the five circuits that have addressed the issue are split three-to-two. Following this pattern, the other circuits will likely be split as well. Second, as indicated by the statistical data,[166] arbitration is growing in popularity. As arbitration becomes more popular, more arbitration agreements will be created because: "Virtually all American businesses and individuals with legal capacity to contract . . . have entered into agreements that specify arbitration as the forum for resolving most or all disputes that might arise between the parties."[167]

Arbitration is impacting businesses and individuals alike – increasingly receiving attention not only in the lower courts but in the Supreme Court as well. For example, the Supreme Court "has decided more than thirty arbitration cases since 1983, including ten since the turn of the century."[168] Therefore, a strong presumption can be made that issues dealing with arbitration are matters of national importance, and accordingly, there is a strong likelihood that the particular issue addressed in this article and perhaps many others dealing with arbitration will face review by the Supreme Court in the future.

In the event that the issues discussed in this article reaches the Supreme Court, there is a strong likelihood that the Supreme Court will adopt the Tenth Circuit's approach—in line with the purpose of arbitration and Congress' intent in enacting the FAA. Furthermore, the opposing view, refusing to grant a stay, relies heavily on the fact that it discourages litigants from bringing frivolous appeals. However, there are measures in place for combating this problem, and therefore the opposing view's argument is substantially discredited.[169]

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165. *See* Richard J. Lazarus, *Judging Environmental Law*, 18 TUL. ENVTL. L.J. 201, 216 (2004).

166. *See supra* Part I.D.

167. Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit*, 35 TEX. TECH L. REV. 497, 498 (2004).

168. *Id.* at 499.

169. *See supra* Part I.F.

CONCLUSION

In *McCauley v. Halliburton Energy Services Inc.*,[170] the Tenth Circuit adopted the reasoning of the Seventh and Eleventh Circuits and held that a non-frivolous appeal of a denied motion to compel arbitration warrants issuance of an automatic stay of proceedings. This is the correct approach for several reasons. First, an appeal divests the district court of jurisdiction over a matter. If the district court does not have jurisdiction over the matter then the district court should not be able to proceed with the case on the merits. Second, a main argument for not granting a stay of proceedings is that it prevents frivolous appeals. However, the Tenth Circuit has addressed this concern by adopting a procedure by which the district court can deny the appeal as frivolous.

Moreover, the Tenth Circuit's approach corresponds to the purposes of arbitration. Generally, a party's decision to enter a pre-dispute arbitration agreement reflects their desire for arbitration. By granting a stay, the parties avoid the time, effort, and expenses associated with litigation, and the district court may proceed with other matters while the appellate court handles the arbitrability issue. Furthermore, based on Congress' intent in enacting the FAA, granting a stay is appropriate. By doing so, the district court gives full effect to the parties' contracted preference for avoiding litigation.

Although the approach of the Tenth Circuit appears to be correct, there is nevertheless a circuit split. As more circuits confront this issue, the split may become more prominent, and when there is a conflict among the circuits on an issue of national importance, such as the issue here, it is likely the issue will reach the Supreme Court. Arbitration is growing in popularity and increasingly making its way into the American legal system, and as a result, the circuits and possibly the Supreme Court will continue to face important issues pertaining to alternative dispute resolutions procedures such as arbitration.

Nickolas J. McGrath[*]

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170. 413 F.3d 1158 (10th Cir. 2005).

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REQUIRING THE UNKNOWN OR PRESERVING REASON: *UNITED STATES V. GONZALEZ-HUERTA* AND THE TENTH CIRCUIT'S COMPROMISE APPROACH TO *BOOKER* ERROR

INTRODUCTION

The United States Supreme Court's decision in *United States v. Booker*[1] sent shockwaves throughout both the criminal justice community and society at large. The method for sentencing all federal offenders had been struck down as a violation of the constitutionally protected right to a jury trial, and the Court changed the previously mandatory sentencing structure into an advisory guideline.[2] The Court provided that "normal prudential doctrines" should guide the review of the now unconstitutional sentences, but unfortunately that guidance was not sufficient.[3]

Left with the overwhelming task of reviewing the constitutionality of each pending sentence and guided by the ambiguous and scantly described "plain error doctrine," a significant disparity developed in the approaches that various federal appellate courts employed. Some circuits utilized a hard line approach to resentencing, buoyed by the textual reading of plain error precedent.[4] Others were more lenient and addressed the fundamental fairness issues by remanding cases for the sole purpose of determining if the district court would have imposed a different sentence under the post-*Booker* structure.[5] Yet even other circuits gave full deference to the rights of defendants by presuming the mere application of mandatory sentencing guidelines constituted prejudice.[6] The several different approaches resulted in only one clear rule—that defendants were being treated differently based solely on geography—a situation the original Sentencing Reform Act was expressly designed to defeat.[7]

Within this context, the Tenth Circuit added yet another layer to the methods of applying *Booker* with its decision in *United States v. Gon-*

1. 125 S. Ct. 738 (2005). For further discussion of *Booker* in this issue, *see* Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665 (2006).

2. *Booker*, 125 S. Ct. at 752.

3. *Id.* at 769.

4. *See* United States v. Antonakopoulos, 399 F.3d 68, 78-79 (1st Cir. 2005); United States v. Mares, 402 F.3d 511, 522 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 43 (U.S. Oct. 3, 2005) (No. 04-9517); United States v. Pirani, 406 F.3d 543 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 266 (U.S. Oct. 3, 2005) (No. 05-5547); United States v. Rodriguez, 398 F.3d 1291, 1300 (11th Cir. 2005), *cert. denied*, 125 S. Ct. 2935 (U.S. June 20, 2005) (No. 04-1148).

5. *See* United States v. Crosby, 397 F.3d 103, 117 (2d Cir. 2005); United States v. Paladino, 401 F.3d 472 (7th Cir. 2005), *cert. denied*, Peyton v. United States, 126 S. Ct. 106 (U.S., Oct. 3, 2005) (No. 04-10402); United States v. Ameline, 409 F.3d 1073, 1078-79 (9th Cir. 2005); United States v. Coles, 403 F.3d 764, 768 (D.C. Cir. 2005).

6. *See* United States v. Hughes, 401 F.3d 540, 548 (4th Cir. 2005); United States v. Barnett, 398 F.3d 516, 526 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 33 (U.S. Sept. 20, 2005) (No. 04-1690).

7. *See* Koon v. United States, 518 U.S. 81, 92 (1996).

zalez-Huerta.[8] The Tenth Circuit found that the fourth prong of plain error review, rather than the third prong that most other circuits were relying upon, was the proper basis for refusing to remand a sentence based solely on prior convictions and facts admitted by the defendant.[9] Although seemingly falling in line with the other hard line circuits, such as the First, Fifth, and Eleventh, this article perceives the Tenth Circuit's decision as a distinct and more appropriate determination resulting from the Supreme Court's guidance in *Booker* that not every sentence deserves remand.[10]

This article will analyze the *Gonzalez-Huerta* decision within the context of both the sister Circuits' decisions and the brief history of the plain error review doctrine. Part I will discuss the history of the Federal Sentencing Guidelines, including the legal challenges to the mandatory sentencing regime, and the development of the plain error doctrine. Part II will discuss the Tenth Circuit's decision in *Gonzalez-Huerta* and compare the decisions of the other circuits. In Part III, this article agrees with the ultimate outcome of the *Gonzalez-Huerta* decision and the analysis of the fourth element of plain error review. However, the Tenth Circuit's decision to place the burden on the defendant to satisfy the third element of plain error review is a mistake given fairness considerations and the difficulty of establishing prejudice in post-*Booker* sentence challenges. Finally, this article will conclude that the *Gonzalez-Huerta* decision represents the clearest application of the Supreme Court's intent under both *Booker* and the plain error doctrine precedent.

I. BACKGROUND

A. United States Federal Sentencing Guidelines

1. History

Since the founding of the United States of America, federal judges have been given unfettered discretion when determining an offender's sentence after a conviction, with the power to impose anything between parole and the statutory maximum.[11] Judges' expansive power over sentencing was moderately curtailed by the establishment of a parole commission, which arose in response to a shift towards the rehabilitative model of criminal punishment.[12] Although judges still imposed the sentences, the parole commission determined the actual time served through

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8. 403 F.3d 727 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 495 (U.S. Oct. 17, 2005) (No. 05-6407).

9. *Gonzalez-Huerta*, 403 F.3d at 739.

10. *Booker*, 125 S. Ct. at 769.

11. UNITED STATES SENTENCING COMMISSION, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2005), http://www.ussc.gov/general/USSCoverview_2005.pdf [*hereinafter* USSC OVERVIEW].

12. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225-28 (1993).

the discretion to release convicted offenders prior to the expiration of their sentences.[13] After an offender had served one-third of his sentence,[14] the parole commission could release the offender upon a finding that the welfare of society would not be threatened and the offender would not reviolate the laws.[15] Outside of the creation of the parole commission, federal judges' sentencing power remained largely unchecked until the Reagan era.[16]

Extensive criticism was directed at the indiscriminate sentencing system during the early 1970's. The most persuasive voices in favor of binding sentencing guidelines were those of Judge Marvin E. Frankel[17] and Senator Edward M. Kennedy.[18] Surprisingly, the main support for sentencing guidelines originated from liberals who viewed them as anti-imprisonment and anti-discrimination measures.[19] Debate over sentencing guidelines lasted over a decade,[20] and Congress finally responded by abolishing the indeterminate sentencing structure and passing the Sentencing Reform Act within provisions of the Comprehensive Crime Control Act of 1984.[21] The main goals of the Sentencing Reform Act were to increase the consistency of sentencing and incorporate the four main purposes of criminal punishment (i.e., retribution, deterrence, incapacitation, and rehabilitation).[22] The structure that replaced indeterminate sentencing was a set of Sentencing Guidelines established by an administrative agency within the judiciary called the United States Sentencing Commission ("Sentencing Commission").[23] The Sentencing Commission developed the Federal Sentencing Guidelines ("Sentencing Guidelines"), which were to provide certainty in sentencing and acceptance of the four purposes of criminal justice.[24] The Sentencing Guidelines went into effect on November 1, 1987,[25] and provided a mandatory range for

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13. Act of June 25, 1910, ch. 387, 36 Stat. 819, 819 (1910) (subsequently codified at 18 U.S.C. § 4205(a) (1982) (repealed 1984)) (establishing parole commissions at each of the three existing federal penitentiary systems).

14. *Id.*

15. *Id.* at 819-20.

16. *See* Stith & Koh, *supra* note 12, at 223.

17. *Id.* at 228-30 (noting that Frankel's book, *Criminal Sentences: Law Without Order*, earned him the title of "father of sentencing reform").

18. *Id.* at 230-36 (noting that Senator Kennedy's main interest was the passage of a bill that overhauled all federal criminal statutes, but that Kennedy spearheaded a bipartisan movement for sentencing guidelines).

19. *Id.* at 223, 232-33 (discussing the participation of Senator John L. McClellan and Professor Alan Dershowitz in garnering support for the sentencing guidelines).

20. *Id.* at 223, 225, 228-30.

21. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551 to 3559, 3561 to 3566, 3571 to 3574, 3581 to 3586, & 28 U.S.C. §§ 991 to 998 (1988)).

22. USSC OVERVIEW, *supra* note 11, at 1. *See also* Stith & Koh, *supra* note 12, at 239-43.

23. 28 U.S.C. § 991 (2005) (creating a seven-member commission within the judiciary for the purpose of establishing sentencing policies and practices).

24. *Id.*

25. USSC OVERVIEW, *supra* note 11, at 2.

sentencing.[26] The Sentencing Reform Act included a list of factors which could be considered for increasing or decreasing a sentence.[27] Any deviation from the prescribed range required the judge to detail the specific reasons for the departure.[28]

2. Challenges

The Sentencing Guidelines elicited strident reactions from both liberal and conservatives that soon led to legal challenges of the Sentencing Reform Act. Within two years of enactment of the Sentencing Guidelines in 1987, the formation and duties of the Sentencing Commission were unsuccessfully challenged in *Mistretta v. United States*,[29] based upon constitutional delegation and separation of powers arguments.[30] The Court quickly dismissed the delegation issue by describing the historically low bar for administrative delegations,[31] and then addressed the separation of powers concern that the integrity of the judicial branch may be threatened by having judges review the constitutionality of mandatory sentences created by fellow judges.[32] The Court analogized the Sentencing Commission's functions to that of developing the Federal Rules of Civil and Criminal Procedure,[33] labeled those functions as within the purview of the judicial branch,[34] and found the vesting of those functions within the judiciary to be acceptable under a flexible checks and balances interpretation of separation of powers.[35] Justice Scalia, in a scathing dissent, viewed the functions of the Sentencing Commission as entirely legislative and thus inappropriately exercised within the judicial branch.[36]

After *Mistretta*, the Sentencing Guidelines were left undisturbed until a series of Supreme Court cases regarding state criminal sentencing provided a constitutional basis under the Sixth Amendment[37] for challenging the federal sentencing structure. An important initial breakthrough occurred in *Apprendi v. New Jersey*,[38] in which a slim five to four majority of the Court established the rule: "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must

26. 18 U.S.C. § 3553 (2005).
27. *Id.* (describing factors such as nature of the offense, effectuating the four purposes of criminal punishment, any pertinent policy statement, sentencing consistency, and the need for restitution).
28. *Id.* (requiring the judge to detail the specific reason for the sentence in a written order).
29. 488 U.S. 361 (1989).
30. *Mistretta*, 488 U.S. at 370-71.
31. *Id.* at 371-80.
32. *Id.* at 383.
33. *Id.* at 392-93.
34. *Id.* at 396-97.
35. *Id.* at 412.
36. *Id.* at 413 (Scalia, J., dissenting).
37. U.S. CONST. amend. VI (guaranteeing the right to a "public trial, by an impartial jury of the State and district wherein the crime shall have been committed").
38. 530 U.S. 466 (2000).

be submitted to a jury, and proved beyond a reasonable doubt."[39] In *Apprendi*, the defendant pled guilty to a state weapons offense with a statutory maximum of ten years, among other charges.[40] However, under a separate bias enhancement statute, the state judge imposed a twelve year sentence after determining that the defendant was motivated by racial animus.[41] The Court struck down the enhanced sentence, finding that the judge's use of facts not determined by a jury at sentencing violated the jury trial right because the use of an additional fact is the functional equivalent of an element, which juries must determine.[42]

An equally important extension of the *Apprendi* rule occurred in *Ring v. Arizona*[43] along the same slim majority. Ring was convicted of felony murder, and Arizona state law required the judge to consider an enumerated list of aggravating factors[44] in addition to any mitigating factors presented by the defense.[45] The state judge sentenced Ring to death, but the Court struck down the sentence after applying the *Apprendi* rule and reasoning that if a "State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."[46]

The next link in the chain was *Blakely v. Washington*,[47] a case that some scholars feel was an inevitable result of the Court's broad application of the *Appendi* reasoning in the *Ring* decision.[48] Blakely pled guilty to second degree kidnapping, an offense that was limited to a sentencing range of forty-nine to fifty-three months under Washington's Sentencing Reform Act.[49] However, the judge found Blakely acted with "deliberate cruelty,"[50] an aggravating factor which allowed the judge to increase the sentence up to the ten year maximum,[51] and the judge imposed a sentence of ninety months—three years over the suggested range but still under the statutory maximum.[52] The Court again struck down the sentence stating that the "relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the

39. *Apprendi*, 530 U.S. at 490.
40. *Id.* at 469-71.
41. *Id.* at 471.
42. *Id.* at 494 n.19, 497.
43. 536 U.S. 584 (2002).
44. *Ring*, 536 U.S. at 592 n.1.
45. *Id.* at 592-93 (requiring the judge to find the existence of at least one aggravating factor and no mitigating factors in order to impose the death penalty).
46. *Id.* at 602.
47. 124 S. Ct. 2531 (2004).
48. David Y. Yellen, *Reuschlein Lecture: Saving Federal Sentencing Reform After Apprendi, Ring, Blakely, and Booker*, 50 VILL. L. REV. 163, 170 (2005).
49. WASH. REV. CODE ANN. § 9.94A.320 (2005).
50. *Blakely*, 124 S. Ct. at 2535.
51. WASH. REV. CODE ANN. § 9.94A.390(2)(h)(iii) (current version at WASH. REV. CODE ANN. § 9.94A.535(2)(a) (2005)).
52. *Blakely*, 124 S. Ct. at 2535.

maximum he may impose *without* any additional findings."[53] Thus, all facts forming the basis for any sentence exceeding a state sentencing guideline must be found beyond a reasonable doubt by a jury, even if a determination of that fact is expressly delegated to the judge's discretion by the legislature.

The reasoning of *Apprendi*, *Ring*, and *Blakely* culminated with the Court's determination in *United States v. Booker*[54] that mandatory application of the federal Sentencing Guidelines violated the Sixth Amendment right to a jury trial.[55] The combined defendants, Booker and Fanfan, faced similar circumstances at the federal level as the defendant in *Blakely*, namely an enhancement of their sentences under judicially determined aggravating factors.[56] The Court reiterated the *Apprendi* rule and included an additional caveat that allowed prior convictions to be considered along with jury-determined facts.[57]

In addition to holding that judge-determined sentence enhancement violated the Sixth Amendment, the Court enacted a "remedial holding" in which it excised two provisions of the Sentencing Reform Act and changed the nature of the Sentencing Guidelines from mandatory to advisory.[58] The impact of these two separate holdings, the primary and the remedial, was to create two types of error under *Booker*. The first type is called "constitutional *Booker* error" because it violates the Sixth Amendment jury trial provision, and it arises when a defendant's sentence was increased to a level above the guideline range based on non-jury determined facts.[59] The second type of error is called "non-constitutional *Booker* error" because mandatory application of the Sentencing Guidelines now violates the express (albeit revised) wording of the Sentencing Reform Act.[60] The subtle point regarding non-constitutional *Booker* error is that the sentence itself is fully constitutional, and the only error is the statutorily violative act of *mandatory* application as opposed to the *advisory* application required by the post-*Booker* Sentencing Guidelines.[61]

Finally, the Court provided the following significant guidance to aid lower courts in reviewing *Booker* challenges to sentences imposed under the Sentencing Guidelines:

> That does not mean that every sentence will give rise to a Sixth Amendment violation or that every appeal will lead to a new sentenc-

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53. *Id.* at 2537 (quotations omitted).
54. 125 S. Ct. 738 (2005).
55. *Booker*, 125 S. Ct. at 756.
56. *Id.* at 746-47.
57. *Id.* at 756.
58. *Id.*
59. *Gonzalez-Huerta*, 403 F.3d at 731.
60. *Id.* at 731-32.
61. *See* United States v. Rodriguez, 398 F.3d 1291, 1300-03 (11th Cir. 2005).

ing hearing. That is because reviewing courts are expected to apply ordinary prudential doctrines, determining, e.g., whether the issue was raised below and whether it fails the "plain-error" test. It is also because, in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine.[62]

The reference to plain error review of sentencing cases is crucial to understanding the subsequent impact of *Booker* on appellate review of sentencing and the subsequent disparate treatment of that standard by various Circuit courts.

B. Plain Error Analysis

Federal Rule of Criminal Procedure 52(b) provides: "plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[63] Otherwise known as the "plain error standard of review," Rule 52(b) allows a court to remedy egregious violations of justice and fairness even when a party has failed to object to the issue at trial, and thus has effectively waived the issue on appeal.[64] The procedural rule codified the common law "plain error doctrine" which allowed appeals courts to notice an error *sua sponte* regardless of whether a party properly objected if the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."[65] The Court later described the purpose of Rule 52(b) as providing an avenue for redressing miscarriages of justice.[66]

A complete framework for determining when plain error constituted grounds for remand didn't develop until 1992 in *United States v. Olano*.[67] The error alleged in *Olano* was the trial court's decision to allow two alternate jurors to be present in the deliberation room with the other twelve actual jurors, and the Court established the following four-part test for analyzing plain error under Rule 52(b): (1) error occurred;[68] (2) the error was plain;[69] (3) the error affected substantial rights;[70] and (4)

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62. *Booker,* 125 S. Ct. at 738.
63. FED. R. CRIM. P. 52(b).
64. *Id.*
65. United States v. Atkinson, 297 U.S. 157, 160 (1936).
66. United States v. Frady, 456 U.S. 152, 163 (1982).
67. 507 U.S. 725 (1993).
68. *Olano*, 507 U.S. at 732-33 (noting that error is any derivation from a legal rule that is not waived). The Court also draws a distinction between "waiver" and "forfeiture"; the latter is the failure to object, while the former is the "intentional relinquishment or abandonment of a known right." *Id.* Waiver forecloses application of Rule 52(b), while forfeiture satisfies the first element. *Id.*
69. *Id.* at 734 (describing the meaning of "plain" as equivalent to "clear" or "obvious").
70. *Id.* at 734-35 (further defining the requirement that the error affect the results of the trial proceedings). Note that, in *Olano*, Justice O'Connor lists this third element as the final limitation, but both courts and scholars include O'Connor's guidance regarding when appellate courts should implement their optional discretion under Rule 52(b) as a fourth element. *United States v. Burbage,*

invocation of the court's discretion under Rule 52(b) would remedy an error that substantially affects the fairness, integrity, or public reputation of judicial proceedings.[71]

The Court characterized plain error review as analogous to harmless error review but with one substantial difference—the burden of persuasion rests with the defendant, not the government, under plain error review for both the "substantial rights" and the "judicial integrity" elements.[72] The Court relied on the discrepancy in language between Rules 52(a) and 52(b), the latter authorizing remedy only when the error does affect substantial rights, as the source of the burden shifting.[73] The Court also placed emphasis on the need for a distinction between plain and harmless error in order to encourage defendants to object.[74] Finally, based upon the specific facts of *Olano*, the Court concluded that no substantial rights were affected and reinstated the jury's verdict without deciding upon the judicial integrity element.[75]

However, despite the general rule that the burden of persuasion lies with the defendant, *Olano* provides a basis for two possible exceptions. The majority describes a "special category of forfeited errors" and a class of "errors that should be presumed prejudicial" but the majority specifically declines to address these categories.[76] Although the Court specifically declined to address the effect of these exceptions, the implication is that the Court may exercise its discretion under Rule 52(b) and rectify easily remedied and presumptively prejudicial errors despite any showing of prejudice or effect on the proceedings.[77]

The commonly used term for the first of the *Olano* exceptions is "structural error" and is defined as a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."[78] Structural error is limited to very exceptional circumstances such as faulty jury instructions,[79] total denial of the right to counsel,[80] and the lack of an impartial judge.[81] Furthermore, a strong presumption against structural error exists when the right to counsel and the

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365 F.3d 1174, 1180 (10th Cir. 2004); Jeffery L. Lowry, *Plain Error Rule – Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Criminal Procedure*, 84 J. CRIM. L. & CRIMINOLOGY 1065, 1072 (1994).

71. *Olano*, 507 U.S. at 735-37 (refusing to limit application of Rule 52(b) to when the defendant is actually innocent).

72. *Id.* at 734-35.

73. *Id.*

74. *Id.*

75. *Id.* at 739-41.

76. *Id.* at 735.

77. *Id.* at 735-36.

78. Arizona v. Fulminante, 499 U.S. 279, 309-10 (1986) (internal citation omitted).

79. Sullivan v. Louisiana, 508 U.S. 275, 280 (1993).

80. Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963).

81. Tumey v. Ohio, 273 U.S. 510, 523 (1927).

right to an impartial adjudicator are satisfied.[82] Consequently, structural error arguments are rarely successful. However, the existence of these exceptions provides a point of departure for the federal circuits undertaking review of non-constitutional *Booker* error, with some courts finding the exceptions are satisfied and others finding they are not.

One final and important aspect of plain error review is that the Supreme Court consistently decides plain error cases by presuming the third element is satisfied and deciding the case based solely upon the fourth element.[83] Since both prongs must be satisfied by the defendant, the result is usually against the defendant, but the general technique of presuming satisfaction of the third element is important in *United States v. Gonzalez-Huerta*.

II. JUDICIAL DECISIONS

A. United States v. Gonzalez-Huerta[84]

In *United States v. Gonzalez-Huerta*, the Tenth Circuit addressed for the first time within its jurisdiction the standard of review applicable to a defendant who alleged non-constitutional *Booker* error and raised the issue for the first time on appeal. Prior to the *Gonzalez-Huerta* decision, the Tenth Circuit had established that mandatory application of the Sentencing Guidelines constituted harmful error warranting remand of the sentence,[85] but now the court was faced with review under the plain error standard, rather than the harmless error standard. The Tenth Circuit heard the case *en banc* due to its importance.[86]

1. Facts

Sergio Gonzalez-Huerta was convicted of burglary in California in 1994 and served a prison term.[87] Six years after his conviction, Mr. Gonzalez-Huerta was deported to Mexico, but was again apprehended in New Mexico for possession of a controlled substance.[88] While in jail on the substance charge, federal authorities charged Mr. Gonzalez-Huerta with illegal reentry by a deported alien convicted of an aggravated felony.[89] Mr. Gonzalez-Huerta pled guilty to the charged offense and was

82. Neder v. United States, 527 U.S. 1, 8 (1999).
83. *See* Johnson v. United States, 520 U.S. 461, 469 (1997) ("[E]ven assuming that the failure to submit materiality to the jury 'affected substantial rights,' it does not meet the final requirement of *Olano*."); United States v. Cotton, 535 U.S. 625, 632-33 (2002) ("[W]e need not resolve whether respondents satisfy this element of the plain-error inquiry, because even assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.").
84. 403 F.3d 727 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 495 (U.S. Oct. 17, 2005) (No. 05-6407).
85. United States v. Labatstida-Segura, 396 F.3d 1140, 1143 (10th Cir. 2005).
86. *Gonzalez-Huerta*, 403 F.3d at 731.
87. *Id.* at 730.
88. *Id.*
89. *Id.*

sentenced to fifty-seven months.[90] When determining the sentence, the only facts used by the district court included the fact of the prior burglary conviction and those facts admitted by Mr. Gonzalez-Huerta in his plea.[91] According to the federal Sentencing Guidelines, Mr. Gonzalez-Huerta's offense level was twenty-one and his criminal history was Category IV, which mandated a sentence between fifty-seven and seventy-one months for the offense charged.[92] The district court imposed the minimum sentence, and Mr. Gonzalez-Huerta did not object to the application of the Sentencing Guidelines during the proceedings.[93] The groundbreaking decisions in *Blakely v. Washington*[94] and *United States v. Booker*[95] were handed down subsequent to Mr. Gonzalez-Huerta's sentencing but prior to the hearing of his appeal.[96]

Mr. Gonzalez-Huerta presented three theories for reversal on appeal: the sentence imposed violated the Sixth Amendment as interpreted by *Booker*, the district court's use of a prior conviction contravened the *Blakely* holding, and a Due Process challenge to the sentence under *Hicks v. Oklahoma*.[97] The court quickly dismissed the latter two arguments. The prior conviction challenge contravened the jurisprudential rule that only the Supreme Court can overrule its own precedent,[98] and the Due Process challenge lacked the necessary statutory liberty interest element.[99]

In his only remaining argument, Mr. Gonzalez-Huerta argued that he should be resentenced according to the holdings of *Blakely* and *Booker*.[100] The central issue in the case, as framed by the Tenth Circuit, was whether the mandatory application of the federal Sentencing Guidelines constitutes reversible error under plain error review when the only facts relied upon at sentencing are prior convictions and those admitted by the defendant.

2. Decision

The Tenth Circuit parted ways with its sister circuits and determined that mandatory application of the Sentencing Guidelines in of

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. 542 U.S. 296 (2004).
95. 543 U.S. 220 (2005).
96. *Gonzalez-Huerta*, 403 F.3d at 730.
97. 447 U.S. 343 (1980). Mr. Gonzalez-Huerta argued the legislature created a statutory liberty interest in sentencing procedures that cannot be removed without due process, but failed to specify which provision of the Sentencing Reform Act established any statutory interest. *Gonzalez-Huerta*, 403 F.3d at 732 n.2.
98. *Id.* at 731 n.1 (discussing the argument that *Booker* questioned the Supreme Court's ruling in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).
99. *Id.* at 732 n.2 (discussing Mr. Gonzalez-Huerta's failure to allege the Sentencing Reform Act created a statutory liberty interest).
100. *Id.* at 730-31.

itself does not satisfy the fourth element of plain error analysis, namely the judicial integrity and fairness requirement, and therefore sentences imposed based solely on prior convictions and admitted facts are not eligible for remand.[101] The court initiated its analysis by determining that the present facts represented non-constitutional *Booker* error,[102] the proper standard of review was plain error,[103] and that the first two requirements under *Olano* were satisfied.[104] The court then stated that the real issue in this case was whether Mr. Gonzalez-Huerta could satisfy the third and fourth *Olano* elements, namely the substantial rights and judicial integrity requirements.

Turning to the substantial rights element, the court described the general rule that the defendant holds the burden to demonstrate "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different."[105] Mr. Gonzalez-Huerta, instead of addressing the burden directly, invoked the two *Olano* exceptions.

Mr. Gonzalez-Huerta first argued that mandatory application of the Sentencing Guidelines is structural error, and thus the burden is shifted to the government.[106] The court held that non-constitutional *Booker* error is not structural error for three reasons: (1) structural error must be constitutional error, which non-constitutional *Booker* error is not; (2) the *Neder* strong presumption against structural error exists in this case due to the presence of counsel and an impartial judge; and (3) the "defining feature" of structural error isn't present in this case.[107] According to the court, the defining feature of structural error is that its effect on the proceedings is unquantifiable,[108] and non-constitutional *Booker* error is readily quantifiable because if it is present, the court can find the substantial rights element is satisfied.[109]

Mr. Gonzalez-Huerta then argued the significant change in well-settled law wrought by *Booker* for cases on appeal, typically termed an "intervening decision," created presumptively prejudicial error.[110] The

101. *Id.* at 739.

102. *Id.* at 732 (discussing that the district court had not enhanced Mr. Gonzalez-Huerta's sentence based on judicially-determined facts, which would have violated the Sixth Amendment under the *Booker* holding).

103. *Id.* (discussing that the appropriate standard was dictated by Mr. Gonzalez-Huerta's failure to raise the issue below).

104. *Id.* (discussing that the district court's mandatory application of the Sentencing Guidelines was clearly erroneous under the holding of *Booker*, and the error was clear at the time of appeal).

105. *Id.* at 733 (quoting United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004)).

106. *Gonzalez-Huerta*, 403 F.3d at 733.

107. *Id.* at 734.

108. *Id.*

109. *Id.* The Tenth Circuit points to the Eleventh Circuit's decision in *United States v. Shelton*, 400 F.3d 1325, 1328, 1332-33 (11th Cir. 2005), as an example where the effect of prejudice is quantified and then turns to the First Circuit's decision in *United States v. Antonakopoulos*, 399 F.3d 68, 80 n.11 (1st Cir. 2005), as support for the general holding that non-constitutional *Booker* error is not structural error. *Id.*

110. *Id.*

Sixth Circuit adopted the presumptively prejudicial approach in *United States v. Barnett*,[111] and Mr. Gonzalez-Huerta asked the Tenth Circuit to follow the *Barnett* approach.[112] The Tenth Circuit declined the request because the Supreme Court never used the presumptively prejudicial exception to remand a case,[113] defendants alleging *Booker* error can make an alternative showing of prejudice,[114] mitigating sentencing factors could and should have been presented to the District Court regardless of the *Booker* decision,[115] and allowing the burden to rest with the government would substantially confuse the line between plain error review and harmful error review.[116]

Having concluded that the defendant holds the burden under the substantial rights prong, the court skipped the analysis of Mr. Gonzalez-Huerta's satisfaction of that burden and moved directly to the judicial integrity prong of plain error review.[117] The court emphasized the separation between the third and fourth prongs of plain error review, which had been condensed by some other circuits,[118] and reiterated that the Supreme Court had "never shifted the burden to the [government] to establish that the error did not seriously affect the fairness . . . of judicial proceedings."[119] The court focused on the impact of intervening decisions on the integrity of the judicial process, and concluded that mandatory application of the Sentencing Guidelines did not result in a miscarriage of justice and therefore Mr. Gonzalez-Huerta had no right to remand.[120] Of importance to the Tenth Circuit were the facts that non-constitutional, as opposed to constitutional, *Booker* error occurred, Mr. Gonzalez-Huerta's sentence was within the national norm, and no mitigating evidence appeared in the record.[121] The court felt these facts mitigated the impact of the error on judicial integrity because no "core notions of justice" were offended.[122] Mr. Gonzalez-Huerta failed his burden, according to the court, because he presented no evidence other than a mere recitation that injustice would result, which the court found insufficient.[123] Finally, the Tenth Circuit affirmed the District Court's sentence on the

111. 398 F.3d 516, 526-529 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 33 (2005).

112. *Gonzalez-Huerta*, 403 F.3d at 735.

113. *Id.* (noting that the Supreme Court had the opportunity to term an intervening decision as presumptively prejudicial in *Johnson v. United States*, 520 U.S. 461, 469-70 (1997), but failed to do so).

114. *Id.* (noting several methods of demonstrating prejudice, which defeats the notion that the defendant cannot make a specific showing of prejudice).

115. *Id.* (discussing the dissent by Chief Judge Boggs in *Barnett*, 398 F.3d at 537-38).

116. *Id.* (noting that an essential distinction between plain error and harmless error is that the burden rests with the defendant in the former).

117. *Id.* at 736 (noting that a specific determination under the third prong is unnecessary because Mr. Gonzalez-Huerta holds the burden under the fourth prong as well).

118. *See, e.g.*, United States v. Crosby, 397 F.3d 103, 118 (2d Cir. 2005).

119. *Gonzalez-Huerta*, 403 F.3d at 737.

120. *Id.* at 737-39.

121. *Id.* at 738-39.

122. *Id.* at 739.

123. *Id.* at 737-38.

basis that Mr. Gonzalez-Huerta had failed to satisfy the fourth prong of plain error review.[124]

3. Concurrences

Three concurrences accompanied the majority decision authored by Chief Judge Tacha, Judge Ebel, and Judge Hartz. Chief Judge Tacha, joined by Judge Kelly, Judge Murphy, Judge O'Brien, Judge McConnell, and Judge Tymkovich, wrote separately to conclude that Mr. Gonzalez-Huerta had failed the third prong of plain error review as well as the fourth prong.[125] Chief Judge Tacha criticized Mr. Gonzalez-Huerta's failure to present any mitigating evidence, which left the record devoid of anything but speculation that suggested a lower sentence would be imposed on remand.[126] Chief Judge Tacha also took the opportunity to engage in a statistics battle with the dissent in order to counter the argument that the third and fourth prongs are satisfied per se by the significant number of district judges that were imposing sentences below the Guidelines range after *Booker*.[127] The United States Sentencing Commission had compiled figures on severity of federal sentences imposed after *Booker*,[128] which Chief Judge Tacha compared to pre-*Booker* figures and concluded that there was only a 1.8 percent increase in the number of sentences imposed below the Sentencing Guidelines, while there was also a 1.1 percent increase in the number of sentences imposed above the Sentencing Guidelines.[129] Consequently, according to Chief Judge Tacha, there can be no inference drawn from statistics that a lower sentence is likely because the chance of a higher sentence is roughly equivalent.[130]

Both Judges Ebel and Hartz wrote separately primarily to put forth additional analysis under the fourth prong. Judge Ebel, who interestingly agreed with the majority on the fourth prong but sided with the dissent on the third prong,[131] set forth three factors to be considered under the judicial integrity element: (1) constitutionality of the error; (2) whether the defendant's sentence falls within the Guidelines range; and (3) whether the record on its face suggests the district court was likely to impose a different sentence.[132] Judge Ebel concluded that all three factors weighed against Mr. Gonzalez-Huerta and thus his sentence should be affirmed.[133] Judge Hartz viewed the fourth prong through a wide lens,

124. *Id.* at 739.

125. *Id.* at 739-40 (Tacha, C.J., concurring).

126. *Id.* at 740 (Tacha, C.J., concurring).

127. *Id.* at 741 (Tacha, C.J., concurring).

128. Linda D. Maxfield, U.S. Sentencing Comm'n, Data Extract on March 3: Numbers on Post-Booker Sentencings at 2 (Mar. 22, 2005), http://www.famm.org/pdfs/booker_032205.pdf

129. *Gonzalez-Huerta*, 403 F.3d at 741 (Tacha, C.J., concurring).

130. *Id.* (Tacha, C.J., concurring).

131. *Id.* at 742 (Ebel, J., concurring)

132. *Id.* at 743 (Ebel, J., concurring).

133. *Id.* at 744 (Ebel, J., concurring).

stating the "fairness" to be considered is determined according to the federal justice system as a whole, not just the particular sentence in any one case.[134] Given the purpose of the Sentencing Guidelines was to create uniformity between similarly situated defendants, Judge Hartz stated that allowing a remand in Mr. Gonzalez-Huerta's case may actually harm fairness.[135] Remand of every sentence would result in more disparate sentences, which undermines the fundamental purpose of the Sentencing Guidelines and thus results in unfairness to the federal criminal justice system in general.[136] Judge Hartz implied the source of this disparity is "the disconnect between the constitutional violation and the remedy" in *Booker* because it created a unique situation where the constitutional remedy has residual impacts on defendants whose constitutional rights were not violated.[137]

4. Dissents

Judges Briscoe and Lucero dissented separately from the majority decision, with the former authoring the main dissent. Judge Briscoe challenged the majority's opinion on the basis that the burden should not rest with the defendant to show prejudice.[138] Judge Briscoe explained three paths to accomplish that goal: harmless-error review should be applied in lieu of plain error, the presumptively prejudicial *Olano* exception should apply, or the intervening decision doctrine could be applied in every non-constitutional *Booker* error case to shift the burden away from the defendant.[139]

While conceding that Mr. Gonzalez-Huerta failed to object to the mandatory application of the Sentencing Guidelines at trial, Judge Briscoe argued that *Booker* error does not mesh with the traditional distinction between harmless and plain error because the defendant had no true opportunity to object.[140] Judge Briscoe noted that, at the time of trial, not one person, ranging from defense counsel to the judge, knew that an objection to the mandatory application would have any effectiveness.[141] Thus, the mandatory application of the Guidelines "substantially undermined any need or incentive for sentencing courts pre-*Booker* to note their objections" and deprived Mr. Gonzalez-Huerta of any mean-

134. *Id.* at 746-47 (Hartz, J., concurring).
135. *Id.* at 745-46 (Hartz, J., concurring).
136. *Id.* at 747 (Hartz, J., concurring).
137. *Id.* at 745 (Hartz, J., concurring).
138. *Id.* at 753 (Briscoe, J., dissenting).
139. *Id.* at 750, 753-55 (Briscoe, J., dissenting).
140. *Id.* at 750-53 (Briscoe, J., dissenting).
141. *See id.* at 747 (Briscoe, J., dissenting).

ingful opportunity to object.[142] Since the defendant had no opportunity to object, the burden should rest on the government.[143]

Judge Briscoe suggested the application of harmless-error review and the intervening decision doctrine as possible solutions,[144] but she mainly relied on the *Olano* presumptively prejudicial exception as the actual solution.[145] Citing the significant number of defendants who were given below-Guidelines sentences post-*Booker* and the practical impossibility of showing prejudice outside of fortuitous statements by the judge, Judge Briscoe fell in line with the Sixth Circuit[146] and concluded that prejudice should be presumed in non-constitutional *Booker* error cases as a matter of course.[147] Judge Briscoe then analyzed the application of her perception of plain error review to the instant case, which took on a decidedly different flavor from the majority opinion.[148] The presumption of prejudice automatically satisfied the third prong, and the accompanying assumption that a lighter sentence was inevitable satisfied the fourth prong.[149]

The final dissenting opinion, Judge Lucero's, further exemplified the diversity of views amongst the Tenth Circuit judges.[150] Judge Lucero agreed with Judge Briscoe's analysis of the fourth prong based on the hypothesis that if the fourth prong could not be satisfied by mandatory application, then the Supreme Court would have had no reason to remand Fanfan's sentence for further sentencing.[151] However, Judge Lucero wrote separately to express solidarity with the "limited remand" position of the Second and Seventh Circuits regarding the third prong.[152] The limited remand would allow the district judge to determine if a lighter sentence could be imposed, and if needed, impose it.[153]

Obviously, there is a wide range of sentiments among the judges within the Tenth Circuit, which indicates the likely diversity of opinion among the other federal circuits. The following section explores the different approaches to judicial review by the appellate circuits in regards to

142. *Id.* at 752 (Briscoe, J., dissenting) (quoting United States v. Barnett, 398 F.3d 516, 529 (6th Cir. 2005)).

143. *See id.* at 753 (Briscoe, J., dissenting).

144. *Id.* at 749, 755 (Briscoe, J., dissenting) (noting the four main directives that result from the language in *Booker*, with application of harmless error review as one of them).

145. *Id.* at 753 (Briscoe, J., dissenting).

146. *See Barnett*, 398 F.3d at 527-28.

147. *Gonzalez-Huerta*, 403 F.3d at 754 (Briscoe, J., dissenting).

148. *Id.* at 756-59 (Briscoe, J., dissenting).

149. *Id.* at 757-59 (Briscoe, J., dissenting).

150. *See id.* at 761-63 (Lucero, J., dissenting) (providing the third point of view on the proper analysis of the substantial rights prong).

151. *Id.* at 761 (Lucero, J., dissenting).

152. *Id.* at 762 (Lucero, J., dissenting).

153. *Id.* at 762 (Lucero, J., dissenting) (quoting the Second Circuit's decision in United States v. Crosby, 397 F.3d 103, 117 (2d Cir. 2005)).

post-*Booker* sentencing. The sentiment surrounding the discrepancy among the circuits was best captured by Judge Lucero's dissent:

> The division on this court over the proper approach to *Booker* cases pending direct review is replicated among the various circuit courts. This wide ranging circuit split results in the disparate treatment of criminal defendants throughout the nation. Such uneven administration of justice cries out for a uniform declaration of policy by the Supreme Court.[154]

B. Circuit Splits

Below is an overview of the different federal circuit positions:

Position	Circuit	Decision
Hard-line Approach Decided on Third Prong Burden on Defendant	1st 5th 8th 11th	*United States v. Antonakopoulos*[155] *United States v. Mares*[156] *United States v. Pirani*[157] *United States v. Rodriquez*[158]
Compromise Approach Decided on Fourth Prong Burden on Defendant	10th	*United States v. Gonzalez-Huerta*[159]
Limited Remand	2d 7th 9th D.C.	*United States v. Crosby*[160] *United States v. Paladino*[161] *United States v. Ameline*[162] *United States v. Coles*[163]
Presumption of Prejudice Burden on Government	4th 6th	*United States v. Hughes (Hughes I)*[164] *United States v. Hughes (Hughes II)*[165] *United States v. Barnett*[166]
No Set Standard Automatic Remand	3d	*United States v. Davis*[167]

154. *Id.* at 763 (Lucero, J. dissenting).
155. 399 F.3d 68 (1st Cir. 2005).
156. 402 F.3d 511 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 43 (U.S. Oct. 3, 2005) (No. 04-9517).
157. 406 F.3d 543 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 266 (U.S. Oct. 3, 2005) (No. 05-5547).
158. 398 F.3d 1291 (11th Cir. 2005), *cert. denied*, 125 S. Ct. 2935 (U.S. June 20, 2005) (No. 04-1148).
159. 403 F.3d 727 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 495 (U.S. Oct. 17, 2005) (No. 05-6407).
160. 397 F.3d 103 (2d Cir. 2005).
161. 401 F.3d 472 (7th Cir. 2005), *cert. denied*, Peyton v. United States, 126 S. Ct. 106 (U.S., Oct. 3, 2005) (No. 04-10402).
162. 409 F.3d 1073 (9th Cir. 2005).
163. 403 F.3d 764 (D.C. Cir. 2005).
164. 396 F.3d 374 (4th Cir. 2005).
165. 401 F.3d 540 (4th Cir. 2005).
166. 398 F.3d 516 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 33 (U.S. Sept. 20, 2005) (No. 04-1690).
167. 407 F.3d 162 (3d Cir. 2005).

While each case indicates a particular stance, their fact patterns differ slightly, which can be outcome-determinative. The analysis will proceed from the defendant's perspective: harshest to lightest.

1. Burden on the Defendant to Demonstrate Prejudice

The First, Fifth, Eighth and Eleventh Circuits each adopted a hard-line stance towards plain error review, namely the burden rests with the defendant to satisfy the third prong of *Olano*.[168] All four of these circuits additionally reached determinations that a trial judge's use of sentencing enhancements not found by a jury, which constitutes *Blakely* error, does not warrant remand per se,[169] and neither circuit gave deference to the argument that remand is more suitable when *Blakely* error occurs.

In the Eleventh Circuit's *Rodriguez* decision, which was decided first, the sentence of a convicted ecstasy dealer was based on the drug quantity and enhanced due to obstruction of justice, which were both facts found by the judge instead of the jury.[170] The Eleventh Circuit described the immense difficulty of overcoming the defendant's burden under the third prong by stating, "[I]f it is equally plausible that the error worked in favor of the defense, the defendant loses; if the effect of the error is uncertain so that we do not know which, if either, side it helped[,] the defendant loses."[171] Having concluded that the burden was not satisfied by Mr. Rodriguez, the Eleventh Circuit criticized the presumed prejudicial and limited remand approaches of the Fourth, Sixth and Second Circuits.[172] In doing so, the Eleventh Circuit both reiterated the principle that the mere use of sentencing enhancements is not unconstitutional under *Booker*[173] and emphasized that the job of *Booker* review lies with the appellate courts, not the trial courts.[174]

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168. *See* United States v. Antonakopoulos, 399 F.3d 68, 78-79 (1st Cir. 2005); United States v. Mares, 402 F.3d 511, 522 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 43 (U.S. Oct. 3, 2005) (No. 04-9517); United States v. Pirani, 406 F.3d 543 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 266 (U.S. Oct. 3, 2005) (No. 05-5547); United States v. Rodriguez, 398 F.3d 1291, 1300 (11th Cir. 2005), *cert. denied*, 125 S. Ct. 2935 (U.S. June 20, 2005) (No. 04-1148).

169. *See Antonakopoulos*, 399 F.3d at 79 (rejecting a *per se* remand of all cases where sentence enhancements were used); *Mares*, 402 F.3d at 521 (agreeing with the Eleventh Circuit's characterization of *Booker* error); *Rodriguez*, 398 F.3d at 1300 (noting that Justice Breyer's majority opinion expressly stated the Sentencing Guidelines were constitutional once the mandatory provisions were excised).

170. *See Rodriguez*, 398 F.3d at 1294 (noting the jury failed to make a determination on the drug quantity and that the pre-sentencing report recommended an enhancement based on lying under oath).

171. *Id.* at 1300.

172. *Id.* at 1301-02.

173. *Id.* at 1303-04 (noting that both the Fourth Circuit in *United States v. Hughes*, 396 F.3d 374 (4th Cir. 2005), and the Sixth Circuit in *United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005), stated the constitutional error was the use of sentencing enhancements that were not found by a jury).

174. *Id.* at 1305 ("The determination of plain error is the duty of courts of appeal, not district courts.").

Without a substantial degree of analysis, the Fifth Circuit agreed heavily with the *Rodriguez* decision and wholly adopted its reasoning in *United States v. Mares*,[175] which affirmed the conviction and the sentence of a felon in possession of ammunition.[176] The primary emphasis for both of these circuits is whether a substantially different result would have occurred at trial under an advisory guidelines scheme.[177] If the record is silent or the defendant cannot reasonably show that a different result is probable, then the defendant loses.[178]

The First Circuit reached essentially the same conclusions as the Eleventh and the Fifth Circuits in *United States v. Antonakopoulos*,[179] but provided some additional guidance for when remand is appropriate under *Booker*.[180] Specifically, the court stated that remand is more appropriate in the following circumstances: when the district judge misapplies the guidelines;[181] when mitigating circumstances existed at trial but could not be considered under the mandatory regime;[182] when the trial judge expresses on record that the Sentencing Guidelines were unfair;[183] and when a reasonable probability exists that the result would have been different.[184] In the end, the First Circuit used the traditional plain error approach to affirm the sentence of a bank manager who embezzled from his employer that was based not only on the jury findings, but also on the pre-sentence report and sentence enhancements.[185]

The Eighth Circuit benefited from deciding *United States v. Pirani*[186] well after the decisions of most of the sister circuits, and decided that the proper approach among the splits is that of the First, Fifth, and Eleventh Circuits.[187] A former sheriff's deputy in Arkansas was convicted of making false statements to federal investigators who suspected that deputies were stealing drug money seized during the course of their duties.[188] The Eighth Circuit agreed that the third *Olano* factor depended upon a defendant's showing a reasonable probability that a different sentence would have been imposed,[189] but the court parted ways with the

175. 402 F.3d 511, 522 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 43 (U.S. Oct. 3, 2005) (No. 04-9517).
176. *Mares*, 402 F.3d at 521-22.
177. *See Rodriguez*, 398 F.3d at 1302; *Mares*, 402 F.3d at 521.
178. *See Rodriguez*, 398 F.3d at 1300; *Mares*, 402 F.3d at 521.
179. 399 F.3d 68 (1st Cir. 2005).
180. *See Antonakopoulos*, 399 F.3d at 81.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* (noting that this final situation can overcome silence by the trial judge).
185. *Id.* at 84.
186. 406 F.3d 543 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 266 (U.S. Oct. 3, 2005) (No. 05-5547).
187. *Pirani*, 406 F.3d at 547.
188. *Id.*
189. *Id.* at 551-52 (noting its agreement with the First, Second, Fifth, Seventh, and Eleventh Circuits on this point).

limited remand circuits on the basis that such a "creative approach" violates the express command from the Supreme Court in *Booker* to apply ordinary prudential doctrines.[190] Consequently, the defendant's sentence was affirmed after he failed to satisfy the *Olano* third prong burden.[191]

2. Limited Remand

Four circuits have adopted the middle-ground approach of limited remand for the purpose of determining whether the defendant was prejudiced by the mandatory application of the Sentencing Guidelines.[192] The Second Circuit was the first to articulate this standard in *United States v. Crosby*[193] as a "remand to the district court, not for the purpose of a required resentencing, but only for the more limited purpose of permitting the sentencing judge to determine *whether* to resentence, now fully informed of the new sentencing regime, and if so, to resentence."[194] *Crosby* involved a felon who pled guilty to possession of a firearm and was sentenced based on his plea, two prior convictions for violent offenses, and three sentence enhancements for behavior during the act and subsequent investigation.[195] The Second Circuit agreed that the use of sentencing enhancements didn't violate the Constitution after *Booker* because the enhancements didn't push the defendant over the "statutory maximum" as required by *Apprendi*.[196] However, the Second Circuit stated that a proper application of plain error review requires knowing what the sentencing judge would have done, which wasn't likely under the pre-*Booker* regime, and thus limited remand was required.[197]

The Seventh Circuit followed the *Crosby* approach in remanding the sentences of several defendants in a consolidated appeal in *United States v. Paladino*.[198] In a colorful opinion, the Seventh Circuit described the "epistemic fog" of not knowing what course of action the trial judge would have taken in a discretionary scheme and decided the most rational approach to *Booker* review was to simply ask the trial judge.[199] In reaching this conclusion, the Seventh Circuit determined that the fatal

190. *Id.* at 552.

191. *Id.* at 553 (noting that the fourth prong need not be considered because the third prong is unsatisfied).

192. *See* United States v. Crosby, 397 F.3d 103, 117 (2d Cir. 2005); United States v. Paladino, 401 F.3d 471, 484 (7th Cir. 2005), *cert. denied*, Peyton v. United States, 126 S. Ct. 106 (2005); United States v. Ameline, 409 F.3d 1073, 1078-79 (9th Cir. 2005); United States v. Coles, 403 F.3d 764, 768 (D.C. Cir. 2005).

193. 397 F.3d 103 (2d Cir. 2005).

194. *Crosby*, 397 F.3d at 117.

195. *Id.* at 106 (noting that the defendant had recklessly endangered the life of a police officer, created a substantial risk of injury for a police officer, and had obstructed justice).

196. *Id.* at 109 n.6.

197. *Id.* at 118-19.

198. *Paladino*, 401 F.3d at 485. The court affirmed the convictions of all the defendants and the sentence of one defendant, Peyton, who challenged his sentence on the basis of a "recidivist" enhancement, which the Seventh Circuit stated was not affected by *Booker*. *Id.* at 480.

199. *Paladino*, 401 F.3d at 482, 484.

flaw in the presumed prejudice approach is that no prejudice results if the trial judge would impose the same sentence,[200] and the hardline refusal to remand unjustly "condem[s] some unknown fraction of criminal defendants to serve an illegal sentence."[201]

Similarly, in *United States v. Ameline*,[202] the Ninth Circuit remanded a sentence where the defendant pled guilty to possession of "some methamphetamine."[203] The trial judge utilized the pre-sentencing figure of 1,079.3 grams of methamphetamine as the basis for sentencing, which the Ninth Circuit stated resulted in constitutional error that demanded resentencing under *Booker*.[204] The Ninth Circuit expressly agreed with the limited remand approach.[205]

Finally, in a relatively short opinion, the District of Columbia Circuit adopted the *Crosby* limited remand approach in *United States v. Coles*.[206] The court remanded the sentence of a former Special Assistant to the Secretary of the District of Columbia convicted of attempting to obtain grant money fraudulently because the record was unclear as to whether the defendant was prejudiced.[207] The most interesting aspect of the *Coles* decision is the D.C. Circuit's criticism of the presumed prejudicial approach that "courts employing this approach assess error and prejudice as if the pre-*Booker*, mandatory sentencing regime were still in place, and as if the error were judicial factfinding under that regime."[208] The skewed perspective of the Fourth and Ninth Circuits, according to the D.C. Circuit, directly conflicts with the *Booker* guidance by ignoring what the trial judge would have done.[209]

3. Presumed Prejudicial

The final prominent position taken by the federal circuits is that of the Fourth and Sixth Circuits, which remand any sentence which is increased based on any fact not found by a jury, including pre-sentencing reports and sentencing enhancements.[210] This position was first described by the Fourth Circuit in *United States v. Hughes*,[211] which af-

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200. *Id.* at 483 (criticizing the Sixth Circuit's decision in *United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005)).
201. *Id.* at 484-85.
202. 409 F.3d 1073 (9th Cir. 2005).
203. *Ameline*, 409 F.3d at 1075.
204. *Id.* at 1075, 1078.
205. *Id.* at 1079-80.
206. 403 F.3d 764, 765 (D.C. Cir. 2005).
207. *Coles*, 403 F.3d at 765, 769-70.
208. *Id.* at 768.
209. *Id.*
210. *See* United States v. Hughes, 396 F.3d 374, 376 (4th Cir. 2005) [hereinafter *Hughes I*]; United States v. Hughes, 401 F.3d 540, 548 (4th Cir. 2005) [hereinafter *Hughes II*]; United States v. Barnett, 398 F.3d 516, 526 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 33 (U.S. Sept. 20, 2005) (No. 04-1690).
211. 396 F.3d 374 (4th Cir. 2005).

firmed a defendant's convictions but remanded his sentence.[212] Hughes was convicted by a jury of bankruptcy fraud and perjury, but the judge imposed a forty-six month sentence based on five enhancements which the jury did not find.[213] The Fourth Circuit framed the constitutional violation as judicial action which "imposes a sentence greater than the maximum authorized by the facts found by the jury alone."[214] There was neither mention of the statutory maximum nor any reference to the portion of the *Booker* decision which authorized the use of sentencing enhancements.[215]

The Fourth Circuit concluded that plain error review was the proper standard because Hughes raised his Sixth Amendment challenge for the first time on appeal,[216] but then proceeded to find that plain error had occurred because each of the four *Olano* prongs were satisfied.[217] The third prong was satisfied by the discrepancy in the Guidelines range between Offense Level 10, which the jury facts warranted, and Offense Level 22, which was the actual level used as enhanced by five judge-found factors.[218] Likewise, the Fourth Circuit held the fourth prong was satisfied due to the major change in federal sentencing law that *Booker* imposed.[219] Oddly enough, the Fourth Circuit, when providing guidance to the trial judge for resentencing, determined that the "district court correctly determined the range prescribed by the guidelines, on remand the court shall consider that range,"[220] which seems to contradict the determination that use of sentencing enhancements to increase the guidelines range violates the Sixth Amendment.[221]

The Fourth Circuit reiterated its position in response to stark criticism from other circuits, particularly the Eleventh Circuit, when it granted a rehearing before a three judge panel.[222] In *Hughes II*, the Fourth Circuit essentially amended its decision in *Hughes I* with additional analysis under the third and fourth *Olano* prongs.[223] Chief Judge Wilkins, writing for the majority, drew support mainly from *Kotteakos v. United States*[224] for the proposition that the main goal of the substantial rights inquiry was not to decide the outcome of an error-free trial, but rather to determine the reasonable effect the error had on the proceed-

212. *Hughes I*, 396 F.3d at 376.
213. *Id.*
214. *Id.* at 378.
215. *See id.* at 379 (noting that the prescribed Guidelines-range for the facts found by the jury authorized a 12-month maximum sentence, which the 46-month actual sentence clearly exceeds).
216. *Id.* at 379.
217. *Id.* at 380-81.
218. *Id.* at 380.
219. *Id.* at 380-81.
220. *Id.* at 385 (noting that the other factors under the Sentencing Guidelines should be considered as well).
221. *Id.* at 378.
222. *Hughes I*, 401 F.3d at 543.
223. *Hughes II*, 401 F.3d at 548.
224. 328 U.S. 750 (1946).

ing.[225] If the reasonable effect is ambiguous, then the court cannot conclude that the defendant's substantial rights were not affected.[226] Furthermore, the Fourth Circuit stated that the appropriate examination of the substantial rights prong is "whether the district court could have imposed the sentence it did without exceeding the relevant Sixth Amendment limitation,"[227] which can never be satisfied when sentencing enhancements were used because they are not facts found by a jury.[228]

The Sixth Circuit followed the Fourth Circuit's decision in *Hughes I* with its decision in *United States v. Barnett*.[229] The *Barnett* defendant was convicted of gun possession and sentenced to 265 months based on three prior violent felonies.[230] The Sixth Circuit held that prejudice should be presumed because the defendant may have received a sentence as low as 180 months, the statutory minimum, and the inherent nature of *Booker* error made it exceptionally difficult to make a showing of prejudice.[231]

Finally, the Third Circuit appears to follow the "presumed prejudicial" approach, but has declined to expressly adopt any specific line of reasoning.[232] The Third Circuit consistently remands *Booker* cases for resentencing under the rationale that, "[T]he sentencing issues appellant raises are best determined by the District Court in the first instance, [consequently] we will vacate the sentence and remand for resentencing in accordance with *Booker*."[233] However, the Third Circuit provides only cryptic reasoning for its automatic remand approach. In an *en banc* decision, Judge Scirica stated in dicta that prejudice should be presumed because "mandatory sentencing was governed by an erroneous scheme."[234] Furthermore, the court viewed the possibility of stripping discretion from the trial court as sufficient harm to the integrity of the judicial system.[235]

III. ANALYSIS

The only undisputed principle in all sentencing challenges after *United States v. Booker*[236] is that plain error occurs through the mandatory application of the Federal Sentencing Guidelines. The clarity ends there, as several unresolved issues regarding plain error review as estab-

225. *Hughes II*, 401 F.3d at 548.
226. *Id.* (quoting *Kotteakos*, 328 U.S. at 765).
227. *Id.* at 551.
228. *See id.* at 548 (noting that the maximum sentence under the facts found solely by the jury would have been 12 months).
229. 398 F.3d 516 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 33 (U.S. Sept. 20, 2005) (No. 04-1690).
230. *Id.* at 521.
231. *Id.* at 526-27.
232. *See, e.g.*, United States v. Bruce, 405 F.3d 145, 150 (3d Cir. 2005).
233. *Id.* at 150. *See also* United States v. Davis, 407 F.3d 162, 166 (3d Cir. 2005) (en banc).
234. *Davis*, 407 F.3d at 165.
235. *Id.*
236. 125 S. Ct. 738 (2005).

lished in *United States v. Olano*[237] have led to a wide-ranging circuit split. The dispute centers on the prejudice created by mandatory sentencing, and understanding the pros and cons of each circuit's approach is crucial to analyzing the effectiveness of the Tenth Circuit's decision in *United States v. Gonzalez-Huerta.*[238] Moreover, the limitations of plain error review, particularly its ability to address sweeping changes in settled law, must also be examined as a contributing source of the disparity in post-*Booker* review. Ultimately, the Tenth Circuit reached the correct outcome in *Gonzalez-Huerta* through reliance on the judicial integrity requirement of plain error review, although burdening criminal defendants to demonstrate prejudice is fundamentally unfair and should not be followed.

A. Requiring the Unknown

The Tenth Circuit incorrectly agreed with the hardline circuits by placing the burden of satisfying the third *Olano* prong with the defendant, which requires him to demonstrate a reasonable probability of prejudice.[239] The Fourth and Sixth Circuits presume prejudice in post-*Booker* review based on the language in *Olano*[240] and the difficulty of establishing that a different outcome would result under an advisory sentencing regime.[241] The Tenth Circuit rejected the "presume prejudice" approach because the Supreme Court had never mentioned nor applied such a presumption after its mere mention in *Olano.*[242] Specifically, Chief Judge Tacha cited the Court's decision in *Johnson v. United States*,[243] which addressed an intervening decision and failed to mention presuming prejudice in its analysis.[244] However, *Johnson* indirectly presumed prejudice by "assuming that the failure to submit materiality to the jury affected substantial rights."[245] Also, reliance on the lack of additional case support for presuming prejudice is misguided, particularly given that *Olano* was decided within the last fifteen years.[246] Insufficient time to develop may be equally culpable for the Supreme Court's failure to mention presuming prejudice, and thus should not be cited as support for rejecting such an approach. Finally, if any situation satisfies the intent of the *Olano* exception, the significant change wrought by *Booker*'s intervening decision should qualify. The only other Supreme Court case

237. 507 U.S. 725 (1993).
238. 403 F.3d 727 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 495 (U.S. Oct. 17, 2005) (No. 05-6407).
239. *Gonzalez-Huerta*, 403 F.3d at 736.
240. *Olano*, 507 U.S. at 735 (noting that some errors "should be presumed prejudicial if the defendant cannot make a specific showing of prejudice").
241. *See* United States v. Hughes, 401 F.3d 540, 548 (4th Cir. 2005); United States v. Barnett, 398 F.3d 516, 526 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 33 (U.S. Sept. 20, 2005) (No. 04-1690).
242. *Gonzalez-Huerta*, 403 F.3d at 735.
243. 520 U.S. 461 (1997).
244. *Gonzalez-Huerta*, 403 F.3d at 735.
245. *Johnson*, 520 U.S. at 469 (quotations omitted).
246. *Olano*, 507 U.S. at 725 (decided in 1993).

to address the impact of an intervening decision was *Johnson*, which considered the change to materiality determinations in *United States v. Gaudin*,[247] and that decision assumed the prejudice element to be satisfied.[248]

The Tenth Circuit also refused to presume prejudice because a criminal defendant could possibly demonstrate prejudice based on the record.[249] The most common avenue for demonstrating prejudice is through judicial comment that a lower sentence is warranted.[250] However, the majority's characterization is essentially a straw man that "ignores the reality of the pre-*Booker* sentencing landscape"[251] where judicial comments criticizing the Sentencing Guidelines are unnecessary and discouraged by existing case law. Guiding principles should not be supported by their extremes, and the presence of sufficient evidence in the trial record to establish prejudice is certainly an extreme situation in post-*Booker* challenges.

Finally, the Tenth Circuit relied on the need to maintain a distinction between plain error and harmless error review as support for its position.[252] The Supreme Court likewise cited concern for distinguishing plain and harmless error as a reason for placing the burden with the defendant in plain error review.[253] However, the main policy support for shifting the burden, which rests with the government in harmless error review, is the need to encourage defendants to object timely and assert their rights as a fundamental part of the adversary system.[254] Most, if not all, plain error post-*Booker* sentencing challenges do not satisfy the policy of encouraging objections because the affected defendants did not know at the time of their trial that a legal right to object to mandatory application of the Sentencing Guidelines existed. As stated by Judge Briscoe in her dissent, "there was no opportunity or incentive, as there is now post-*Booker*, for Gonzalez-Huerta or the government to present evidence or arguments outside of the bounds allowed by the Guidelines."[255] In a similar vein, the Second Circuit stated, "[i]f we were to penalize defendants for failing to challenge entrenched precedent, we would be insisting upon an omniscience on the part of defendants . . . [and] would only encourage frivolous objections and appeals."[256] Therefore, the need for a true distinction between plain and harmless error is minimal, and

247. 515 U.S. 506 (1995).
248. *Johnson*, 520 U.S. at 467.
249. *Gonzalez-Huerta*, 403 F.3d at 735-36.
250. United States v. Shelton, 400 F.3d 1325, 1328 (11th Cir. 2005).
251. *Gonzalez-Huerta*, 403 F.3d at 752 (Briscoe, J., dissenting).
252. *Id.* at 736.
253. *Olano*, 507 U.S. at 734-35.
254. *See* Lowry, *supra* note 70, at 1080 (quoting United States v. Silverstein, 732 F.2d 1338, 1349 (7th Cir. 1984)).
255. *Gonzalez-Huerta*, 403 F.3d at 751 (Briscoe, J., dissenting).
256. United States v. Viola, 35 F.3d 37, 42 (2d Cir. 1994).

although the failure to object should give rise to plain error review, defendants should not be doubly penalized by a strict enforcement of the burden, which would otherwise rest with the government under the common law plain error doctrine.[257]

Furthermore, general policy arguments support adopting of presuming prejudice under the third prong of *Olano*. Conceding prejudice within the context of significant intervening decisions prevents undermining the fairness of judicial proceedings. Requiring defendants to produce the unknown, namely the actions a sentencing judge would have perused under an advisory regime, is fundamentally unfair. The "limited remand" approach of the Second, Seventh, Ninth, and District of Columbia Circuits addresses the fairness issue, but it fails to meet the judicial efficiency goals of plain error review. Assuming prejudice would allow the appellate courts to decide *Booker* cases based upon the impact to the integrity of the judiciary, which is more reliant on policy considerations which appeals courts are best equipped to handle.

Since the burden under the third *Olano* prong should rest with the government in post-*Booker* review cases, the arguments presented by Chief Judge Tacha and Judge Briscoe regarding satisfaction of that burden are moot. However, one prominent aspect of Mr. Gonzalez-Huerta's case that was ignored by both sides of the debate, and indeed every circuit to address *Booker* review, is the fact that Mr. Gonzalez-Huerta was sentenced to the absolute minimum within the proscribed sentencing range.[258] Supporters of remand could cite minimum range application as an implicit statement by the sentencing judge that he would impose a lower sentence if it were possible. Although the ability of minimum range application to demonstrate prejudice is tenuous, it provides a valuable argument when faced with the alternative of a silent trial record and may persuade a court to grant limited remand.

B. Preserving Reason

Despite the limitations of the prejudice element analysis, the Tenth Circuit's analysis and conclusion under the judicial integrity element provided the saving grace of the *Gonzalez-Huerta* decision. Even if prejudice to the defendant is presumed, remand is only warranted if the prejudice results in a miscarriage of justice.[259] Thus, the reviewing appellate court can exercise its discretion under the fourth *Olano* prong when the circumstances of the case deserve remedy, but can decline if the circumstances do not. The Supreme Court followed this exact reasoning in *Johnson*, where it examined the merits of the underlying materiality dispute and declined to remand because the evidence supporting

257. *See* Lowry, *supra* note 70, at 1078-80.
258. *Gonzalez-Huerta*, 403 F.3d at 730.
259. *Id.* at 736-37 (citing United States v. Gilkey, 118 F.3d 702, 704 (10th Cir. 1997)).

the trial court's ruling was "overwhelming."[260] Likewise in *Gonzalez-Huerta*, the judicial integrity element provided a dispositive basis of decision because Mr. Gonzalez-Huerta failed to, and indeed was unable to, provide evidence that mandatory application of the Sentencing Guidelines caused injustice.[261]

The fairness of Mr. Gonzalez-Huerta's sentence is, similar to *Johnson*, overwhelming. The only enhancement used at sentencing was the prior conviction,[262] which *Booker* expressly approved.[263] The trial court imposed the minimum sentence of the corresponding sentencing range.[264] Mr. Gonzalez-Huerta presented no mitigating evidence which was rejected by the mandatory regime.[265] Most importantly, the Sentencing Guidelines are still used as the national standard and meant to provide consistency among criminal defendants.[266] Although the recent trend in sentencing is the increased imposition of below-guidelines sentences,[267] the overwhelming majority of post-*Booker* sentences are within the Sentencing Guidelines.[268] As a result, Mr. Gonzalez-Huerta's sentence is conclusively fair because it comports with the national norm and is based solely on constitutional facts, and as such does not give rise to the necessary "miscarriage of justice" required for plain error remand.

Furthermore, the Supreme Court's guidance for handling post-*Booker* review expressly stated that not every appeal would lead to resentencing,[269] and that guidance would be vitiated entirely if remand was granted in *Gonzalez-Huerta*.[270] The only possible prejudice to Mr. Gonzalez-Huerta was the mandatory application of the Sentencing Guidelines.[271] Therefore, if remand were granted, it would implicitly amount to a statement that mandatory application alone is sufficient to warrant resentencing. Since every pre-*Booker* sentence was statutorily required to be mandatory, then every sentence would have to be remanded. Such a result violates the express intent of the Supreme Court and cannot be rationally sustained. Consequently, the automatic remand approaches of

260. *Johnson*, 520 U.S. at 469-70.
261. *Gonzalez-Huerta*, 403 F.3d at 737-38.
262. *Id.* at 730.
263. 125 S. Ct. 738, 756 (2005).
264. *Gonzalez-Huerta*, 403 F.3d at 730.
265. *See id.* at 735-36.
266. *See* Koon v. United States, 518 U.S. 81, 92 (1996).
267. UNITED STATES SENTENCING COMMISSION, SPECIAL POST-BOOKER CODING PROJECT DATA EXTRACTION DATE: DECEMBER 21, 2005 at 1 (Jan. 5, 2006), http://www.ussc.gov/Blakely/PostBooker_010506.pdf (noting that only 1.7% of cases sentenced subsequent to the *Booker* decision are above the guidelines, while 37.1% of the cases are below the guidelines, although 24.4% of the below-guidelines sentences are government sponsored).
268. *Id.* at 1 (noting that 61.2% of cases sentenced subsequent to the *Booker* decision are within the guidelines).
269. United States v. Booker, 125 S. Ct. 738, 769 (2005).
270. 403 F.3d 727 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 495 (U.S. Oct. 17, 2005) (No. 05-6407).
271. *Id.* at 730-31 (noting the basis of sentencing was limited to admitted facts and prior convictions).

the Second, Third, Seventh, Ninth, and District of Columbia Circuits, even if limited, cannot be sustained for this reason.[272] The Fourth and Sixth Circuits' "presumed prejudicial" approach also fails under the Supreme Court's limits on remand because both circuits compress the separate elements under *Olano*, so instead of merely presuming prejudice to the defendant, the court also presumes injustice results regardless of the circumstances in individual cases.[273] Failure to distinguish between the third and fourth *Olano* prongs, when combined with presuming prejudice, holds the same effect as the Third Circuit's "automatic remand" approach. Consequently, the only feasible approaches are those of the First, Fifth, Eighth, Tenth, and Eleventh Circuits because they preclude remand in every case.[274]

CONCLUSION

The Tenth Circuit's decision in *United States v. Gonzalez-Huerta*[275] establishes the correct outcome under the holding of *United States v. Booker*[276] and the judicial integrity element of plain error review established in *United States v. Olano*.[277] Fairness warrants providing the defendant with leniency regarding prejudicial effect of the plain error, particularly caused by an intervening decision requiring a defendant to see the future in order to properly object in good faith. However, unless the asserted error causes a miscarriage of justice or fails to comport with appropriate policy considerations, then the reviewing court should refuse to exercise its discretion under the fourth *Olano* prong.

One technique the Tenth Circuit would be well-advised to adopt is avoidance of disparate treatment through broad interpretation of the objection required to trigger harmless error review. The First Circuit has supported such an approach in *United States v. Heldeman*[278] and *United States v. Antonakopoulos*.[279] The *Antonakopoulos* court viewed any ar-

272. *See* United States v. Davis, 407 U.S. 162, 166 (3d Cir. 2005); United States v. Crosby, 397 F.3d 103, 117 (2d Cir. 2005); United States v. Paladino, 401 F.3d 472 (7th Cir. 2005), *cert. denied*, Peyton v. United States, 126 S. Ct. 106 (U.S., Oct. 3, 2005) (No. 04-10402); United States v. Ameline, 409 F.3d 1073, 1078-79 (9th Cir. 2005); United States v. Coles, 403 F.3d 764, 768 (D.C. Cir. 2005).

273. *See* United States v. Hughes, 396 F.3d 374, 376 (4th Cir. 2005); United States v. Hughes, 401 F.3d 540, 548 (4th Cir. 2005); United States v. Barnett, 398 F.3d 516, 526 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 33 (U.S. Sept. 20, 2005) (No. 04-1690).

274. *See* United States v. Antonakopoulos, 399 F.3d 68, 78-79 (1st Cir. 2005); United States v. Mares, 402 F.3d 511, 522 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 43 (U.S. Oct. 3, 2005) (No. 04-9517); United States v. Pirani, 406 F.3d 543 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 266 (U.S. Oct. 3, 2005) (No. 05-5547); United States v. Gonzalez-Huerta, 403 F.3d 727, 736 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 495 (U.S. Oct. 17, 2005) (No. 05-6407); United States v. Rodriguez, 398 F.3d 1291, 1300 (11th Cir. 2005), *cert. denied*, 125 S. Ct. 2935 (U.S. June 20, 2005) (No. 04-1148).

275. 403 F.3d 727 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 495 (U.S. Oct. 17, 2005) (No. 05-6407).

276. 125 S. Ct. 738 (2005).

277. 507 U.S. 725 (1993).

278. 402 F.3d 220 (1st Cir. 2005).

279. 399 F.3d 68 (1st Cir. 2005).

gument under *Apprendi v. New Jersey*,[280] *Blakely v. Washington*,[281] or a general challenge to the constitutionality of the Sentencing Guidelines as sufficient to trigger harmless error,[282] which typically results in remand for resentencing.[283] Avoidance of customarily applying plain error review would help mitigate the disparate treatment of similarly situated defendants that are merely separated by the passage of time, during which the *Blakely* and *Booker* arguments became available and provided defendants with a basis to object. Specifically, the Tenth Circuit could avoid the disparity exemplified by the cases of Mr. Gonzalez-Huerta and Mr. Labastida-Segura. Mr. Labastida-Segura pled guilty to reentering the United States after being deported, and was sentenced based on admitted facts and a prior felony conviction.[284] Despite the striking similarity in circumstances to *Gonzalez-Huerta*, the Tenth Circuit remanded for resentencing.[285] The only distinction was that Mr. Labastida-Segura's trial was not conducted until after the *Blakely* decision and he prudently filed a motion to have the Sentencing Guidelines declared unconstitutional,[286] which entitled him to a harmless error standard of review on appeal.[287] Avoidance through interpretation would allow more defendants to challenge their sentences under harmless error review and would foster the appearance of equitable treatment of comparable defendants.

The wide-ranging circuit split deserves resolution by the Supreme Court. Different geographic areas are treating similar defendants differently—undermining not only the purposes of the Guidelines but also the spirit of justice in the criminal punishment system. However, given the fact that the Court has denied certiorari in almost half of the controlling appellate circuit cases, including *Gonzalez-Huerta*,[288] and the temporary nature of *Booker* error, the possibility exists that the Court may simply wait for the discrepancy to elapse. The discrepancy among the circuits over *Booker* review presents an opportunity for the Court to add significantly to the plain error review precedent and should not be foregone.

Peter A. Jenkins[*]

280. 530 U.S. 466 (2000).
281. 124 S. Ct. 2531 (2004).
282. *See Antonakopoulos*, 399 F.3d at 76. *See also Heldeman*, 402 F.3d at 224.
283. *See, e.g.*, United States v. Labastida-Segura, 396 F.3d 1140, 1143 (10th Cir. 2005).
284. *Id.* at 1141-42.
285. *Id.* at 1143.
286. *Id.* at 1142.
287. *Id.* at 1143.
288. *See supra* Part II.B (noting that six of the thirteen controlling cases in each respective circuit have been denied certiorari to date).

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APPROVAL VERSUS APPLICATION: HOW TO INTERPRET THE REGISTRATION REQUIREMENT UNDER THE COPYRIGHT ACT OF 1976

> If I were required to guess off-hand, and without collusion with higher minds, what is the bottom cause of the amazing material and intellectual advancement of the last fifty years, I should guess that it was the modern-born and previously non-existent disposition on the part of men to believe that a new idea can have value.
>
> - *Mark Twain*[1]

INTRODUCTION

While Mark Twain identified the significance of innovation in the intellectual and social progress of man, perhaps equally important is the value an innovation has to its creator. American copyright law has recognized and struggled with this dichotomy between progress and ownership from the time the first copyright statute was enacted in 1790.[2] In an effort to balance private incentives and public resources from which future innovators could draw, Congress implemented a system of procedural formalities.[3] Individuals were permitted to exert control over their creations only if they complied with the registration, notice, and renewal requirements of the Copyright Act.[4] While the current federal system has relaxed many of these requirements, procedural formalities continue to play an important role in copyright law. Although an original work is protected the moment it is fixed in a tangible form,[5] certain rights and benefits accrue only upon copyright registration. These rights and benefits include: the ability to initiate an infringement action in federal court,[6] and to recover statutory damages and attorney's fees.[7] Therefore, while an author may *own* the copyright in his work as soon as his work is created, his ability to *enforce* the copyright depends on compliance with registration procedures.

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1. Jone Johnson Lewis, Wisdom Quotes: Quotations to Inspire and Challenge, http://www.wisdomquotes.com/cat_ideas.html (last visited Jan. 27, 2006).
2. Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 486-87 (2004).
3. *Id.* at 487.
4. *Id.*
5. 17 U.S.C.A. § 102(a) (West 2005) ("*Copyright protection subsists*, in accordance with this title, *in original works of authorship fixed in any tangible medium of expression*, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.") (emphasis added).
6. 17 U.S.C.A. § 411(a) (West 2005).
7. 17 U.S.C.A. § 412 (West 2005).

In *La Resolana Architects v. Clay Realtors Angel Fire,*[8] the United States Court of Appeals for the Tenth Circuit addressed two conflicting interpretations of the registration requirement under the Copyright Act of 1976.[9] The determination of whether a copyright has been properly registered is the preliminary step to initiating an infringement action in federal court.[10] In a case of first impression for the Tenth Circuit, the court was faced with the task of determining whether a creator had sufficiently complied with the Copyright Act's registration requirements, thus providing the court with proper jurisdiction over the case.[11] Copyright claimants may register their copyright claims by submitting a registration application.[12] The court held that registration under the Act required the Copyright Office's review of a registration application rather than just the successful submission of an application.[13] Because the plaintiff in *La Resolana* initiated suit after successfully submitting an application but prior to receiving approval, the court dismissed the claim for lack of subject matter jurisdiction.[14]

This article examines the Tenth Circuit's interpretation of the registration requirement under the Copyright Act in *La Resolana.* Part I discusses the origins and evolution of copyright law, the federal registration system, and recent amendments to the Copyright Act. It also provides an overview of the disparate application of registration formalities under current federal law. Part II addresses the circuit split regarding the prerequisites of copyright registration and outlines the two competing interpretations of Title 17: (1) the "Application approach"—a policy based interpretation where registration is satisfied upon the successful submission of a copyright application; and (2) the "Approval approach"—a plain language interpretation where an application must either be approved or rejected to satisfy the Act's registration requirement.[15] Part III provides a detailed view of the *La Resolana* decision and the Tenth Circuit's reliance on the Approval approach. Part IV analyzes this decision and proposes that the United States Court of Appeals for the Tenth Cir-

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8. 416 F.3d 1195 (10th Cir. 2005).
9. *La Resolana,* 416 F.3d at 1197.
10. *See id.* at 1199.
11. *See id.* at 1197.
12. 17 U.S.C.A. § 408(a) (West 2005) states:

> At any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim *by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708.* Such registration is not a condition of copyright protection.

17 U.S.C.A. § 408(a) (West 2005) (emphasis added). For purposes of this survey, "successful submission" of a registration application covers submission of the deposit, fee, and application, as well as receipt by the Copyright Office.

13. *La Resolana,* 416 F.3d at 1197.
14. *Id.* at 1197-98.
15. *Id.* at 1202-03.

cuit incorrectly decided *La Resolana* by misinterpreting the registration requirement and improperly relying on a 2005 amendment to support its statutory interpretation. This article suggests that the statutory scheme is inconsistent and requires deference to public policy. This article also suggests that the United States Supreme Court grant certiorari and adopt the Application approach in order to ensure that the application of copyright law comports with the purpose of the Copyright Act—to unify copyright law and relax procedural formalities.

I. BACKGROUND

A. The Copyright Act of 1976

Before the Copyright Act of 1976, a range of common law and statutory schemes governed infringement actions throughout the country.[16] Copyright law varied from state to state as did the conditions necessary for its enforcement.[17] Although the Constitution vested copyright protection in the federal government under the Copyright Clause,[18] copyright protection was not the exclusive province of the federal government.[19] For nearly one hundred and fifty years, copyright protection developed under a dual system of both state and federal law,[20] creating an inconsistent and confusing set of rules.[21] After the implementation of the current Act on January 1, 1978, state and federal copyright law converged.[22] Congress created a uniform federal copyright system "governed exclusively" by Title 17 of the United States Code, thus preempting most State copyright law.[23]

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16. *Id.* at 1198 (citing H.R. REP. NO. 94-1476, at 219 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5744).

17. *Id. See also,* Jessica D. Litman, *Copyright, Compromise, and Legislative History,* 72 CORNELL L. REV. 857, 858 (1987) (arguing that the ambiguity of the 1909 Copyright Act forced courts to stretch statutory boundaries and develop a significant amount of common law interpretation; "[l]ike many bodies of judge-made law, the common law doctrines were often inconsistent and contradictory, not only among courts but within courts; not only among lines of cases, but within lines of cases.") (citing B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 79-97 (1967)).

18. U.S. CONST., art. I, § 8 cl. 8 (providing that Congress shall have power "to promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries.").

19. *See La Resolana,* 416 F.3d at 1198.

20. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, at OV-3 (2005).

21. *La Resolana* 416 F.3d at 1198.

22. NIMMER, *supra* note 20, at OV-3.

23. Title 17 states:

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, *are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.*

17 U.S.C.A. § 301(a) (West 2005) (emphasis added); *La Resolana,* 416 F.3d at 1198 (citing H. Rep. No. 94-1476 at 130, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5746 ("The intention of section 301 is to

In addition to streamlining copyright law, the 1976 Act eliminated a number of statutory formalities that served as prerequisites to the existence of copyrights and recognized a creator's automatic copyright in an "original work of authorship fixed in a tangible medium."[24] Federal statutory protection was to continue for fifty years[25] after the death of the author regardless of whether the work had been published, registered, or renewed.[26] The Act also established a "single, centralized, federal registration system."[27] Under the new system, the existence and maintenance of copyrights were not dependent upon acquiescence to procedural registration requirements.[28] Copyright registration was no longer mandatory, but voluntary.[29]

Through the Act, Congress moved from a "conditional" system to an "unconditional" system and broke with nearly two hundred years of practice.[30] Because authors were no longer required to register their creations in order to receive copyright protection, Congress implemented certain registration incentives so as to ensure the continued vitality of an expansive public record.[31] Under the current system, only those authors who register their copyright may initiate an infringement action in federal court.[32] It is through infringement suits that Title 17's additional incentives, such as statutory damages, the recovery of attorney's fees, and injunctive relief function.[33] Absent copyright registration, federal courts shall not exercise jurisdiction and award these remedies. Thus, authors who have failed to comply with the registration requirement under the Act may have copyrights to their work without any meaningful way to enforce them.[34] Although the Act replaced required formalities with voluntary formalities, procedural mechanisms remained an integral part of the American copyright system. In fact, American copyright law

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preempt and abolish any rights under common law or statutes of a state that are equivalent to copyright.")).

24. 17 U.S.C.A. § 102(a) (West 2005).

25. Today protection continues for seventy years after the death of the author. 17 U.S.C.A. 302(a) (West 2005) ("Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.").

26. NIMMER, *supra* note 20, at OV-3.

27. *La Resolana*, 416 F.3d at 1198.

28. Sprigman, *supra* note 2, at 488.

29. *Id.*

30. *Id.*

31. *See* John B. Koegel, *Bamboozlement: The Repeal of Copyright Registration Incentives*, 13 CARDOZO ARTS & ENT. L.J. 529, 534 (1993).

32. *Id.* at 529.

33. *La Resolana*, 416 F.3d at 1199-1200.

34. *But see id.* at 1199 n.2 ("Although the Act preempts state copyright law, it does not eliminate all state law actions. For example, conduct that may give rise to a federal suit for copyright infringement may also give rise to a state law claim in tort for unfair competition, tortuous interference, or breach of contract.").

continued to be characterized by its ministerial focus until the approval of an important 1988 amendment.[35]

B. The Berne Convention Implementation Act of 1988

On March 1, 1989, the Berne Convention Implementation Act of 1988 (BCIA) took effect[36] and further relaxed the procedural requirements of American copyright law.[37] The BCIA was enacted in order to "ally the United States with a set of international rules and regulations, known as the Berne Convention, that protects intellectual property in the global marketplace and is adhered to by much of the global community."[38] Adherence to the Berne Convention required United States federal copyright law to focus on the importance of moral rights, self-execution, and retroactivity, and forced the country to "sacrifice its obsession with copyright formalities."[39] In particular, the Berne Convention forbid registration as a pre-requisite for copyright protection.[40] Congress, however, was reluctant to eliminate registration provisions and endorse an expansive approach to the amendment's enactment. Instead, Congress opted for a "minimalist" philosophy, whereby it could retain the current registration system without violating international regulations. [41]

After a substantial legislative debate between the House of Representatives, which fought to maintain the registration requirement, and the Senate, which argued to eliminate it, delegates agreed upon a statutory revision of the Act's registration provision.[42] Registration would remain a condition precedent to the initiation of an infringement action for domestic authors only.[43] Because registration is a condition of copyright enforcement rather than copyright existence, and "loss of copyright," the destruction of an otherwise existent copyright due to ministerial requirements, is the standard for determining the existence of a formality in contravention of Berne,[44] the United States could avoid offending the Berne Convention with respect to its own authors.[45] But because the ability to bring a claim or obtain any kind of relief for copyright infringement is dependent upon a procedural mechanism, "the enjoyment" of copyright mandated by Berne, which "shall not be subject to any for-

35. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 701[A], at 7-8 (2005).

36. NIMMER, *supra* note 20, at OV-3, 4; Public Notice 1086, Department of State, 53 Fed. Reg. 48, 748 (Nov. 22 1988).

37. *Id.* at OV-5.

38. *La Resolana,* 416 F.3d at 1205.

39. NIMMER, *supra* note 20, at OV-5.

40. NIMMER, *supra* note 35, at 7-163.

41. *Id.*

42. *Id.* at 7-164.

43. 17 U.S.C.A. § 411(a) (West 2005) ("[N]o action for infringement of the copyright in *any United States work* shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.") (emphasis added).

44. NIMMER, *supra* note 35, at 7-163.

45. *Id.* at 7-163 to -65.

mality,"[46] is severely compromised and therefore inapplicable to foreign works. The United States had appeared to gain accession at the expense of its domestic authors. The delegates' compromise created two classes of works: Berne works of foreign origin which were not subject to any registration formalities, and all other works which were subject to registration before obtaining infringement action initiation rights.[47]

Although charged with "hypertechnical casuistry,"[48] the voluntary registration system for domestic authors did not invoke proscribed formalities. Even upon the Copyright Office's refusal to approve a copyright registration application, the Act's registration provision allows a claimant to file suit.[49] Furthermore, the registration provision has been characterized as a "court filing requirement, much like the fees that must be paid to file a complaint in a United States district court."[50] Sending an application and diminutive registration fee is a small imposition upon an international claimant who is already required to pay a much larger filing fee.[51] In this respect, eliminating the registration requirement is a supererogatory action. The analogy between the court filing requirement and the registration requirement will be significant later in this analysis. The comparison not only illustrates the small burden imposed by the provision, but infers that which should satisfy its conditions.

C. *The Federal Registration System and Its Purpose*

Copyright functions were centralized in the Library of Congress in 1870.[52] In 1897, the first Register of Copyrights was appointed and the Copyright Office became a separate department of the Library of Congress.[53] The Copyright Office is now one of the Library's foremost service units, employing over 500 people and receiving approximately

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46. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, (Paris text 1971), art. 5(2).

47. NIMMER, *supra* note 35, at 7-165 to -66.

48. *Id.* at 7-164. *See also La Resolana,* 416 F.3d at 1205-06 ("[R]egistration . . . [while] not, technically speaking, a condition for the existence of copyright, . . . is, however a precondition for the exercise of any of the . . . rights conferred by copyright . . . This metaphysical distinction between the existence of a right . . . and the exercise of that right [is not] maintainable under . . . our legal tradition which disfavors . . . rights without remedies." (citing S. Rep. No. 100-352, at 18, *reprinted in* 1988 U.S.C.A.A.N. 3723).

49. 17 U.S.C.A. § 411(b) (West 2005).

50. NIMMER, *supra* note 35, at 7-164.

51. For an international claimant:

> Given that even under the Senate bill, a Danish author who wished to sue for infringement of her copyright in Los Angeles, in 1988, for instance, had to pay $120 to the Clerk for the Central District of California for the privilege of instituting suit, the question arises why the Senate bill believed it necessary to relieve that Danish author of the further small burden of spending an additional $[3]0 and sending a form to the Copyright Office in Washington, D.C.

Id.

52. U.S. Copyright Office, A Brief History and Overview (January 2005), http://www.copyright.gov/circs/circ1a.html.

53. *Id.*

600,000 applications annually.[54] Fifty percent of the Copyright Office's budget and over sixty percent of its employees are committed to the registration process, making it the Office's single largest business activity.[55]

The placement of the Office was the result of a strategic decision on the part of Congress to facilitate the quick and efficient selection of deposited works for the Library's collections.[56] The Library, which is "recognized as the national library of the United States" is essential to the research practices of Congress.[57] Containing "more than 130 million items on approximately 530 miles of bookshelves," the Library of Congress is the world's largest library.[58] Its expansive stature is the result of the Copyright registration process through which the Library receives the majority of its collections.[59] Copyright registration has been and continues to be vital to the existence of the Library, and consequently, to the efficiency of Congress. Without a federal registration system whereby creative works are deposited and recorded, both the national government and the American people would be deprived of "a comprehensive record of human creativity and knowledge."[60] Therefore, when registration became voluntary in 1976, Congress found it essential to implement statutory incentives to ensure that authors continued to register their copyrights.

D. Registration Requirements

The conditions necessary for copyright registration[61] and the benefits conferred upon those in compliance are codified in chapter 4 of Title 17.[62] To register a work, three elements must be sent together to the Library of Congress: a properly completed application form, a nonrefundable filing fee (currently $30) and a nonreturnable deposit of the work being registered.[63] Once these items are received, the Copyright Office reviews the application and determines if the work is copyrightable.[64] Processing time varies depending on the number of applications the Office is receiving, but an applicant can expect to receive either a certificate

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54. *Id.*

55. UNITED STATES COPYRIGHT OFFICE, STRATEGIC PLAN 2004-2008 12 (2004), http://www.copyright.gov/reports/strategic2004-2008.pdf.

56. *Id.* at 5.

57. The Library of Congress, Frequently Asked Questions, http://www.loc.gov/about/faqs (last visited Jan. 27, 2006).

58. The Library of Congress, Fascinating Facts, http://www.loc.gov/about/facts.html (last visited Jan. 27, 2006).

59. *Id.*

60. The Library of Congress, Frequently Asked Questions, *supra* note 57.

61. The debate as to what these conditions entail is the primary subject of this analysis. *See* discussion *infra* Parts III & IV.

62. *See* 17 U.S.C.A. §§ 408-12 (West 2005).

63. U.S. COPYRIGHT OFFICE, CIRCULAR 1: COPYRIGHT BASICS, REGISTRATION PROCEDURES 7 (Dec. 2004), http://www.copyright.gov/circs/circ01.pdf.

64. U.S. Copyright Office, I've Mailed My Application, Fee, and Copy of My Work to the Copyright Office. Now What?, http://www.copyright.gov/help/faq/faq-what.html#certificate (last visited Jan. 27, 2006).

of registration or a rejection letter within approximately four to five months.[65]

Copyright registration has been regarded as a relatively simple process.[66] However, complications arise when courts are forced to determine when the benefits of registration are to be conferred. Section 410(d) of Title 17 explicitly states that, "[t]he effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office."[67] However, § 410, neither directly confirms nor invalidates "whether this 'effective date' is indeed effective upon filing or only once the filer has the copyright certification (or denial) in hand."[68] Under § 411, authors may only initiate an infringement suit after "preregistration[69] or registration of the copyright claim has been made in accordance with th[e] title" or "where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused[.]"[70] Keeping in mind that the purpose of statutory remedies and the grant of federal standing is to encourage copyright owners to register their work, it is important to ask: Just what exactly satisfies registration "in accordance" with Title 17? If copyright claimants can file copyright infringement actions regardless of whether their applications are approved or rejected, is it really necessary to condition satisfaction of § 411's registration requirements on the Copyright Office's review of an application, or are these requirements satisfied more efficiently upon the successful submission of a registration application?

E. Preregistration

On April 27, 2005 the Artists' Rights and Theft Prevention Act of 2005 (ART), Title I of the Family Entertainment and Copyright Act of 2005 (FECA), took effect, and amended §§ 408, 410, and 411 of Title 17.[71] The amendment created a "class of works pending registration

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65. *Id.*

66. Miriam Claire Beezy & Reese A. Pecot, *Caveat Emptor or "Let the Buyer Beware": Applying Diligent Investor Principles to Trademark and Copyright Issues in Mergers and Acquisitions*, 17 INTELL. PROP. & TECH. L.J. 14, 21 (2005) (recommending copyright registration as a "simple, inexpensive process"); Gordon U. Sanford, III, *An Intellectual Property Roadmap: The Business Lawyer's Role in the Realm of Intellectual Property*, 19 MISS. C. L. REV. 177, 192 (1998) ("Copyright registration is also simple and provides many benefits.").

67. 17 U.S.C. § 410(d).

68. Int'l Kitchen Exhaust Cleaning Ass'n v. Power Washers of N. Am., 81 F. Supp. 2d 70, 72 (D.C. Cir. 2000).

69. *See* discussion *infra* Parts II.E & IV.C.

70. 17 U.S.C. § 411(b).

71. Family Entertainment and Copyright Act, Pub. L. No. 109-9, 119 Stat. 218 (2005); Interim Regulation for Preregistration of Certain Unpublished Copyright Claims, 70 Fed. Reg. 61,905 (Oct. 27, 2005) (to be codified at 37 C.F.R. Pt. 202) *available at*

[that] will support an infringement action."[72] As amended, § 411 allows copyright owners to sue for infringement of preregistered works in addition to registered works.[73] Preregistration, however, is not a proxy for registration.[74] Preregistered work "must be registered within one month after the copyright owner becomes aware of infringement but in no case later than three months after first publication."[75] ART's amendment to § 408 requires that the Register of Copyrights define and create procedures for preregistration.[76] At the time *La Resolana* was decided, the Copyright Office had not yet issued its preregisration regulations.[77] Yet despite the absence of guidance from the Copyright Office, the Tenth Circuit relied on the amendment and the new preregistration scheme to support its statutory interpretation.[78] It wasn't until October 27, 2005 that the Copyright Office's interim regulations were issued.[79]

The procedures established by the Register of Copyrights under § 408 pertain to unpublished works "being prepared for commercial distribution."[80] Similar to the registration process, the preregistration process requires that three elements be sent together to the Library of Congress: a properly completed application form, a nonrefundable filing fee (currently $100), and a description of the work being registered.[81] Once these items are received, the Copyright Office conducts a limited review to "ascertain whether the application describes a work that is in a class of works that the Register of Copyrights has determined has had a history of infringement prior to authorized commercial release."[82] After reviewing the application, "the Copyright Office will provide the claimant official notification by email of the preregistration."[83]

Much like registration, "[t]he effective date of preregistration is the day on which an application and fee for preregistration of a work, which the Copyright Office later notifies the claimant has been preregistered or which a court of competent jurisdiction has concluded was acceptable for

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http://www.copyright.gov/fedreg/2005/70fr61905.html [hereinafter *Preregistration of Unpublished—Interim*].

72. *La Resolana,* 416 F.3d at 1207.

73. 17 U.S.C.A. § 411(b).

74. *See* Preregistration of Certain Unpublished Copyright Claims, 70 Fed. Reg. 42,286, 42,287 (proposed July 22, 2005) *available at* http://www.copyright.gov/fedreg/2005/70fr42286.html [hereinafter *Preregistration of Unpublished—Proposed*].

75. *Id.* at 42,290.

76. 17 U.S.C.A. § 408(f)(1) ("Not later than 180 days after the date of enactment of this subsection, the Register of Copyrights shall issue regulations to establish procedures for preregistration of a work that is being prepared for commercial distribution and has not been published.").

77. *La Resolana,* 416 F.3d at 1207.

78. *Id.* ("Whatever the Register of Copyrights eventually determines . . . the adoption of FECA further confirms our statutory analysis").

79. *Preregistration of Unpublished—Interim, supra* note 71, at 61,905. *See* discussion *infra* Part I.V.(C).

80. *Id.* at 1207 n.12.

81. *Preregistration of Unpublished—Interim, supra* note 71, at 61,907.

82. *Id.* at 61,908.

83. *Id.*

preregistration, have been received in the Copyright Office."[84] Unlike the registration process, however, the preregistration process is electronic.[85] Hence, preregistrants are spared the registrants' burden of having to wait four to five months before their applications are processed and quite possibly, before they are afforded the right to enforce their copyright in federal court. Quick or immediate preregistration processing may very well eliminate the need to ask whether the submission of an application or the approval of an application satisfies the jurisdictional prerequisites of preregistration. However, the determination of what constitutes registration for purposes of federal standing is not yet inconsequential. Furthermore, allocating rights based on the practices of businesses rather than the rule of law seems an unwise approach to interpreting either registration or preregistration requirements under the Copyright Act.

II. CIRCUIT SPLIT

Federal circuits are split as to whether it is necessary for the Copyright Office to review a copyright application in order for an individual to satisfy the registration requirement and bring an infringement action, or if an individual can bring an infringement suit upon the successful *submission* of a registration application. Whether the split occurred prior to the *La Resolana Architects v. Clay Realtors Angel Fire*[86] decision or as a result of the decision, is subject to debate and will be discussed at the end of this Part. The Tenth Circuit in *La Resolana* has claimed that the Fifth and Eleventh circuits have developed two different approaches to interpreting Title 17 in response to this issue.[87] The *La Resolana* court identified the Fifth Circuit's approach as the "Application approach" and the Eleventh Circuit's approach as the "Registration approach."[88] For purposes of this analysis and for reasons explained in Part IV, the "Registration approach" shall be renamed the "Approval approach."

A. The Application Approach

Courts employing the Application approach have analyzed Title 17 using a "policy-based methodology."[89] The Fifth Circuit and district courts in Rhode Island, New York, California, Delaware, and the District of Columbia have adopted this approach and granted standing to individuals initiating infringement actions prior to the approval or rejection of their copyright applications.[90] That is, these courts have concluded that the Act's registration requirement is satisfied once an application has

84. *Id.*
85. *Id.* at 61907.
86. 416 F.3d 1195 (10th Cir. 2005).
87. *La Resolana*, 416 F.3d at 1201-05.
88. *Id.*
89. *Id.* at 1203.
90. *Id.* at 1203-04.

been successfully submitted. The courts have supported their conclusions by referring to the leading treatises on copyright law written by Melville B. Nimmer,[91] and the language of § 410(d), which states, "[t]he *effective date of a copyright registration* is the day on which an application, deposit, and fee *which are later determined* by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office."[92] Courts embracing the Application approach have argued that "because a copyright owner can sue regardless of whether an application for registration is ultimately granted or rejected, delaying the date on which a copyright owner can sue is a senseless formality."[93] By allowing a claimant to initiate suit while her application is pending approval, the courts using the Application approach prevent infringers from diluting the copied work during the five to six months it takes to process the claimant's registration application.

In *Apple Barrel Productions, Inc. v. Beard*,[94] an infringement suit involving two country music programs, the Fifth Circuit held that the only elements necessary to confer federal court jurisdiction were proof of payment of the required registration fee, deposit of the work in question, and the receipt of a registration application by the Copyright Office.[95] In *Lakedreams v. Taylor*,[96] the same court held that receipt of materials sufficient to satisfy § 410's statutory formalities could be "inferred from the testimony of one of Lakedreams' partners that the Copyright Office cashed the fee check."[97] By construing the registration requirement more leniently and adopting the Application approach, the Fifth Circuit adhered to the view endorsed by Nimmer, that "in resolving issues of first impression as to the formalities required under the 1976 and 1909 Acts, the courts should refrain from overtechnical constructions."[98]

In *Foraste v. Brown University*,[99] a case involving the copyright infringement of a number of photographs, the district court of Rhode Island held that pending registration applications for ninety-seven of the images in question were sufficient to satisfy the federal jurisdictional requirements of § 411.[100] Because § 411 entitles a claimant to bring an infringement suit even upon the rejection of her application, and because § 410 "mandate[s] that the merits of the application materials are 'later

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91. *Id.* at 1203.
92. *Id.*; *see* 17 U.S.C. § 410(d).
93. *La Resolana*, 416 F.3d at 1203.
94. 730 F.2d 384 (5th Cir. 1984).
95. *Apple Barrel Productions*, 730 F.2d at 386-87.
96. 932 F.2d 1103 (5th Cir. 1991).
97. *Foraste*, 932 F.2d at 1108.
98. NIMMER, *supra* note 35, at 7-9.
99. 248 F. Supp. 2d 71 (D. R.I. 2003).
100. *Id.* at 76-78. The court further noted that § 411(a) "confirms that it is the submission of an application, deposit, and fee (rather than the issuance *vel non* of a registration certificate) that triggers registration for purposes of conferring standing to sue." *Id.* at 77 n.10.

determined,' that is, determined at some time after the right to sue comes into being," the court reasoned that application submission was sufficient to confer federal jurisdiction.[101] The court, however, also held that the plaintiff would not be entitled to damages "until such time as the images [were] fully registered."[102] While application was sufficient to enable the initiation of a suit, it did not sufficiently grant a claimant the right to obtain damages under § 412.[103] By allowing copyright owners to keep their case in federal court, yet still maintaining the requirement that an owner obtain a certificate before acquiring Title 17 remedies, the Application approach encourages both author protection and statutory compliance.

B. The Approval Approach

Courts applying the Approval approach have analyzed the Act using the plain language of Title 17 and have determined that a successful application submission does not constitute registration for purposes of federal jurisdiction under § 411.[104] The Tenth Circuit adopted the Approval approach in *La Resolana.*[105] Before that opinion, no circuit court had either expressly or clearly championed such an interpretation. However, in *La Resolana,* the court concluded that the Eleventh Circuit and district courts in New York, Maryland, California, Kansas, and South Carolina had adopted the Approval approach and denied standing to individuals initiating copyright infringement actions prior to the approval or rejection of their registration applications.[106] Using §§ 410 and 411 of the Act, the district courts based their opinions on the fact that the "term application is used in the same section [as the term registration] and is clearly something separate and apart from registration"[107] and the "requirement of 'examination' would be meaningless if filing and registration were synonymous."[108] The Eleventh Circuit, however, neglected to engage in a similar analysis.

In *M.G.B. Homes, Inc. v. Ameron Homes, Inc.,*[109] an infringement case involving two competing home builders, the Eleventh Circuit ac-

101. *Id.* at 76-77.

102. *Id.* at 78.

103. As evidenced in *Foraste,* § 412 has posed a particular problem to photographers. Due to the nature of their art, the vast number of works created, and inevitable mistakes made on registration applications, many photographers find it too difficult, expensive, and exhausting to comply with registration provisions by registering every copyrightable image. Consequently, it may be easy for defense attorneys to "abuse the registration process, utilizing it as a weapon in infringement litigation." Charles Ossola, *Registration and Remedies: Recovery of Attorney's Fees and Statutory Damages Under the Copyright Reform Act,* 13 CARDOZO ARTS & ENT. L.J. 559, 560 (1995).

104. *La Resolana,* 416 F.3d at 1202.

105. *Id.* at 1201-02 ("Despite the Act's seemingly plain language, courts construing these provisions are split into two interpretive camps: The "Registration approach," *which we have adopted,* and the "Application approach.") (emphasis added).

106. *Id.* at 1202.

107. Mays & Assocs. v. Euler, 370 F. Supp.2d 362, 368 (D.Md. 2005).

108. Robinson v. Princeton Review, Inc., No. 96 CIV. 4859(LAK), 1996 WL 663880, *7 (S.D.N.Y. 1996).

109. 903 F.2d 1486 (11th Cir. 1990).

knowledged that "[t]he registration requirement is a jurisdictional prerequisite to an infringement suit."[110] To support its claim, the court cited eight different district court cases.[111] In only two of those cases did courts extrapolate from that argument and state that the receipt or denial of a registration certificate was a jurisdictional requirement.[112] The Eleventh Circuit in *M.G.B. Homes* never actually addressed what was necessary to satisfy the registration requirement.[113] Furthermore, and contrary to the Tenth Circuit's claim in *La Resolana,* the Eleventh Circuit did not dismiss the infringement action as premature.[114] In *M.G.B. Homes,* the court was faced with the task of determining whether the trial court's dismissal of a suit for lack of jurisdiction precluded it from entertaining a party's motion to amend once the party had been issued a registration certificate.[115] The Eleventh Circuit held that the "technical distinction between filing a new complaint and filing an amended complaint" neither precluded the trial court's nor its own jurisdiction.[116] The court added that the party "acted within the bounds of an arguably accepted practice" when it filed a complaint asserting copyright registration prior to receiving a certificate.[117]

Not only did the Eleventh Circuit fail to use the Approval approach by neglecting to address the meaning of registration, it validated the Application approach by affirming the trial court's jurisdiction in an infringement action initiated prior to copyright application approval. Consequently, it was not until the Tenth Circuit's decision in *La Resolana* that the federal circuits split and the Approval approach was adopted by an appellate court.

III. *LA RESOLANA ARCHITECTS V. CLAY REALTORS ANGEL FIRE*[118]

A. Facts

While visiting a building site in Angel Fire, New Mexico in October 2003, a representative of the Santa Fe architecture firm, La Resolana, discovered that a local realtor had infringed upon a La Resolana copyright.[119] Architectural drawings created by La Resolana had been used to

110. *Id.* at 1488.

111. *Id.* n.4 (citing cases in Indiana, New York, Arkansas, and Massachusetts).

112. *Id.* (citing *Demetriades v. Kaufmann,* 680 F. Supp. 658, 661 (S.D.N.Y. 1988) ("Receipt of an actual certificate of registration or denial of same is a jurisdictional requirement, and this court cannot prejudge the determination to be made by the Copyright Office."); and *International Trade Management, Inc. v. United States,* 1 Cl. Ct. 39, 41 (1982) ("A suit for copyright infringement is conditioned on obtaining (or being denied) a certificate of registration.")).

113. *See id.* at 1486-89.

114. *Id.* at 1489.

115. *Id.* at 1488.

116. *Id.* at 1489.

117. *Id.* n.6.

118. 416 F.3d 1195 (10th Cir. 2005).

119. *La Resolana,* 416 F.3d at 1197.

build a number of townhouses being sold in the area.[120] Clay Realtors, who had met with La Resolana in late 1996 in a series of discussions regarding development plans for townhouses in Angel Fire, happened to be the seller.[121] In response to this discovery, La Resolana submitted an application for registration of the copyrighted drawings on November 6, 2003.[122] On November 20, La Resolana sued Clay Realtors for copyright infringement.[123]

Clay Realtors claimed that the court lacked subject matter jurisdiction and moved to dismiss on March 8, 2004.[124] Because La Resolana had not obtained a certificate of copyright registration from the Copyright Office prior to filing their complaint, Clay Realtors argued that La Resolana did not have standing to sue.[125] La Resolana responded with a March 10, 2004 letter from the Copyright Office.[126] The letter stated that copyright registration had been approved on January 22, 2004, and that the effective date of registration was November 19, 2003, one day prior to commencement of the action.[127] The district court refused to admit the letter into evidence and found that the drawings were not yet registered.[128] It dismissed the case without prejudice based on lack of subject matter jurisdiction and La Resolana appealed.[129]

B. Decision

After engaging in the most comprehensive analysis of the two competing registration interpretations to date, the Tenth Circuit Court of Appeals affirmed the district court's holding.[130] The court adopted the Approval approach, referring to the method as the "Registration approach,"[131] and reasoned that the plain language of §§ 408 & 410 "require[d] a series of affirmative steps by *both* the applicant and the Copyright Office."[132] Because La Resolana's registration application had neither been approved nor rejected before initiation of the suit, the court held that La Resolana did not have standing to sue.[133]

The court began its analysis with § 411(a): "no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in

120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *See id.*
125. *Id.*
126. *Id.*
127. *See id.* at 1197-98.
128. *Id.* at 1198.
129. *Id.*
130. *See id.* at 1208.
131. *See id.* at 1201-02.
132. *Id.* at 1200 (emphasis added).
133. *See id.* at 1201-02.

accordance with this title."[134] Because the term preregistration was added to the statute in a 2005 amendment after commencement of the suit, and had not yet been defined by the Copyright Office, the court held that the new language did not control the outcome of the case.[135] Next, the court attempted to determine the meaning of registration under § 411 by looking to § 410: "[w]hen, after examination, the Register of Copyrights determines that . . . the material deposited constitutes copyrightable subject matter . . . the Register shall register the claim and issue to the applicant a certificate of registration."[136] To "examine" and "register" a copyright application, and "issue" a certificate of registration, the Register must act affirmatively. Because the Register "shall register the claim" only "after examination," and La Resolana's suit was initiated prior to registration, the court reasoned that La Resolana's suit was premature.[137] According to the court, the process required by § 410 failed to indicate that the filing of an application alone would be sufficient to register the work and confer standing.[138]

To support its view that registration did not occur upon application, the court addressed the language of § 408. According to § 408, a copyright claimant "may" obtain copyright registration by successful application. Because Congress used "may," a discretionary term, indicating that the claimant does not automatically obtain registration, rather than the word "shall," which would mandate registration upon application, the court found that § 411 could require the Register's substantive review of the material before conferring jurisdiction.[139] Using the Approval approach and interpreting the Act using the plain language of Title 17, the Tenth Circuit thus concluded that registration required approval or rejection of a copyright application.[140]

The court, however, disagreed with other courts adopting the Approval approach, concluding that a registration *certificate* was not a jurisdictional requirement.[141] According to the court, § 411 demonstrates "that registration is separate from the issuance of a certificate of registration . . . ."[142] Section 411 makes no reference to a certificate at all, and even under § 410(c) a certificate of registration is only prima facie evidence of the validity of a copyright, not a condition of registration.[143] Therefore, to satisfy the jurisdictional prerequisite of registration under Title 17, the Tenth Circuit required a copyright claimant to wait for the

134. *Id.* at 1200.
135. *Id.*
136. *Id.* at 1201.
137. *Id.*at 1201, 1208.
138. *Id.* at 1201.
139. *Id.*
140. *Id.* ("[R]egistration . . . does not occur until the Register of Copyrights takes action.").
141. *Id.* at 1202-03.
142. *Id.* at 1203.
143. *See id.*; *see also* 17 U.S.C.A. § 411 (West 2005).

Copyright Office to process her application before bringing suit, rather than requiring her to wait for the Copyright Office to issue or deny a registration certificate. After reaching this conclusion, the court speculated as to how a litigant might demonstrate her copyright registration to a court in the absence of a certificate.[144] According to the court, an "owner can still attempt to prove registration through other means, such as testimony or other evidence from the copyright office."[145] The court conceded that the "other evidence," "could be a letter similar to the one presented by La Resolana . . . or perhaps an affidavit from a person with first-hand knowledge of a copyright's registration."[146] Therefore, had La Resolana appealed the district court's evidentiary ruling excluding the March 10th letter, and argued its validity as evidence of registration, the court would not have dismissed the complaint for lack of subject matter jurisdiction.[147]

IV. ANALYSIS

The Approval approach and the Tenth Circuit's opinion in *La Resolana Architects v. Clay Realtors Angel Fire*[148] are rife with inconsistencies and traps for unwary copyright owners. Not only did the court misinterpret the registration requirement, it confused and mischaracterized the registration issue throughout the case, ignored valid policy considerations, and erected an unnecessary barrier to copyright protection. The court also incorrectly claimed that a recent amendment to the Copyright Act's registration provision would address the detrimental implications of the court's statutory interpretation. Although the amendment increases copyright protection for certain digital works, the new scheme does not address the copyrights of authors working outside of the entertainment industry. Preregistration is an inequitable and insufficient solution to copyright infringement that values economic productivity over creative control. Together, the Approval approach and the preregistration scheme fail to address the problem presented in *La Resolana* as sufficiently as would the Application approach. The Application approach is thus a sounder method for achieving the dual goals of creative protection and public progress.

A. Confusing the Issue

In *La Resolana*, the Tenth Circuit attempted to support its view of Title 17's registration requirement by mischaracterizing the competing interpretative approaches, obfuscating the issue, and ignoring valid public policy concerns in the face of an inconsistent statutory scheme. *La*

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144. *Id.* at 1207-08.
145. *Id.*
146. *Id.* at 1207 n.13.
147. *See id.* at 1208.
148. 416 F.3d 1195 (10th Cir. 2005).

Resolana essentially required the court to determine the meaning of "registration" under § 411. By labeling the Approval approach as the "Registration approach,"[149] the court presupposed that its interpretation of the statute was the correct interpretation. An approach with the title of that which it seeks to prove is inappropriately aligned with the conclusion before its argument is even propounded. Thus, before the interpretations were evaluated, the court automatically established the Application approach as something separate and apart from registration.

Courts adopting the Application approach never denied that registration was a jurisdictional prerequisite to a copyright infringement action; they merely proposed that the successful submission of an application satisfied § 411's registration requirement.[150] The "Approval approach" is therefore a more appropriate characterization of the Tenth Circuit's interpretation. The "Approval approach," like the "Application approach,"[151] describes that which will constitute registration under its interpretation and prevents the court from putting the cart before the horse, so to speak.

The "Registration approach," was the first of many mischaracterizations that obfuscated the registration issue and devalued the Application approach. The court also inappropriately used "[s]ubsequent Acts of Congress" to support its interpretation.[152] In referring to the 1988 amendment, which created a narrow registration exception for Berne works of foreign origin,[153] the court misrepresented the question at issue in *La Resolana.* After evaluating the congressional debate, and discussing the important purpose of registration incentives, the court stated, "it is clear that in passing the original Copyright Act of 1976 and the Berne Act in 1988, Congress sought to create and retain the incentives to registration, make certain benefits available only to registrants, and, in fact, condition federal court intervention on registration of the copyright."[154] The court's argument was a subterfuge used to undermine the credibility of the Application approach and indicate its inconsistency with legislative intent to maintain registration incentives. The debate between the Senate and the House of Representatives addressed the abandonment of

149. *La Resolana,* 416 F.3d at 1201-02.

150. *See* Int'l Kitchen Exhaust Cleaning Ass'n v. Power Washers of N. Am., 81 F. Supp. 2d 70, 72 (D.C. Cir. 2000); Apple Barrel Productions, Inc. v. Beard, 730 F.2d 384, 386-87 (5th Cir. 1984); Lakedreams v. Taylor, 932 F.2d 1103, 1108 (5th Cir. 1991) (citing *Apple Barrel Productions*).

151. *La Resolana* states:

> Two conflicting interpretations of the Act's registration requirement have been upheld by circuit courts: 1) *registration occurs when* the copyright owner submits an application for registration to the copyright office, or, conversely 2) *registration occurs when* the copyright office actually approves or rejects the application. We hold that the second interpretation is correct.

La Resolana, 416 F.3d at 1197 (emphasis added).

152. *Id.* at 1205.

153. *Id.* at 1205-06.

154. *Id.* at 1206.

the registration requirement altogether, not whether application submission satisfied registration.[155]

Proponents of the Application approach do not propose to eliminate registration as a pre-requisite for infringement litigation; they merely suggest that registration involves fewer formalities than those suggested by proponents of the Approval approach.[156] Claimants are still required to submit a fee, deposit, and application in order to register their copyrights and receive the benefit of federal standing.[157] Again, the issue in *La Resolana* is *what* registration requires, not *whether* it is required.[158] Consequently, the court's reference to the 1988 amendment neither supported nor addressed their interpretation of the Act.

The court also obscured the actual issue in *La Resolana* when it created and attacked a fictional argument in favor of the Application approach. The court addressed "the argument that copyright holders are left without a remedy until registration,"[159] and dismissed it as "beg[ging] the question,"[160] once again mischaracterizing the issue and misrepresenting the Application approach as an interpretation that separates *application* from *registration*. Courts adopting the Application approach have not attempted to support their interpretation of § 411's registration requirement with the conclusion that owners cannot enforce their copyrights absent registration. These courts have, however, proceeded upon this assumption, instead arguing what registration under the Act should entail.[161] By implying that these courts rely on an argument that begs the question, the Tenth Circuit erroneously imposed its own confusion of the registration issue upon those adopting the competing approach.

B. Ignoring Valid Policy Considerations

In addition to mischaracterizing the interpretive approaches and obfuscating the issue in *La Resolana,* the Tenth Circuit Court of Appeals

155. *Id.* at 1205.

156. *See generally id.* at 1205-06.

157. *See, e.g., Int'l Kitchen*, 81 F.Supp.2d at 72 ("To best effectuate the interests of justice and promote judicial economy, the court endorses the position that a plaintiff may sue once the Copyright Office receives the plaintiff's application, work, and filing fee."); *Apple Barrel Productions,* 730 F.2d at 386-87 ("In order to bring suit for copyright infringement, it is not necessary to prove possession of a registration certificate. One need only prove payment of the required fee, deposit of the work in question, and receipt by the Copyright Office of a registration application."); *Lakedreams,* 932 F.2d at 1108 (citing *Apple Barrel Productions*).

158. *La Resolana,* 416 F.3d at 1197.

159. *Id.* at 1204.

160. *Id.*

161. *See, e.g., Int'l Kitchen,* 81 F.Supp.2d at 72 ("[I]f Kitchen Exhaust indeed filed its copyright application, deposited its work, and paid the appropriate fee before filing suit, the court shall hear its claims . . . ."); *Apple Barrel Productions,* 730 F.2d at 386-87 ("In order to bring suit for copyright infringement, it is not necessary to prove possession of a registration certificate. One need only prove payment of the required fee, deposit of the work in question, and receipt by the Copyright Office of a registration application.").

failed to give deference to public policy in the face of an inconsistent statutory scheme. The court stated, "[if] the statutory language is not ambiguous, and the 'statutory scheme is coherent and consistent,' our inquiry ends."[162] In *La Resolana,* the court concluded that both conditions were met, when in fact, neither were satisified. Section 411 entitles a copyright owner to sue for infringement "where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused."[163] Imagine a situation in which two different copyright owners wish to sue for infringement of their works. The first owner sends in his registration application, which is subsequently rejected by the Copyright Office, and then initiates suit. The second author submits his registration application, initiates suit, and then receives a certificate of registration indicating the approval of his application. By adopting the Application approach in this situation, both authors will be entitled to protect their work in federal court. By adopting the Approval approach, however, the author with the claim involving non-copyrightable material will be afforded the opportunity to protect his work, while the author with copyrightable material will not. The Approval approach thus effectuates an inconsistent statutory scheme, a scheme affirmed by the Tenth Circuit in *La Resolana.* Because a claimant may bring suit regardless of whether his copyright registration application is rejected, federal standing is not dependent upon the *result* of an application's review by the Copyright Office. Therefore, it makes little sense to force a claimant to wait until approval or rejection before bringing suit, and to condition his ability to enforce his copyright in federal court upon the review of his application.

In addition to denying the author with copyrightable material, and arguably the more credible claim to protection, the Approval approach ignores "developments in the law, which continues to move in the direction of increased control."[164] While it has been argued that the removal of copyright formalities has reduced copyright's social utility by "expanding the domain of copyright beyond works for which application of the law is useful,"[165] the Application approach merely removes an unnecessary step in a formality that remains intact. Furthermore, § 411's grant of federal standing to authors suing for infringement of non-copyrightable work is much more likely to improperly expand the scope of copyright law than will the acceptance of the Application approach.

An author's ability to sue upon the submission of his copyright application is also more consistent with the purpose behind Title 17's registration incentives. By conditioning remedies on the approval or rejection

162. *La Resolana,* 416 F.3d at 1200 (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002)).

163. 17 U.S.C. § 411(a).

164. Sprigman, *supra* note 2, at 487.

165. *Id.* at 489.

of a copyright application, a court employing the Approval approach makes the crucial act that of the Copyright Register rather than that of the claimant. If the goal of implementing registration incentives is to encourage authors to submit their work to the Copyright Office, why condition remedies on an element over which authors have no control? Copyright infringement remedies do not encourage the Register to approve or reject applications; therefore, conditioning remedies upon the Register's acts is an unnecessary formality. By applying the Application approach and making registration dependent upon the acts of the author, the goals of the Copyright Act will be achieved in a manner more consistent with public policy and legislative intent. The Library of Congress will still continue to expand its collections, and copyright infringers will be prevented from using a ministerial formality as a weapon to avoid litigating the merits of an infringement claim. Under the Application approach, stealing original work and diluting it during the Register's four to five month processing period will no longer save a copyright infringer from having to pay for his misdeed.

C. The Preregistration Scheme

Because La Resolana initiated suit prior to the enactment of FECA, the Tenth Circuit Court of Appeals did not analyze § 411's preregistration language.[166] However, the court claimed that the amendment supported its statutory interpretation, noting that "the availability of a preregistration scheme would in whole or in part address the problem presented by this case: the need to sue for infringement to prevent dilution of a copyright but the inability to do so without completed registration."[167] While the Tenth Circuit was correct in so far as it presupposed that preregistration would *in part* address the problem presented by its decision in *La Resolana,* the preregistration scheme neither supported the Approval approach, nor adequately addressed the issue in the case. Instead of indicating what might satisfy registration requirements under the Act, the preregistration scheme added another formality in need of interpretation. Instead of adopting the Application approach and thereby eliminating the problem of an infringer's opportunity to dilute stolen copyrights before the commencement of litigation, the court relied on the possibility that a new amendment would solve the problems it had created by adopting the Approval approach.[168]

By requiring the review of an application by the Copyright Office before acknowledging registration under the Act, the court not only denied hearing a meritorious claim, it created an economically dangerous situation for *digital* copyright owners. "It's one thing to take someone else's townhouse blueprints and try to quickly construct them. It's an-

166. *La Resolana,* 416 F.3d at 1200.
167. *Id.* at 1207.
168. *Id.*

other thing to capture digital files and begin electronically distributing them."[169] Where it might take a number of months to erect a building, a digital file may be copied in a matter of minutes. Digital files intended for publication are also often available online before their completion or publication and well before their commercial distribution.[170] Under the Approval approach, the four to five months it takes the Copyright Office to process an application can be economically destructive to digital content creators.[171] "Obviously, the increasingly frequent situation of copyrighted works being distributed illegally via the internet before they are even made available for sale to the public severely undercuts the ability of copyright holders to receive fair and adequate compensation for their works."[172] The preregistration scheme was enacted in response to this problem.[173] However, employed in conjunction with the Approval approach, preregistration serves as a Band-Aid for specified authors only; an incomplete and inequitable solution that elevates the economic concerns of some over the creative control of all.

The Copyright Office's interim regulations note that "[p]reregistration serve[s] as a place-holder for limited purposes - notably where a copyright owner needs to sue for infringement while a work is still being prepared for commercial release."[174] Although preregistration is not a proxy for registration and preregistered work "must be registered within one month after the copyright owner becomes aware of infringement but in no case later than three months after first publication," preregistration allows an owner to satisfy the requirements necessary to initiate an infringement action.[175] The regulations, however, identify only six classes of works eligible for preregistration under the Act: motion pictures, sound recordings, musical compositions, literary works being prepared for publication in book form, computer programs (including video games), and advertising or marketing photographs.[176] The specific works were chosen by the Register of Copyrights after movie studio and record company representatives "persuaded Congress that the existing rules making copyright registration a prerequisite for suit . . . [and] awards of attorney's fees and statutory damages [were] unduly burdensome on plaintiffs seeking relief against pre-release infringement . . . ."[177] Because these specific works were determined to have had a "history of

169. Patrick Ross, When a Copyrighted Work Isn't Copyrighted, Posting to The IPcentral Weblog, http://weblog.ipcentral.info/archives/2005/08/when_a_copyrigh.html#more (Aug. 5, 2005).

170. *Preregistration of Unpublished—Proposed*, *supra* note 74, at 42,286.

171. Ross, *supra* note 169.

172. *Preregistration of Unpublished—Proposed*, *supra* note 74, at 42,286 (citing 151 Cong. Rec. S495 (daily ed. Jan. 25, 2005) statements of Senator Hatch (bill sponsor)).

173. *Id.*

174. *Preregistration of Unpublished—Interim*, *supra* note 71 at 61,905.

175. *Preregistration of Unpublished—Proposed*, *supra* note 74, at 42,290.

176. *Preregistration of Unpublished—Interim*, *supra* note 71, at 61,905-06.

177. *Preregistration of Unpublished—Proposed*, *supra* note 74, at 42,287.

infringement prior to authorized commercial distribution"[178] and "[b]ecause works intended for publication usually are not registered until they are in final form and are being disseminated to the public,"[179] the registration practices of particular copyright owners dictated the preregistration guidelines. The preregistration scheme thus addresses the detrimental implications of the *La Resolana* decision for a select group of digital copyright owners only. By affording these authors an opportunity to gain earlier copyright protection, it acknowledges and remedies "damage to the content creator [that] is obviously going to be far greater, far quicker [for works that can be immediately electronically distributed.]"[180] The scheme, however, if viewed as a supplement to the Approval approach and a solution to these detrimental implications, will not save future copyright owners, like La Resolana, who do not fall within the protected classes of the new regulation. Because architectural blueprints and photographs for artists' exhibitions and portfolios were not deemed to have a history of pre-release infringement, owners of unpublished work, like La Resolana and Foraste, whose work has been infringed prior to the approval of a registration application, will not likely be able to initiate an infringement suit at the same time as owners belonging to an enumerated pregistration class. This scheme affords greater protection to certain owners based on the likelihood of immediate publication and profit realization rather than legitimate copyrights, and the likelihood of infringement rather than actual infringement.

Again, imagine a situation in which two different copyright owners wish to sue for infringement of their works. This time, the first owner wishes to sue for the infringement of a sound recording which falls within an enumerated preregistration class. The owner preregisters his work, sues for infringement, and then submits a registration application for the work within the time required by the new regulation. His registration application is then approved by the Copyright Office. The second copyright owner wishes to sue for the infringement of a building plan which does not fall within an enumerated preregistration class. This owner successfully submits a registration application, initiates suit, and then also receives a certificate of registration indicating the approval of his application. Under the Approval approach, even though both registration applications will be approved *after* the owners have initiated suit, only the owner with the preregistered sound recording will be afforded the opportunity to protect his work. Under the Approval approach, even though both copyrights have been infringed, only the copyright which was more likely to be infringed will be argued in federal court. Thus, together, the Approval approach and the preregistration scheme facilitate an inequitable application of the law where not all copyright owners will

178. *Preregistration of Unpublished—Interim*, *supra* note 71, at 61,905-06.

179. *Preregistration of Unpublished—Proposed*, *supra* note 74, at 42,286.

180. Ross, *supra* note 169.

be able to exercise their rights in the same way. If instead, the preregistration scheme were to coexist with the Application approach, all copyright owners would receive equal protection under the Act. By adopting the Application approach, the law will not discriminate between what is more and what is less likely to be profitable. Those owners whose practices prevent them from registering until commercial distribution will still receive protection, and copyright owners with unpublished work will receive the same benefits as owners with copyrights having a history of pre-release infringement.

While the preregistration scheme may address the dilution of copyrights for certain classes of copyright owners, its enactment does not support the Tenth Circuit's adoption of the Approval approach. Preregistration was not created to answer whether or not jurisdictional prerequisites were met by an application's submission or an application's approval or rejection. It was created in response to the pleas of motion picture studios and record companies whose profits were being siphoned away through internet piracy.[181] Neither does preregistration indirectly support the Approval approach. Rather, it imposes additional interpretive burdens upon the court. Instead of indicating what might satisfy registration requirements under the Act, the preregistration scheme adds another formality in need of interpretation. The new scheme poses a problem identical to that of registration; what exactly satisfies preregistration, application submission or application approval?

CONCLUSION

If the purpose of the Copyright Act of 1976 was to relax the procedural mechanisms that made it overly cumbersome for authors to protect their works, the Tenth Circuit's reading of Title 17 in *La Resolana* blatantly ignores legislative intent. If an additional goal of the Act was to create a uniform federal copyright system, the recent split among federal circuits regarding registration formalities requires a remedy from the United States Supreme Court. If the Tenth Circuit's interpretive approach goes unchecked and federal circuits continue to embrace the Approval approach, by engaging in inconsistent and inequitable interpretations of the Copyright Act's registration requirement, the balance between creative ownership and cultural progress will be lost.

As federal copyright law endeavors to encourage creative genius by increasing the control copyright owners may exert over their creations, it is important to remember that all copyright owners should be able to exercise their intellectual property rights in the same way. As federal copyright law endeavors to enrich the public record in the Library of Congress by preserving registration incentives, it is important to remem-

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181. U.S. Copyright Office, Frequently Asked Questions: Registering a Work, http://www.copyright.gov/help/faq/faq-register.html#length (last visited Jan. 23, 2006).

ber that procedural formalities should not condition rights or benefits upon that which the copyright owner has no control. By adopting the Application approach, the Supreme Court will ensure that public policy and the interests of justice eclipse statutory inconsistencies. The owner with copyrightable work who initiates an infringement claim after successfully submitting a registration application but before receiving notice of its review, will be afforded the same rights as the owner who initiates suit after the rejection of his application, and the owner whose preregistered work has yet to be infringed.

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PUT ON YOUR COAT, A CHILL WIND BLOWS: EMBRACING THE EXPANSION OF THE ADVERSE EMPLOYMENT ACTION FACTOR IN TENTH CIRCUIT FIRST AMENDMENT RETALIATION CLAIMS

INTRODUCTION

"The First Amendment is the bedrock of American Democracy."[1] Protection of the First Amendment in the public employment context is paramount to the livelihood of a thriving democracy. Government employees must have the opportunity to speak publicly about their employer without the fear of undue retaliation.

In the recent Tenth Circuit cases of *Baca v. Sklar*[2] and *Maestas v. Segura*,[3] the court resolved two First Amendment retaliation claims brought by public employees under 42 U.S.C. § 1983.[4] First Amendment retaliation claims arise when a government employer takes some undue adverse employment action against a public employee after he or she speaks on a matter which concerns the public at large.[5] Within these two cases, the court displayed its tendency toward utilizing a broader standard of reviewing detrimental actions which employers take against their employees. However, the court did not explicitly define its standard for interpreting the adverse employment action factor.[6]

In the past, the court has refused to restrict the analysis of the adverse employment action factor to its counterpart in Title VII[7] retaliation claims. In these claims, an employee who is retaliated against for opposing employment discrimination or filing a charge of discrimination must prove that the employer's retaliation manifested itself in the form of an ultimate employment decision such as termination or demotion.[8] Conversely, the court has also refused to adhere to the broadest interpretation, that any action which tends to chill an employee's free speech is adverse.[9]

1. Kary Love, *First Amendment Law: Free Speech Rights of Public Employees: A Natural Resource for Democracy*, MICH. B. J., June 2005, at 28, 29.
2. 398 F.3d 1210 (10th Cir. 2005).
3. 416 F.3d 1182 (10th Cir. 2005).
4. *See* U.S. CONST. amend. I; 42 U.S.C. § 1983 (2005).
5. Love, *supra* note 1, at 29.
6. *Baca*, 398 F.3d at 1220-21; *Maestas*, 416 F.3d at 1188.
7. 42 U.S.C. § 2000e to 2000e-17 (2005).
8. § 2000e-3(a) (2005); *See* Nancy Landis Caplinger & Diana S. Worth, *Vengeance is Not Mine: A Survey of the Law of Title VII Retaliation*, 73 J. KAN. B. ASS'N 20, 21 (Apr. 2004).
9. *Maestas*, 416 F.3d at 1188 n.5.

This article is a survey of the *Baca* and *Maestas* cases wherein the court decided not to assert a position in the circuit split of adverse employment action interpretation in First Amendment retaliation claims. Instead, the court chose to "leave that question for another day."[10] However, both cases lay the foundation for a discussion of First Amendment retaliation, the circuit split regarding the adverse employment action factor of the claim, and how the Tenth Circuit should now embrace the broad "chilling effect" interpretation of adverse employment actions.

Part I of this article provides the foundation for First Amendment retaliation claim jurisprudence. Part II analyzes the circuit split, including the various circuit court interpretations of adverse employment actions: strict Title VII adherence, the "individual of ordinary firmness" model, and the "chilling effect" standard. Part III discusses the facts and merits of the Tenth Circuit *Baca* and *Maestas* cases. Finally, in Part IV the author argues that the Tenth Circuit should now embrace the "chilling effect" interpretation of adverse employment actions in First Amendment retaliation claims. By joining the circuits which utilize the "chilling effect" approach to the adverse employment action factor, the Tenth Circuit will further protect public employees from employers who punish them for exposing issues which are a matter of public interest.

I. FIRST AMENDMENT RETALIATION CLAIMS

Generally, the constitutional rights of public employees are protected under § 1983.[11] Among other claims, this statute gives a public employee the right to file suit against a government employer for violating the employee's constitutional right(s).[12] The statute states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .[13]

Section 1983 gives public employees a clear advantage over private employees because it provides a cause of action for claims outside the scope of Title VII, such as a First Amendment retaliation.[14] First Amendment retaliation claims typically arise when an employee speaks out against the employer and suffers some detrimental action as a result.[15]

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10. *Id.*
11. 42 U.S.C. § 1983 (2005).
12. *Id.*
13. *Id.*
14. John R. Williams, *Public Employment Litigation Under Section 1983*, 715 PRACTISING L. INST. 441, 443 (2004).
15. DAVID L. HUDSON, BALANCING ACT: PUBLIC EMPLOYEES AND FREE SPEECH 31 (2002).

The Supreme Court has held that a "public employee does not relinquish its First Amendment rights to comment on matters of public interest by virtue of government employment."[16] A series of monumental Supreme Court cases established the criteria for First Amendment retaliation claims. Beginning with *Pickering v. Board of Education*[17] in 1968, the Court created a balancing test weighing the rights of an employee to comment on matters of public concern with the rights of an employer "in promoting the efficiency of the public services it performs through its employees."[18] Following *Pickering*, in *Mount Healthy City School District v. Doyle*,[19] the Supreme Court enumerated a two part test requiring that the employee's speech be a substantial motivating factor for the adverse action taken against him or her.[20] Finally, the Supreme Court concentrated its attention on what constitutes public concern.[21] In *Connick v. Myers*,[22] the Court held that as a matter of law the employee's speech must involve public issues in order for the employee to have a cognizable claim.[23]

For a First Amendment retaliation claim to prevail in the Tenth Circuit, an employee must establish that "(1) the speech involved a matter of public concern, (2) the employee's interest in engaging in the speech outweighed the employer's interest in regulating the speech, and (3) the speech was a 'substantial motivating factor' behind the employer's decision to take an adverse employment action against the employee."[24] If an employee meets these criteria, the burden shifts to the employer to prove that he would have acted in the same manner regardless of the employee's protected speech.[25]

Each element leaves room for discussion and analysis. Through *Pickering*, *Mt. Healthy*, and *Connick*, the Supreme Court set boundaries within which the lower Federal courts must operate. But within those guidelines there is room for interpretation.[26] Each circuit has created its own criteria for the public concern and the employee-employer *Pickering* balancing test.[27] However, the subject of this article is narrowly drawn to the third factor: what constitutes an adverse employment action. There is a split among the circuits regarding interpretation of this factor,

16. Connick v. Myers, 461 U.S. 138, 140 (1983).
17. 391 U.S. 563, 568 (1968).
18. *Id.*
19. 429 U.S. 274 (1977).
20. *Mt. Healthy*, 429 U.S. at 283-84.
21. *Connick*, 461 U.S. at 146-48.
22. 461 U.S. 138 (1983).
23. *See* Rosalie Berger Levinson, *Superimposing Title VII's Adverse Action Requirement on First Amendment Retaliation Claims: A Chilling Prospect for Government Employee Speech*, 79 TUL. L. REV. 669, 694 (2005) (citing *Connick*, 461 U.S. at 145).
24. Maestas v. Segura, 416 F.3d 1182, 1187 (10th Cir. 2005).
25. *Id.*
26. Levinson, *supra* note 23, at 687.
27. *See generally* William Herbert, *The First Amendment and Public Sector Labor Relations*, 19 LAB. LAW. 325, 337-40 (2004).

resulting in three approaches: Title VII adherence, the "individual of ordinary firmness" model, and the "chilling effect" standard.

II. THE SPLIT—HIGH PRESSURE, MODERATE ATMOSPHERE, AND A CHILLY FRONT

In 1990, the Supreme Court addressed the "adverse employment action" of a First Amendment retaliation claim in *Rutan v. Republican Party of Illinois*.[28] This case blasted the "chilling" wind through the circuits.[29] In a footnote interpreted as mere dicta by its adversaries, the Court adhered to the Seventh Circuit's assertion that "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech" was an adverse employment action.[30] In light of *Rutan*, the circuit courts have struggled to define "adverse employment action" in First Amendment retaliation claims.

The range of interpretation spans from the confines of Title VII to the "chilling effect" mentioned in *Rutan*. The Eleventh, Eighth, and Fifth Circuits utilize the structure of Title VII retaliation adverse employment actions, holding that only "materially adverse change[s] in the terms or conditions of employment" are actionable.[31] Additionally, there is the reasonable person of adverse employment actions, the "individual of ordinary firmness," as categorized by the Second, Third, Sixth, and D.C. Circuits.[32] However, the Seventh, Ninth, and Fourth Circuits have consistently held that any action that is likely to chill the exercise of free speech is cognizable.[33] The following subsections provide an explanation of each standard and how each of the circuit courts are applying the three applications of adverse employment actions in First Amendment retaliation claims.

A. High Pressure Likely—Title VII Adherence

To assert a successful First Amendment retaliation claim, the public employee must allege that "an adverse personnel action resulted from the protected activity."[34] The Eleventh, Eighth, and Fifth Circuits consistently borrow Title VII "adverse employment action" interpretation and apply it to First Amendment retaliation claims.[35] These circuit courts adopt a narrow approach, holding that only those actions which "demon-

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28. 497 U.S. 62 (1990).
29. *Id.* at 76.
30. *Id.* at 76 n.8 (quoting Rutan v. Republican Party of Ill., 868 F.2d 943, 954 n.4 (7th Cir. 1989)). For an interpretation of *Rutan's* footnote eight as "non-controlling dicta" *see* Lybrook v. Bd. of Educ., 232 F.3d 1334, 1340 n.2 (10th Cir. 2000).
31. Levinson, *supra* note 23, at 687.
32. Washington v. County of Rockland, 373 F.3d 310, 320 (2d Cir. 2004).
33. Love, *supra* note 1, at 31.
34. Herbert, *supra* note 27, at 341.
35. Levinson, *supra* note 23, at 692; 42 U.S.C. § 2000e to 2000e-17 (2005).

strate a 'materially adverse' or 'tangible' job action" are recognizable under the third prong of the First Amendment claim.[36]

In order to prevent discrimination, Title VII prohibits employers from discriminating against employees because of their race, color, religion, sex, or national origin.[37] Included in Title VII is an anti-retaliation provision which states that employers cannot discriminate against employees who have "opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[38]

In order to prove discriminatory retaliation the employee must meet a three part prima facie test.[39] The employee must establish: "(1) protected opposition to Title VII discrimination or participation in a Title VII proceeding, (2) adverse action by the employer subsequent to or contemporaneous with such employee activity, and (3) causal connection between such activity and the employer's adverse action."[40] If all three elements are met, the burden shifts to the employer to prove that he or she had a legitimate, non-discriminatory basis for the adverse action taken against the employee.[41]

The Eleventh Circuit adheres to the Title VII standard by enumerating several key employment decisions as adverse actions. These actions include "discharges, demotions, refusals to hire or promote, and reprimands."[42] Although the court previously used the "chilling" effect language, it consistently utilizes the Title VII standard for interpreting adverse actions in First Amendment retaliation claims.[43] In *Stavropoulos v. Firestone*,[44] the public university employee was subject to a memo criticizing her, the compilation of a file which consisted of faculty letters criticizing the employee, and the encouraging of other faculty members at the university to state negative things about her in an employment review.[45] Cumulatively, these actions led to an initial faculty vote not to

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36. Levinson, *supra* note 23, at 689.
37. 42 U.S.C. § 2000e to 2000e-17 (2005).
38. *Id.* at § 2000e-3(a).
39. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
40. Caplinger & Worth, *supra* note 8, at 24 (citing Pastran v. K-Mart Corp., 210 F.3d 1201, 1205 (10th Cir. 2000)).
41. *Id.*
42. *Stavropoulos*, 361 F.3d at 619.
43. *Id.* The *Stavropoulos* court stated:

> Requiring the First Amendment retaliation claimant to show that the action she complains of not only was likely to chill her speech but *also* altered an important condition of employment insures that she satisfies the injury-in-fact requirement of federal justiciability law . . . Show[ing] that the action had an impact on an *important* aspect of her employment.

Stavropoulos, 361 F.3d at 620 (emphasis added).

44. 361 F.3d 610 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 1850 (2005).
45. *Id.* at 620.

renew the employee's university contract.[46] The court held that "taken together or separately, Firestone's acts *fail to rise* to the level of an adverse employment action because they had no impact on an important condition of Stavropoulos's job, such as her salary, title, position, or job duties."[47]

Similarly, the Eighth Circuit adheres to the Title VII demand for material or tangible adverse actions for an employee to have a cognizable First Amendment retaliation claim.[48] In *Meyers v. Starke,*[49] Ms. Meyers was a monitor of children in state custody who made placement and therapy decisions for the children.[50] Shortly after a disagreement with coworkers about a regimen of treatment for two children and testifying against the treatment in a court proceeding, Ms. Meyers was transferred to another department.[51] Ms. Meyers resigned her position and filed a First Amendment retaliation claim, alleging she was demoted to a position that did not entail a full workload.[52] Relying on precedent, the court held that an adverse employment action must be "exhibited by a *material* employment disadvantage, such as a change in salary, benefits or responsibilities."[53] The court found that Ms. Meyer's transfer did not rise to the level of an adverse employment action and therefore she did not have a cognizable First Amendment retaliation claim under § 1983.[54]

Finally, the Fifth Circuit applies a slightly modified Title VII adverse employment action standard. While the court does not require an "ultimate employment decision," it repeatedly adheres to the same standard enumerated by the Eleventh Circuit.[55] The court has refused to expand the First Amendment retaliation adverse employment action prong to those acts which are trivial in nature.[56] For instance, in *Foley v. University of Houston System,*[57] the court denied a professor's First Amendment retaliation claim in part because she failed to demonstrate that she

46. *Id.* at 613.
47. *Id.* at 621 (emphasis added).
48. Levinson, *supra* note 23, at 690.
49. 420 F.3d 738 (8th Cir. 2005).
50. *Meyers*, 420 F.3d at 738.
51. *Id.* at 740.
52. *Id.* at 741, 744.
53. *Id.* at 744 (quoting Duffy v. McPhillips, 276 F.3d 988, 991 (8th Cir. 2002)). *See also* Fischer v. Pharmacia & Upjohn, 225 F.3d 915, 919 (8th Cir. 2000); Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997). "Other Eighth Circuit cases similarly discuss the need to show significant alteration in the conditions of employment or 'a material change in the terms and conditions of employment' in order to establish a First Amendment violation." Levinson, *supra* note 23, at 691.
54. *Meyers*, 420 F.3d at 744.
55. Levinson, *supra* note 23, at 689-90.
56. *See* Terrence S. Welch, *A Primer on Texas Public Employment Law*, 56 BAYLOR L. REV. 981, 991 (2004).
57. 355 F.3d 333 (5th Cir. 2003).

suffered an adverse employment action.[58] The court relied on the precedent of *Harrington v. Harris*[59] in its determination.[60]

In *Harrington*, the court rejected the "chilling effect" interpretation, holding that "actions such as 'decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures,' while extremely important . . . do not rise to the level of a constitutional deprivation."[61] The court held that those actions which merely chill protected speech are not actionable.[62] This explicit rejection was accompanied by language consistently used in Title VII retaliation claims: "[a]dverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands."[63]

While the Eleventh, Eighth, and Fifth circuits apply the Title VII "material" adverse employment action standard, several circuit courts have shied away from the strict standard.[64] These circuits have adopted a compromise of interpretation in First Amendment retaliation claims.

B. Gray Skies of Moderation—The Individual of Ordinary Firmness

The Second, Third, Sixth, and D.C. Circuits established the great compromise of First Amendment retaliation claims through the "individual of ordinary firmness" standard.[65] This "sensible standard," as articulated by the D.C. Circuit, is implicated when the acts against the employee "would chill or silence a 'person of ordinary firmness' from future First Amendment activities."[66]

In 2005, the Second Circuit stated in *Burkybile* v. *Board of Education*[67] that it would continue to apply the "individual of ordinary firmness" standard and reiterated that "an adverse employment action is one that 'would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights.'"[68] The employee in *Burkybile* was subject to the threat of suspension and possible termina-

58. *Foley*, 355 F.3d at 341.
59. 118 F.3d 359 (5th Cir. 1997).
60. *Foley*, 355 F.3d at 342.
61. *Harrington*, 118 F.3d at 365.
62. *Id.*
63. *Id.* (quoting Pierce v. Texas Dep't of Criminal Justice Inst. Div., 37 F.3d 1146, 1149 (5th Cir. 1994)).
64. Levinson, *supra* note 23, at 697-98.
65. *See* Burkybile v. Bd. of Educ., 411 F.3d 306, 313 (2d Cir. 2005); Farmer v. Cleveland Pub. Power, 295 F.3d 593, 599 (6th Cir. 2002); Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000); Crawford-El v. Britton, 93 F.3d 813, 826 (D.C. Cir. 1996).
66. Love, *supra* note 1, at 31 (citing *Crawford-El*, 93 F.3d at 826).
67. 411 F.3d 306 (2d Cir. 2005).
68. *Burkybile*, 411 F.3d at 313 (quoting Washington v. County of Rockland, 373 F.3d 310, 320 (2d Cir. 2004)). In *Washington*, the employee was threatened with administrative proceedings and a thirty-day suspension without pay which the court determined could deter individuals within the police department from speaking out against discrimination practices and polices. *Washington*, 373 F.3d at 320.

tion as a result of a disciplinary hearing.[69] The court determined that the looming consequences of the hearing, as well as the inconvenience of litigation costs were "clearly deterrents for even a person of ordinary firmness."[70]

Similarly, the Third and Sixth Circuits have fashioned their own "individual of ordinary firmness" standards. In *Suppan v. Dadonna*,[71] the Third Circuit recognized that the strength of the First Amendment would be diluted if "harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise . . . ."[72] Mirroring *Suppan*, the Sixth Circuit in *Farmer v. Cleveland Public Power*[73] held that First Amendment retaliation claims require "that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that [constitutionally protected] activity."[74] In *Farmer*, the employee was subject to reduction in supervisory, management, and policy-making tasks.[75] The court found that these changes, though not materially adverse to her employment status, were enough to deter a person of ordinary firmness from exercising her free speech rights.[76]

These cases establish a precedent of compromise among the circuits and lay the foundation for a fact-based inquiry which does not rely on a strict enumeration of materially adverse actions, but respects the serious nature of First Amendment claims. They utilize the "chilling" effect but remain wary of allowing any deterrents to be actionable.[77] While the Second, Third, Sixth, and D.C. Circuits hold a compromising interpretation of "adverse employment actions," several circuits have adopted a broad understanding of the third prong of First Amendment retaliation claims.

C. Grab A Coat, It's Chilly Out There—The "Chilling Effect"

The Ninth, Seventh, and Fourth Circuits consistently hold that less severe actions which deter or "chill" speech are adverse in First Amendment retaliation claims.[78] Within these circuits, "adverse actions need not be great where First Amendment rights are involved to allow public

69. *Burkybile*, 411 F.3d at 314.
70. *Id.*
71. 203 F.3d 228 (3d Cir. 2000).
72. *Suppan*, 203 F.3d at 235 (citing Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982)).
73. 295 F.3d 593 (6th Cir. 2002).
74. *Farmer*, 295 F.3d at 602 (quoting Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998)).
75. *Id.*
76. *Id.*
77. *Suppan*, 203 F.3d at 235.
78. *See* Coszalter v. City of Salem, 320 F.3d 968, 976 (9th Cir. 2003); Power v. Summers, 226 F.3d 815, 820 (7th Cir. 2000); Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 352 (4th Cir. 2000).

employees to proceed with a retaliation case."[79] Any detrimental action against a public employee need not be significant but must chill, ever so slightly, the employee from exercising his or her right to speak in the future.[80]

In *Coszalter v. City of Salem*,[81] the Ninth Circuit stated that the goal of First Amendment retaliation claims is to "prevent, or redress, actions by a government employer that 'chill the exercise of protected' First Amendment rights."[82] In *Coszalter*, the employee was transferred to new and sometimes unpleasant job duties, subjected to several unwarranted disciplinary investigations, and placed on two reviews of work product quality for his public disclosure of information about health and safety standards in the City's public works department.[83] The court determined that these actions were adverse and also held that "various kinds of employment actions may have an *impermissible chilling effect* . . . [whereby] even minor acts of retaliation can infringe on an employee's First Amendment rights."[84] Thus, the threshold in Ninth Circuit adverse employment claims is minimal deterrence of an employee's First Amendment rights.[85]

The Seventh Circuit is the Federal court system's greatest proponent of a broad interpretation of adverse employment actions in First Amendment retaliation claims. In fact, the Seventh Circuit "does not buy into the idea that adverse employment action is a necessary element of a First amendment case in the public employment context."[86] According to Judge Posner, "*any* deprivation under color of law that is likely to deter the exercise of free speech, whether by an employee or anyone else, is actionable."[87]

The Seventh Circuit holds that a constitutionally-based retaliation claim is not comparable to federal employment discrimination statutes because in constitutional claims, any deterrence of the exercise of free speech is actionable.[88] In *Spiegla v. Major Eddie Hull*,[89] the court held that a transfer to more physically demanding job which required less skill and a change in schedule constituted an adverse employment action.[90] The court specifically stated that a "§ 1983 case *does not* require an ad-

79. Love, *supra* note 1, at 31.
80. *Section 1983 First Amendment Claims*, 5 EMP. COORD. EMPLOYMENT PRACTICES § 1:16 (2005).
81. 320 F.3d 968 (9th Cir. 2003).
82. *Coszalter*, 320 F.3d at 974-75.
83. *Id.* at 970-72.
84. *Id.* at 975 (emphasis added).
85. *Id. See also* Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000); Allen v. Scribner, 812 F.2d 426, 435 n.17 (9th Cir. 1987).
86. Williams, *supra* note 14, at 457.
87. *Power*, 226 F.3d at 820 (emphasis added).
88. Spiegla v. Major Eddie Hull, 371 F.3d 928, 941 (7th Cir. 2004).
89. 371 F.3d 928 (7th Cir. 2004).
90. *Spiegla*, 371 F.3d at 928.

verse employment action within the meaning of the antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964."[91]

Finally, the Fourth Circuit also adheres to the "chilling effect" standard for adverse employment actions in First Amendment retaliation claims. To establish retaliation an employee must prove "that he was deprived of a valuable government benefit or adversely effected in a manner that, *at the very least*, would tend to chill his exercise of First Amendment rights."[92] In the Fourth Circuit the public employee does not have to show that the action was the equivalent of a dismissal.[93]

These three circuits embrace the notion that any action which deters or chills an employee from exercising his or her constitutional right to free speech is sufficiently recognizable as an adverse employment action. Where "[m]ore subtle forms of punishment are available" to an employer, the Ninth, Seventh, and Fourth Circuits will readily stand guard against the chilling adverse actions.[94]

III. *BACA* AND *MAESTAS*

The Tenth Circuit currently wavers in its interpretation of adverse employment actions in First Amendment retaliation claims. In *Baca* and *Maestas* the Tenth Circuit again refused to choose an approach for interpreting adverse employment actions within the circuit.

A. Baca v. Sklar[95]

1. Case

In *Baca,* Peter Baca alleged that David Sklar and the University of New Mexico had discriminated against him based on ethnicity and retaliated against him for "exercising his First Amendment rights."[96] The defendants removed to federal district court and moved for summary judgment.[97] The district court granted the defendants' motion for summary judgment holding that Baca had failed to raise a genuine issue of material fact as to whether his statements had motivated the defendant to take adverse actions against him.[98]

Baca began employment with the University of New Mexico in March 2001 in the Center for Injury Prevention Research and Education

91. *Id.* (emphasis added).

92. *Goldstein*, 218 F.3d at 352 (4th Cir. 2000) (emphasis added). *See also* Edwards v. City of Goldsboro, 178 F.3d 231, 246 (4th Cir. 1999).

93. *Goldstein*, 218 F.3d at 356 (citing DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir. 1995)).

94. Michael L. Wells, *Section 1983, The First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (And Vice Versa)*, 35 GA. L. REV. 939, 971 (2001).

95. 398 F.3d 1210 (10th Cir. 2005).

96. *Baca*, 398 F.3d at 1210, 1215.

97. *Id.* at 1215.

98. *Id.* at 1216.

(CIPRE).[99] Shortly thereafter Baca encountered a series of discrepancies in university funding and hiring practices.[100] Baca reported this information to his supervisor, Sklar.[101] A few weeks later Baca again raised the issue to Sklar and his assistant.[102]

Shortly thereafter, two employees began directly communicating with Sklar, which allegedly usurped Baca's supervisory role.[103] In June 2001 Baca met with university human resources and attorneys to discuss the funding and hiring concerns.[104] From then on Baca faced several irregularities on the job, including employee transfers from his department which resulted in large budget cuts and a reprimand from Sklar about his attitude.[105] Additionally, and without deference to human resources protocol, Sklar sent Baca a letter reprimanding him for a vacancy announcement he had published.[106]

Baca suffered through an unfounded employee investigation after which Sklar demanded his resignation, which Baca refused to tender.[107] In early 2002, a mediation was scheduled where, after some dispute, Baca agreed to resign.[108]

2. Decision

The court applied the following test to determine whether the university's action against Baca constituted a prima facie First Amendment retaliation violation:[109] whether:

> (1) the speech in question involves a matter of public concern; (2) his interest in engaging in the speech outweighs the government employer's interest in regulating it; and (3) that the speech was a substantial motivating factor behind the government's decision to take an adverse employment action against the employee.[110]

The court determined that Baca's statements regarding the funding and hiring practices met the initial requirement that the "speech in question involve[d] a matter of public concern."[111] Utilizing the *Pickering* balanc-

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99. *Id.* at 1213.
100. *Id.* at 1214.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 1215.
108. *Id.*
109. *Id.* at 1218.
110. *Id.* at 1218-19.
111. *Id.* at 1219.

ing test,[112] the court found that Baca's interest in making his statements outweighed the university's interest in regulating Baca's speech.[113]

The court then turned to the third element: whether Baca's "protected speech substantially motivated CIPRE to take adverse employment actions against him."[114] The court began by discussing whether the discipline constituted an adverse employment action. The court stated, "[a]lthough we have never delineated what actions constitute 'adverse employment actions' in the First Amendment context, we have repeatedly concluded that a public employer can violate an employee's First Amendment rights by subjecting an employee to repercussions that would not be actionable under Title VII."[115]

The court noted that actions short of constructive or actual employment decisions, such as employee reprimands, transfers, and the removal of job duties, could be adverse employment actions in instances of First Amendment retaliation.[116] The court commented that if Baca's allegations of university improprieties were true, then those actions could be adverse.[117]

The court then discussed whether Baca's protected speech "substantially motivated the employer to administer such adverse consequences."[118] Consequently the court held that Baca had raised a sufficient issue of material fact regarding Sklar's motivation to survive summary judgment.[119] As such, the court reversed the district court's grant of summary judgment to the defendants and remanded the case.[120]

B. Maestas v. Segura[121]

1. Case

Plaintiff Bennie Maestas filed suit under 42 U.S.C. § 1983 alleging that David Segura and Dennis Pratt, in their official capacities, retaliated against him "for speaking out on matters of public concern in violation of the First Amendment."[122] The district court granted the defendant's motion for summary judgment holding that Maestas had met the first three

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112. *See supra* Part I.
113. *Id.*
114. *Id.* at 1220.
115. *Id.* (citing Morfin v. Albuquerque Pub. Sch., 906 F.2d 1434, 1437 n.3 (10th Cir. 1990); Schuler v. City of Boulder, 189 F.3d 1304, 1310 (10th Cir. 1999)).
116. *Id.* (citing *Schuler*, 189 F.3d at 1310).
117. *Baca*, 398 F.3d at 1221 (enumerating Baca's assertions of the removal of supervisory authority, procedural discrepancies, and the filing of unfounded employment investigations as feasibly adverse).
118. *Id.*
119. *Id.* at 1222.
120. *Id.*
121. 416 F.3d 1182 (10th Cir. 2005).
122. *Maestas*, 416 F.3d at 1182.

elements of the prima facie case but it "ultimately concluded Defendants would have reached the same decision absent Plaintiff's speech."[123]

Maestas began employment with the City of Albuquerque in 1987, and in 1994 became "material manager" at the Vehicle Maintenance Department (VMD), a division of the Solid Waste Management Department (SWMD).[124] Over the next several years Maestas repeatedly complained to the city and local media about deficiencies within the SWMD.[125] Thereafter, reports and internal audits revealed improprieties within the department including verification of Maestas' concerns.[126]

Throughout the next couple of years, Maestas continued to complain about department protocol.[127] In 2001 and 2002 the city mayor required every department to make budget cuts.[128] In April 2002, Maestas was informed of the City's proposal to cut his position.[129] Maestas was reassigned to SWMD's Central Service Division (CSD) and his previous position at VMD was left vacant.[130] At CSD Maestas "retained the same salary, benefits, and job title."[131]

2. Decision

Judge Baldock began his analysis with an exhortation to government employers that they may not "as a condition of employment, compel an employee to relinquish carte blanche his First Amendment right to comment on matters of public concern."[132] The judge then set forth the prima facie case for First Amendment retaliation claims. The employee must establish that the speech was a matter of public concern, the employee's interest in voicing the speech must outweigh the employer's interest in regulating it, and "the speech [must be] . . . a 'substantial motivating factor' behind the employer's decision to take an adverse employment action against the employee."[133] The court analyzed the third element by placing the adverse employment discussion in a lengthy footnote and concentrating on the substantial motivating factor.[134]

Within the footnote, the court discussed the circuit split regarding what constitutes adverse actions in First Amendment retaliation claims.[135] The court referenced *Baca*, stating that some retaliation may

123. *Id.*
124. *Id.* at 1184.
125. *Id.*
126. *Id.* at 1185.
127. *Id.*
128. *Id.*
129. *Id.* at 1186.
130. *Id.* at 1185.
131. *Id.* at 1187.
132. *Id.*
133. *Id.*
134. *Id.* at 1188 n.5.
135. *Id.*

be actionable under § 1983 and the First Amendment, though not under Title VII.[136] Addressing the actionable range of adverse procedures, the court stated that employment decisions that do not amount to termination or dismissal could be adverse.[137] However, the court was quick to mention that the Tenth Circuit has "never held employment actions which may tend to chill free speech [as] necessarily adverse."[138] Additionally, the court refused to determine if Maestas' transfer constituted an adverse employment action: "[g]iven our conclusion that Plaintiffs' speech was not a substantial motivating factor . . . we continue to leave that question [whether a chilling effect on free speech is an adverse employment action] for another day."[139]

The court then took considerable time in explaining its stance on the substantial motivating factor.[140] The court concluded that Maestas failed to establish a link between his speech and Segura's decision to transfer him to CSD.[141] The court held that Maestas failed to establish a prima facie case and the court affirmed the district court's judgment.[142]

3. Dissent

In his dissent, Judge Briscoe disagreed with the court's analysis of adverse employment actions in Tenth Circuit First Amendment retaliation claims.[143] Judge Briscoe argued that the court already held that those actions which tend to chill free speech are adverse.[144] Referencing *Belcher v. City of McAlester*,[145] the judge stated that the court already applied the Seventh Circuit's "chilling effect" to Tenth Circuit adverse employment jurisprudence.[146]

IV. ANALYSIS—HIGH PRESSURE DISSIPATING, GRAY SKIES COMPROMISING, AND CHILLS RISING

The Tenth Circuit should adopt the approach asserted by the Ninth, Seventh, and Fourth Circuits which hold that actions which have a "chilling effect" on employees First Amendment rights are cognizable.[147]

136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 1188-89. "What constitutes a substantial motivating factor evades precise definition." *Id.* at 1188. However, the court stated that it was something less than "but-for" causation or the sole reason for the employer's action, but more than mere speculation or "hunches amidst rumor and innuendo." *Id.* at 1188-89.
141. *Id.* at 1189.
142. *Id.* at 1192.
143. *Id.* at 1195 n.2 (Briscoe, J., dissenting).
144. *Id.*
145. 324 F.3d 1203 (10th Cir. 2003).
146. *Maestas*, 416 F.3d at 1195 n.2 (Briscoe, J., dissenting).
147. *See* Coszalter v. City of Salem, 320 F.3d 968, 975 (9th Cir. 2003); Power v. Summers, 226 F.3d 815, 820-21 (7th Cir. 2000); Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 352 (4th Cir. 2000).

While each standard for interpreting adverse employment actions has advantages, the "chilling effect" approach rises above the rest because it effectively advances employee protection in First Amendment retaliation claims. The Title VII standard held by the Eleventh, Eighth, and Fifth Circuits attempts to dam the proverbial flood of litigation but its statutory status is not the proper measure for interpreting a constitutional claim. In addition, the "individual of ordinary firmness" approach is appealing for its compromising nature but its application varies among the Second, Third, Sixth, and D.C. Circuits.

Subsections A and B below expand on the reasoning behind the author's assertion that the Title VII and the "individual of ordinary firmness" interpretations should not be utilized in the Tenth Circuit. In Subsection C, the author argues for the Tenth Circuit's adoption of the "chilling effect" approach to interpreting adverse employment actions in First Amendment retaliation claims.

A. Title VII's High Pressure System

The First Amendment retaliation adverse employment action approach held by the Eleventh, Eighth, and Fifth Circuits derives from Title VII retaliation claims.[148] These circuits restrict adverse employment actions to significant alterations of the conditions of employment amounting to a material or tangible change.[149] There are three reasons why the Title VII approach to adverse employment actions should not be utilized by the Tenth Circuit in First Amendment retaliation claims. First, the Supreme Court's precedent in these claims broadly protects public employees' free speech. Second, the Circuits which utilize the "ultimate employment decision" standard in First Amendment retaliation claims are applying an interpretation which is flawed in its original application to Title VII. Third and finally, the statutory Title VII approach to retaliation claims should not be used to interpret constitutional First Amendment claims.

1. Supreme Court Precedent

The Supreme Court has made it abundantly clear that it will protect an employee's freedom of speech, "absent strong countervailing interests."[150] Beginning with *Pickering v. Board of Education*[151] the Court has consistently held that First Amendment rights are paramount and that the employer ultimately has the burden to prove that his actions were not retaliatory.[152] An adoption of the Title VII approach to interpreting ad-

148. Levinson, *supra* note 23, at 687.
149. *Id.* at 674.
150. *Id.* at 692.
151. 391 U.S. 563 (1968).
152. *Pickering*, 391 U.S. at 678-80.

verse employment actions is inconsistent with the Supreme Court's broad protection of employee's rights.[153]

2. The "Ultimate Employment Decision" Interpretation

The circuits which adopt the "ultimate employment decision" interpretation of adverse employment action in Title VII claims are adopting an approach which disproportionately favors employers who retaliate against their employees.[154] This approach is flawed in its application to Title VII and should not be imposed on employees with First Amendment retaliation claims, thereby promoting the initial error. The Equal Employment Opportunity Commission's (EEOC) Compliance Manual, which has not been adopted by all the circuits, broadly construes Title VII retaliation claims.[155] Contrary to the interpretation held by the Eleventh, Eighth, and Fifth Circuits, the EEOC states that "[t]he statutory retaliation clauses prohibit *any* adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."[156] The EEOC explicitly states that it does not agree with the circuits that require ultimate employment decisions to prove the adverse employment action prong of retaliation claims.[157] Conversely, the agency believes that this interpretation undermines the effectiveness of employment statutes and harms the public "by deterring others from filing a charge."[158]

The circuits which adhere to the "ultimate employment action" approach limit the remedies available to employees that are retaliated against and adopt a flawed view of adverse employment actions.[159] It is important for the Tenth Circuit to refuse to apply this defective approach to adverse employment action interpretation in both the Title VII and First Amendment retaliation contexts. While discrimination is an evil unto itself, an infringement on the ability to exercise one's constitutional right to free speech is an infringement on an essential aspect of American

153. *See infra* Part IV.C.1 (discussing the Supreme Court's recent cases expanding employee protection in First Amendment retaliation claims).

154. The Fifth and Eighth Circuits utilize the "ultimate employment decisions" standard requiring an adverse action relating to hiring, discharging, granting leave, promoting and wage adjustments for the employee to succeed in a Title VII retaliation claim. *See* Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997); Davis v. KARK-TV Inc., 421 F.3d 699, 706 (8th Cir. 2005) (holding that only tangible changes in working conditions such as termination or reduced pay constitute adverse employment actions in Title VII retaliation claims).

155. *See* U.S. Equal Employment Opportunity Comm'n, Compliance Manual § 8-II(D)(3) (1998), http://www.eeoc.gov/policy/docs/retal.pdf. The Tenth Circuit has already adopted a broader interpretation of adverse employment actions in Title VII retaliation claims and has refused to apply the narrow approach to First Amendment retaliation claims. *See* Maestas v. Segura, 416 F.3d 1182, 1188 n.5 (10th Cir. 2005).

156. U.S. Equal Employment Opportunity Comm'm, *supra* note 155, at § 8-II(D)(3) (emphasis added).

157. *Id.*

158. *Id.*

159. Levinson, *supra* note 23, at 687-88.

democracy.[160] In furtherance of the EEOC's interpretation of Title VII adverse employment actions, this strict approach should be avoided when constitutional rights are at stake.[161]

3. Standards for Constitutional Claims

The statutory text of Title VII should not be used when deciding claims arising under the constitutional protection of the First Amendment.[162] Judge Posner of the Seventh Circuit asserts that First Amendment retaliation claims should not be measured or interpreted by the statutory provisions of Title VII.[163] Retaliation suits brought under § 1983 are not comparable to discriminatory retaliation suits brought under Title VII.[164] According to Judge Posner, Title VII forbids "invidious discrimination in employment" and limits "protection to victims of 'adverse employment action,' which is judicial shorthand (the term does not appear in the statutes themselves) for the fact that these statutes require the plaintiff to prove that the employer's action . . . altered the terms or conditions of his employment."[165]

No such limitation is required in § 1983 or the constitutional provisions it enforces.[166] Indeed, § 1983 does not necessitate that the claim arise in an employment context.[167] It only demands that a deprivation occur "under color of law" and "is likely to deter the exercise of free speech" or any other constitutional deprivation which is claimed.[168] Unlike Title VII, § 1983 creates government liability when the government deprives a person of his or her constitutional rights.[169] The context and content of Title VII and § 1983 constitutional deprivation claims are so dramatically different it is incorrect to use the one (Title VII) to interpret the other (§ 1983).

4. Summary—Title VII Interpretation

These three reasons establish why Title VII adverse employment action interpretation should not be applied to First Amendment retaliation

160. Love, *supra* note 1, at 29.

161. On December 5, 2005, the Supreme Court granted certiorari in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 797 (2005), in which it will decide what type of adverse employment action a plaintiff must establish to support a Title VII retaliation claim. This case has far reaching implications in the Title VII and First Amendment retaliation contexts because of the "ultimate employment decision" standard's application to both causes of action. If the strict standard is rejected by the Supreme Court, the circuits which apply it to Title VII, and First Amendment retaliation claims will have to adopt a less stringent test.

162. Levinson, *supra* note 23, at 676.

163. Spiegla v. Major Eddie Hull, 371 F.3d 928, 941 (7th Cir. 2004).

164. *Power*, 226 F.3d at 820.

165. *Id.*

166. *Id.*

167. Harvey Brown and Sarah Kerrigan, *42 U.S.C. § 1983: The Vehicle For Protecting Public Employees' Constitutional Rights*, 47 BAYLOR L. REV. 619, 622 (1995).

168. *Power*, 226 F.3d at 820. *See also* 42 U.S.C. § 1983 (2005).

169. Love, *supra* note 1, at 31.

claims. However, even if the standard were adopted by the Tenth Circuit, the court's Title VII retaliation jurisprudence would not require strict adherence to the "material" or "significant alteration of employment conditions" interpretation.[170]

In the unlikely event that the Tenth Circuit adopts the Title VII interpretation, the court already holds a broad interpretation of adverse employment action, liberally construing each action on a case-by-case basis.[171] Generally, the Tenth Circuit holds that those employer actions which do "not rise to the level of ultimate employment decisions such as discharge, demotion, or failure to hire, may be actionable."[172] The Tenth Circuit's case-by-case approach is much less threatening than its counterparts' interpretation in the Eleventh, Eighth, and Fifth Circuits.[173]

Adherence to the Title VII approach may not be severely detrimental to Tenth Circuit public employees; however, applying this strict Title VII approach to First Amendment retaliation claims may have far-reaching implications.[174] A decision to further restrain the now liberally construed adverse employment action factor in the Title VII context could deter free speech if applied to First Amendment retaliation claims.[175] However, the Tenth Circuit will not likely adopt this position. As they stated in *Baca*, "we have repeatedly concluded that a public employer can violate First Amendment rights by subjecting an employee to repercussions that would not be actionable under Title VII."[176]

B. Weak Gray Skies of the Individual of Ordinary Firmness

The "individual of ordinary firmness" standard in First Amendment retaliation claims, though appealing as the middle ground between the strict standard of Title VII and the broader "chilling effect" interpretation, is too fickle an approach to be adopted by the Tenth Circuit.

While the "individual of ordinary firmness" is a "sensible standard,"[177] the interpretation varies from circuit to circuit, creating uncer-

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170. Caplinger, *supra* note 8, at 27.

171. *Id.*

172. *Id.*

173. *See supra* Part II.A (discussing the circuits' adherence to a strict "materially adverse" interpretation of what constitutes an adverse employment action).

174. *See* Caplinger, *supra* note 8, at 20 (asserting that there has been a steady increase of retaliation claims in the past decade possibly stemming from the ease of surviving summary judgment in Title VII retaliation claims as opposed to Title VII discrimination claims).

175. *See* Tran v. Trustees of the State Colleges in Colo., 355 F.3d 1263, 1267 (10th Cir. 2004). This case discussed the Supreme Court's definition of adverse employment action in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). The court held that the "tangible employment action" is the standard in the 10th Circuit for purposes of Title VII retaliation claims, perhaps implying a move in a more restrictive direction. *See also* Caplinger, *supra* note 8, at 28.

176. Baca v. Sklar, 398 F.3d 1210, 1220 (10th Cir. 2005).

177. Crawford-El v. Britton, 93 F.3d 813, 826 (D.C. Cir. 1996). *See also* Love, *supra* note 1, at 31 (explaining the D.C. Circuit's approval of the district court's holding in *Crawford-El* which stood for the proposition that the person of ordinary firmness was a "sensible standard," which was

tainty for public employees and employers.[178] For instance, the Second Circuit, in *Deters v. Lafuente*,[179] required the "combination of seemingly minor incidents to form the basis of a constitutional retaliation claim . . . [to] reach a critical mass" in retaliation claims based on a hostile work environment.[180] Those incidents which are minor and infrequent, though retaliatory, are not considered deterrent to the "individual of ordinary firmness" in the Second Circuit.[181]

For example, in *Deters*, two police officers were subject to department disciplinary proceedings after being acquitted of criminal assault charges.[182] The employees asserted that several hostile and retaliatory actions were taken against them, including false accusations of failure to respond and playing games on the police radio, as well as failure to promote.[183] However, "[l]ooking at plaintiffs' hostile environment allegations in the most favorable light," the court held "that [the allegations] *[we]re insufficient* to raise a constitutional claim of retaliation."[184]

Conversely, in the Third Circuit case of *Suppan v. Dadonna*,[185] police officers were subject to a variety of similar retaliatory actions including questionable employee "rankings and the failure to promote."[186] The court held that this retaliatory conduct *was enough* to deter an individual of ordinary firmness from exercising his First Amendment rights in the future.[187] In contrast to the Second Circuit's similarly worded standard, the Third Circuit's "individual of ordinary firmness" seems weak.

The discrepancy between circuits which hold the same standard exemplifies the ambiguity of the term and the feeble nature of this compromise between the Title VII and "chilling effect" interpretations. Additionally, the Second Circuit's need for a "critical mass" of actions while "understandable to ensure that minor incidents of retaliation do not flood the courts, deviates from the core question" of deterrence of free speech and weakens the conciliatory nature of the approach.[188] While this interpretation of adverse employment action, held by the Second, Third, Sixth and D.C. Circuits, allows employees a greater breadth of actionable claims, it does not provide public sector employees with the

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subsequently left alone by the Supreme Court). *Crawford-El*, 951 F.2d at 1322, *vacated and remanded en banc*, 93 F.3d 813 (D.C. Cir. 1996), *vacated and remanded*, 523 U.S. 747 (1998).

178. *See* Levinson, *supra* note 23, at 691; Love, *supra* note 1, at 31.

179. 368 F.3d 185 (2d Cir. 2004).

180. *Deters*, 368 F.3d at 189 (quoting Phillips v. Bowen, 278 F.3d 103, 109 (2d Cir. 2002)).

181. *Deters*, 368 F.3d at 189.

182. *Id.* at 186.

183. *Id.* at 187.

184. *Id.* (emphasis added).

185. 203 F.3d 228 (3d Cir. 2000).

186. *Suppan*, 203 F.3d at 234.

187. *Id.* at 235.

188. Levinson, *supra* note 23, at 692.

"sensibility" it purports and therefore should not be adopted by the Tenth Circuit.

C. "Chilling Effect" Cools Retaliation and the Tenth Circuit

The Ninth, Seventh, and Fourth Circuits have adopted the broadest interpretation of First Amendment retaliation adverse employment actions.[189] While the Title VII and "individual of ordinary firmness" interpretations may serve the "laudable goal of filtering out insubstantial claims," the "chilling effect" approach most effectively protects First Amendment rights.[190] The Supreme Court has held that First Amendment retaliation claims must stop "the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate."[191] By decisively embracing the "chilling effect" approach, the Tenth Circuit will further restrain public employers from retaliating against employees who exercise their constitutionally ordained rights.

Adoption of the "chilling effect" approach is proper because this interpretation protects employees who suffer discrete actions which infringe on their constitutional rights. Additionally, both the Supreme Court and the Tenth Circuit are already embracing a broader protection of employees' rights in this context.[192] Finally, the protection of public employees' speech benefits both the employees and the American public at large.

The "chilling effect" interpretation of adverse employment actions protects public employees where "any deprivation that is likely to deter the exercise of free speech" occurs.[193] Thus, "a government act of retaliation need not be severe and it need not be of a certain kind."[194] Perhaps as a result of the constitutional deprivation, the actions do not have to be great to be adverse; the slightest wariness to speak freely may be enough.[195] By their nature, demotions and discharges are adverse actions if based upon an employee's protected speech.[196] However, "the courts' limits on what counts as an [adverse action] have the effect of enabling sophisticated government supervisors to keep their employees in line

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189. *See supra* Part II.C (discussing the "chilling effect" standard adopted in these three circuits).

190. Wells, *supra* note 94, at 972.

191. Rutan v. Republican Party of Ill., 497 U.S. 62, 76 (1990).

192. *Rutan*, 497 U.S. at 76; Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996); United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 477 (1995); Belcher v. City of McAlester, 324 F.3d 1203, 1207 (10th Cir. 2003); Schuler v. City of Boulder, 189 F.3d 1304, 1308 (10th Cir. 1999).

193. Levinson, *supra* note 23, at 699.

194. *Section 1983 First Amendment Claims*, 5 EMP. COORD. EMPLOYMENT PRACTICES § 1:16 (2005).

195. Love, *supra* note 1, at 31.

196. MARCY EDWARDS, ET AL., FREEDOM OF SPEECH IN THE PUBLIC WORKPLACE 91 (1998).

without risking the loss of a lawsuit."[197] Retaliatory acts need not be monstrous but must create the *potential to chill* an employee's speech.[198] "A campaign of petty harassment may achieve the same effect as an explicit punishment" and therefore chill free speech.[199] According to the Seventh circuit, even a small effect—a chill—on freedom of speech can be actionable because there is no justification for harassing people for exercising their constitutional rights.[200]

Additionally, the Supreme Court utilizes the lower courts' "chilling effect" adverse employment action standard. This positively chilling trend was acclaimed in *Rutan* and further expanded in two decisive cases.[201]

1. The Supreme Court's Positively Chilling Front

The Supreme Court's expansion of First Amendment retaliation claims indicates the Court's desire to broadly protect individuals. In several politically charged cases regarding party patronage, public employee honoraria, and government contracting, the Supreme Court has liberally protected public employees' free speech.[202] It is likely the Supreme Court will fully embrace the "chilling effect" approach in the future, as evidenced by its expansion of public employees' First Amendment rights under § 1983. Following the Supreme Court's lead, the Tenth Circuit should adopt the "chilling effect" approach to adverse employment action interpretation and secure free speech rights for government employees.

a. *Rutan*

In 1990, the Supreme Court decided *Rutan*, a case involving the constitutionality of adverse employment actions based on a public employee's party affiliation.[203] In holding that political patronage practices such as promotion, transfer, layoff recall, and hiring could be adverse if improperly directed at non-affiliated parties, the Supreme Court further protected employees from actions effected to deter their free speech.[204] The Court soundly rejected the respondents' assertion that because the

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197. Wells, *supra* note 94, at 973.
198. Levinson, *supra* note 23, at 699.
199. *Id.* (quoting Walsh v. Ward, 991 F.2d 1344, 1345 (7th Cir. 1993)).
200. Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982).
201. *Rutan*, 497 U.S. at 75; *See also* Levinson, *supra* note 23, at 682-87.
202. *See Rutan*, 497 U.S. at 64; Nat'l Treasury, 513 U.S. 454 (1995); Umbehr, 518 U.S. 668 (1996).
203. *Rutan*, 497 U.S. at 64. In *Rutan*, the governor of Illinois issued a hiring freeze on several departments under his control. *Id.* at 65. No exceptions were allowed without the express consent of the Governor. *Id.* According to the petitioners, the Governor utilized the freeze to benefit those individuals loyal to the Republican party. *Id.* at 66. As a result, petitioners argued that they were denied promotions, transfers to locations nearer to home, and recalls after layoffs. *Id.* at 67. *See also* Nancy Oxfeld, *Free Speech for Public Employees: Justice Holmes Had It Wrong*, 45 KAN. L. REV. 1299, 1310 (1997).
204. *Rutan*, 497 U.S. at 64.

actions were not punitive they could not "chill the exercise of protected belief and association by public employees."[205]

The Court held that "[e]mployees who find themselves in dead end positions because of their political backgrounds *are* adversely affected."[206] The Court found that if an employee feels obligated to associate with the party in power his First Amendment right to affiliate with whichever political party he prefers is impermissibly infringed.[207] By being denied transfers or being laid off, an employee may feel compelled to change patronage, thereby being deprived a constitutionally protected freedom.[208] In turn, the Court increased the depth of First Amendment retaliation claims and furthered the noble goal of protecting public employees' rights.

b. *National Treasury v. Treasury Employees Union*[209]

Several years later the Supreme Court continued its course and struck down a federal employee honoraria ban because it infringed on a public employee's speech.[210] The Ethics Reform Act of 1989 banned public employees of all three branches from receiving honoraria for any speech, appearance, or article.[211] In *National Treasury v. Treasury Employees Union*, the Court "recognized that preventing compensation for speech may deter, and thus infringe on, protected speech rights."[212]

Here, the Court expanded the "chilling effect" recognized in *Rutan*. "Unlike an adverse action taken in response to actual speech, this ban *chills potential speech* before it happens."[213] The restraint of speech, appearance, or written word imposes such a serious burden on the public's right to read and hear and the employee's right to express that it "abridges speech under the First Amendment."[214] Acknowledgment that the ban chilled *potential* speech further solidified the Court's desire to protect public employee speech without evidence of a significant, narrowly-tailored government interest.[215]

205. *Id.* at 73.
206. *Id.*
207. *Id.*
208. *Id.*
209. 513 U.S. 454 (1995).
210. *Nat'l Treasury*, 513 U.S. at 457.
211. *Id.* at 459-460.
212. *Id.* at 466-67.
213. *Id.* at 468 (emphasis added).
214. *Id.* at 470.
215. *See* Ian H. Morrison, *The Case for Minimal Regulation of Pubic Employee Free Speech: A Critical Analysis of the Federal Honoraria Ban Controversy*, 48 WASH. U. J. URB. CONTEMP. L. 141, 164-65 (1995).

c. *Board of County Commissioners v. Umbehr*[216]

Finally, in *Board of County Commissioners v. Umbehr*, a case accepted from the Tenth Circuit, the Supreme Court established that employees contracted by the government are protected against adverse actions resulting from First Amendment retaliation.[217] The Court again utilized the "chilling effect" language regarding adverse employment actions.[218] "As in Rutan, the Supreme Court focused on whether certain government conduct chilled speech, not on whether the adverse action could be characterized as a material or substantial employment action."[219]

Citing several precedential cases, the Court held that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights."[220] The Court determined that a bright line rule distinguishing government contractors from employees would "give the government *carte blanche* to terminate independent contractors for exercising First Amendment rights."[221] The Court firmly established its support for the "chilling effect" approach to adverse actions in First Amendment retaliation claims by holding that contractors' First Amendment rights should be protected.[222] Once again the Court found that "[t]he threat of the loss of which in retaliation for speech may *chill* speech on matters of public concern" was enough to constitute an adverse employment action in First Amendment retaliation claims.[223]

In light of *Rutan*, *National Treasury*, and *Umbehr*, the Tenth Circuit should follow the Supreme Court's lead, adopt the "chilling effect" standard and broadly protect public employees' speech in First Amendment retaliation claims.

2. Chilly Air Covers the Tenth Circuit

At the heart of the argument in favor of adopting the "chilling effect" standard is the Tenth Circuit's own utilization of the "chilling effect" language, its willingness to reject the Title VII approach,[224] and its expansion of the actions it deems adverse. In several cases, including

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216. 518 U.S. 668 (1996).
217. *Umbehr*, 518 U.S. at 673.
218. *Id.* at 674.
219. Levinson, *supra* note 23, at 685 (citing *Umbehr*, 518 U.S. at 674-76).
220. *Umbehr*, 518 U.S. at 674 (alteration in original) (quoting Laird v. Tatum, 408 U.S. 1, 11 (1972)); *see also* Perry v. Sindermann, 408 U.S. 593, 597 (1972); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977).
221. *Umbehr*, 518 U.S. at 679.
222. *See* Levinson, *supra* note 23, at 685.
223. *Umbehr*, 518 U.S. at 674 (quoting Waters v. Churchill, 511 U.S. 661, 674 (1994)).
224. *See supra* Part V.A.

Baca, the court expanded protection of public employees' free speech rights and inched towards embracing the "chilling effect" approach.[225]

First, the Tenth Circuit has previously used the "chilling effect" language.[226] For example, in *Belcher v. City of McAlester*,[227] the plaintiff suffered adverse actions when he received a written reprimand for contacting city councilmen without following procedure.[228] Additionally, the plaintiff was told that more procedural violations would result in severe disciplinary action which could include dismissal.[229] The court found that: "[i]n reprimanding Belcher, the fire department *chilled* any future attempts to contact Council members outside of a public meeting. We conclude that this *chilling effect* is real, and that Belcher has shown that he was subject to adverse employment action as a result of his speech."[230] The court's own use of the "chilling effect" language implies that at least three of the circuit court judges are in favor of adopting this approach.

In addition to express use of the language, the court has broadened its protection of public employees by finding many actions less severe than dismissal as adverse. In *Baca,* the court found that, if true, the removal of some supervisory authority, reprimands outside of procedure, and the filing of an unfounded employment charge constituted an adverse employment action.[231] These actions do not constitute significant employment decisions, and yet the court found them adverse.

Similarly, in *Schuler v. City of Boulder*,[232] the court found that the removal of job duties, a written reprimand, a low evaluation score, and an involuntary lateral transfer constituted an adverse employment action in First Amendment retaliation claims.[233] Additionally, the court strengthened employee protection by finding that Schuler's subsequent enjoyment of her new position did not matter in light of the retaliatory actions.[234] Relying on *Rutan* the court stated its desire to protect employees from those "deprivations less harsh than dismissal which nevertheless violated a public employee's rights under the First Amendment."[235]

In *Maestas*, and in direct contrast to Judge Baldock's stated that the court had not yet decided on the matter, Judge Briscoe asserted that the

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225. Baca v. Sklar, 398 F.3d 1210 (10th Cir. 2005); Belcher v. City of McAlester, 324 F.3d 1203 (10th Cir. 2003); Schuler v. City of Boulder, 189 F.3d 1304 (10th Cir. 1999).
226. *Maestas*, 416 F.3d at 1195 n.2 (Briscoe, J., dissenting).
227. 324 F.3d 1203 (10th Cir. 2003)
228. *Belcher*, 324 F.3d at 1205.
229. *Id.*
230. *Id.* at 1207 n.4 (emphasis added).
231. *Baca*, 398 F.3d at 1221.
232. 189 F.3d 1304 (10th Cir. 1999).
233. *Schuler*, 189 F.3d at 1310.
234. *Id.* at 1310 n.3.
235. *Id.* at 1309.

Tenth Circuit has already adopted the "chilling effect" approach.[236] While the honorable judges may disagree, it is now time for the court to firmly decide the issue and embrace the "chilling effect" approach to adverse employment actions in First Amendment retaliation claims. Subsequent to the rulings in *Baca*, *Belcher*, and *Schuler* the court should follow the protectionist lead of the Ninth, Seventh, and Fourth Circuits and adopt the "chilling effect" interpretation.

3. Chilling Climate Benefits Public

Finally, the Tenth Circuit should embrace the "chilling effect" approach to interpreting adverse employment actions in First Amendment retaliation claims because it benefits both employees and the public at large. By broadly interpreting this element, the general public will be in a superior position to make intelligent decisions while voting on issues and electing officials.[237] Public employees have unique access to information not readily available to the public as a whole. Society does not benefit when government employers retaliate against their employees for speaking out on matters affecting the public. Above all, government employees are "often in the best position to know what ails the agencies for which they work."[238]

For example, the employee in *Baca* was exercising his First Amendment rights when he spoke against alleged fiscal and hiring improprieties within the state university system.[239] Without the ability to speak freely about these matters, employees like Baca will not be able to inform the public of government abuses. Government employees have unique access to information regarding the inner workings of the democratic system and their ability to speak on these matters should not be infringed upon for fear of retaliation.[240] Additionally, the public employee already has a high threshold to meet because *Pickering* and *Mt. Healthy* established that the matter spoken on must be of public concern.[241] By embracing a broad interpretation of what constitutes an adverse employment action in First Amendment retaliation claims the Tenth Circuit will further protect this "bedrock of American democracy."[242] The court has an obligation to protect the public and safeguard "the public's right to receive critical information" by embracing the "chilling effect" approach to interpreting adverse employment actions in First Amendment retaliation claims.[243]

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236. *Maestas*, 416 F.3d at 1195 n.2 (Briscoe, J., dissenting).
237. Love, *supra* note 1, at 32.
238. *Umbehr*, 518 U.S. at 674 (citing *Waters*, 511 U.S. at 674).
239. *Baca*, 398 F.3d at 1217-20.
240. Levinson, *supra* note 23, at 693.
241. Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968); Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 284 (1977).
242. Love, *supra* note 1, at 29.
243. Levinson, *supra* note 23, at 693.

CONCLUSION

Retaliation against public employees for exercising their First Amendment right to comment on matters of public concern is unacceptable. The Tenth Circuit should not condone retaliatory acts by refusing to adopt the "chilling effect" approach to adverse employment action interpretation. The First Amendment retaliation claim has three elements which protect government employers from unfounded actions against them.[244] The employee must establish that "(1) the speech involved a matter of public concern, (2) the employee's interest in engaging in the speech outweighed the employer's interest in regulating the speech, and (3) the speech was a 'substantial motivating factor' behind the employer's decision to take an adverse employment action against the employee."[245] By adopting the broad "chilling effect" approach to interpreting this third factor, the Tenth Circuit will insure the protection of the public employee's constitutional right to free speech. In turn, actions which are "intended to punish" an employee for free speech on issues of public interest will not be tolerated if the court adopts the "chilling effect" standard.[246] Additionally, both the Supreme Court and the Tenth Circuit utilize the "chilling effect" language which provides support for its wholehearted adoption in the Tenth Circuit. Finally, a broader interpretation of adverse employment actions in First Amendment retaliation claims benefits government employees and the public at large. By accepting the "chilling effect" approach to interpreting adverse employment actions the court will protect employees from retaliation and give the public access to "an unequalled source of information concerning public matters."[247] The Tenth Circuit must join the Ninth, Seventh, and Fourth Circuits and embrace the "chilling effect" approach to interpreting adverse employment actions in First Amendment retaliation claims.

Elizabeth J. Bohn[*]

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244. Maestas v. Segura, 416 F.3d 1183, 1187 (10th Cir. 2005).
245. *Maestas*, 416 F.3d at 1187.
246. *Rutan*, 497 U.S. at 76 n.8.
247. Love, *supra* note 1, at 29.

* J.D. Candidate, May 2007, University of Denver Sturm College of Law. The author would like to thank her beloved family, Catherine Smith, Assistant Professor of Law at the University of Denver Sturm College of Law, and the *Denver University Law Review* board and staff. *Jeremiah* 29:11.

IF YOU HAVE SEEN ONE CIRCUIT, HAVE YOU SEEN THEM ALL? A COMPARISON OF THE ADVOCACY PREFERENCES OF THREE FEDERAL CIRCUIT COURTS OF APPEAL

DAVID LEWIS†

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INTRODUCTION

Over the past several years, I have investigated the attitudes of appellate judges regarding various components of lawyers' advocacy on appeal. This article reports on the results of my survey in the federal First, Second, and Tenth Circuit Courts of Appeal. I mailed my survey, which consisted of eighty-six questions divided into seven sections, to all of the state and federal appellate judges in New England, New York, and the Mountain West in the hope of determining whether state and federal judges look at different aspects of appellate practice differently.[1] Overall, I received responses from 138 judges, which amounts to over forty-nine percent of those who received the survey. I received twenty-three responses from federal appellate judges, which equaled just over forty-two percent of the federal appellate judges who received the survey.

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1. This survey, substantially based on one conducted several years ago in California, was conducted under the auspices of the American Bar Association's Council of Appellate Lawyers. *See* Charles A. Bird & Webster Burke Kinnard, *Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court*, 4 J. APP. PRAC. & PROCESS 141 (2002).

Some earlier results of the survey were presented last year in the *Journal of Appellate Practice and Process*.[2] But that article only reflected some of the responses, and it included none from the judges in the Mountain West. All of the survey's results, both federal and state and including the Mountain West courts, were presented this year in the *Journal of Appellate Practice and Process*.[3]

The responses from each of the three federal appellate courts, however, were combined into a single "federal" response in that article. The graphs shown here, in comparison, present the responses of each individual federal Circuit Court of Appeal to every question in the survey.

I. METHODOLOGY

Each of the seven sections of the survey covered a different topic relevant to appellate advocacy:

A. The Structural Elements of Briefs;[4]

B. Writing Style and Advocacy;[5]

C. Use of Authority and the Record;[6]

D. Typography of Briefs;[7]

E. Physical Characteristics of Appellate Work Product;[8]

F. Frequency of Certain Errors;[9] and

G. Oral Argument[10]

The questions in each section sought to discover not only the advocacy preferences of the judges on those topics, but also the strength of their feelings. To accomplish this, the questions in six of the sections provided the judges with a Likert scale consisting of five ranked answer choices ranging from strongly agreeing with a question asked (indicated by the judge's choosing "1") to strongly disagreeing with a question asked (indicated by the judge's choosing "5"), with no preference in the middle (indicated by the judge's choosing "3"). The remaining two choices were basic agreement or disagreement (indicated by the judge's choosing "2" or "4," respectively). Mean values as well as standard deviations were calculated for each individual federal court.

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2. David Lewis, *Common Knowledge about Appellate Briefs: True or False?* 6 J. APP. PRAC. & PROCESS 331 (2004).
3. David Lewis, *What's the Difference? Comparing the Advocacy Preferences of State and Federal Appellate Judges*, 7 J. APP. PRAC. & PROCESS (forthcoming 2005).
4. For results on this topic, *see infra* Part III.A (pages 896–903; questions #1–15).
5. For results on this topic, *see infra* Part III.B (pages 904–12; questions #16–32).
6. For results on this topic, *see infra* Part III.C (pages 913–16; questions #33–39).
7. For results on this topic, *see infra* Part III.D (pages 917–25; questions #40–56).
8. For results on this topic, *see infra* Part III.E (pages 926–30; questions #57–65).
9. For results on this topic, *see infra* Part III.F (pages 931–35; questions #66–74).
10. For results on this topic, *see infra* Part III.G (pages 936–41; questions #75–86).

The questions in the lone non-Likert scale part of the survey, however, sought a different type of information. In Section F ("Frequency of Certain Errors"), the judges were given nine particular attributes of appellate briefs that appellate judges, research attorneys, staff attorneys, and advocates would all generally agree are errors. The questions then provided the judges with three categories of cases: General Civil, Criminal, and Family. The judges were then asked to estimate how often the particular error occurred in that category of case by choosing a percentage for each category of case: from zero to ten percent, eleven to twenty percent, twenty-one to thirty percent, thirty-one to forty percent, forty-one to fifty percent, or over fifty percent.

II. UNDERSTANDING THE GRAPHS

The survey results presented here remain in their original sections, and they are in order, so the article shows the results in the same context in which the judges saw the questions. The graphs in all of the sections other than section six (which was measured using a different scale), show how strongly the judges agreed or disagreed with the premise underlying a particular question. In each graph, the column height reflects the mean response of the judges.

The graphs generated from judges' answers to Section F of the survey[11] are somewhat different. They indicate through percentages how often an error appeared to the judges to be occurring for each type of case. The graphs in this Section are not broken out to reflect any differences among the three Circuits; for this section—but only for this section—all of the judges' responses are presented together.

While the total number of responses to each question varies slightly because some judges did not answer every question, in general the graphs reflect the advocacy preferences of about twenty-three federal appellate judges. I believe that the graphs generally speak for themselves, so I do not provide any comments about individual graphs.

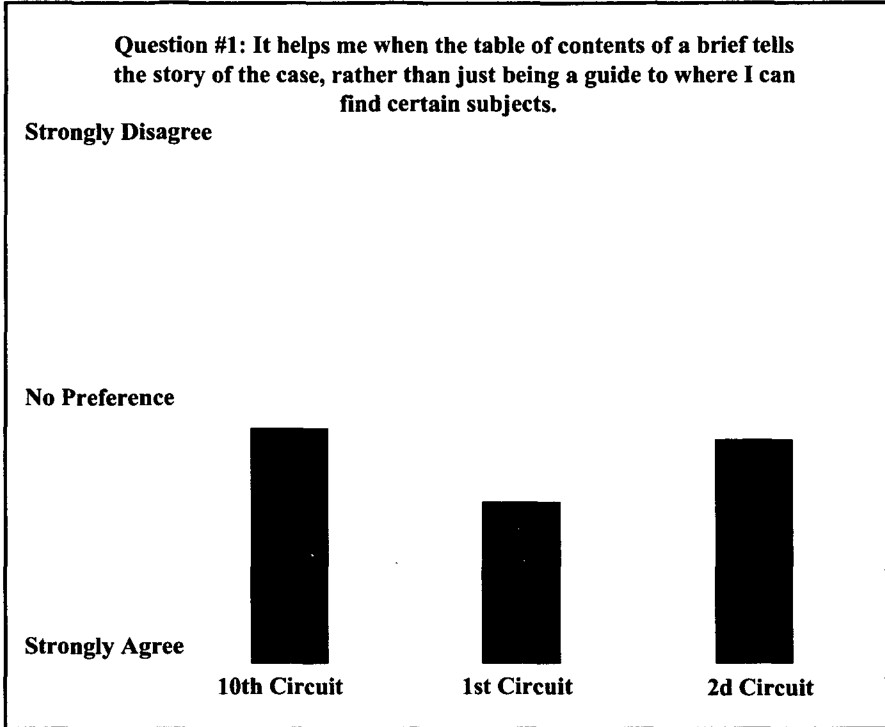
I recognize as well that some of the survey questions are not particularly germane to federal practice either because the issue is addressed in the federal rules of appellate procedure or the practice area is not litigated in federal court. In short, this was the by-product of conducting a multi-jurisdictional survey that was not tailored to any one jurisdiction.

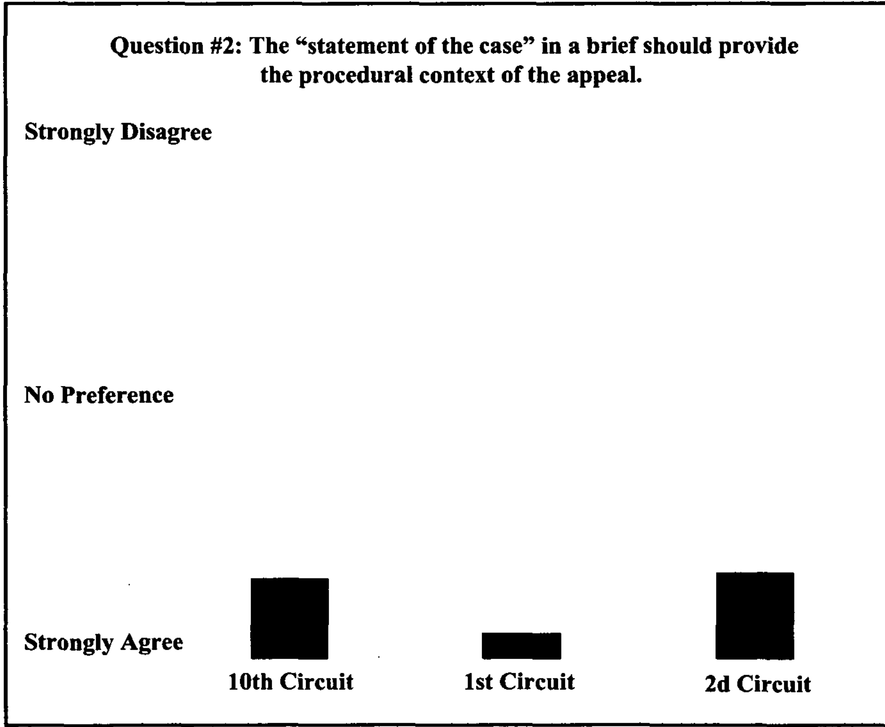
III. SURVEY RESULTS

The survey results are summarized beginning on the following page.

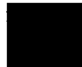
11. *See infra* Part III.F.

A. The Structural Elements of Briefs





Question #3: The "statement of the case" and "statement of the facts" in a brief should identify all the parties in the appeal.



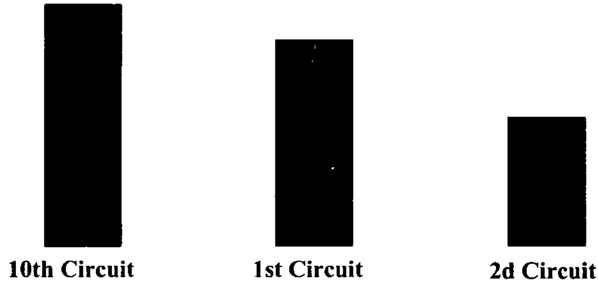
Question #4: The "statement of the facts" in a brief should provide the case's critical facts.

Question #5: The "statement of the case" in a brief should identify the case's dispositive issues.

Strongly Disagree

No Preference

Strongly Agree

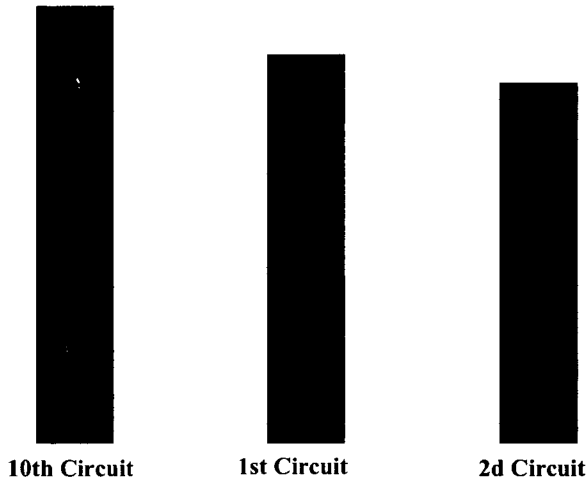


Question #6: The "statement of the case" in a brief should argue the merits in addition to stating the context.

Strongly Disagree

No Preference

Strongly Agree



Question #7: An appellant's opening brief should state the standard of review for each issue.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit 1st Circuit 2d Circuit

Question #8: If the respondent's brief does not state the standard of review, I assume the appellant has it right, unless I know otherwise.

Strongly Disagree

No Preference

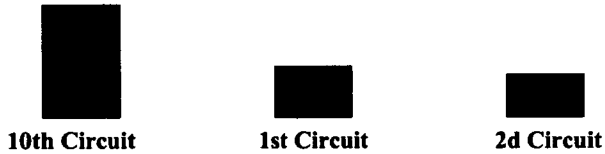
Strongly Agree

10th Circuit 1st Circuit 2d Circuit

Question #9: The conclusion to an appellant's opening brief should state precisely the remedy the appellant seeks.

Strongly Disagree

No Preference



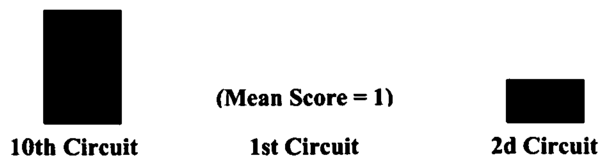
Strongly Agree

10th Circuit 1st Circuit 2d Circuit

Question #10: The conclusion to a respondent's brief should state precisely the outcome the respondent seeks.

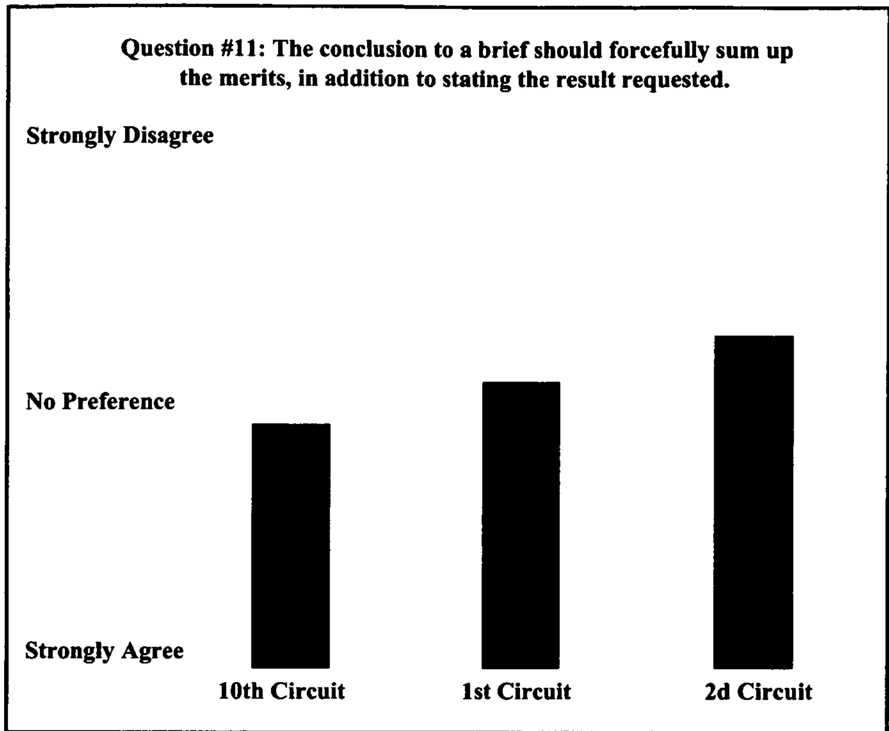
Strongly Disagree

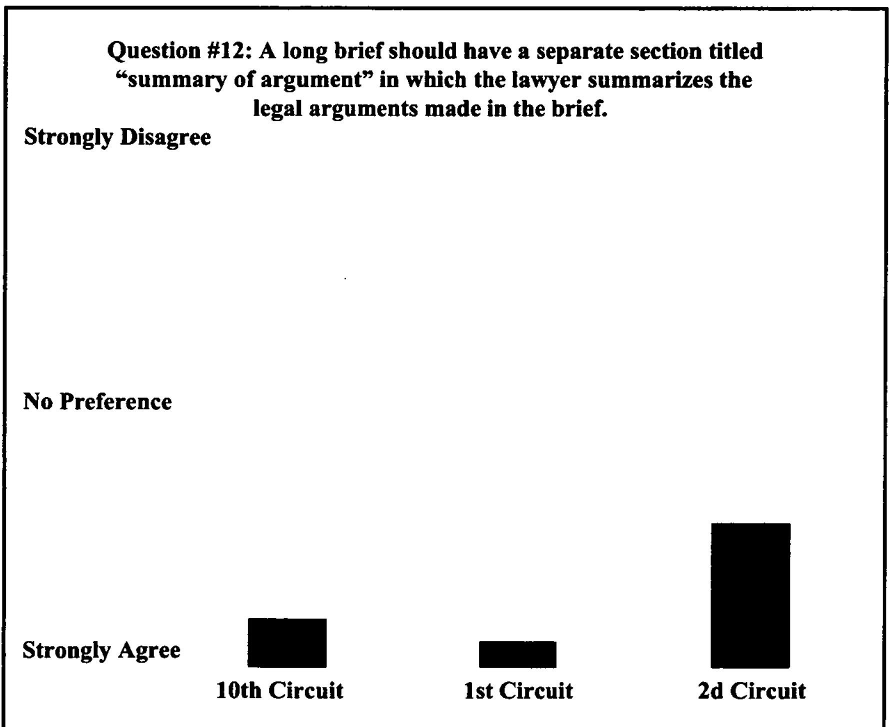
No Preference



Strongly Agree

10th Circuit 1st Circuit 2d Circuit


Question #11: The conclusion to a brief should forcefully sum up the merits, in addition to stating the result requested.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit


Question #12: A long brief should have a separate section titled "summary of argument" in which the lawyer summarizes the legal arguments made in the brief.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit

Question #13: A "summary of the argument" section provides an opportunity to persuade me, different and separate from a well-written table of contents or statement of the case and facts.

Strongly Disagree

No Preference

Strongly Agree

10th Circuit **1st Circuit** **2d Circuit**

Question #14: A "summary of the argument" should not simply repeat the issue headings.

Strongly Disagree

No Preference

Strongly Agree

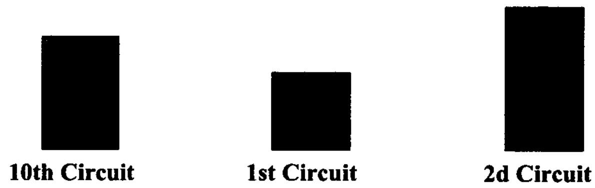
10th Circuit **1st Circuit** **2d Circuit**

Question #15: A "summary of the argument" should be included even if the rules do not require it.

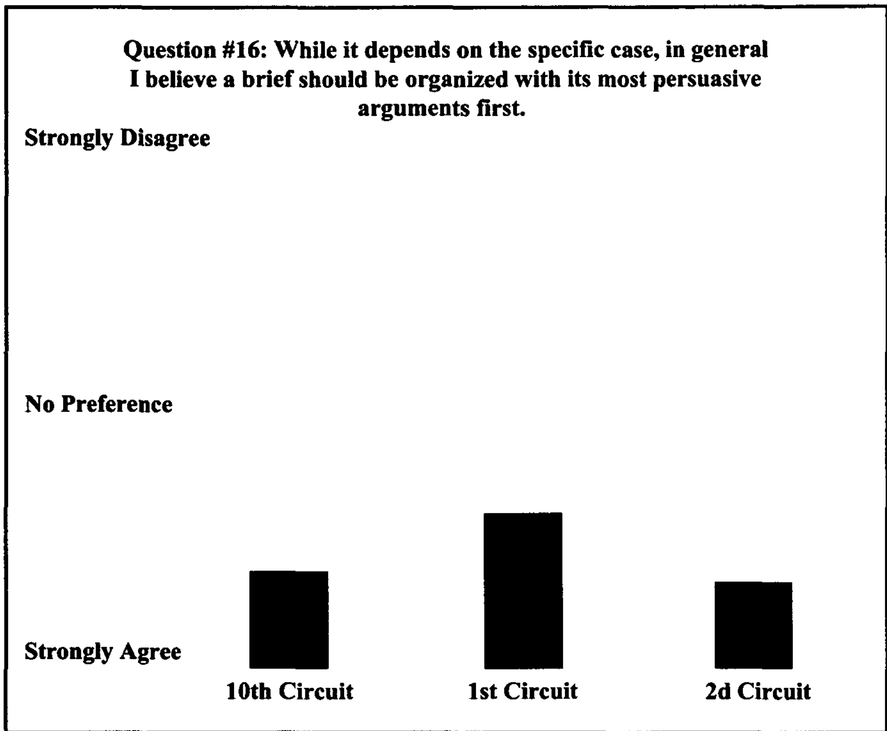
Strongly Disagree

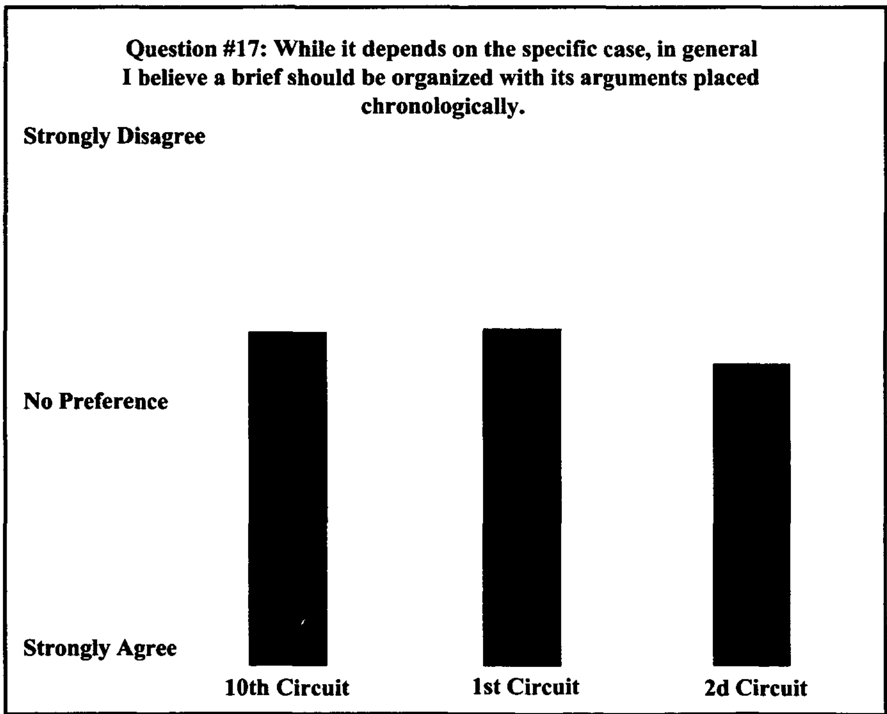
No Preference

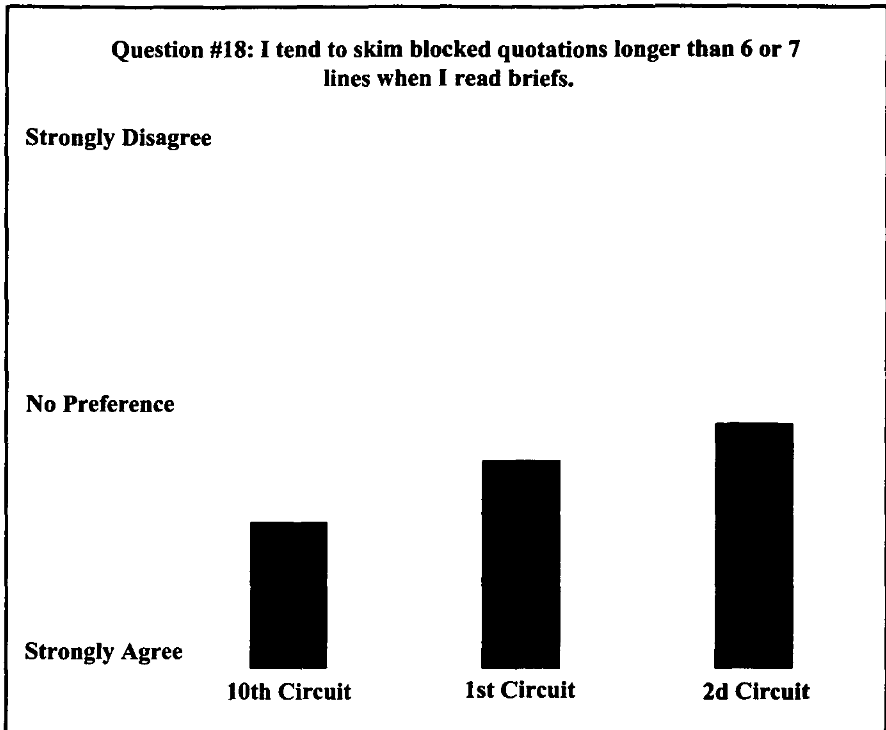
Strongly Agree

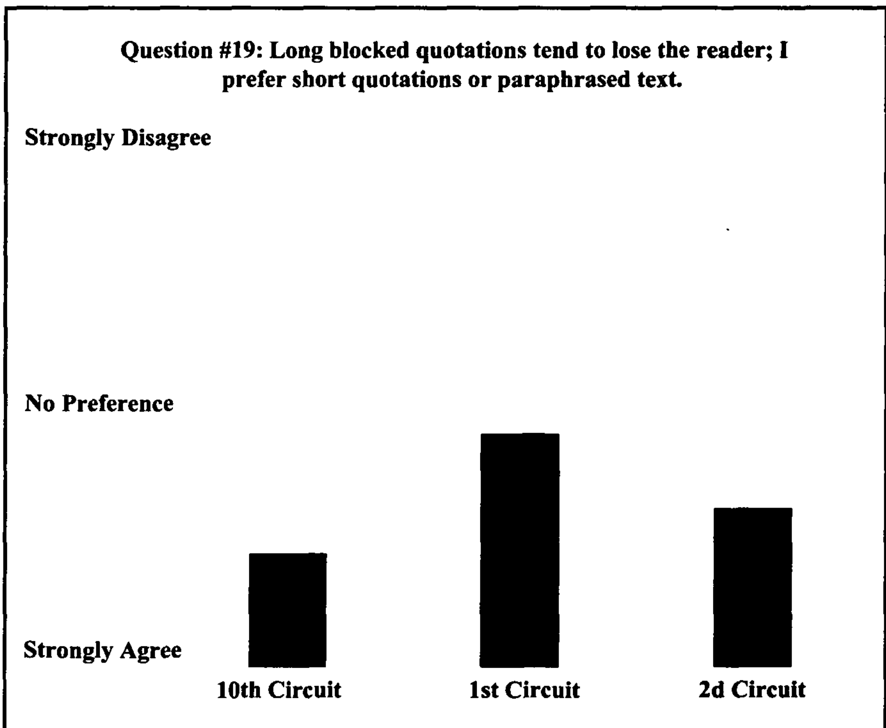


B. Writing Style and Advocacy






Question #18: I tend to skim blocked quotations longer than 6 or 7 lines when I read briefs.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit

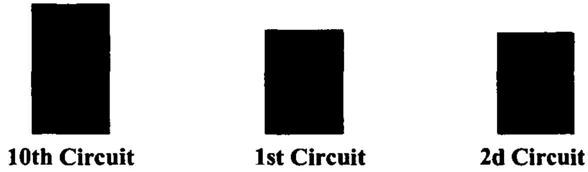

Question #19: Long blocked quotations tend to lose the reader; I prefer short quotations or paraphrased text.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit

Question #20: It bothers me when a brief or writ petition uses legalese and old pleading language.

Strongly Disagree

No Preference

Strongly Agree



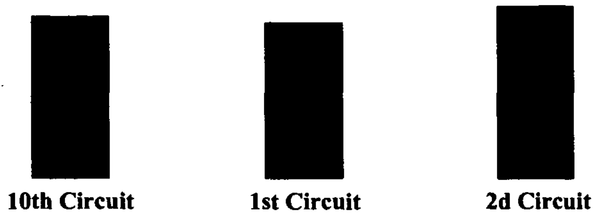
10th Circuit **1st Circuit** **2d Circuit**

Question #21: It bothers me when a brief uses the passive voice frequently.

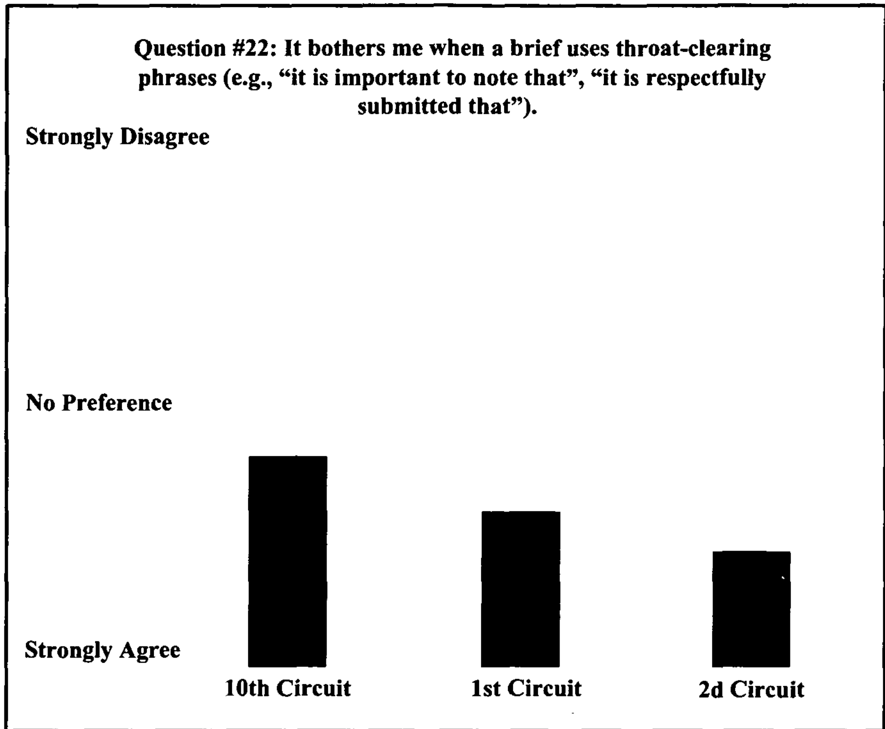
Strongly Disagree

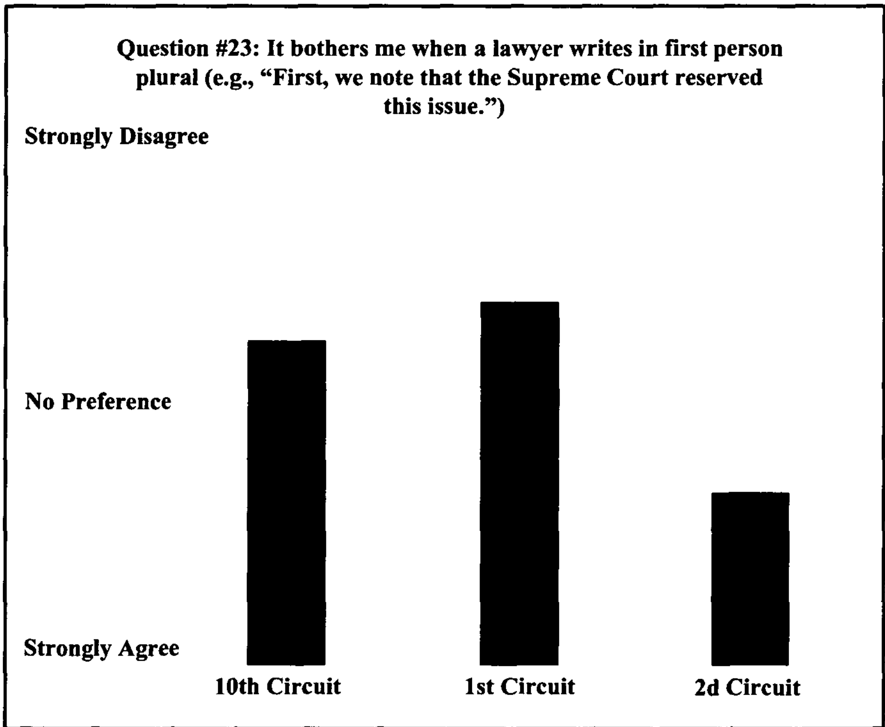
No Preference

Strongly Agree

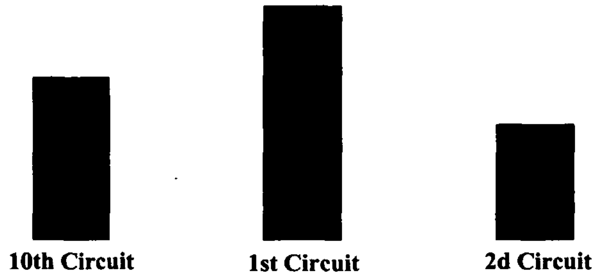


10th Circuit **1st Circuit** **2d Circuit**

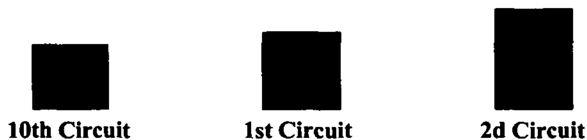

Question #22: It bothers me when a brief uses throat-clearing phrases (e.g., "it is important to note that", "it is respectfully submitted that").
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit


Question #23: It bothers me when a lawyer writes in first person plural (e.g., "First, we note that the Supreme Court reserved this issue.")
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit

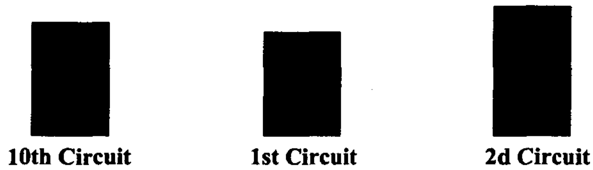
Question #24: It bothers me when a brief uses adverbs like "clearly" and "obviously" to support arguments.



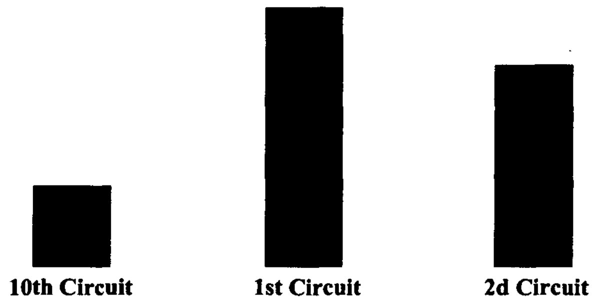
Question #25: Sometimes long sentences are distracting or confusing even if they are grammatically correct.



Question #26: Lawyers should try to use shortened names rather than acronyms as abbreviations for corporate parties, statutes, and the like.



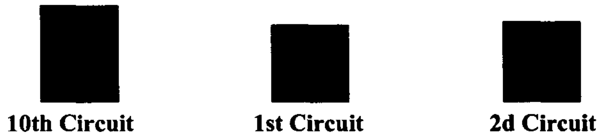
Question #27: I notice, and it bothers me, when arguments longer than six or seven pages lack subheadings.



Question #28: I'm bothered when statements of facts or of the case give me immaterial information, like dates of events and filings that don't matter.

Strongly Disagree

No Preference



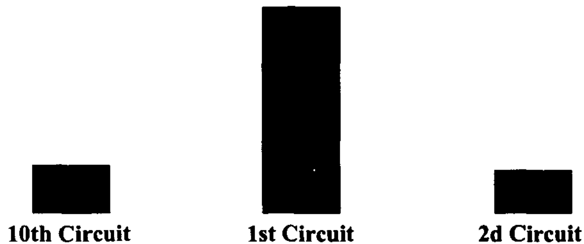
Strongly Agree

10th Circuit 1st Circuit 2d Circuit

Question #29: Substantive arguments should not be made in footnotes.

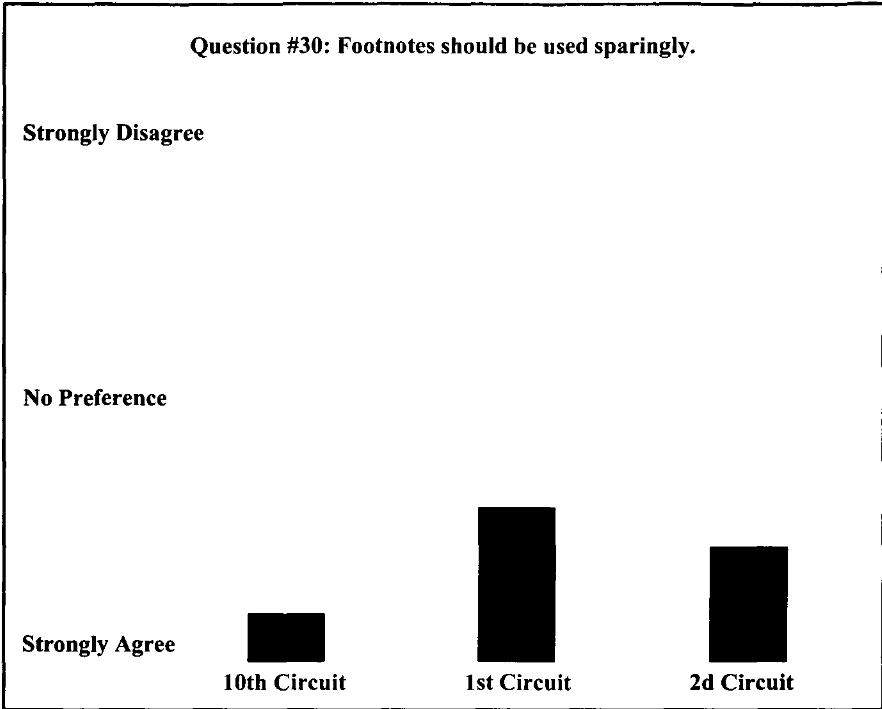
Strongly Disagree

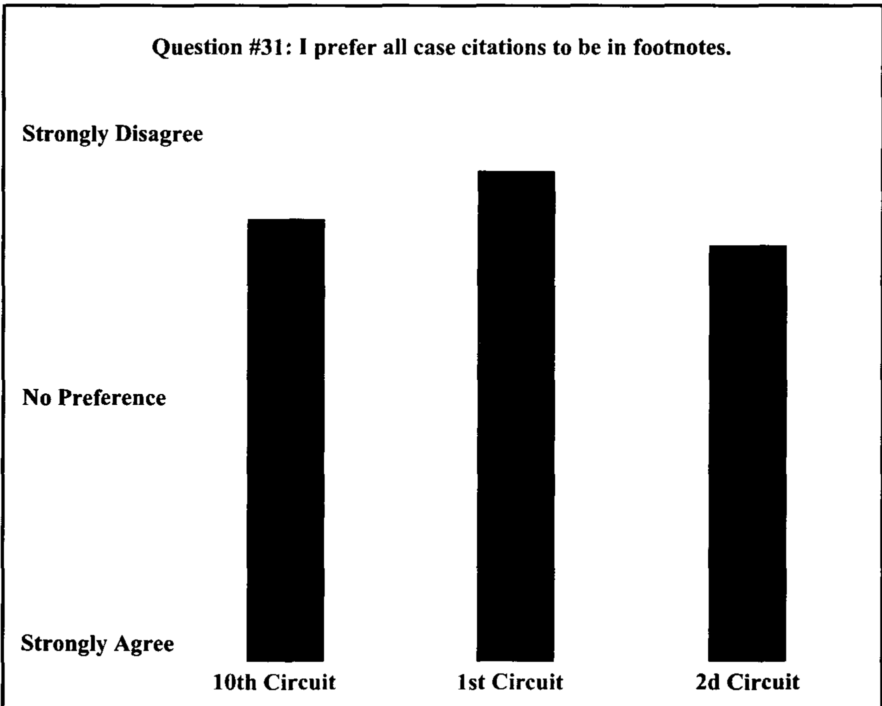
No Preference

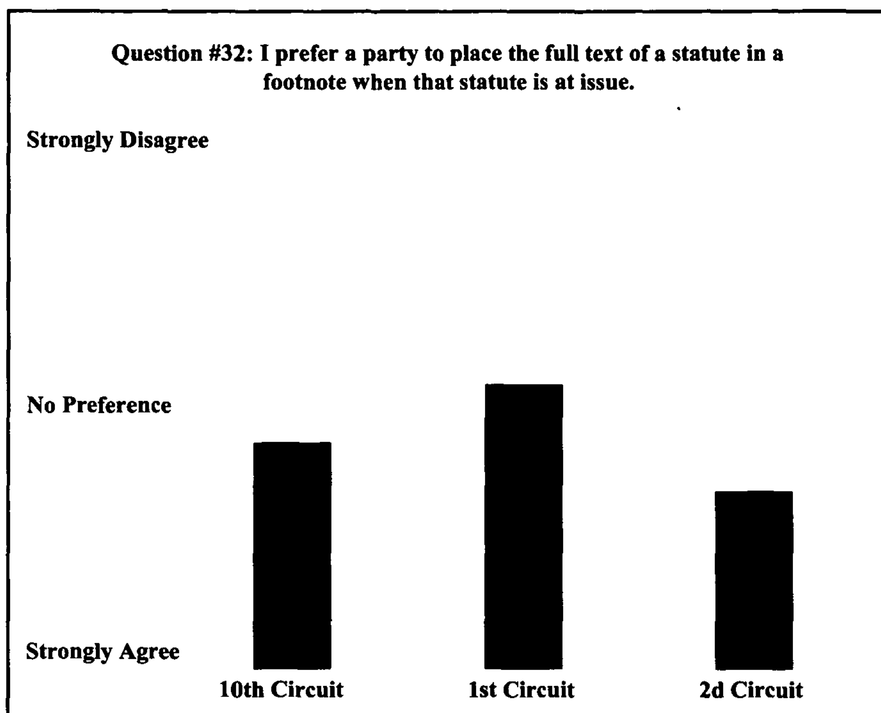


Strongly Agree

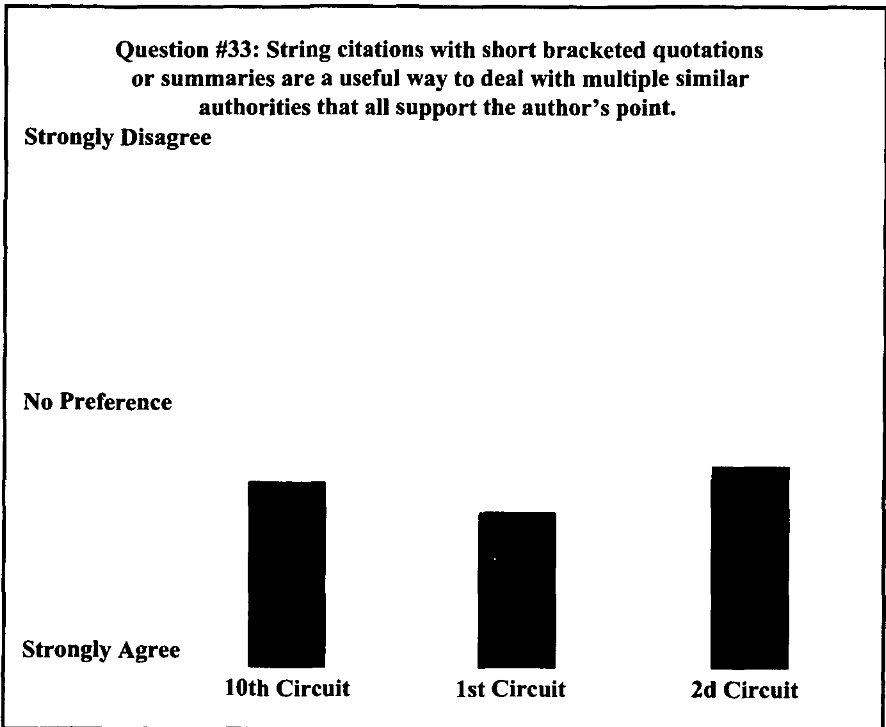
10th Circuit 1st Circuit 2d Circuit

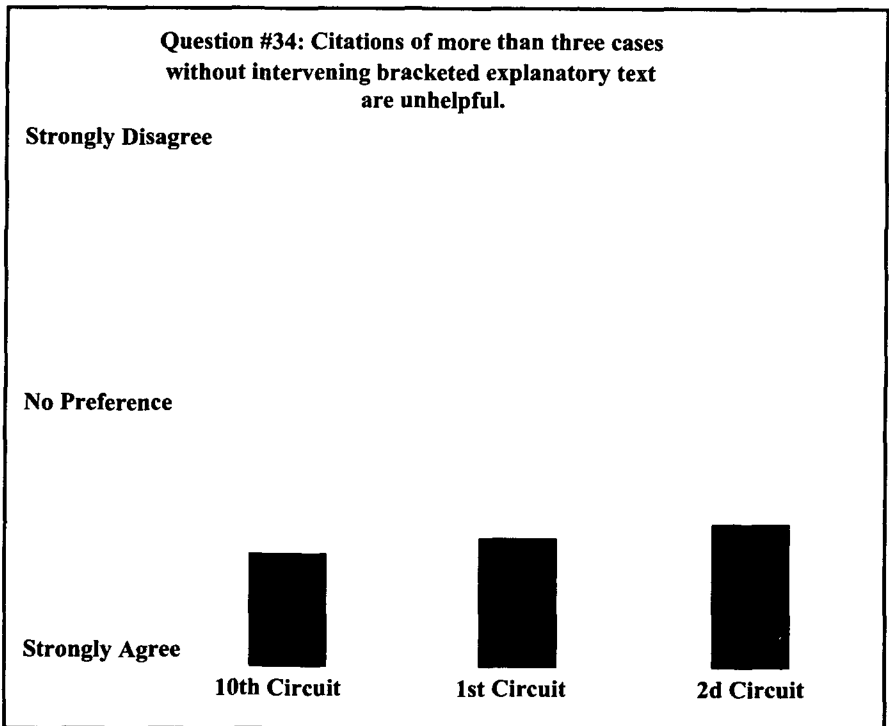

Question #30: Footnotes should be used sparingly.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit


Question #31: I prefer all case citations to be in footnotes.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit

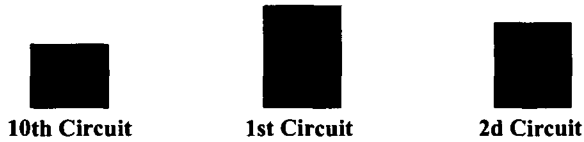

Question #32: I prefer a party to place the full text of a statute in a footnote when that statute is at issue.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit

C. Use of Authority and the Record

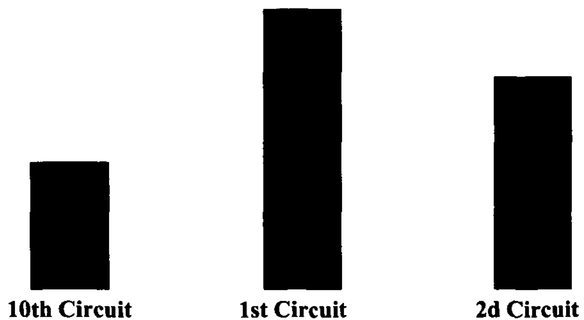




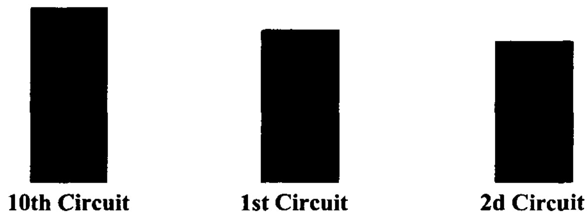
Question #35: Case citations should almost always include a specific page reference.



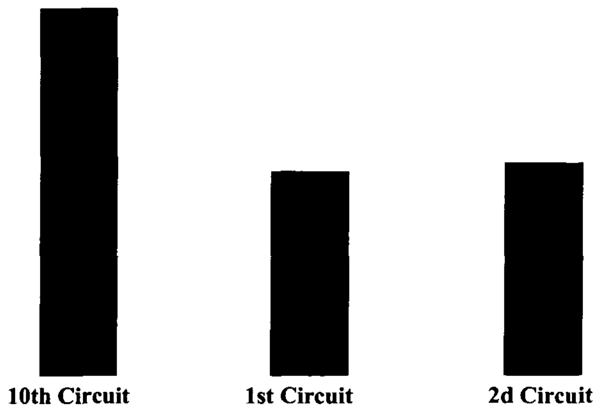
Question #36: I am suspicious about whether the authority stands for the proposition asserted when a case citation lacks a specific page reference.



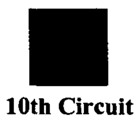
Question #37: I prefer that record references follow each sentence rather than come at the end of a paragraph.



Question #38: Even if a whole paragraph reports facts from only a page or two of the record, I still prefer that record references follow each sentence.



Question #39: Whenever a clerk's transcript, reporter's transcript, appendix, or set of exhibits includes multiple volumes, I prefer the record references in briefs to include volume numbers as well as page numbers.

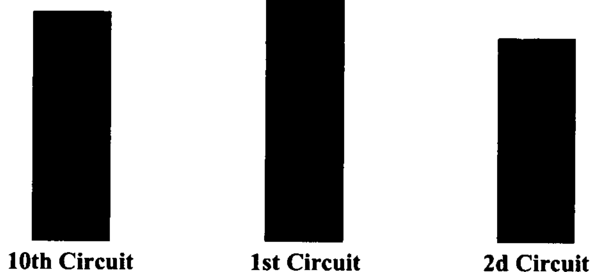


D. Typography of Briefs

Question #40: Briefs can be produced with "ragged right" justification, which looks more like typing than printing, or "full justification," which makes every line except the last line of a paragraph run to the right margin. I prefer ragged right.

Strongly Disagree

No Preference

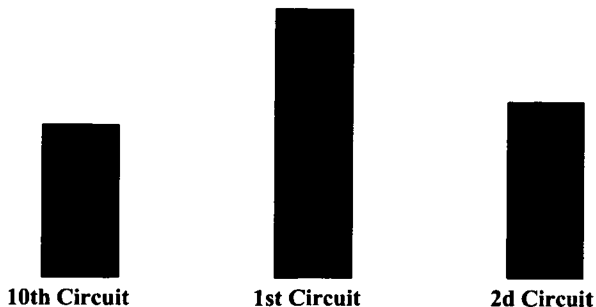


Strongly Agree

Question #41: It affects the credibility of a brief when the lawyer has failed to apply any recognized style manual.

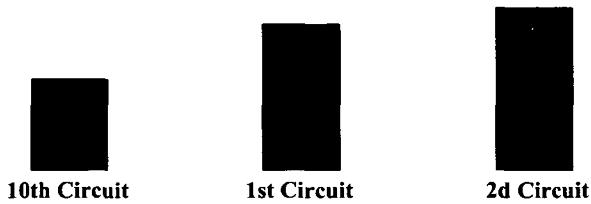
Strongly Disagree

No Preference

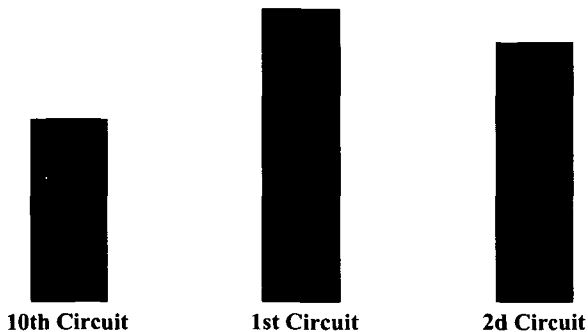


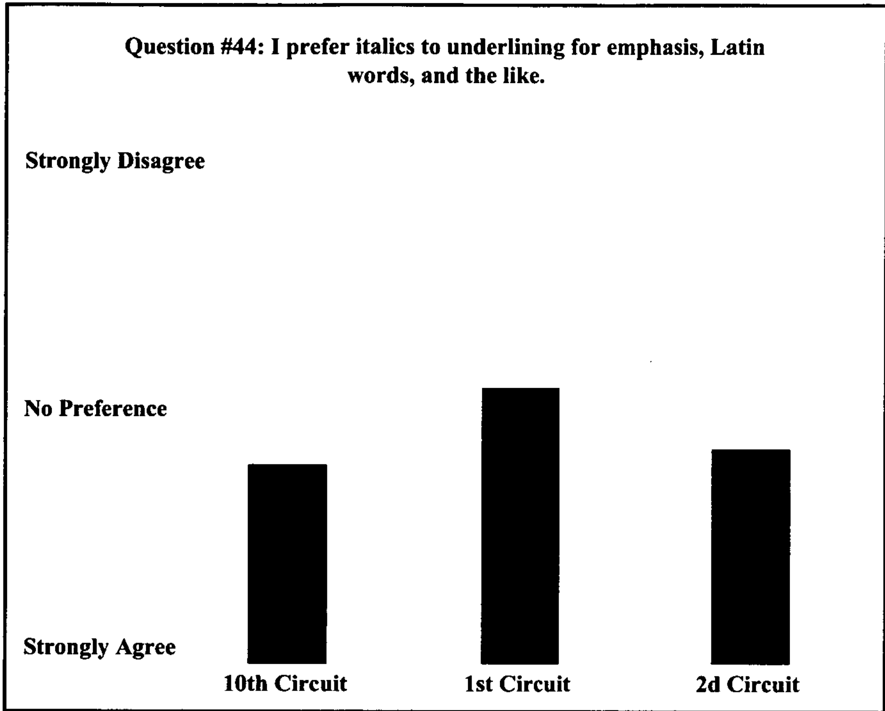
Strongly Agree

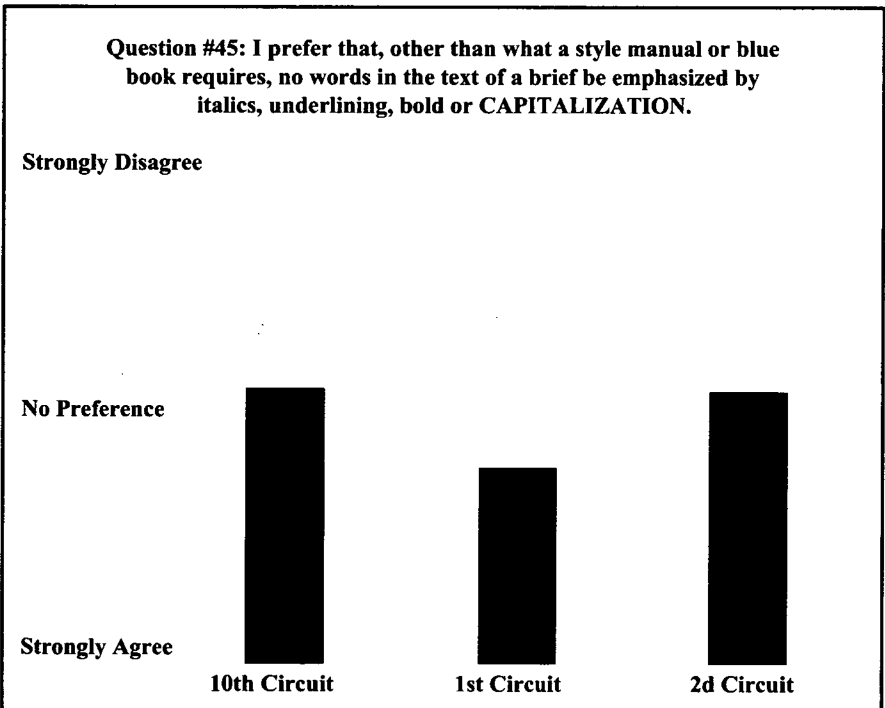
Question #42: I do not have a preference for which style manual an attorney should use as long as the method used is consistent throughout the brief and allows me to quickly and accurately identify cited authority.



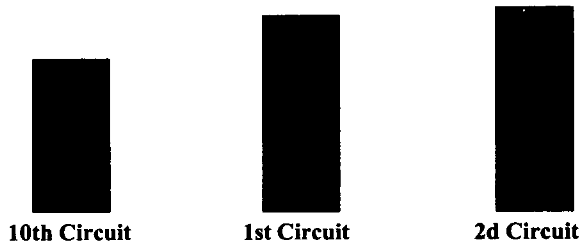
Question #43: I prefer italics to underlining for case citations.



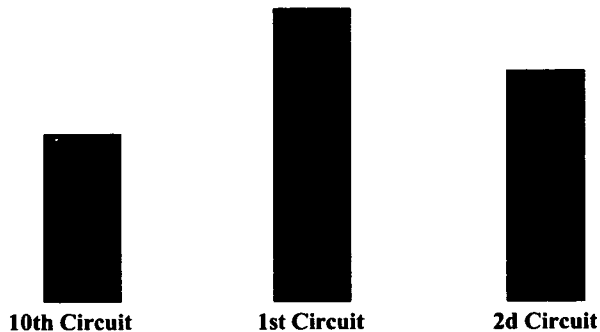

Question #44: I prefer italics to underlining for emphasis, Latin words, and the like.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit

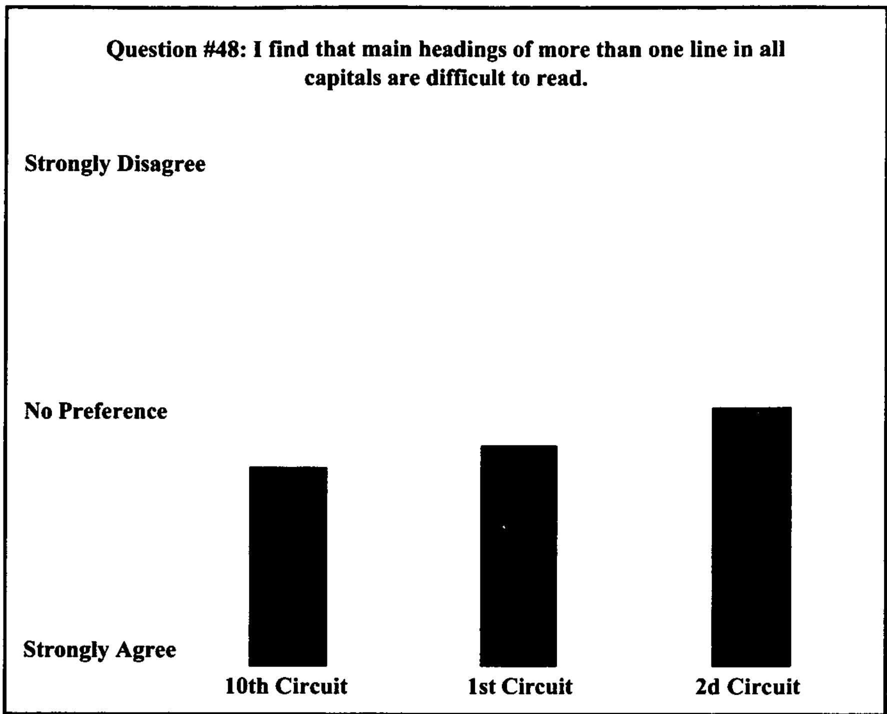

Question #45: I prefer that, other than what a style manual or blue book requires, no words in the text of a brief be emphasized by italics, underlining, bold or CAPITALIZATION.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit

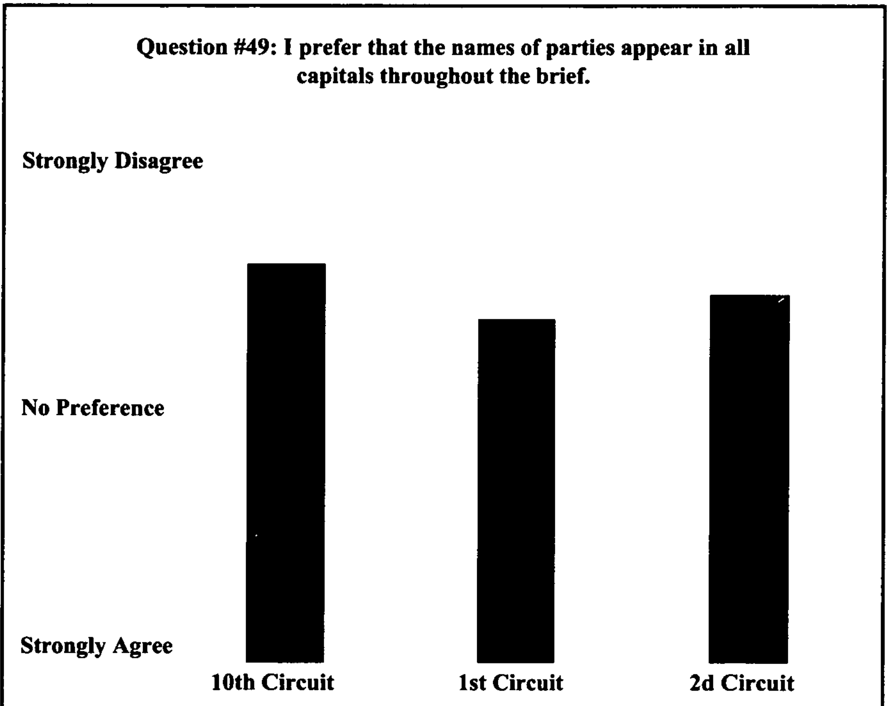
Question #46: I prefer titles of major parts of the brief (e.g. STATEMENT OF THE CASE) to be in all capitals.



Question #47: I prefer main headings of the legal argument (e.g., THE JUDGMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE) to be in all capitals.




Question #48: I find that main headings of more than one line in all capitals are difficult to read.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit

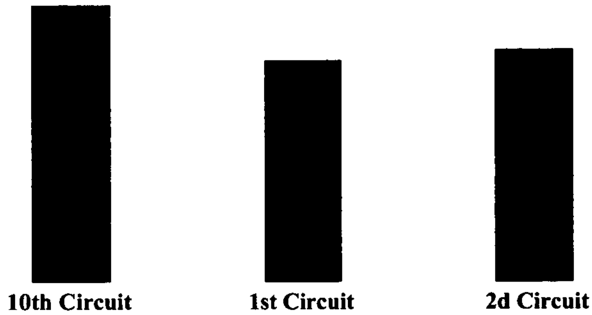

Question #49: I prefer that the names of parties appear in all capitals throughout the brief.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit

Question #50: Some lawyers use a traditional outline structure, indenting each tier of headings an additional five spaces. Others use flush-left headings at all levels. I prefer flush-left.

Strongly Disagree

No Preference

Strongly Agree

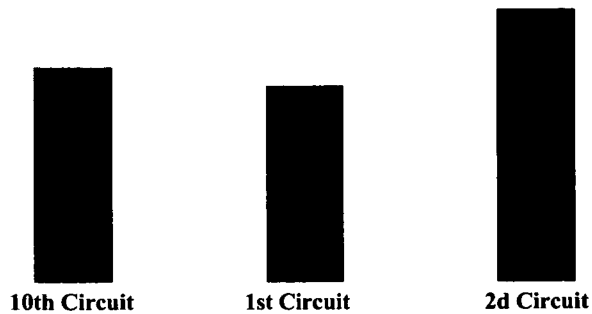


Question #51: Briefs are easier to read when headings are boldface but not underlined.

Strongly Disagree

No Preference

Strongly Agree

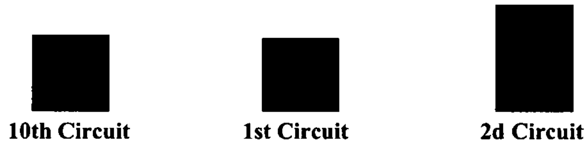


Question #52: I prefer the brief to be in double spacing, though greater spacing would be acceptable.

Strongly Disagree

No Preference

Strongly Agree



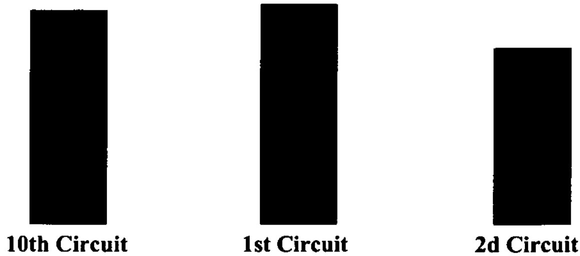
10th Circuit 1st Circuit 2d Circuit

Question #53: I prefer main headings of a legal argument in single line spacing.

Strongly Disagree

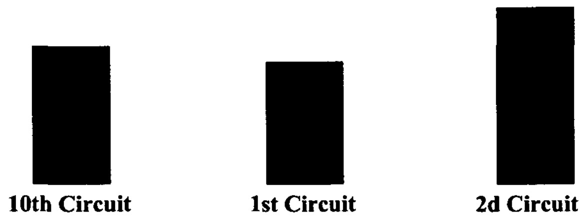
No Preference

Strongly Agree

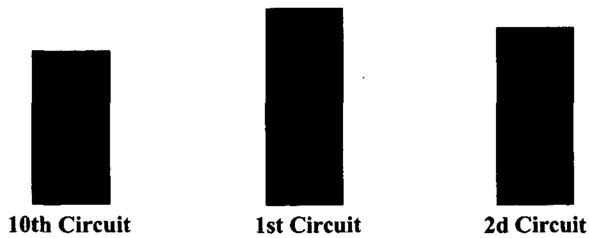


10th Circuit 1st Circuit 2d Circuit

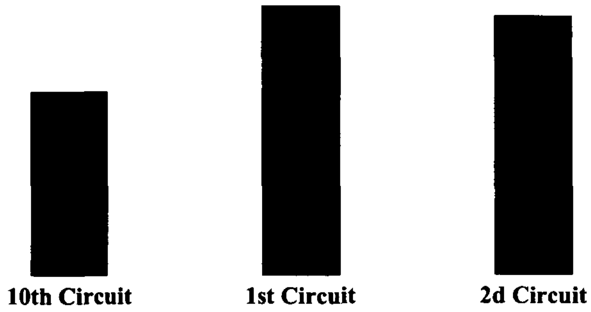
Question #54: When a brief contains a list, I like bullet points or other creative typography to set it off from regular text.



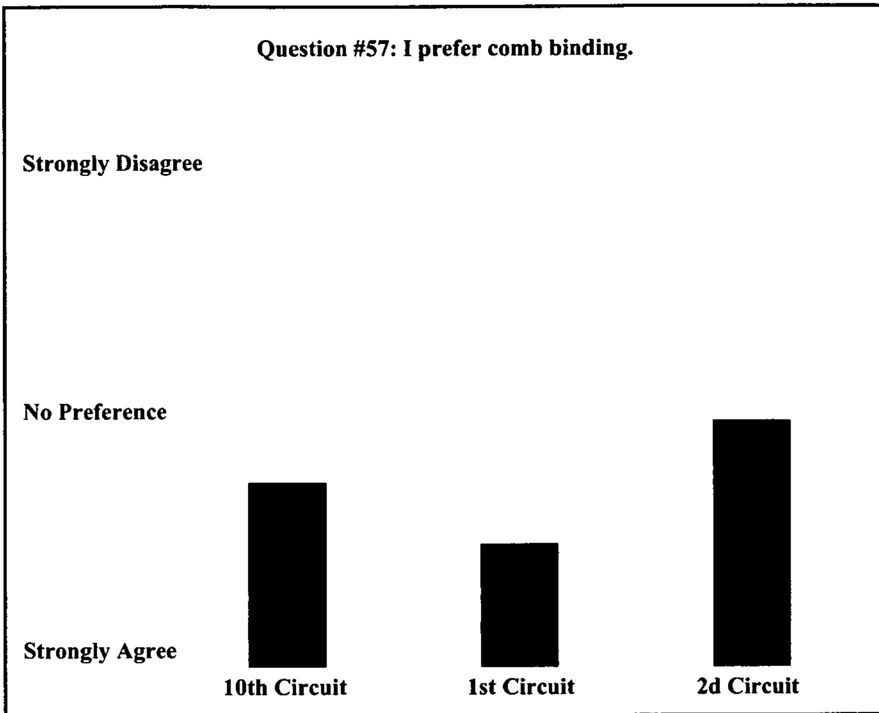
Question #55: I like charts, diagrams, and other visual aids, especially when they can substitute for long textual explanations.

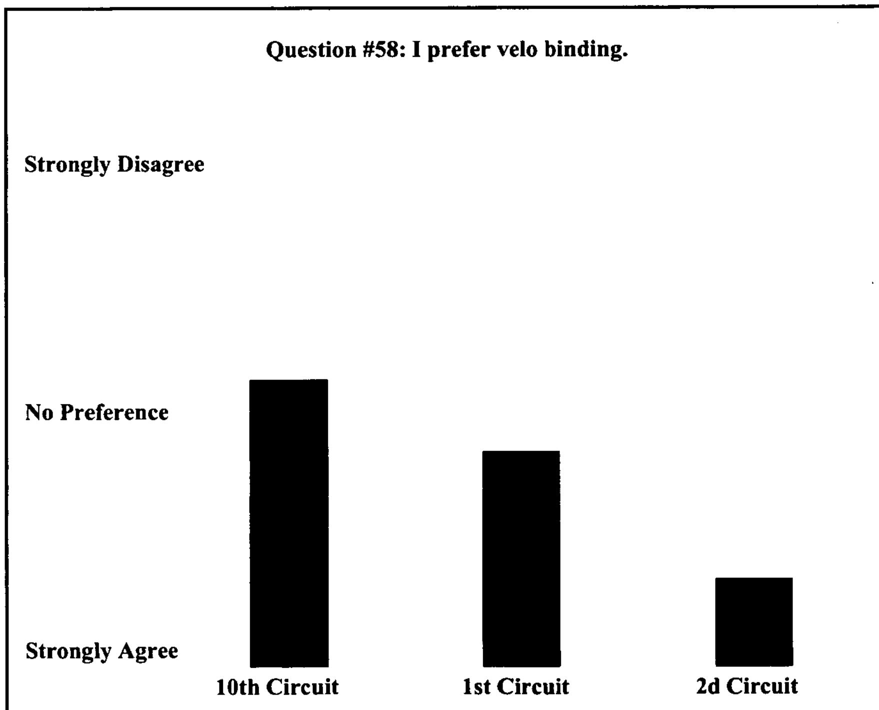


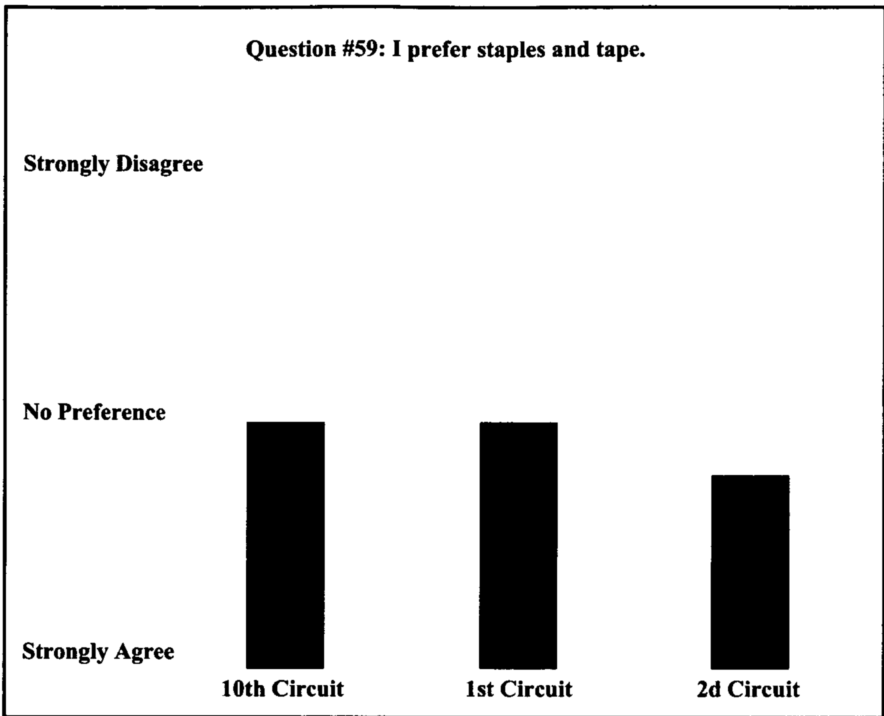
Question #56: I'm distracted by paragraphs that begin with an indentation longer than the regular five spaces.

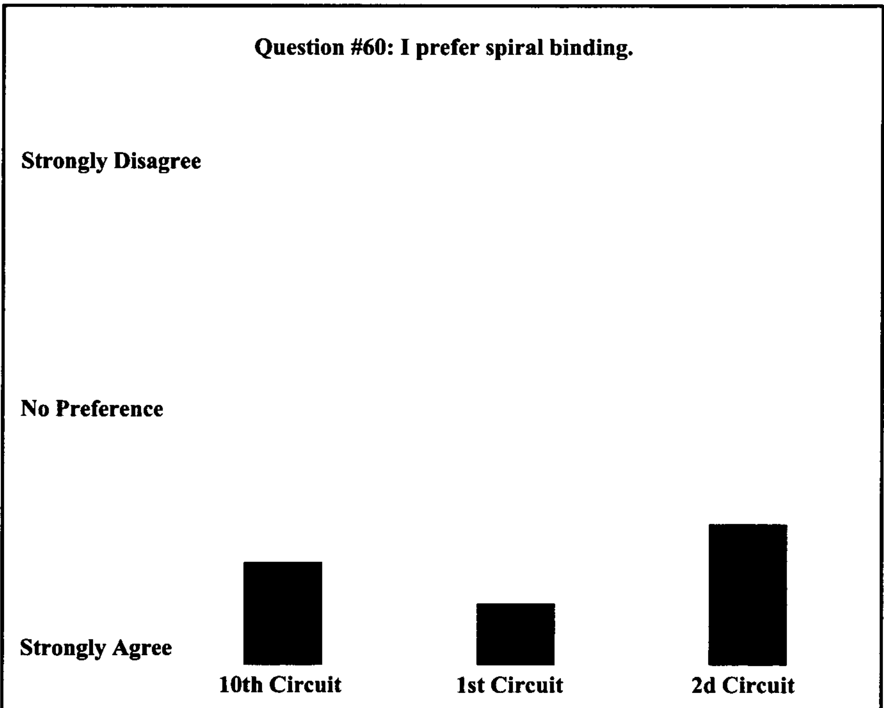


E. Physical Characteristics of Appellate Work Product






Question #59: I prefer staples and tape.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit

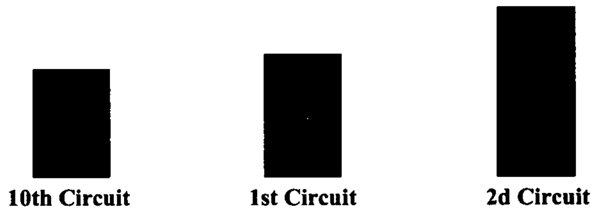

Question #60: I prefer spiral binding.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit

Question #61: Attorneys do not sufficiently proofread briefs before filing them with the court.

Strongly Disagree

No Preference

Strongly Agree

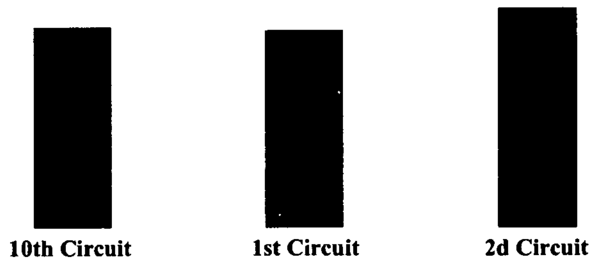


Question #62: Attorneys often provide illegible copies in the appendix.

Strongly Disagree

No Preference

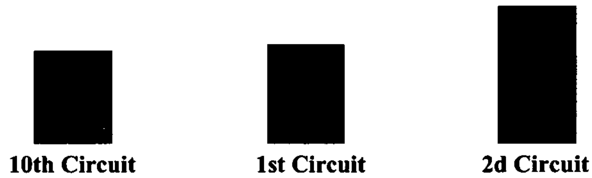
Strongly Agree



Question #63: It negatively affects the credibility of an appeal when I believe that the appellant failed to make a good faith effort to include all appropriate documents in the appellant's appendix or addendum.

Strongly Disagree

No Preference



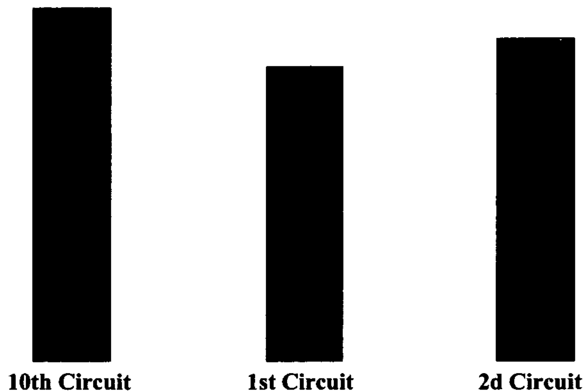
Strongly Agree

10th Circuit **1st Circuit** **2d Circuit**

Question #64: I prefer a party to include all exhibits in an appendix, not just those cited in the briefs.

Strongly Disagree

No Preference



Strongly Agree

10th Circuit **1st Circuit** **2d Circuit**

Question #65: I appreciate it when a party attaches documents with the brief that are important to the resolution of the appeal (e.g., statutes, the trial court's findings, the relevant portion of a contract or transcript).

Strongly Disagree

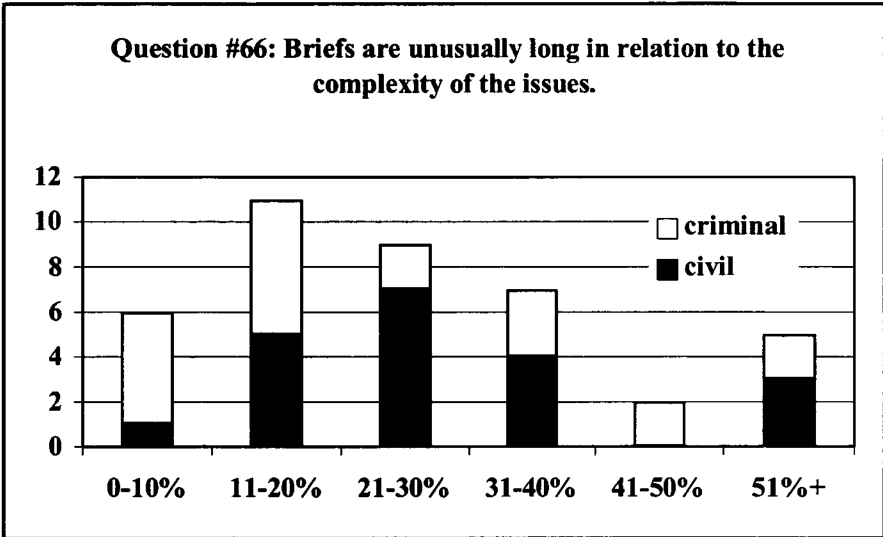
No Preference

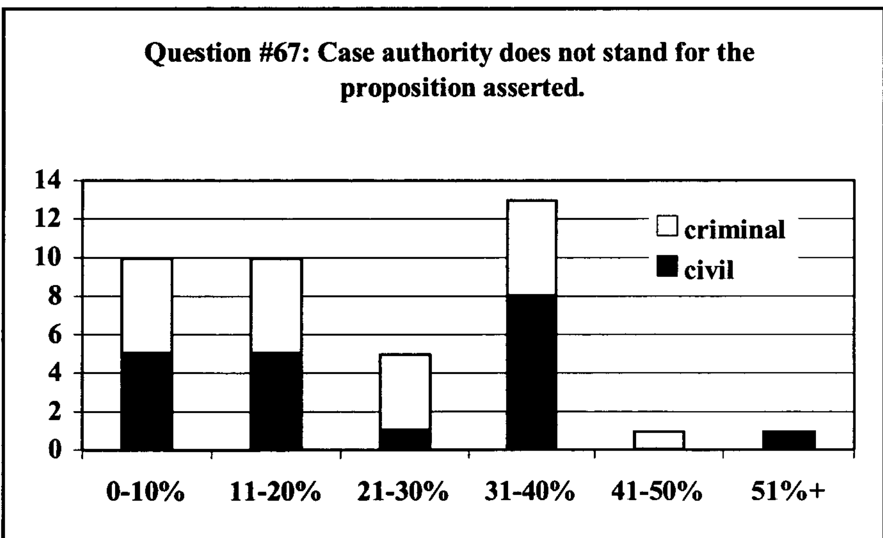
Strongly Agree

10th Circuit **1st Circuit** **2d Circuit**

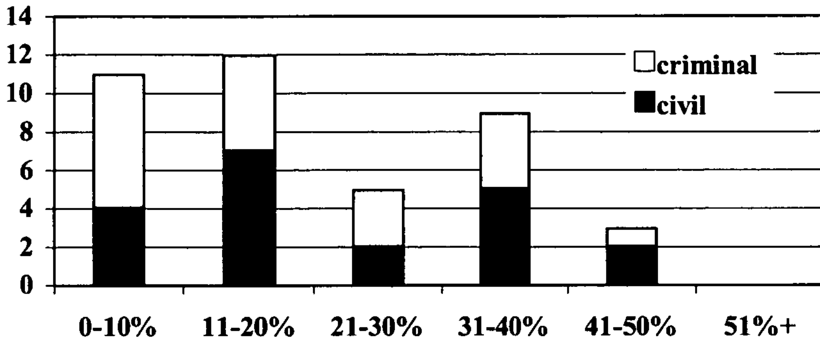
F. Frequency of Certain Errors[12]

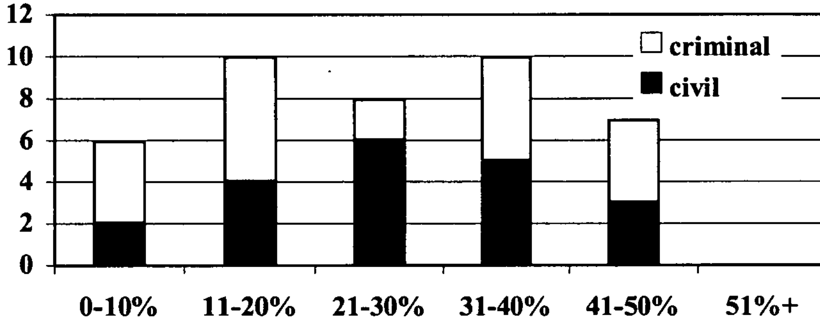
Justices, research attorneys, and advocates would all agree that the attributes of briefs listed in this section are errors. The justices saw these errors in the following percentage of briefs filed in civil and criminal cases.

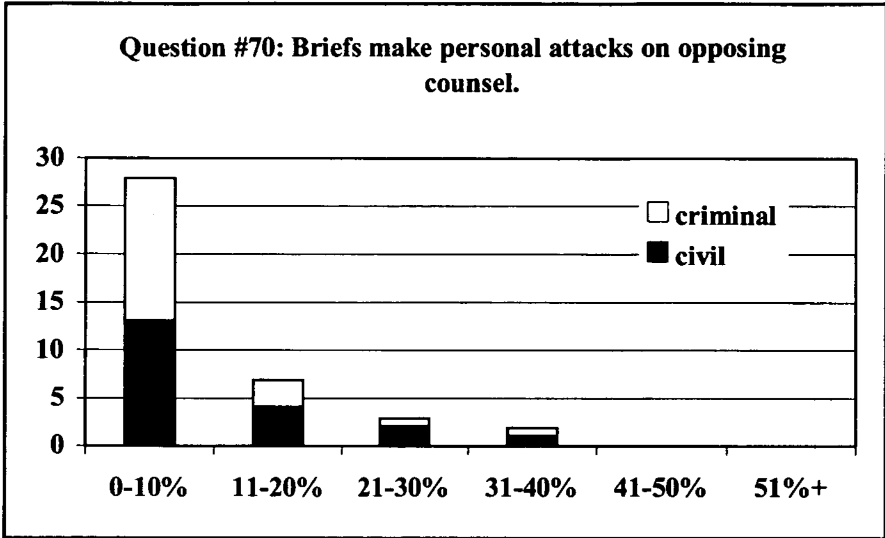


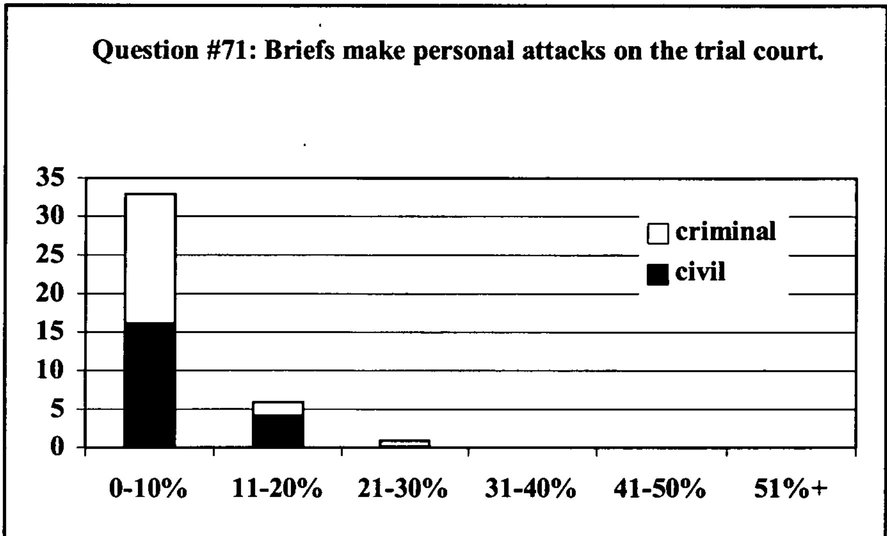


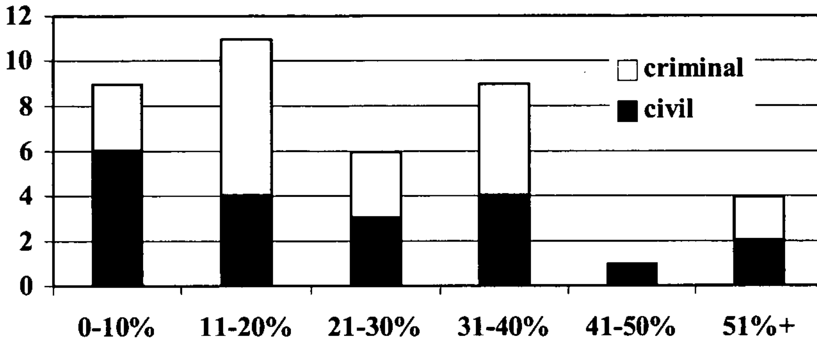
12. *See supra* Part I for a detailed discussion of this information.

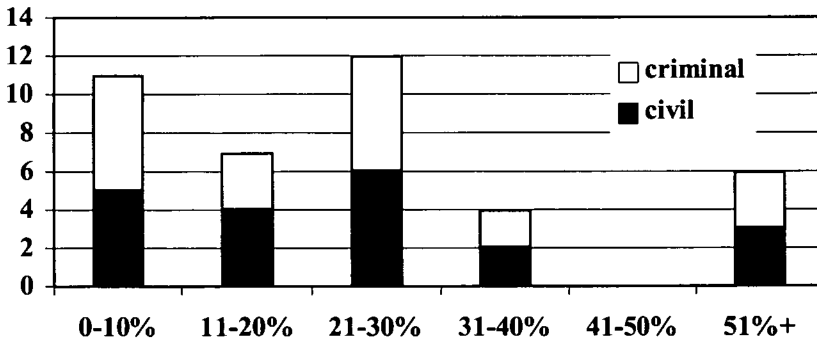

Question #68: Briefs misstate the record.
14
12
10
8
6
4
2
0
criminal
civil
0-10%
11-20%
21-30%
31-40%
41-50%
51%+

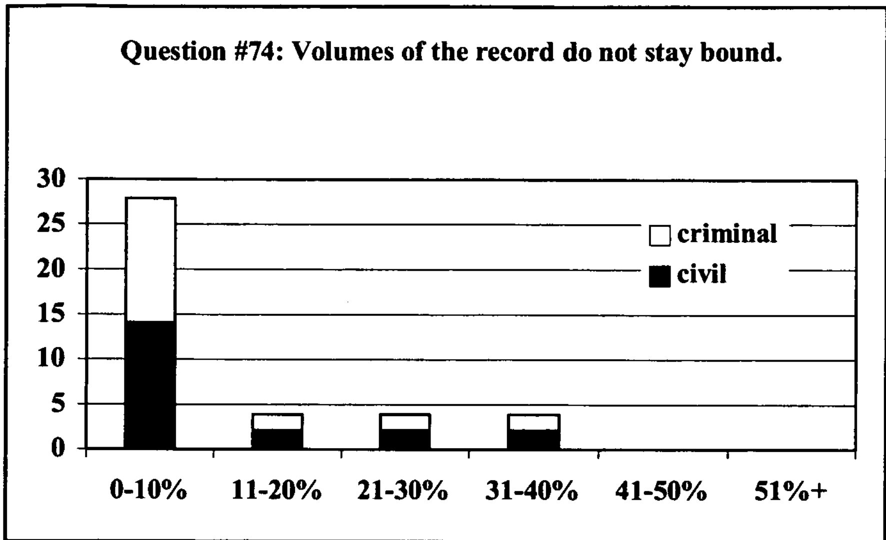

Question #69: Statements of facts violate the standard of review (e.g., in a substantial evidence appeal, appellant presents the side of conflicting evidence favorable to appellant).
12
10
8
6
4
2
0
criminal
civil
0-10%
11-20%
21-30%
31-40%
41-50%
51%+


Question #70: Briefs make personal attacks on opposing counsel.
30
25
20
15
10
5
0
criminal
civil
0-10%
11-20%
21-30%
31-40%
41-50%
51%+

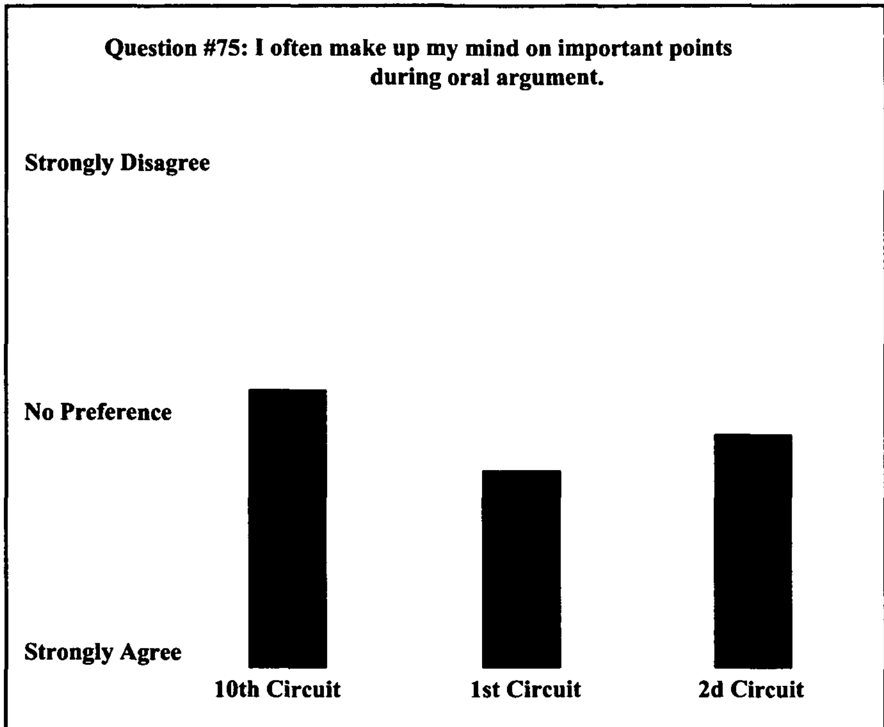

Question #71: Briefs make personal attacks on the trial court.
35
30
25
20
15
10
5
0
criminal
civil
0-10%
11-20%
21-30%
31-40%
41-50%
51%+

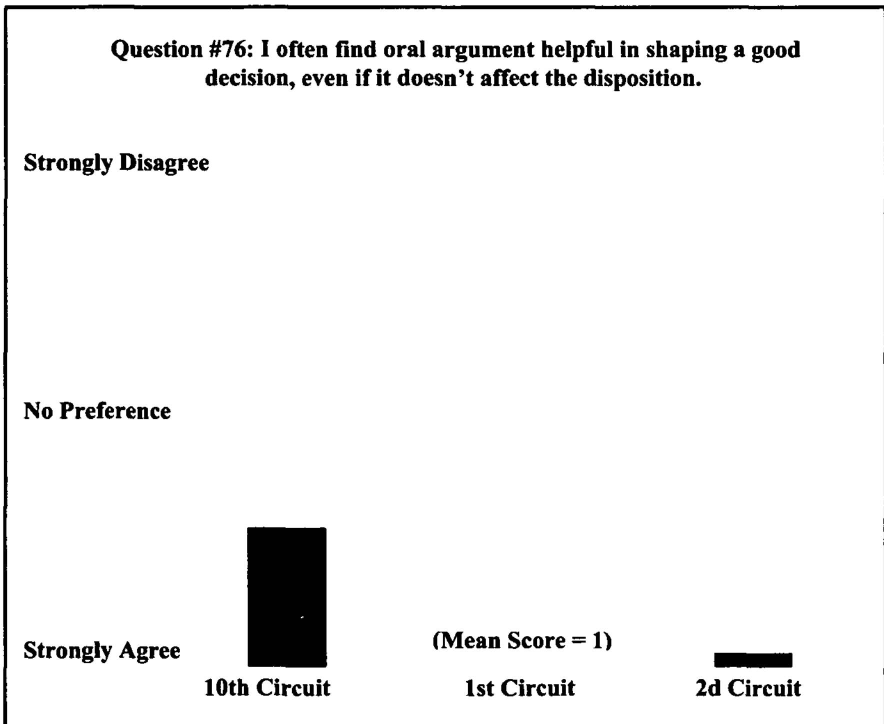

Question #72: Briefs are not sufficiently edited or proofread.
12
10
8
6
4
2
0
criminal
civil
0-10%
11-20%
21-30%
31-40%
41-50%
51%+


Question #73: Briefs contain improper grammar, punctuation, or use of apostrophes.
14
12
10
8
6
4
2
0
criminal
civil
0-10%
11-20%
21-30%
31-40%
41-50%
51%+

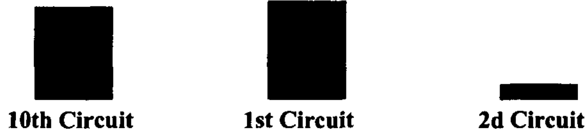

Question #74: Volumes of the record do not stay bound.
30
25
20
15
10
5
0
criminal
civil
0-10%
11-20%
21-30%
31-40%
41-50%
51%+

G. Oral Argument

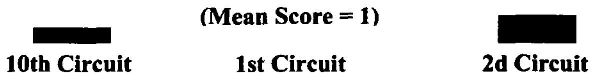


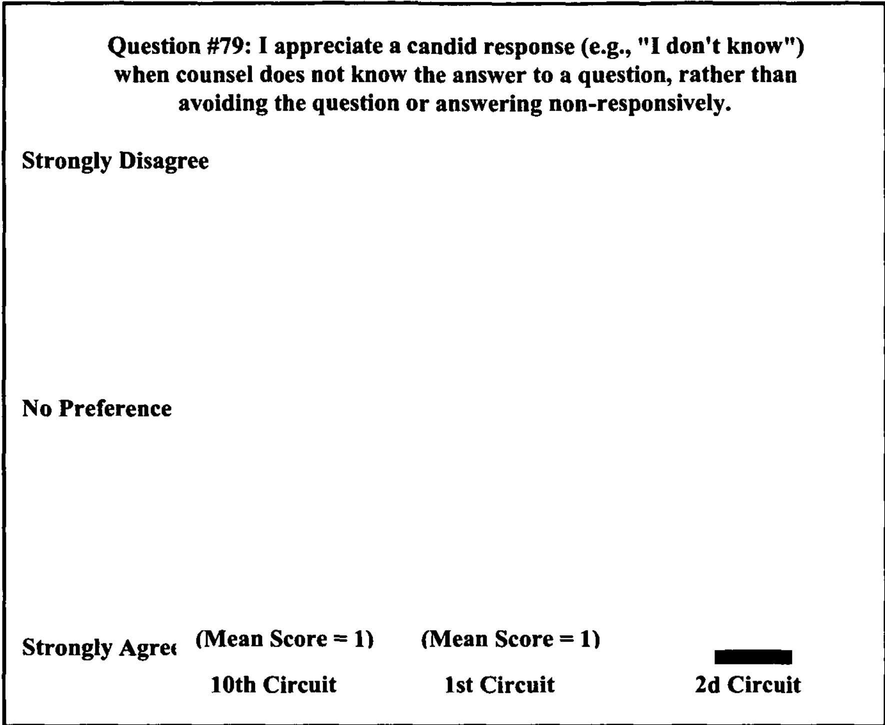


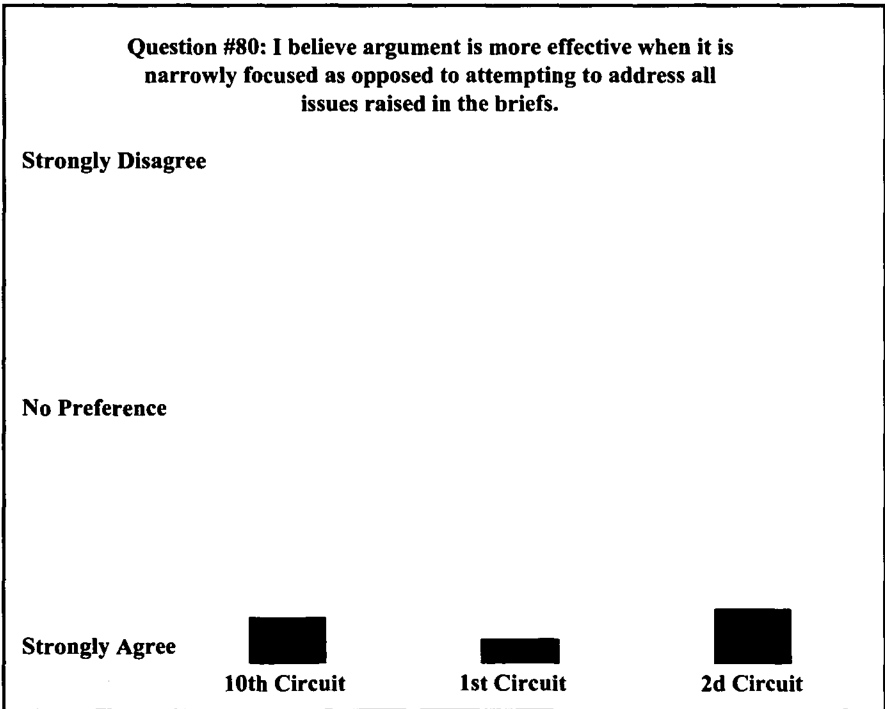
Question #77: I expect counsel to strictly abide by their time estimates unless the court indicates counsel may exceed it.



Question #78: I appreciate it when counsel ceases argument upon making all planned and responsive necessary points even though his or her available time has not yet expired.




Question #79: I appreciate a candid response (e.g., "I don't know") when counsel does not know the answer to a question, rather than avoiding the question or answering non-responsively.
Strongly Disagree
No Preference
Strongly Agree
(Mean Score = 1)
(Mean Score = 1)
10th Circuit
1st Circuit
2d Circuit

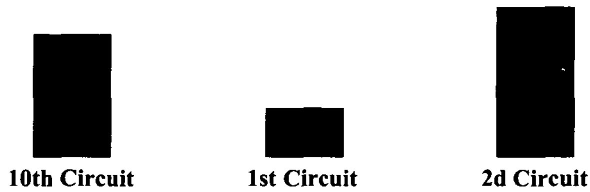

Question #80: I believe argument is more effective when it is narrowly focused as opposed to attempting to address all issues raised in the briefs.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit

Question #81: It bothers me when counsel uses oral argument simply to reiterate those points raised in the briefs.

Strongly Disagree

No Preference

Strongly Agree

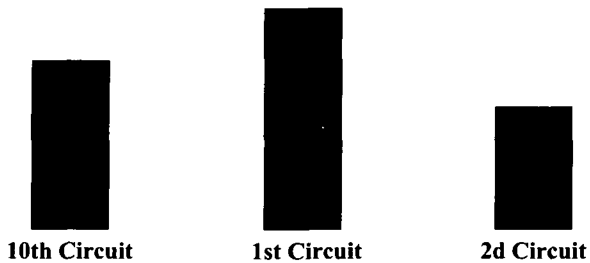


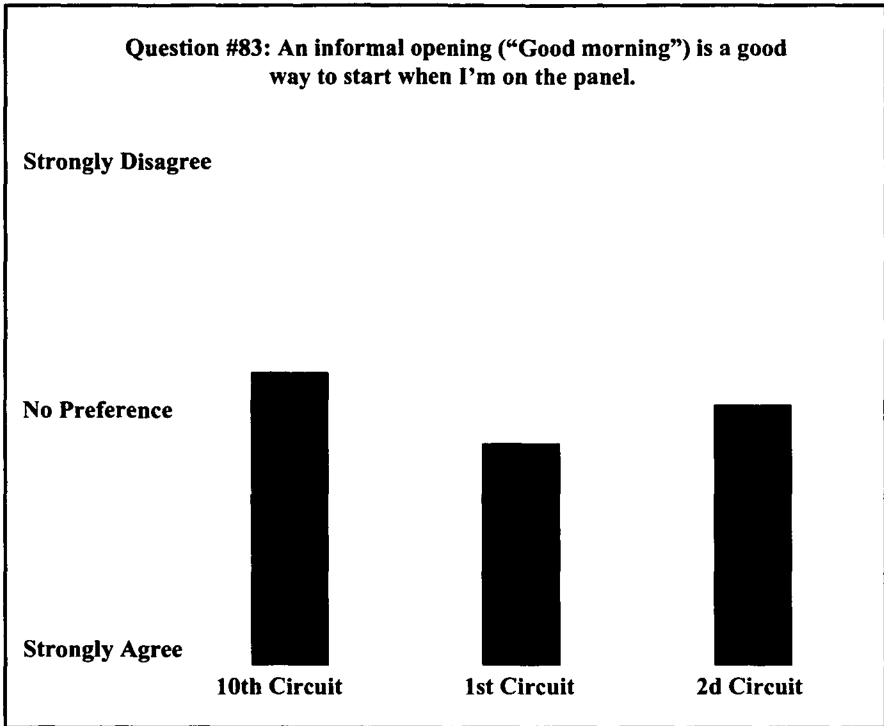
Question #82: The traditional opening ("May it please the Court") is a good way to start when I'm on the panel.

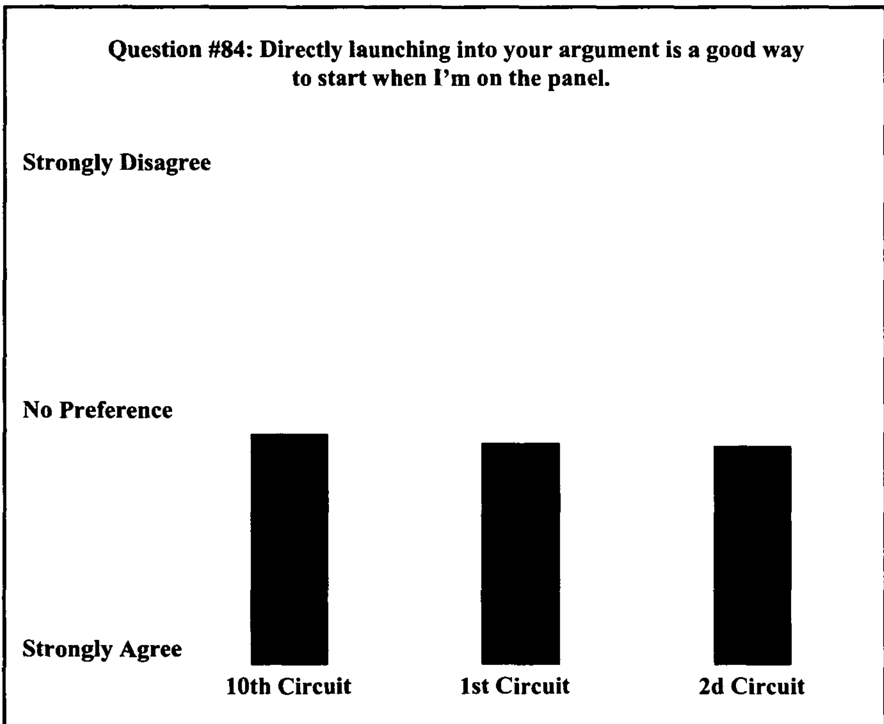
Strongly Disagree

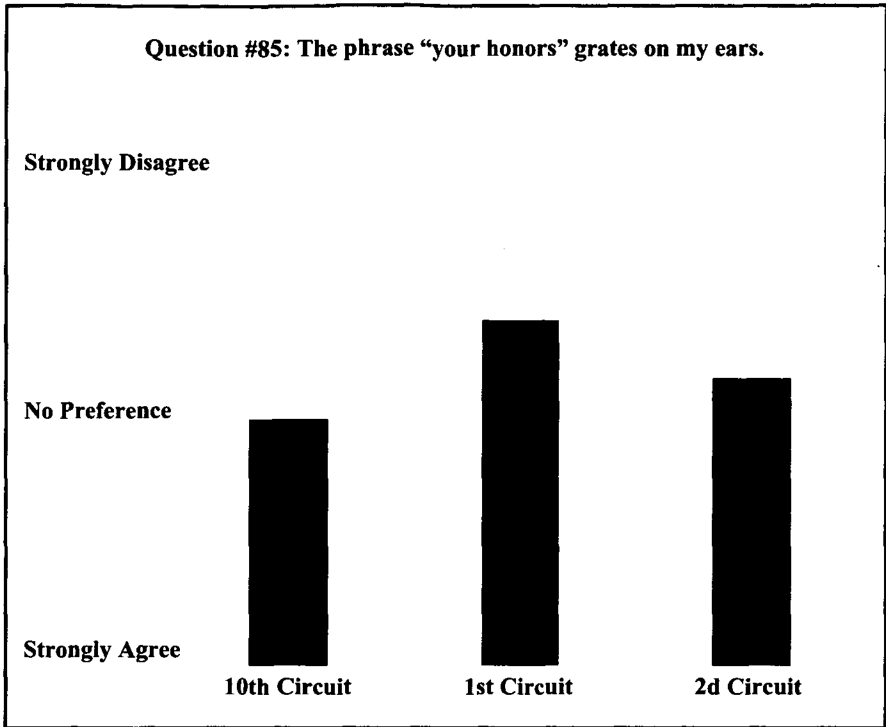
No Preference

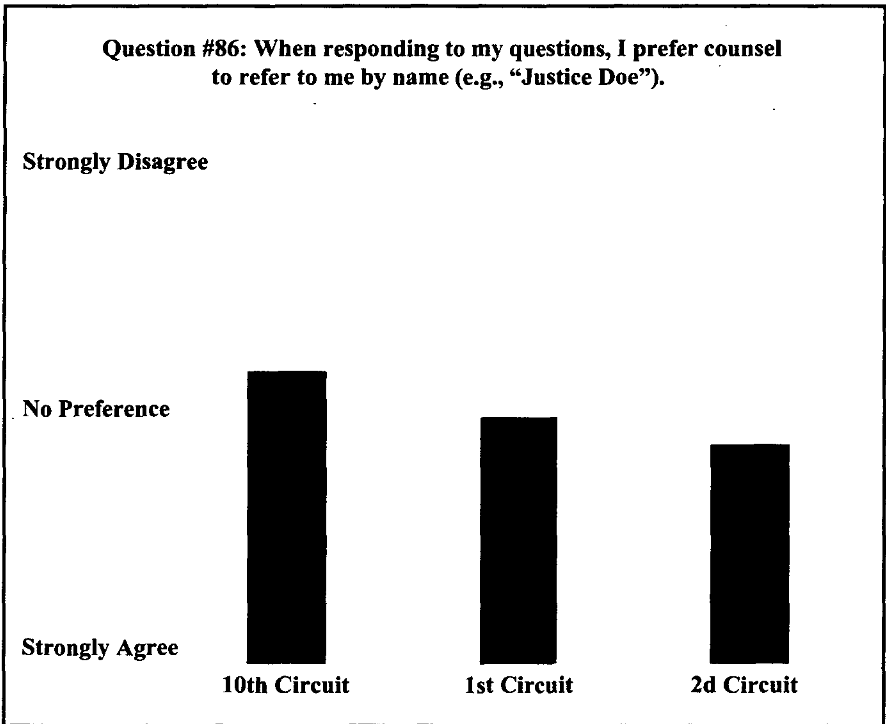
Strongly Agree




Question #83: An informal opening ("Good morning") is a good way to start when I'm on the panel.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit


Question #84: Directly launching into your argument is a good way to start when I'm on the panel.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit


Question #85: The phrase "your honors" grates on my ears.
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit


Question #86: When responding to my questions, I prefer counsel to refer to me by name (e.g., "Justice Doe").
Strongly Disagree
No Preference
Strongly Agree
10th Circuit
1st Circuit
2d Circuit

CONCLUSION

I conclude by expressing my thanks once again to all of the judges who took the time to respond to the survey. They are all extremely busy people who took a few minutes out of their day to read through and answer these questions. I hope their responses and these graphs, as well as the graphs presented in the *Journal of Appellate Practice and Process*,[13] will benefit both appellate lawyers and judges and result in briefs that are both more clear and better written, and advocacy that is conducted at a higher level overall.

13. *See supra*, notes 2–3.