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Employee Benefits Law—Shifting the Burden Out of Neutral: Why Burden-Shifting Is Necessary in ERISA Breach of Fiduciary Duty Claims

William G. McGrath

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ARTICLES

COMMENTS

SURVEY OF RECENT CASE LAW

A NEW STAGE IN THE STRUGGLE FOR VOTING RIGHTS

*Lynn Adelman**

When the American republic was founded, laws governing voting rights were quite varied, but the "lynchpin" of such laws "was the restriction of voting to adult men who owned property."[1] Now almost 250 years later, with the unfortunate exception of state laws disenfranchising felons, the United States has achieved universal suffrage.[2] As the great voting rights historian Alexander Keyssar explains, the expansion of suffrage was generated by such factors as the emergence of increasingly democratic ideas, the use of political parties, the growth of an industrial working class, the settlement of the frontier, the push for participation by the disenfranchised, and, significantly, the fact that the country fought a number of wars.[3] War made a big difference because it was difficult to require men to bear arms while denying them the right to vote.[4]

Professor Keyssar also advises that the history of suffrage in the United States was shaped by forces that "resisted a broader franchise, forces that at times succeeded in contracting the right to vote and often served to retard its expansion."[5] He further explains that the most significant of the forces opposing a broader franchise, "the single most important obstacle to universal suffrage in the United States from the late eighteenth century to the 1960s," was resistance by middle and upper classes.[6] The "growth of an industrial working class, coupled with the creation of a free black agricultural working class in the South," generated widespread apprehension about the harm that extending the franchise to members of these classes might bring about and a "potent[] and sometimes successful opposition to a broad-based franchise in much of the nation."[7]

Keyssar, who published his magisterial book about the contested history of voting rights in the United States in 2000, identifies four distinct periods in the history of the right to vote in this country, all shaped by class and

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* Lynn Adelman is a U.S. District Judge in the Eastern District of Wisconsin. He thanks Barbara Fritschel for her research assistance.

1. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN AMERICA 5–6 (Basic Books 2000).
2. *Id.* at xvi.
3. *Id.* at xxi.
4. *Id.*
5. *Id.*
6. *Id.*
7. *See* KEYSSAR, *supra* note 1, at xxii.

its link to immigration. "The first was a pre- and early industrial era during which the right to vote expanded: this period lasted from the signing of the Constitution until roughly 1850, when the transformation of the class structure wrought by the Industrial Revolution was well underway."[8] The second period, lasting from 1850 until roughly World War I, was characterized by a growing opposition on the part of the middle class and the affluent to universal suffrage and "a narrowing of voting rights."[9] The third period ran from World War I until the 1960s and, while it differed in the South and North, was generally characterized by minimal change in the formal scope of the franchise.[10] In the South, nearly all blacks and many poor whites remained disenfranchised as they had been since the advent of Jim Crow, in the last twenty years of the nineteenth century. "[I]n the North this period also was distinguished by state-sponsored efforts to mitigate the significance and power of an unavoidably growing electorate."[11] The fourth period, "inaugurated by the success of the civil rights movement in the South, witnessed the abolition of almost all remaining restrictions on the right to vote."[12] During each of these periods the breadth of suffrage was intensely contested; "at stake always was the integration (or lack of integration) of the working poor into the polity."[13]

As I see it, in the year 2000, roughly speaking, we entered into a new period in the history of voting rights in the United States, a period we are presently in the middle of and in which class is also playing a critical role. Once again, voting rights are the subject of intense disagreement, although this time the dispute is not so much whether people should have the right to vote (although that issue has not gone away) but how much power state legislatures and other state officials who establish the rules and practices governing voting should have to make it more difficult to vote.[14] This dispute has arisen because, even though for a long time Americans have voted at depressingly low rates for a modern democracy,[15] in the last twenty years a

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at xxii–xxiii.
12. *Id.* at xxiii.
13. KEYSSAR, *supra* note 1, at xxiii.
14. *See* Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 264 (2020).
15. *See* COMM'N ON THE PRACTICE OF DEMOCRATIC CITIZENSHIP, AM. ACAD. OF ARTS & SCIS., OUR COMMON PURPOSE: REINVENTING AMERICAN DEMOCRACY FOR THE 21ST CENTURY 13 (2020), https://www.amacad.org/sites/default/files/publication/downloads/2020-Democratic-Citizenship_Our-Common-Purpose_0.pdf.

whole range of what some scholars refer to as vote denial devices have become prominent features of the electoral landscape.[16]

With respect to the issue of low voter participation, even in a year where there is relatively high turnout, more than one-third of eligible voters may fail to cast a ballot.[17] In some years the percentage approaches two-thirds.[18] "Electoral turnout has declined significantly over the last century, and it is markedly lower in the United States than in most other nations."[19] And in a pattern that is "distinctively American, turnout correlates . . . with social class": those who are educated and have higher incomes are "far more likely to vote" than the poor, minorities, and the less educated.[20] The people who are "most likely to need government help" are the least likely to vote. Keyssar explains that it is no coincidence "that nonvoters come disproportionately from the same social groups that in earlier decades were targets of restrictions on the franchise."[21] This is so because "the political institutions and culture that evolved during the era of restricted suffrage spawned a political system that offers few attractive choices to the nation's least well-off citizens. The two major political parties operate within a narrow, ideological spectrum" and generally do not offer "proposals that might appeal to the poor and are commonplace in other nations."[22] Thus, "[a]lthough the formal right to vote is now nearly universal, few observers would characterize the United States as a vibrant democracy" where there is a rough equality of political rights.[23] Broader participation in voting would bring us closer to such a democracy. Thus, the question of whether public officials should be able to establish laws and practices that make it harder for people to vote is an important one.

The period of disputation in which we now find ourselves could be said to have begun when Al Gore contested the results of the Florida presidential vote, which showed a small margin in favor of George W. Bush. "[T]he Miami-Dade canvassing board voted to recount 10,750 ballots that had been rejected by its electronic machines, letting the 643,250 others stand, a deci-

16. *See* Hasen, *supra* note 14, at 284; Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 214 (2018); BRENNAN CTR. FOR JUSTICE, NEW VOTING RESTRICTIONS IN AMERICA 1 (2019) https://www.brennancenter.org/sites/default/files/2019-11/New%20Voting%20Restrictions.pdf; Joshua A. Douglas, Undue Deference to States in 2020 Election Litigation 2 (Nov. 2, 2020) (unpublished draft), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720065.

17. *See* Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1366 (2015).

18. *See id.*

19. KEYSSAR, *supra* note 1, at 320.

20. *Id.*

21. *Id.*

22. *Id.* at 320–21.

23. *Id.* at 320.

sion that, at the time, seemed as though it could tip the vote to Gore."[24] With a "protest growing inside and around the building," the board moved the counting to a room on the nineteenth floor "away from the crowd."[25] The decision to conduct a recount led to a protest, which involved a group of upscale protesters "storm[ing] the counting room in a . . . wave of clenched fists, pleated khakis and button down shirt collars," "[b]anging on doors and walls, . . . chant[ing], 'Stop the fraud!'"[26] Reporters variously called this protest the Blue Blazer Riot, the Bourgeois Riot, and the Brooks Brothers Riot.[27] The protesters' claim of fraudulent counting did not appear to have any evidentiary basis.[28] The board, however, was "sufficiently intimidated" that it "suspended the count less than a quarter of the way through, when it had shown a net gain of nearly 160 votes for Gore."[29] The count never resumed.[30] "If the rest of the ballots had broken the same way, Gore would have gained more votes than Bush's final winning margin in Florida of 537."[31]

Not long after this incident, on December 11, 2000, the Supreme Court, by a five-four vote, ordered a halt to the counting of votes in Florida and awarded the presidency to George W. Bush.[32] The election in Florida exposed numerous problems in American voting procedures, including sloppily maintained voting rolls, the problem of eligible voters being improperly stricken from voting rolls, poorly trained election officials, poorly designed ballots, out-of-date voting machines, antiquated voting procedures, and the absence of national standards governing voting even in presidential elections.[33] Instead of focusing on these issues, however, activists and many state legislatures began to promote the notion that voter fraud was rampant in our electoral system.[34] Possibly, the success of the Brooks Brothers Riot suggested that a claim of election fraud, even one unsupported by facts, could help determine the result of a contested election.[35]

Those claiming fraud focused primarily on a form of retail fraud that they called voter impersonation fraud, in which a would-be voter shows up at the polls pretending to be someone else. Most scholars believe that this

24. Jim Rutenberg, *The Attack on Voting: How the False Claim of Voter Fraud Is Being Used to Disenfranchise Americans*, N.Y. TIMES MAG., Oct. 4, 2020, at 29, 31.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. Rutenberg, *supra* note 24, at 31.
31. *Id.*
32. *See* Bush v. Gore, 531 U.S. 98 (2000).
33. *See* MICHAEL WALDMAN, THE FIGHT TO VOTE 176–79 (2016).
34. *See id.* at 183.
35. Rutenberg, *supra* note 24, at 31.

type of fraud is virtually non-existent, and that few people in their right mind would attempt to commit it.[36] This is so because the fraudster would risk going to prison while the candidate on whose behalf the fraud was committed would gain one meager vote.[37] As legal scholar Samuel Issacharoff put it, trying to change the outcome of an election through voter impersonation "is much like trying to change the salinity of the sea by adding a box of salt."[38] Nevertheless, the claims of fraud served a purpose. They provided a justification for new laws requiring voters to bring to the polls various forms of identification to prove that they were who they said they were.[39] And such laws made it more difficult for people who lacked or could not easily obtain the required documents to vote. And these were people on society's lower economic rung.[40]

Political observers had long been aware that reducing voter turnout among low-income people likely has a partisan political impact. Issacharoff studied the correlation between voter turnout and partisan success and concluded that "Democrats seem to do better when voter turnout is higher, and worse when turnout is lower."[41] Seventh Circuit Judge Terence T. Evans made the same point in a dissent in one of the first cases involving voter ID laws, stating, "Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."[42] And conservative activist Paul Weyrich mocked what he called the "goo goo" syndrome—referring to good government. "They want *everybody* to vote. I don't want everybody to vote. . . . As a matter of fact, our leverage in the elections quite candidly goes up as the voting populace goes down."[43] Relatedly, many political observers believed that voter ID laws would reduce voter turnout.[44] On this point, long-time Texas political operative Royal Masset said that "requiring photo

36. *See* Issacharoff, *supra* note 17, at 1377; WALDMAN, *supra* note 33, at 183.
37. WALDMAN, *supra* note 33, at 183.
38. Issacharoff, *supra* note 17, at 1377.
39. *See generally id.* at 1378.
40. *See id.* at 1380.
41. Issacharoff, *supra* note 17, at 1366.
42. Crawford v. Marion Cty. Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting).
43. WALDMAN, *supra* note 33, at 185.
44. *See* Manheim & Porter, *supra* note 16, at 231; Jeff Stone, *Photo Voter ID Laws Reduced Turnout by 4.4 Percent Nationally, Report Finds*, INT'L BUS. TIMES (Nov. 7, 2014, 6:48 PM), https://www.ibtimes.com/photo-voter-id-laws-reduced-turnout-44-percent-nationally-report-finds-1721071. *But see* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-634, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 36–38 (2014), https://www.gao.gov/products/GAO-14-634 (summarizing mixed results of studies as to actual effect of voter ID laws on turnout).

IDs could cause enough of a drop-off in legitimate Democratic voting to add 3 percent to the Republican vote."[45]

The connection between claims of voter fraud and efforts to limit participation in voting is not new. Another leading historian of voting in the United States, Michael Waldman, explains that there has long been a link between the specter of voter fraud and opposition to broadening the franchise.[46] In the founding era, middle- and upper-class people worried that the poor would sell their votes, and in the Gilded Age Protestants expressed fears about immigrant voters.[47] Moreover, at times and places in American history, voter fraud has been a real problem, causing people to be genuinely and rightfully offended by the state of political practices and to believe that fraud was epidemic, particularly in the cities.[48] Yet as Professor Keyssar advises, the belief that

> fraud was epidemic, particularly in the cities . . . was itself linked to and shaped by class and ethnic tensions. Respectable middle-class and upper-class citizens found it easy to believe that fraud was rampant among the Irish or . . . immigrant workers precisely because they viewed such men as untrustworthy, ignorant, incapable of appropriate democratic behavior, and . . . threatening. Stories about corruption and illegal voting seemed credible—and could be magnified into apprehensive visions of systematic dishonesty—because inhabitants of the slums (like blacks in the South) appeared unworthy or uncivilized and because much-despised machine politicians were somehow winning elections.[49]

And like claims of voter fraud, opposition to a broad-based franchise has not disappeared. Despite the triumph of universal suffrage in the last third of the twentieth century (excepting, of course, felon disenfranchisement), remnants of that opposition remain. In the 1950s, the influential conservative intellectual Russell Kirk wrote a book on a relatively obscure eighteenth-century thinker, John Randolph of Virginia, who notably declared, "I am an aristocrat. I hate equality. I love liberty."[50] Kirk lauded Randolph for tying suffrage to property ownership and for his opposition to "one man, one vote."[51] And following the enactment of civil rights legislation in the 1960s, the concerns of states' rights activists seemed to merge "with the idea that, somehow, the wrong people were being allowed to vote, that a bloated, profligate welfare state was being kept aloft by millions of

45. WALDMAN, *supra* note 33, at 190.
46. *See id.* at 183–85.
47. *Id.* at 184.
48. *Id.* at 74–76.
49. KEYSSAR, *supra* note 1, at 161.
50. WALDMAN, *supra* note 33, at 184.
51. *Id.*

new voters."[52] Further, in 1977 when Jimmy Carter lamented that "voter participation in the United States ranked twenty-first among democracies [and] proposed a nationwide system that would allow people to register on Election Day," anti-voting activists objected and the proposal never came up for a vote.[53]

More recently, a number of writers and officials have expressed similar views. Columnist Matthew Vadum wrote that "registering the poor to vote . . . is like handing out burglary tools to criminals,"[54] and the president of the Tea Party Nation stated that imposing a property requirement on voting made "a lot of sense" because "property owners have a little bit more of a vested interest in the community than non-property owners."[55] Florida Congressman Ted Yoho told supporters, "I've had some radical ideas about voting and it's probably not a good time to tell them, but you used to have to be a property owner to vote."[56] In the 2018 election cycle, Mississippi Senator Cindy Hyde-Smith expressed the opinion that "there's a lot of liberal folks . . . who maybe we don't want to vote. Maybe we want to make it just a little more difficult."[57] And the Secretary of State of Georgia expressed concern about the negative effects of registering more minority voters.[58]

More prominent political figures have also assailed the right to vote in various contexts. Both Utah Senator Mike Lee, "considered one of the Senate's brightest constitutional thinkers," and former Texas governor Rick Perry have suggested that it was a mistake to adopt the Seventeenth Amendment, which enabled citizens to vote for United States senators rather than having state legislatures choose them.[59] And Lee recently tweeted another edgy political belief, namely that "[w]e're not a democracy."[60] Voting rights expert Rick Hasen explained that "Lee is articulating a view that has long been in vogue on the American right . . . . The premise is that liberty is a higher value than democracy, and . . . liberty . . . mean[s] a right to property that precludes redistribution. That is to say, the far right does not merely view progressive taxation, regulation and the welfare state as impediments

52. *Id.*
53. *Id.* at 184–85.
54. *Id.* at 196 (alteration in original).
55. *Id.* at 197. Waldman refers to Ted Yoho as a "Minnesota Republican," but Yoho actually represented Florida. *Representative Ted S. Yoho*, CONGRESS.GOV, https://www.congress.gov/member/ted-yoho/Y000065?s=3&r=2152&searchResultViewType=expanded (last visited Mar. 28, 2021).
56. WALDMAN, *supra* note 33, at 197.
57. Manheim & Porter, *supra* note 16, at 243–44 n.156.
58. *Id.* at 244.
59. WALDMAN, *supra* note 33, at 197.
60. *See* Rick Hasen, *Senator Mike Lee Hates Democracy*, ELECTION LAW BLOG (Oct. 8, 2020, 8:20 AM), https://electionlawblog.org/?p=116465.

to growth, but as fundamentally oppressive."[61] Thus, concern about the unruly passions of the masses has not gone away.

While it may be politically difficult for elected officials to advocate restricting suffrage, it is less difficult to invoke the specter of voter fraud to justify passing laws that make it harder to vote. As discussed, claims of voter fraud have a certain resonance and play into the fears and suspicions of the poor and minorities as such claims once did about Irish and Eastern European immigrants.[62] Thus, in the years after *Bush v. Gore*, activists commenced an intense public relations campaign espousing the view that voter fraud was a serious problem. For example, after a Missouri court allowed polling places to stay open two hours longer in a hotly contested election, Senator Kit Bond "charg[ed] that the election had been stolen by 'a major criminal enterprise to defraud voters.'"[63] Hans von Spakofsky, a fellow at the Heritage Foundation and a leading promoter of the idea that voter fraud was widespread, wrote dozens of articles warning of fraudulent ballots and created what he called an Election Fraud Database containing some 1,298 entries that he described as "proven instances of voter fraud."[64] A joint investigation by USA Today, Columbia journalism investigations, and the PBS series "Frontline," however, found that "[f]ar from being proof of organized, large-scale vote-by-mail fraud, the Heritage database presents misleading and incomplete information that overstates the number of alleged fraud instances and includes cases where no crime was committed . . . [and that] a deeper look at the cases in the list shows that the vast majority put just a few votes at stake."[65] Other high-profile promoters of the voter fraud narrative included Fox News, which set up a "Voter Fraud Watch,"[66] and political consultant and pundit Dick Morris, who, after observing poor people voting in Ohio, warned that "[p]hoto IDs are necessary to combat this rampant voter fraud."[67]

As stated, however, most scholars conclude that most of the claims of fraud lack an evidentiary basis. Law professors Lisa Marshall Manheim and Elizabeth Porter characterize the threat of widespread voter fraud as a "fantasy."[68] Rutgers University political scientist Lorraine Minnite put it this way: "It's the same thing over and over and over—say it, say it, say it—and

61. *Id.*

62. *See* Keyssar, *supra* note 1, at 161.

63. WALDMAN, s*upra* note 33, at 186.

64. Catharina Felke et al., *Database of Fraud Overstates Threat*, MILWAUKEE J. SENTINEL, Oct. 24, 2020, at 1A.

65. *Id.*

66. Michael Waldman, *What's Behind the Voter Fraud Witch Hunt?*, BRENNAN CTR. FOR JUSTICE *(*Mar. 30, 2016), https://www.brennancenter.org/our-work/analysis-opinion/whats-behind-voter-fraud-witch-hunt.

67. *Id.*

68. Manheim & Porter, *supra* note 16, at 233.

push it out there. . . . It functions just like propaganda."[69] Legal scholar Justin Levitt explains that while allegations of voter fraud make for enticing headlines, on closer examination they usually generate a lot of "smoke" and little "fire."[70]

In almost all cases, the allegations simply do not pan out. A study conducted in Wisconsin provides an example. The *Milwaukee Journal Sentinel* conducted a study of voter fraud claims in the state and concluded that "[i]llegal voting is exceptionally rare."[71] The study found only a couple dozen cases of improper voting, comprising "a minute fraction of all ballots cast," over a three-year period.[72] Further, the improper voting that did occur was mostly due to error rather than fraud.[73] The inflated claims, however, are harmful in that they distract attention from the many real problems that need attention and because claims of voter fraud are used to justify policies that disenfranchise real voters. Journalist James Rutenberg comments that "[i]t is remarkable, but not at all accidental, that a narrative built from minor incidents, gross exaggeration and outright fabrication is now at the center of the [2020 presidential campaign]."[74] He sees this narrative as the result of "a decades-long disinformation campaign—sloppy, cynical and brazen, but often quite effective—carried out by a consistent cast of characters with a consistent story line."[75]

Public officials such as FBI Director Christopher Wray who have examined the question also debunk the fraud claim.[76] Wray testified before Congress that the FBI had "not historically seen 'any kind of coordinated national voter fraud effort in a major election.'"[77] And President Trump's Advisory Commission on Election Integrity was disbanded without having found evidence of significant fraud.[78] The non-partisan Brennan Center for

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69. Sam Levine & Spenser Mestel, '*Just Like Propaganda': The Three Men Enabling Trump's Fraud Lies*, GUARDIAN (Oct. 26, 2020, 9:00 PM), https://www.theguardian.com/us-news/2020/oct/26/us-election-voter-fraud-mail-in-ballots.

70. JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, THE TRUTH ABOUT VOTER FRAUD 3 (2007), https://www.brennancenter.org/our-work/research-reports/truth-about-voter-fraud.

71. Eric Litke, *Prosecutors Received 158 Voter Fraud Referrals Since 2016. Few Proved to Be Criminal.*, MILWAUKEE J. SENTINEL (Oct. 30, 2020, 3:03 PM), https://www.jsonline.com/story/news/politics/elections/2020/10/30/voter-fraud-wisconsin-prosecutors-find-few-criminal-cases/6087613002/.

72. *Id.*

73. *Id.*

74. Rutenberg, *supra* note 24, at 30.

75. *Id.*

76. Alison Durkee, *FBI Director Says No Evidence of 'National Voter Fraud Effort,' Undercutting Trump*, FORBES (Sept. 24, 2020, 2:23 PM), https://www.forbes.com/sites/alisondurkee/2020/09/24/fbi-director-says-no-evidence-of-national-voter-fraud-effort-undercutting-trump/?sh=5cc89d604974.

77. *Id.*

78. Rutenberg, *supra* note 24, at 34–35.

Justice analyzed the issue and found that incidence rates of voter fraud in past elections were negligible.[79] Seventh Circuit Judge Richard Posner, in a dissent regarding the constitutionality of a voter ID law, stated, "As there is no evidence that voter impersonation fraud is a problem, how can the fact that the legislature says it's a problem turn it into one? If the Wisconsin legislature says witches are a problem, shall Wisconsin courts be permitted to conduct witch trials?"[80] Finally, there is a stark disconnect between the rare cases of documented voter fraud (such as those associated with the theft of absentee ballots) and the practices that legislatures target through restrictive measures (primarily those associated with in-person voting and voter registration).[81] The 2018 midterm elections, for example, did see one ballot fraud effort.[82] It involved political operatives in North Carolina who conspired to request hundreds of ballots on behalf of unwitting voters and then intercept them and fill them out on behalf of the congressional candidate they were working for.[83] But the restrictive legislation that North Carolina enacted including a strict voter ID law was unrelated to this type of fraud. When proponents of the voter fraud narrative are forced to face the fact that there is vanishingly little evidence of fraud at the retail level, they sometimes fall back on the contention that it is important to address the *perception* of voter fraud because that perception undermines public confidence.[84] This assertion, however, is also unsupported. In fact, there is empirical evidence that voter fraud has no impact on voter participation.[85]

Notwithstanding the absence of voter fraud, the public relations campaign to the contrary, designed to create support for restrictive voting laws, has achieved considerable success. Since 2010, twenty-five states have put in place new voting restrictions—fifteen states enacted more restrictive voter ID laws "(including six states with strict photo ID requirements), [twelve] have laws making it harder for citizens to register . . . , ten made it more difficult to vote early or absentee, and three took action to make it harder to restore voting rights for people with past criminal convictions."[86] And the voter fraud narrative played a part in justifying another method of making voting more difficult, namely the way states manage the logistics of voter registration. Like many states, the State of Ohio, for example, presumes that registered voters have moved and accordingly purges their names from the

79. LEVITT, *supra* note 70, at 3.

80. Frank v. Walker, 773 F.3d 783, 795 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc).

81. *See* Manheim & Porter, *supra* note 16, at 233.

82. *See id.*

83. *Id.*

84. *Id.* at 235.

85. *Id.* at 235 n.122.

86. BRENNAN CTR. FOR JUSTICE, *supra* note 16, at 1.

voting rolls if they engage in no voting activity for six years and fail to return a postcard to the state confirming their address.[87] The effect of this practice is that a large number of eligible and registered voters are needlessly and routinely purged from the voting rolls. Further, these eligible voters are not informed that they are not registered until they show up at the polls and discover that they cannot vote. These purges tend disproportionately to affect low income and minority voters. A 2016 analysis found that Ohio removed at least 144,000 people from the voter rolls in Cleveland, Cincinnati, and Columbia.[88]

Voting rights advocates challenged Ohio's purge practice, and in *Husted v. A. Philip Randolph Institute*, the Supreme Court addressed the challenge.[89] A number of the briefs in support of Ohio argued that "corrupted voter rolls" caused voter fraud to flourish.[90] The Supreme Court approved Ohio's practice, stating that nationwide twenty-four million voter registrations are "invalid or significantly inaccurate" and that 2.75 million people "are said to be registered to vote in more than one State."[91] As Professors Manheim and Porter point out, "this statistic appeals to promoters of a voter-fraud narrative based on the assumption that these inaccuracies facilitate fraudulent voting. Yet the Court cites no evidence to support this inference."[92] The decision also encourages states to engage in purging. A recent Brennan Center study found that the number of states engaging in purging has increased, four have unlawfully purged names from voter rolls, and another four have implemented unlawful rules governing purging.[93] The study also found that states often use inaccurate information to purge voters and that "[a] new coterie of activist groups is pressing for aggressive purges."[94] Such a group, for example, unsuccessfully brought a lawsuit seeking to compel Wisconsin to purge 200,000 names from the voter rolls.[95]

Thus, it is indisputable that by enacting voter ID laws, aggressively purging eligible voters, and taking other actions, including making voter registration and absentee voting more complicated and limiting the number

87. Manheim & Porter, *supra* note 16, at 222.

88. Andy Sullivan & Grant Smith, *Use It or Lose It: Occasional Ohio Voters May Be Shut Out in November,* REUTERS (June 2, 2016, 6:05 AM), https://www.reuters.com/article/us-usa-votingrights-ohio-insight-idUSKCN0YO19D.

89. 138 S. Ct. 1833 (2018).

90. *See* Manheim & Porter, *supra* note 16, at 7–8.

91. *Husted*, 138 S. Ct. at 1838.

92. Manheim & Porter, *supra* note 16, at 237.

93. JONATHAN BRATER ET AL., BRENNAN CTR. FOR JUSTICE, PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf.

94. *Id.* at 2.

95. State *ex rel.* Zignego v. Wis. Elections Comm'n, __ N.W.2d __, 2021 WI 32 (Wis. 2021).

of drop off boxes where voters can deposit ballots, many states have made it harder to vote. As numerous studies have shown, these actions have impacted the poor and the disadvantaged more than others.[96] From a voting rights perspective, however, at least as problematic as the activity by states has been the response of the courts, particularly the Supreme Court and the federal appellate courts. The Supreme Court has considerable latitude in interpreting the Constitution relative to voting rights issues. This is so not only because it is the Supreme Court but also because the Constitution does not contain language affirmatively granting the right to vote.[97] When the Constitution was established, states controlled voting, and the Constitution did not change that.[98] Nor did the Fifteenth Amendment enacted by the Reconstruction Congress.[99] Rather, the Fifteenth Amendment prohibited states from denying the right to vote "on account of race, color, or previous condition of servitude."[100] Professor Keyssar explains that this less robust treatment of voting rights came about because opponents of an amendment affirmatively granting a right to vote wanted to retain the power to control voting rights based on ethnicity, class, sex, religion, property, and education.[101] And, of course, during the Jim Crow era, many states got around the Fifteenth Amendment by barring blacks from voting based on grounds other than race.[102] Not until the 1960s did the Constitution provide all citizens with the right to vote.[103] And this was not because of a change in the Constitution but rather because of the work of voting rights activists and the Warren Court.[104]

In a series of cases, including one that Chief Justice Warren regarded as the most important of his career,[105] the Warren Court developed a set of constitutionally derived rules governing elections.[106] Most importantly, the Court understood the Reconstruction Amendments to require, among other things, that state laws and practices impacting the franchise satisfy searching judicial scrutiny.[107] In a 1966 case, for example, the Court insisted that "any

96. *See* Issacharoff, *supra* note 17, at 1379–80; Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disenfranchisement of the Poor*, 114 NW. U. L.R. 633, 635–36 (2019).

97. Edward B. Foley, Opinion, *Think the Constitution Protects Your Right to Vote? That's Not Really True—But It Should.*, WASH. POST (Oct. 19, 2020, 4:10 PM), https://www.washingtonpost.com/opinions/2020/10/19/does-the-constitution-protect-your-right-to-vote/; KEYSSAR, *supra* note 1, at 4.

98. KEYSSAR, *supra* note 1, at 4–5.

99. Foley, *supra* note 97.

100. U.S. CONST. amend. XV.

101. KEYSSAR *supra* note 1, at 101–02.

102. *Id.* at 111–12.

103. Foley, *supra* note 97.

104. *Id.*

105. Baker v. Carr, 369 U.S. 186 (1962); WALDMAN, *supra* note 33, at 135.

106. WALDMAN, *supra* note 33, at 134–39.

107. *See* KEYSSAR, *supra* note 1, at 266–68.

alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[108] The Court based this principle on the equal protection clause of the Fourteenth Amendment and also alluded to other constitutional sources.[109] In the interest of promoting "the legitimacy of representative government," the Court sought to constitutionalize the democratic ideal of voting rights for all.[110] Moreover, since the Warren Court's decisions establishing a constitutional right to vote, federal courts have expanded on the principle to make clear that the greater the burden imposed by a state law on voting rights, the more justification the state must have for enacting the law.[111] Under this formula, the Court first invalidated poll taxes and property qualifications and then a number of other electoral regulations.[112] And the Warren Court's emphasis on the individual's right to exercise the franchise in a free and unimpaired manner remained the guiding principle of voting rights law for the next fifty years.

The current Court does not view the Constitution as protecting the right to vote as robustly as the Warren Court did, and it has employed a less demanding standard of review of state laws that impact voting rights, one that is more deferential to state legislatures and state officials.[113] Law professor Joshua Douglas explains that traditionally, if a voting restriction imposes a severe burden on voting rights, the Court applies strict scrutiny review. And if the restriction does not create a severe burden but still impacts the right to vote, courts apply intermediate-level scrutiny by identifying "the precise interests put forward by the state as justifications for the burden imposed by its rule" and determining "the extent to which those interests make it necessary to burden the plaintiff's rights."[114] Douglas argues that the Court has too readily deferred to states and, in so doing, derogated the constitutional right to vote. Without specifying new standards, Douglas points out, the Court has failed to require states to identify the "precise interests" served to justify a restrictive voting rule or to explain why "those interests make it necessary to burden" the right to vote.[115]

One of the early indicators of the Court's shift in approach came in 2006 in the case of *Purcell v. Gonzales*.[116] In *Purcell*, the Ninth Circuit had enjoined Arizona from enforcing a newly enacted voter-ID requirement pur-

108. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966).
109. *Id.* at 669.
110. *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969).
111. KEYSSAR, *supra* note 1, at 272.
112. *Id.* at 269–72.
113. Douglas, *supra* note 16, at 3.
114. *Id.*; Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celbrezze, 460 U.S. 780, 789 (1983)).
115. Douglas, *supra* note 16, at 1.
116. 549 U.S. 1 (2006).

portedly adopted to prevent fraud. The Supreme Court held that it was too close to the election to block the law because revising the rules might cause confusion.[117] And without citing evidence, the Court stated that "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."[118] Thus, it was clear that the hulabaloo about voter fraud had reached the nation's highest court. Reacting to this statement, Professor Keyssar said scornfully: "*Feel* disenfranchised? Is that the same as 'being disenfranchised?' So if I might 'feel' disenfranchised, I have a right to make it harder for you to vote?"[119]

Although it rests on the reasonable notion that courts should consider how their rulings might affect an upcoming election, *Purcell* has developed into a rigid rule that bars courts from intervening even in the face of late-breaking problems that threaten the right to vote. For example, in April 2020, the Court reversed a lower court decision[120] extending the absentee ballot receipt deadline for the Wisconsin primary by six days to enable election clerks to respond to the overwhelming number of requests for absentee ballots resulting from the pandemic and allow voters to return their ballots. In doing so, the Court put many Wisconsin citizens in the position of having to vote in person and incur a risk to their health or not vote.[121] Before *Purcell*, courts did not close the door to voters whose right to vote was burdened simply because an election was approaching. Rather, they applied the traditional equitable standards including the likelihood of success on the merits, the balance of hardships, and the public interest.[122]

Two years after *Purcell* in *Crawford v. Marion County Election Board*, the Court faced a direct constitutional challenge to a photo ID law, this one from Indiana.[123] The Court was very deferential to the state, characterizing the photo ID requirement as an inconvenience rather than a substantial burden and unskeptically accepting the claim that the law was justified by concern about voter fraud.[124] This was so despite the absence of evidence of in-person voter fraud or of any effort by Indiana to combat more prevalent forms of fraud, and despite evidence that legislators may have been motivated at least in part by a partisan interest in making it harder for people on the lower economic rung to vote.[125] The Court cited two examples of voter-

117. *Id.* at 4–6.
118. *Id.* at 4.
119. WALDMAN, *supra* note 33, at 193.
120. Democratic Nat'l Comm. v. Bostelmann, 451 F. Supp. 3d 952 (W.D. Wis. 2020).
121. Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020).
122. *See* Hasen, *supra* note 14, at 282.
123. Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008).
124. *Id.* at 195–96, 198.
125. *See* Manheim & Porter, *supra* note 16, at 228–29.

impersonation fraud, one of which occurred in 1868 when voters allegedly shaved off mustaches and beards in order to vote more than once and the other of which occurred in the State of Washington, but deemed these anecdotes sufficient to say that "the risk of voter fraud [is] real" and that "it could affect the outcome of a close election."[126] The Court also said that to trigger heightened scrutiny, voting rights plaintiffs had to produce evidence of the negative effect of voting restrictions.[127] However, it is very difficult to prove with any degree of precision the extent to which a restriction burdens voters, and the Court did not explain how the burden should be measured. Nor did the Court address the burden of the law on narrower groups of voters such as the poor. Ultimately, as Michael Waldman explains, the Court treated the law not as a serious restriction on voting rights but as a "bland" technical provision "designed to uphold 'the integrity and reliability of the electoral process.'"[128] The phrase "electoral integrity," also quite bland, came to be commonly used in judicial opinions involving voting restrictions.[129]

Because of the large volume of voting rights cases filed in 2020, the Court's deferential approach has already had a substantial impact. Litigation in 2016 more than doubled the pre-2000 rate and has only continued to grow.[130] Over four hundred cases in forty-four states were filed before the 2020 election.[131] Lawsuits involving voting are now part of the normal voting wars between hyperpolarized political parties. The judiciary itself is also divided. In at least eighteen recent cases, district courts ruled in favor of voting rights plaintiffs on constitutional grounds, often because of difficulties resulting from the pandemic, only to see their decisions reversed.[132] The appellate courts have consistently permitted states to make voting more difficult, often justifying their decisions on the basis of concerns about voter fraud.[133] For example, in reversing a district court decision rejecting the Governor of Texas' directive to allow only one ballot drop off location per county regardless of the size of the county, the Fifth Circuit cited Texas's stated goal of preventing fraud.[134] Another Fifth Circuit case reversed a district court decision requiring Texas to allow voters to cure alleged signature

126. *Crawford*, 553 U.S. at 195 nn.11–12, 196; WALDMAN, *supra* note 33, at 194.
127. *See id*. at 200–03.
128. WALDMAN, *supra* note 33, at 194–95.
129. *Id.* at 195.
130. Richard L. Hasen, Op-Ed, *Don't Let Our Democracy Crash*, N.Y. TIMES (July 15, 2017), https://www.nytimes.com/2017/07/15/opinion/sunday/dont-let-our-democracy-collapse.html?partner=rss&emc=rss.
131. Douglas, *supra* note 16, at 22.
132. *Id.* at 5.
133. *Id.* at 6–10.
134. Tex. League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 146–47 (5th Cir. 2020).

mismatches on absentee ballots, again citing the possibility of voter fraud and the need to preserve electoral integrity.[135] The court also cited *Crawford* for the proposition that a state could restrict voting based on fraud without presenting evidence of fraud.[136]

The jurisprudence of other circuits is to the same effect. The Sixth Circuit, for example, reversed a district court decision staying a ban imposed by Michigan on paying people for providing transportation to the polls.[137] The appellate court credited the state's interest in preventing fraud resulting from "vote hauling,"[138] while the dissenting judge noted that the plaintiffs merely wanted to help people get to the polls and that companies like Uber were willing to provide discounted rides as they had in other states.[139] Another Sixth Circuit decision upheld on standing grounds a district court decision denying a preliminary injunction against a Tennessee statute establishing procedures for verifying signatures on absentee ballots.[140] In dissent, Judge Moore characterized the decision as "another chapter in the concentrated effort to restrict the vote," enabling Tennessee to "disenfranchise hundreds, if not thousands of its citizens . . . . [R]uling by ruling, many courts are chipping away at votes that ought to be counted."[141]

Professor Douglas indicates that the results of these and other circuit court decisions are not necessarily mistaken but rather that the courts did not require the states to demonstrate the "precise interests" that justified burdening the right to vote.[142] A dissent by Judge Jane Kelly in a case from the Eighth Circuit illustrates Douglas's point. The Eighth Circuit stayed a district court decision that had invalidated a newly enacted Missouri rule that mail-in voters—those at risk for Covid-19 but without another excuse not to vote in person—could return their ballots only by mail and had to have them in by 7:00 p.m. on election day, even though absentee voters with a valid excuse other than the pandemic could return their ballots in person.[143] The court called the rule "a reasonable . . . exercise of the State's authority,"[144] whereas Judge Kelly pointed out that although the state asserted an "interest in preserving the integrity of its election process," such an interest "cannot merely be asserted in the abstract."[145] Judge Kelly went on to explain that "the state interest must be linked in some meaningful way to the particular

135. Richardson v. Hughs, 978 F.3d 220, 224 (5th Cir. 2020).
136. *Id.* at 240.
137. Priorities USA v. Nessel, 978 F.3d 976, 978–79 (6th Cir. 2020).
138. *Id.* at 983.
139. *Id.* at 990 (Cole, C.J., dissenting).
140. Memphis A. Philip Randolph Inst. v. Hargett, 978 F.3d 378, 382 (6th Cir. 2020).
141. *Id.* at 392, 417 (Moore, J., dissenting).
142. Douglas, *supra* note 16, at 16.
143. Org. for Black Struggle, Inc. v. Ashcroft, 978 F.3d 603 (8th Cir. 2020).
144. *Id.* at 608.
145. *Id.* at 611 (Kelly, J., dissenting).

rule or regulation that allegedly imposes a burden on a citizen's right to vote."[146]

Thus, twenty years after the end of a period in American history in which voting rights activists, elected officials who enacted ground-breaking laws like the Voting Rights Act, and courts struck down long-standing barriers to African-American voting rights and brought about something close to universal suffrage, the right to cast a ballot easily is once again intensely contested. As discussed, many states have made voting more difficult, and courts are less vigilant about protecting voting rights than they once were. Further, some elected officials and commentators feel free to propound large amounts of disinformation about the prevalence of voter fraud.[147] Thus, the relatively high turnout in the 2020 election should not cause us to gloss over the fact that, in addition to being underfunded, overly complicated, and flawed in many respects, our present electoral system makes it hard for a considerable number of eligible voters to participate.

In a talk celebrating the great Alabama-based federal judge Frank Johnson, Jr., who dealt with major voting rights cases in the 1960s, Professor Kathryn Abrams compared the means of suppressing votes then with the so-called second generation of vote denial devices used today.[148] She pointed out that both techniques of suppression are tools of a strategy designed to "achieve electoral advantage," and both use facially neutral laws to prevent the enfranchisement of disadvantaged groups so as to "perpetuate a more privileged and homogeneous electorate."[149] The voter suppression tactics of the 1960s, however, were more blatant, making it easier to infer a racially discriminatory motive, and the suppressive effects were more extensive, possibly having a 90% rather than a 5% effect.[150] These differences may partly account for the fact that courts have been less receptive to recent challenges.[151]

What then, if anything, can be done to address these new barriers to voting rights, the disenfranchisement of those unable to overcome them and the reluctance of courts to vindicate voting rights? Although many voting rights advocates and scholars have offered ideas, it is fair to say that as a result of the hyper-polarized state of American politics, few people believe that change is imminent. Rather, the present period of struggle seems likely to be with us for a while. Nevertheless, many of the ideas offered are inter-

146. *Id.* at 612.

147. *See* WALDMAN, *supra* note 33, at 189–90; Levine & Mestel, *supra* note 69.

148. Kathryn Abrams, *Bridging Past and Future: Judge Frank Johnson and Minority Vote Suppression*, 71 ALA. L.R. 819, 823–24 (2020).

149. *Id.* at 823.

150. *See id.* at 819–20.

151. *Id.* at 824.

esting and important, and I will conclude by briefly discussing several of them.

Professor Abrams offers Judge Johnson's approach to voting rights cases as a model for judges, particularly emphasizing several features of his jurisprudence, the most important being that he viewed the right to vote as fundamental.[152] If the right to vote is regarded as fundamental, any restriction that arguably affects it will be viewed skeptically, and the state will not receive the benefit of the doubt. Further, a voting rights plaintiff will rarely, if ever, be required to present hard evidence about the number of voters harmed or deterred by the restriction. Finally, in a voting rights case, it is essential that a judge develop a detailed factual record including whatever evidence the state possesses that purportedly justifies the measure. Put differently, the court must be extraordinarily sensitive to pretext. The cases stemming from the 2020 election indicate that many judges, particularly district judges, share Judge Johnson's approach but also that many do not.[153]

Professors Manheim and Porter propose an innovative legal theory as a means of directly confronting voter suppression efforts by states, pointing out that the approaches relied on so far have failed for various reasons, such as courts' embrace of baseless voter fraud claims and the difficulty of proving the extent of the burden created by a restriction.[154] They argue that intentional voter suppression by states, without more, violates the Constitution.[155] This is so regardless of the racial impact of the restriction, how much it burdens voters, or whether it serves partisan goals. The assumption underlying their theory is pretty basic: if voting is a constitutional right, a state cannot intentionally undermine it.[156] Manheim and Porter urge attorneys for voting rights plaintiffs to develop this theory.[157] They acknowledge the obstacles to proving the claim, not the least of which is establishing the element of intent. Thus, they suggest a burden-shifting framework which, upon a sufficient showing by the plaintiff, would require the state to demonstrate a legitimate justification for the law.[158] This would address the problem of excessive deference. As they put it, deference to states is a "menace" if states are not acting in good faith.[159] They also argue that adopting this framework would have other positive effects, such as discouraging states from enacting

152. *Id.* at 820.
153. *See* Douglas, *supra* note 16, at 4.
154. Manheim & Porter, *supra* note 16, at 218.
155. *Id.* at 238.
156. *Id.* at 239–40.
157. *See id.* at 250.
158. *Id.* at 247–48.
159. *Id.* at 246.

laws designed to discourage voting and politicians from attempting to reopen the issue of universal suffrage.[160]

Other observers, who are concerned about a variety of deficiencies in the administration of elections, advocate a legislative response.[161] They argue that both Congress and state legislatures should enact laws that would make voting less difficult and thus increase voter turnout.[162] Take, for example, voter registration. Presently some states register voters automatically and mail them ballots,[163] whereas others require registration weeks before an election and, unless voters have a valid excuse for voting absentee, require them to show up at the polls in person.[164] At the polls they may face long lines, poorly trained poll workers, unreliable equipment, and, last year, the coronavirus. In some states,[165] if a voter hasn't registered by election day, he or she is barred from voting.[166] A related issue is that of universal mail-in voting. Currently only nine states and the District of Columbia send ballots to all registered voters.[167] Of the remaining states, thirty-five allow absentee voting upon request, while six require voters to vote in person unless they have an excuse beyond the pandemic.[168] A third issue is that the electoral system is fragmented and usually administered by elected officials who are sometimes influenced by partisan considerations.[169] Thus, some scholars argue that pursuant to its authority under the Constitution's Election Clause,

160. Manheim & Porter, *supra* note 16, at 243.

161. *See, e.g.*, Douglas, *supra* note 16, at 15; AM. ACAD. OF ARTS & SCIS., *supra* note 15, at 32–39.

162. AM. ACAD. OF ARTS & SCIS., *supra* note 15, at 32–39.

163. *Automatic Voter Registration*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx (last updated Feb. 8, 2021); *VOPP: Table 18: States with All-Mail Elections*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 21, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-18-states-with-all-mail-elections.aspx.

164. *Voter Registration Deadlines*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 2, 2020), https://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx; *VOPP: Table 2: Excuses to Vote Absentee*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 20, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-2-excuses-to-vote-absentee.aspx.

165. Charlotte Hill & Lee Drutman, Opinion, *America Votes by 50 Sets of Rules. We Need a Federal Elections Agency*, N.Y. TIMES (Nov. 5, 2020), https://www.nytimes.com/2020/11/05/opinion/election-federal-agency-voting.html.

166. *Cf. Voter Registration Deadlines*, *supra* note 164.

167. Austin Williams, *Voting by Mail: 9 States Send Ballots Automatically, 35 Allow COVID-19 as an Excuse, 6 Require Other Reason*, FOX5 N.Y. (Aug. 31, 2020), https://www.fox5ny.com/news/voting-by-mail-9-states-send-ballots-automatically-35-allow-covid-19-as-an-excuse-6-require-other-reason; Ian Ayers & Pranjal Drall, *The Unpersuasive Empiricism Regarding Universal Mail-In Voting Fraud*, BALKINIZATION (Oct. 7, 2020), https://balkin.blogspot.com/2020/10/the-unpersuasive-empiricism-regarding.html.

168. Williams, *supra* note 167.

169. Hill & Drutman, *supra* note 165.

Congress should create a federal election agency, modeled on those in other democracies such as Canada, that could impose uniform national rules, at least for federal elections.[170] They contend that such an agency could effectively address some of the practices that plague our present system, including disproportionate purges of minority voters, the invalidation of minorities' ballots at higher rates because of technicalities, and the distribution of false or misleading information.[171] As columnist Farhad Manjoo puts it, we should not go on as we have, "[f]rom the endless lines to the pre-election legal wrangling," to the situation we endured this year where "every ballot cast . . . was a leap of faith: Would it get there in time? . . . Would they try to toss it out because you voted from a car" or "signed your name carelessly" or because they changed the mail-in deadline?[172] "Would you ever be able to find the one dropbox in your sprawling county?" And after all that, would people trust the outcome?[173]

Some election law scholars believe that legislation would not be sufficient to protect voting rights, that adding an amendment to the Constitution is ultimately the only way to protect democracy as we have come to expect.[174] Professor Edward Foley, for example, explains that the Warren Court relied on the equal protection clause to protect voting rights because it was the best constitutional basis available.[175] He fears, however, that a Court with a different philosophy could disagree.[176] This is so because "the equal protection clause was not originally intended to protect voting rights."[177] We know this because of other language in the Fourteenth Amendment and because otherwise the Fifteenth and Nineteenth Amendments would have been unnecessary.[178] Although Professor Douglas believes that federal legislation easing the burden on voters, adopting best practices for the administration of elections, and requiring states to adopt pro-voter rules would be a good short term fix, he is also skeptical that a statute would be enough, given the possibility that the Court could continue to uphold restrictive state voting rules and/or strike down federal legislation.[179] Professor Hasen also makes a strong case for a constitutional amendment, arguing that reliance on the

170. *See id.*
171. *Id.*
172. Farhad Manjoo, Opinion, *2020 Should Be the Last Time We Vote Like This*, N.Y. TIMES (Nov. 4, 2020), https://www.nytimes.com/2020/11/04/opinion/election-day-voting.html.
173. *Id.*
174. *See* Hasen, *supra* note 14, at 265; AM. ACAD. OF ARTS & SCIS., *supra* note 15, at 28; Douglas, *supra* note 16, at 20–22.
175. Foley, *supra* note 97.
176. *See id.* (postulating that current Court holds a different philosophy).
177. *Id.*
178. *Id.*
179. Douglas, *supra* note 16, at 20.

courts is not a sustainable long-term strategy, both because of the Supreme Court's new approach and because courts are institutionally incapable of solving the problems created by fragmented and partisan control of the electoral process.[180] Hasen argues that it is critical that such an amendment be "specific" and contain more than "aspirational language" as is the case with some state constitutional provisions, and that it must accomplish three things: (1) protect the right of all citizens to vote and provide that when a state restriction is challenged, the state must establish that it is nondiscriminatory and necessary to serve an important state interest, (2) create an independent nonpartisan agency to run federal elections, and (3) "provide that states must meet certain . . . standards guaranteeing the right to vote."[181]

Other observers have begun to discuss an idea that voting rights advocates, political scientists and legal scholars in the United States have historically paid little attention to, that of compulsory voting.[182] The lack of attention to this issue is likely the result of a deep-seated pessimism that such an idea could ever be seriously considered in a country like the United States, which prides itself on being individualistic and often seems to define individualism as opposing anything that government says is beneficial. Nevertheless, there are a number of powerful arguments in support of compulsory voting. Voting is arguably the core duty of citizenship and should be recognized as such. It is every bit as important as jury service, which is a requirement in all states. In addition, compulsory voting strengthens democratic values. It also substantially increases voter turnout.[183] Significantly, in 2018 the American Academy of Arts and Sciences created a commission to consider ways to revitalize democracy. This project resulted in a document entitled "Our Common Purpose," a set of thirteen proposals, one of which was a universal voting mandate.[184] Many other countries employ some system of mandatory voting.[185] Australia has had it since 1924.[186] In Australia, citizens are required to submit ballots, and all ballots include the option of voting for none of the above.[187] Votes remain secret, exemptions are available and penalties are modest, particularly for the first offense.[188] Voter turnout is over ninety percent.[189] Supporters of compulsory voting understand

180. Hasen, *supra* note 14, at 282.
181. *Id.* at 283.
182. Win McCormack, *Yes, You Have a Duty to Vote*, NEW REPUBLIC (Oct. 22, 2020), https://newrepublic.com/article/159690/yes-duty-vote-2020.
183. *Id.*
184. AM. ACAD. OF ARTS & SCIS., *supra* note 15, at 7.
185. John Misachi, *Countries with Mandatory Voting*, WORLD ATLAS (May 28, 2018), https://www.worldatlas.com/articles/countries-with-mandatory-voting.html.
186. AM. ACAD. OF ARTS & SCIS., *supra* note 15, at 38.
187. *Id.*
188. *See id.*
189. *Id.*

that it would have only a modest impact on many problems in the United States but believe that on balance it would be a great gain in that it would strengthen citizens' allegiance to democracy and dramatically increase voter turnout.[190]

In conclusion, it is important to note that other factors besides voting laws and practices and judicial philosophies affect the quality of a democracy. In this respect, it is worth mentioning a country that has achieved exceptionally high voter turnout without universal mandatory voting, Denmark.[191] Political scientists explain that this "results from an 'early and rapid socialization of new generations to vote in national elections,' . . . a high level of trust in government, relative economic equality, and a widely held and deeply ingrained norm that voting is a civic duty."[192] These characteristics may not be easily emulated, but as individuals and groups in the United States continue to press for greater democratization and equality, they surely should be kept in mind.

190. *See id.*
191. McCormack, *supra* note 182.
192. *Id.*

CONTRACT LAW—CONSPICUOUS ARBITRATION AGREEMENTS IN ONLINE CONTRACTS: CONTRADICTIONS AND CHALLENGES IN THE UBER CASES

I. INTRODUCTION

Rachel Cullinane and Spencer Meyer were ordinary consumers who downloaded and used the popular ride-sharing application ("app") Uber on their smartphones.[1] When they did so, they agreed (or, at least, Uber believed that they had agreed) to be bound by a set of terms and conditions.[2] Like many online customers, Cullinane and Meyer had clicked away their right to have their grievances heard by a court of law; instead, they agreed—perhaps without even knowing it—to a binding arbitration agreement.[3] Yet, despite the potential to be denied one's day in court, as experienced by Cullinane and Meyer, most people will never read the terms to which they agree.

Courts, both state and federal, have wrestled with what "mutual assent" means in a world where contracts are not negotiated, and the parties never see each other.[4] The case law surrounding such agreements is muddled and often contradictory. Just ask Uber: in 2018, the United States Court of Appeals for the Second Circuit held that the arbitration provisions in its Terms and Conditions were binding on Meyer.[5] The next year, the First Circuit held that notice of assent to Uber's terms and conditions was insufficiently "conspicuous" to make the terms enforceable against Cullinane.[6] These conflicting decisions are far from ideal for Uber and other companies that are left to guess when the terms of their contracts will be enforced, but the situation is arguably even worse for consumers. The current standards that courts apply have little relation to the reality of online contracting in the modern era.[7]

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1. Cullinane v. Uber Techs, Inc., 893 F.3d 53, 55 (1st Cir. 2018); Meyer v. Uber Techs, Inc., 868 F.3d 66, 70 (2d Cir. 2017).

2. *Cullinane*, 893 F.3d at 57–58; *Meyer*, 868 F.3d at 71.

3. *Cullinane*, 893 F.3d at 59; *Meyer*, 868 F.3d at 71–72.

4. *See* 15 ARTHUR L. CORBIN & TIMOTHY MURRAY, CORBIN ON CONTRACTS § 83.5 (Matthew Bender & Co. rev. ed. 2019).

5. *Meyer*, 868 F.3d at 79–80.

6. *Cullinane*, 893 F.3d at 63–64.

7. *See generally* Cheryl B. Preston, "*Please Note: You Have Waived Everything": Can Notice Redeem Online Contracting?*, 64 AM. U. L. REV. 535 (2014) (arguing that the law of online contracts assumes behavior by consumers that is not only impracticable, but also counter-intuitive).

This note discusses the law surrounding the enforceability of mandatory arbitration provisions in online contracts and argues for the adoption of clear, policy-based rules that will either protect the expectations of businesses or the rights of vulnerable consumers. Part II of this note gives a brief history of American arbitration law.[8] Part III surveys the current state of the law of online contracting.[9] Part IV discusses *Cullinane v. Uber Techs, Inc.* and *Meyer v. Uber Techs, Inc.* (hereinafter "The Uber Cases"), wherein different courts came to different conclusions about essentially the same contract.[10] Part V discusses the difficulties and consequences that arise from such contradictions.[11] Finally, Part VI explores which new, or perhaps old, rules courts and legislatures can adopt to advance the arbitration policies they desire.[12]

II. HISTORICAL ENFORCEMENT OF ARBITRATION PROVISIONS

While arbitration has long been a part of contracting, the approach of Anglo-American courts has varied greatly over the years.[13] Modern arbitration law is a mix of federal statutory law and the case law interpreting it, as well as state common law.[14] This section will give a brief overview of the history of arbitration provisions in American contract law.

A. Common Law History

Early English courts held that arbitration contracts were contrary to public policy.[15] These courts considered arbitration a threat to their exercise of jurisdiction.[16] After the Revolution, American courts consistently followed the English rule, continuing into the twentieth century.[17] Courts often

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8. *See infra* Part II.
9. *See infra* Part III.
10. *See infra* Part IV.
11. *See infra* Part V.
12. *See infra* Part VI.
13. *See generally* CORBIN & MURRAY, *supra* note 4, § 83.5.
14. *See generally* Henry K. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385 (1992) (discussing the intersection of state and federal law in the arbitration context).
15. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995) (quoting Bernhart v. Polygraphic Co. of Am., Inc., 350 U.S. 198, 211 n.5 (1956)) ("The origins of [the rule against arbitration] apparently lie in 'ancient times,' when the English courts fought 'for extension of jurisdiction—all of them being opposed to anything that would altogether deprive them of jurisdiction.'").
16. *Id.*
17. *E.g.*, Meacham v. Jamestown, Franklin & Clearfield R.R. Co., 105 N.E. 653, 655 (N.Y. 1914) (holding that courts are not required to hold arbitration provisions as enforceable if they are "contrary to a declared policy of our courts."); Mead's Adm'x v. Owen, 74 A.

treated the rule against arbitration as a matter of precedent with little discussion of the reasoning behind it.[18]

By the early twentieth century, the consensus on arbitration had begun to unravel.[19] England led the way, passing the Arbitration Act of 1889, which abolished the common law rule against arbitration.[20] Some American courts also began to question the validity of the English rule.[21] However, most courts continued to follow the traditional rule and invalidate arbitration provisions.[22] As Judge Cardozo said, "It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary."[23]

B. The Federal Arbitration Act

In 1925, Congress enacted the Federal Arbitration Act (FAA).[24] Congress believed that arbitration agreements should be enforceable and enacted a law to place such agreements "upon the same footing as other contracts, where [they] belong."[25] However, for years federal courts understood the legislative history of the FAA to suggest that Congress expected arbitration agreements to be employed primarily in cases where both parties to a contract were experienced merchants.[26] At the very least, these courts recog-

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1058, 1059–60 (1910) (holding that agreements to arbitrate were revocable by either party at any time before the publication of an award).

18. *See* U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1007–08 (S.D.N.Y. 1915) ("Since (at the latest) the time of Lord Kenyon, it has been customary to stand rather upon the antiquity of the rule, than upon its excellence or reason.").

19. *See, e.g.*, *id.* at 1007–08 (discussing criticisms that the English rule against arbitration agreements was arguably not rooted in sound policy, but ultimately applying it as a matter of precedent).

20. The Arbitration Act, 52 & 53 Vict. c. 49 (1889), *reprinted in* W. OUTRAM CREWE, LAW OF ARBITRATION; BEING THE ARBITRATION ACT, 1889, WITH NOTES OF STATUTES, RULES OF COURT, FORMS AND CASES, AND AN INDEX (1890).

21. *See U.S. Asphalt Ref. Co.*, 222 F. at 1007–08.

22. *E.g.*, *id.*; *Meacham*, 105 N.E. at 655; *Mead's Adm'x*, 74 A. at 1059–60.

23. *Meacham*, 105 N.E. at 656 (Cardozo, J., concurring).

24. Federal Arbitration Act, ch. 213, 68 P.L. 401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–307 (2020)); *see generally* CORBIN & MURRAY, *supra* note 4, § 83.5 (for historical background).

25. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)).

26. *E.g.*, Craft v. Campbell Soup Co., 177 F.3d 1083, 1089 (9th Cir. 1998) ("[T]he legislative history demonstrates that the Act's purpose was solely to bind merchants who were involved in commercial dealings."); Local 205, United Elec., Radio and Mach. Workers v. Gen. Elec. Co., 233 F.2d 85, 99 (1st Cir. 1956) ("The whole tenor of [the committee reports and hearings], however, demonstrates that congressional action was being directed at that time solely toward the field of commercial arbitration."); *see also* Christopher R. Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381, 388 (2018).

nized that Congress likely did not anticipate the use of binding arbitration agreements involving consumers or employees.[27] Regardless of Congress's intent, the FAA would ultimately change the nature of arbitration throughout the country.

The FAA states that arbitration provisions in contracts "evidencing a transaction involving commerce" are "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[28] "Commerce" is simply defined as follows:

> [C]ommerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.[29]

The federal courts initially interpreted the FAA narrowly and remained willing to consider the policy ramifications of arbitration in individual contexts.[30] For example, the Second Circuit held that antitrust cases that do not involve parties who "are willing to accept less certainty of legally correct adjustment" should not be sent to arbitration based on "the pervasive public interest in the enforcement of the antitrust laws."[31] This decision was well-regarded and was adopted by other circuits.[32] The Supreme Court also remained wary of arbitration in the decades following the FAA's passage.[33]

Since the 1980s, however, the Supreme Court has interpreted the FAA as having a very broad reach.[34] In *Southland Corp, v. Keating*, the Court held that the FAA is fully applicable in state courts to all contracts to which it applies and preempts any state arbitration law.[35] As a result of this decision and its progeny, federal courts' interpretations of the FAA now govern arbitration law as much or more than state contract law does.[36] In addition to the text of the FAA itself, a vast body of case law has developed that in-

27. *See* Leslie, *supra* note 26, at 388.
28. 9 U.S.C. § 2 (2018).
29. *Id.* § 1.
30. *See* Leslie, *supra* note 26, at 389.
31. Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827–28 (2d Cir. 1968).
32. *See* Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974); Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 980 (9th Cir. 1970).
33. *See* Wilko v. Swan, 346 U.S. 427, 435–38 (1953); *see also* Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 3000–01 (2015).
34. *See generally* Strickland, *supra* note 14.
35. Southland Corp. v. Keating, 465 U.S. 1, 14 (1984).
36. Strickland, *supra* note 14, at 400.

forms the enforceability of arbitration provisions.[37] However, neither the Supreme Court nor lower federal courts have developed a comprehensive standard regarding the reach of the FAA's interstate commerce requirement, instead preferring to reach decisions on a case-by-case basis.[38] Regardless, where the FAA does apply, an arbitration agreement is presumptively valid and may be voided only on state law grounds that would apply to any contract,[39] such as a lack of mutual assent.[40]

III. MODERN INTERNET CONTRACTING

The advent of the internet and other consumer electronics has presented new issues to the old rules of contracting.[41] Courts have taken numerous, often conflicting, approaches and have devised several new terms to attempt to explain modern internet consumer contracts.[42] This section will attempt to untangle this area of the law.

A. The Development of "Wrap" Contracting

Courts often divide internet contracts into various categories, with two of the most common being browsewrap and clickwrap.[43] In a browsewrap contract, a website will contain a notice that use of the website constitutes assent to the terms of service, which will usually be accessible through a hyperlink somewhere on the page.[44] In a clickwrap contract, a consumer assents to the terms of service by checking a box labeled "I agree" (or something similar), which is typically required in order to use the online service.[45] As in browsewrap, the terms are usually on another page, accessible through a hyperlink.[46]

Initially, most courts held that that clickwrap contracts were enforceable but browsewrap contracts were not, under the theory that requiring the consumer to physically click the checkbox gave clear notice of the terms,

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37. *See generally id.* at 397–400 for more information about modern federal arbitration jurisprudence.
38. *Id.* at 412.
39. 9 U.S.C. § 2.
40. *See* CORBIN & MURRAY, *supra* note 4, § 83.5A.
41. *Id.*
42. *See* Collin P. Marks, *Online Terms as In Terrorem Devices*, 78 MD. L. REV. 247, 253–58 (2019).
43. *E.g.*, Temple v. Best Rate Holdings LLC, 360 F. Supp. 3d 1289, 1302 (M.D. Fla. 2018).
44. *Id.*
45. *Id.*
46. *Id.*

while merely browsing a website did not.[47] However, many online contracts exist between the classical definitions of clickwrap and browsewrap.[48] For example, the apps in the Uber cases provided that signing up for the service constituted assent to the terms.[49] Unlike in a pure browsewrap case, the consumer does not assent merely by viewing the sign-up screen, but unlike a pure clickwrap case, there is no check box showing clear agreement.[50]

Some courts and scholars have created various other categorizations.[51] Terms used for such contracts include "sign-in wrap" and "scrollwrap."[52] Others refer to everything in between clickwrap and browsewrap as "hybridwrap" or simply "hybrid agreements."[53] The variety of terminology shows that the use of simple classifications is no longer sufficient to resolve issues of enforceability.[54] While familiarity with the history of browsewrap and clickwrap classifications is helpful in understanding the development of the law, this note will generally use the generic term "online contracting."

B. The Conspicuousness Standard

The primary issue in internet contracts today is mutual assent.[55] Because the terms are contained on another page, it is easy for consumers to agree without ever reading the contract.[56] However, it is a long-established rule of contract law that failure to read a contract does not void one's obligations under it.[57] Furthermore, internet contracts are an example of "contracts of adhesion," that is, contracts that are drafted entirely by one party and offered to the other on a "take it or leave it" basis.[58]

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47. Matt Meinel, *Requiring Mutual Assent in the 21st Century: How to Modify Wrap Contracts to Reflect Consumers' Reality*, 18 N.C. J.L. & TECH. ON. 180, 187 (2016).

48. *See* Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 398–401 (E.D.N.Y. 2015) (discussing "scrollwrap" and "sign-in wrap" contracts).

49. Cullinane v. Uber Techs, Inc., 893 F. 3d 53, 61 n.10 (1st Cir. 2018); Meyer v. Uber Techs, Inc., 868 F.3d 66, 75–76 (2d Cir. 2017).

50. *Meyer*, 868 F.3d 75 ("Of course, there are infinite ways to design a webpage or smartphone application, and not all interfaces fit neatly into the clickwrap and browsewrap categories."); *see also* Meinel, *supra* note 47, at 187.

51. *See, e.g.*, *Berkson*, 97 F. Supp. 3d at 398–401; *see also* Marks, *supra* note 42, at 253.

52. *E.g.*, *Berkson*, 97 F. Supp. 3d at 398–401.

53. *See, e.g.*, Temple v. Best Rate Holdings, LLC, 360 F. Supp. 3d 1289, 1303–04 (M.D. Fla. 2018); *see also* Meinel, *supra* note 47, at 182–83.

54. *Id.*

55. CORBIN & MURRAY, *supra* note 4, § 83.5A.

56. *Id.*

57. *E.g.*, Veeder v. NC Mach. Co., 720 F. Supp. 847, 852 (W.D. Wash. 1989) ("Failure to read contract terms when not brought about by fraud does not excuse the signing party from compliance with those terms.").

58. *See* Nicosia v. Amazon.com, Inc., 834 F.3d 220, 232–33 (2d Cir. 2016); *see also* Klos v. Lotnicze, 133 F.3d 164, 168 (2nd Cir. 1997) ([c]ontracts of adhesion are standard form contracts offered . . . on a take-it-or-leave-it basis, with no opportunity to change the

Courts typically begin the analysis by asking whether the consumer had sufficient notice of the terms.[59] This is decided by determining whether the notice on the website or app is conspicuous enough to put a reasonable person on notice of the existence of the terms.[60] However, this is a legal fiction; the vast majority of consumers will never read the terms of service, and there is little evidence that the sorts of terms courts consider "conspicuous" are necessarily more likely to be read.[61]

There is no exhaustive list of factors to look at when examining the enforceability of internet contracts.[62] True clickwrap agreements where the consumer is required to check a box indicating agreement to the terms are still usually held to be enforceable.[63] However, that does not mean that the absence of such a box, by itself, makes a contract unenforceable.[64]

One case in which terms may be held to be inconspicuous is when the link is located lower on the page than the button that is said to manifest assent.[65] In such cases, a consumer can easily "agree" to the contract without ever seeing the link to the terms and conditions.[66] Courts also examine factors like size, font and color of the hyperlink.[67]

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contract's terms.") (quoting Avail, Inc. v. Rider Sys., Inc., 913 F. Supp. 826, 831 (S.D.N.Y. 1996).

59. Ty Tasker & Darren Pakcyk, *Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements*, 18 ALB. L. J. SCI. & TECH. 79, 90–91 (2008).

60. Specht v. Netscape Commc'n Corp., 306 F.3d 17, 36 (2d Cir. 2002) ("Reasonably conspicuous notice of the existence of contract terms . . . [is] essential if electronic bargaining is to have integrity and credibility.").

61. Preston, *supra* note 7, at 552.

62. CORBIN & MURRAY, *supra* note 4, § 83.5A.

63. *See, e.g.*, Klebba v. Netgear, Inc., No. 1:18-CV-438-RP, 2019 U.S. Dist. LEXIS 17833, at *12 (W.D. Tex. Feb. 5, 2019) ("Klebba formed an agreement to arbitrate when he checked the checkbox next to the words 'I agree to the Terms of Service.'"); Holl v. United Parcel Serv., Case No. 16-cv-05856-HSG, 2017 U.S. Dist. LEXIS 153317, at *11–12 (N.D. Cal. Sept. 18, 2017) (holding a clickwrap agreement enforceable even while acknowledging that UPS "did not make it particularly easy for users to access the . . . Terms and Conditions of Service.").

64. *See, e.g.*, DeVries v. Experian Info. Sols., Inc., Case No. 16-cv-02953-WHO, 2017 U.S. Dist. LEXIS 26471, at *14–15 (N.D. Cal. Feb. 24, 2017) (holding an arbitration agreement enforceable where notice of Terms and Conditions was located directly above the confirmation button, but the user was not required to click a check box).

65. *See, e.g.*, *Specht*, 306 F.3d at 31–32 (holding that a link to terms of service that could only be seen by scrolling well past the download button was inconspicuous).

66. *Id.* at 39 ("[T]here is no reason to assume users will scroll down to subsequent screens simply because screens are there.").

67. *E.g.*, Bernardino v. Barnes & Noble Booksellers, Inc., No. 17-CV-04570 (LAK) (KHP), 2017 U.S. Dist. LEXIS 192814, at *26–27 (S.D.N.Y. Nov. 20, 2017) ("The language . . . was clear and obvious by virtue of its black sans-serif font contrasted against a white background, with blue font indicating the hyperlink . . . [which was] also contrasted against a white background.").

Another way terms may be inconspicuous is if the page is too "cluttered."[68] If a page contains (for example) many different hyperlinks, then any given link, such as to the terms and conditions, becomes inconspicuous.[69] The leading case on this issue is *Nicosia v. Amazon.com, Inc.*[70]

Nicosia involved a typical mandatory arbitration provision that read, "Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court . . . ."[71] Amazon moved to dismiss based on this arbitration provision.[72] The court was left to decide whether Nicosia had reasonable notice of the terms.[73]

The court noted that the link to the terms was set out at the top of the order page, which would generally support the enforceability of the terms.[74] However, the court held that "[p]roximity to the top of a webpage does not necessarily make something more likely to be read in the context of an elaborate webpage design."[75] The court reasoned that there were so many links and buttons on the page that no single one could be conspicuous.[76] For example, the page also contained multiple links advertising other Amazon products and services, as well as links to a customer service page and Amazon's return policy.[77] The court further noted that Amazon had not used a standard clickwrap agreement where the customer would be required to check a box indicating agreement.[78] Ultimately, the court held that the page was sufficiently cluttered as to create a jury question of whether Nicosia had notice of the terms.[79] *Nicosia* exemplifies the law in force at the time of the Uber cases.

IV. THE UBER CASES

Nicosia did not settle the law, and as a result more cases have arisen regarding the conspicuousness of terms in online contracts.[80] The Uber cases

68. *See* Nicosia v. Amazon.com, Inc., 834 F.3d 220, 235–38 (2d Cir. 2016).
69. *Id.* at 237.
70. *Id.*; *see generally* Meinel, *supra* note 47, for more discussion of this case.
71. *Nicosia*, 834 F.3d at 227.
72. *Id.*
73. *Id.* at 232.
74. *Id.* at 236.
75. *Id.* at 237.
76. *Id.*
77. *Nicosia*, 834 F.3d at 236–37.
78. *Id.* at 237–38.
79. *Id.* at 238.
80. *See generally, e.g.*, Meyer v. Uber Techs, Inc., 868 F.3d 66; Cullinane v. Uber Techs, Inc., 893 F. 3d 53.

provide an interesting case study because both cases involved the same company and were decided within two years of each other, yet came to different outcomes. Part IV will discuss the background of these cases and attempt to harmonize them.

A. *Meyer v. Uber Techs, Inc.*

In *Meyer*, a single plaintiff attempted to sue Uber for alleged price fixing and violation of antitrust statutes. Subsequently, Uber moved to compel arbitration.[81] The district court held that Meyer did not have reasonably conspicuous notice of the arbitration terms, and Uber appealed to the Second Circuit.[82] The court described the terms and conditions on Uber's app as follows:

> Below the input fields and buttons on the Payment Screen is black text advising users that "[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." . . . The capitalized phrase, which is bright blue and underlined, was a hyperlink that, when clicked, took the user to a third screen containing a button that, in turn, when clicked, would then display the current version of both Uber's Terms of Service and Privacy Policy.[83]

The court also provided screenshots of the app in addenda.[84]

The appellate court reversed the judgment of the District Court, holding that the notice of the terms of service was reasonably conspicuous and that Meyer had unambiguously manifested assent.[85] According to the court, the screen was "uncluttered."[86] The notice of the terms of service was located directly beneath the button to create an account.[87] The entire screen was visible with no need to scroll further.[88] Though the text was small, the black text on the white background with a blue hyperlink made it stand out.[89] The court specifically distinguished this case from *Nicosia* on the grounds that there was significantly less information on the screen, and the notice of the terms was adjacent to the sign-up button.[90]

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81. *Meyer*, 868 F.3d at 70–71.
82. *Id.* at 70, 72.
83. *Id.* at 71.
84. *Id.* at 81–82, add. A, add. B.
85. *Id.* at 79–81.
86. *Id.* at 78.
87. *Meyer*, 868 F.3d at 78.
88. *Id.*
89. *Id.*
90. *Id.*

B. *Cullinane v. Uber Techs, Inc.*

In *Cullinane*, four named plaintiffs sought to represent a putative class of persons who had been incorrectly and unnecessarily charged surcharges when using Uber's app.[91] The District Court held the arbitration provision to be enforceable and dismissed the case; the plaintiffs appealed to the First Circuit.[92] The layout of Uber's app was similar to that described in *Meyer* with two major differences. First, the *Cullinane* app used a black background with white text instead of a white background with black text.[93] Second, the accept button was at the top right of the screen rather than in the center.[94] As in *Meyer*, the opinion provided screenshots of the app.[95]

The court held that the notice of the terms of service was "not reasonably communicated to the plaintiffs."[96] As in *Nicosia*, the court noted that this was not a traditional clickwrap contract where the consumer would have to check a box or otherwise clearly manifest agreement to continue.[97] The hyperlink was white, rather than the traditional blue, and not underlined.[98] The screen contained other links that looked similar to the terms of service link which cluttered the screen.[99] For example, the options to "scan your card" or "enter promo code" looked similar to the terms and conditions link.[100] Notably, such options were present in the *Meyer* app as well, but the court there did not consider them as significant.[101]

C. Can the Uber Cases be Harmonized?

The contradiction between the decisions in the Uber Cases evidences the uncertain and subjective nature of the current standards of notice in online contracting. However, it may be possible to synthesize a rule of law from these decisions, as there are some differences between the two cases that could allow a consistent reading.

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91. Cullinane v. Uber Techs, Inc., 893 F. 3d 53, 55–56 (1st Cir. 2018).
92. *Id.* at 55.
93. *Id.* at 57; *cf. Meyer*, 868 F.3d at 71.
94. *Cullinane*, 893 F.3d at 58; *cf. Meyer*, 868 F.3d at 71.
95. *Cullinane*, 893 F.3d at 57, 58.
96. *Id.* at 64.
97. *Id.* at 62.
98. *Id.* at 63.
99. *Id.* at 64.
100. *Id.* at 63.
101. Meyer v. Uber Techs, Inc., 868 F.3d 66, 81–82 (2d Cir. 2017) (*see* add. A and B).

1. The Difference in Jurisdiction

Contract law is state law, and the Uber Cases arose in different states; *Cullinane* was decided under Massachusetts law, while *Meyer* was a case from New York.[102] However, this is an unconvincing distinction. The general law of mutual assent in internet contracting is recognized in the Restatement of Contracts[103] and is substantially similar in most jurisdictions.[104] Furthermore, the descriptions of the laws in each case are very similar; both cases reference mutual assent, conspicuousness, and the reasonable-person test.[105] Finally, the FAA has created a heavy federal component to arbitration law.[106] Therefore, differences in jurisdiction cannot convincingly explain the disparate results.

2. The Differences in the Apps

The descriptions and images of the Uber app provided by the courts also show some differences. Most notably, the color of the apps is different. In *Meyer,* the background was white with black text and blue hyperlinks.[107] There was a large grey button labeled "NEXT" in the middle of each page; the text changed to "REGISTER" on the final page.[108] In *Cullinane*, by contrast, the background was black; the text was grey, and the hyperlinks were white.[109] The "NEXT" button appears at the top right-hand side of the screen and is faded until all required information has been entered on the page. On the final page the button reads "DONE."[110] Because of this, the "NEXT"/"DONE" button is farther away from the terms of service than it was in *Meyer*.

The reasons for the differences are unclear. It may be that Uber changed the design of its app in the time between the events leading to the cases. The named plaintiffs in *Cullinane* used the app between December

102. *Cullinane*, 893 F.3d at 60; *Meyer* 868 F.3d at 74.

103. RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. LAW INST. 1981).

104. *See Meyer*, 868 F.3d at 74 (noting that the question of whether California or New York law governed was largely irrelevant because California applies "substantially similar" rules concerning mutual assent as New York).

105. *Compare id.* at 74–75 ("Whether a reasonably prudent user would be on inquiry notice [of the terms] turns on the '[c]larity and conspicuousness of the arbitration terms.'" (quoting Specht v. Netscape Commc'n Corp., 306 F.3d 17, 30 (2nd Cir. 2002))), *with Cullinane*, 893 F.3d at 62 ("'[C]onspicuous' means that a terms [sic] is 'so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it." (quoting MASS. GEN. LAWS ch. 106 § 1-201(b)(10))).

106. Strickland, *supra* note 14, at 400.

107. *Meyer*, 868 F.3d at 78; *see also id.* at 81–82 (providing screenshots).

108. *Id.* at 70–71.

109. *Cullinane*, 893 F.3d at 57–59 (including screenshots).

110. *Id.*

31, 2012, and January 10, 2014.[111] It appears that every named plaintiff encountered the same interface. Meyer used the app on October 18, 2014, more than nine months after the last of the *Cullinane* plaintiffs.[112] The difference might also be explained by a difference in operating systems. *Cullinane* involved the iPhone app, whereas *Meyer* involved the Android app.[113]

It is possible to distinguish the cases based on the design differences in the app. The *Meyer* court singled out the fact that the hyperlink was blue in its finding that the terms of service were conspicuous.[114] Traditionally, the proximity of the confirmation button to the terms of service link is a factor that courts consider.[115] And, in fact, the *Meyer* court noted this too.[116]

However, this distinction is ultimately unsatisfactory. First, the *Cullinane* court was not overly concerned with the font color or proximity of the buttons.[117] Rather, the court based its decision on the fact that the app had so many "conspicuous" elements that each one was easily lost in the mess.[118] The court also emphasized the fact that Uber did not use a traditional clickwrap setup with a checkbox to indicate assent.[119] However, the app in *Meyer* was not a traditional clickwrap setup either.[120] Second, to give such distinctions the force of law merely reinforces the absurdity of the conspicuousness doctrine as applied. In short, there is no satisfying way to read the two cases harmoniously without producing absurd results.

V. PROBLEMS OF CURRENT ARBITRATION LAW

The Uber Cases demonstrate the lack of clarity in this area of law. As tempting as it is to find a harmonized reading of the cases, doing so provides little clarity to the law. Before discussing solutions, however, it is necessary to clarify the difficulties arising from the current legal doctrine as exemplified in the Uber Cases.

111. *Id.* at 55–56.
112. *Meyer*, 868 F.3d at 70.
113. *Cullinane*, 893 F.3d at 55; *Meyer*, 868 F.3d at 70.
114. *Id.* at 78.
115. *See* Specht v. Netscape Commc'n Corp., 306 F.3d 17, 31–32 (2d Cir. 2002).
116. *Meyer*, 868 F.3d at 78.
117. *See Cullinane* 893 F.3d at 63–64.
118. *Id.* at 64.
119. *Id.* at 62.
120. *Meyer*, 868 F.3d at 76 ("In the interface at issue in this case, a putative user is not required to assent explicitly to the contract terms").

A. The Requirement of Conspicuousness Fails to Advance the Interests of Either Party.

Notice is a legal fiction.[121] It is well understood and accepted that consumers do not usually read the "contracts" to which the law decides they agree.[122] Moreover, the corporations that write such contracts do not expect or want the consumers to read the terms.[123] Thus, the traditional rule that a person assumes the risk of a contract he does not read does not reflect the reality of the twenty-first century.

As previously discussed, consumers have no opportunity to negotiate or change the terms of these contracts.[124] Many of these contracts are now required to access services that are necessary to function in modern society. Most people require at least phone and internet service,[125] and social networking is becoming a larger and larger part of modern life.[126] The sheer number of contracts to which people "assent" makes reading each one functionally impossible.[127] Additionally, most online contracts are intentionally written to be near-impossible for the average consumer to comprehend.[128] Finally, consumers are punished for actually reading contracts; when the consumer has actual notice, the court is more likely to enforce the contract.[129]

The volume of internet contracts in itself contradicts the idea of constructive notice. When the terms-and-conditions link appears on every web-

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121. *See* Michael L. Rustad & Maria Vittoria Onufrio, *Reconceptualizing Terms of Use for a Globalized Knowledge Economy*, 14 U. PA. J. BUS. L. 1005, 1098 (2012).

122. *See* Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 134 (2010).

123. *See* Marks, *supra* note 42, at 259 (noting that drafters intentionally use less conspicuous terms to aid in making more efficient sales).

124. *See, e.g.*, Cicle v. Chase Bank USA, 583 F.3d 549, 555 (8th Cir. 2009) ("[I]f individual negotiation were required to make [consumer contracts] enforceable, much of commerce would screech to a halt.").

125. In 2019, 96% of Americans owned a cellular phone of some kind, and 81% owned a smartphone. *Mobile Fact Sheet*, PEW RES. CTR.: INTERNET & TECH. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/mobile [https://web.archive.org/web/20200131012854/https://www.pewresearch.org/internet/fact-sheet/mobile/]. Around 90% of American adults use the internet. *Internet/Broadband Fact Sheet*, PEW RES. CTR. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/internet-broadband [https://web.archive.org/web/20200212222417/https://www.pewresearch.org/internet/fact-sheet/internet-broadband/].

126. In 2019 around 72% of Americans used some type of social media. *Social Media Fact Sheet*, PEW RES. CTR. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/social-media [https://web.archive.org/web/20200210180143/https://www.pewresearch.org/internet/fact-sheet/social-media/].

127. Preston, *supra* note 7, at 553.

128. *Id.*

129. *Id.* at 570.

site and in every app, it naturally ceases to hold any meaning. Yet courts continue to hold that this generic link, which appears so constantly that it has naturally faded into the background of consumer experience, can be so "conspicuous," that a "reasonable person" would have read the terms.[130] The natural consequence is that almost no one is reasonable by these standards because no one actually reads these contracts.[131] The result is that the hypothetical reasonable person has become totally divorced from the experiences of actual consumers.

B. Consequences of Enforcement and Non-Enforcement of Arbitration Provisions

Because most arbitration proceedings are private and governed by non-disclosure agreements, it is difficult to know for sure whether arbitration favors one side or the other.[132] However, it is at least reasonable to draw the inference that, because corporations consistently draft contracts with such provisions, they must see them as beneficial to their interests.[133] There are several reasons for this. First, arbitration decisions are unreviewable.[134] While this may seem at first glance to be an equal advantage to either side, it actually provides an advantage to defendants.[135] A single motion to dismiss or motion for summary judgment may end the case, leaving the plaintiff with no recourse.[136] Limitations on discovery, as compared to litigation, also tends to favor defendants.[137] Corporations also make use of relief-limiting terms that arbitrators may be more likely to enforce than courts.[138]

There are also severe risks of bias among arbitrators.[139] Arbitrators are typically chosen by the corporate defendants and are usually drawn from the same industry.[140] Additionally, a corporate defendant will interact frequently with arbitrators across numerous controversies, while a given plaintiff will

130. *See, e.g.*, Meyer v. Uber Techs, Inc., 868 F.3d 66, 79 (2d Cir. 2017).
131. Preston, *supra* note 7, at 540.
132. *See* Schmitz, *supra* note 122, at 138–39.
133. Leslie, *supra* note 26, at 392–93.
134. *Id.* at 395 ("Although judicial review of arbitration decisions is theoretically possible, it is functionally non-existent.")
135. *Id.* at 394–95.
136. *Id.*
137. *Id.* at 392–93.
138. *Id.* at 395–400.
139. Mark A Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 17–20 (2015).
140. *Id.* at 17–18.

likely go to arbitration only once.[141] Unsurprisingly, many consumers assume that arbitrators will be biased against them.[142]

There are, of course, arguments in favor of arbitration as well. In theory, arbitration is faster and less expensive for both parties.[143] The supposed efficiency of arbitration has been cited by the Supreme Court as a justification for the federal policy favoring arbitration.[144] Additionally, while the data is mixed, some studies have cast doubt on the assumption that arbitration necessarily leads to adverse outcomes for consumers.[145]

However, there are also reasons to be skeptical of these arguments. Notably, studies have shown that businesses do not use arbitration in all of their dealings; rather, they favor arbitration specifically in disputes with customers.[146] Businesses are much less likely to use arbitration provisions when contracting with other businesses.[147] This casts doubt on the theory that arbitration is favored for its efficiency rather than its outcomes.[148] And while some studies may show favorable arbitration outcomes for consumers, others contradict that finding.[149]

Furthermore, even if arbitration is not in itself something to be avoided, the current law on enforceability of such provisions does no services to the businesses that draft the contracts. Businesses are left in the position of guessing what user interface designs will be upheld by courts and which will destroy their contracts. Even if we reconcile the Uber cases, the result leaves companies with no useful information to predict how courts will rule. Is the rule of the cases that all hyperlinks must be blue?[150] That white backgrounds make enforceable contracts while black backgrounds do not?[151] More likely, the Uber cases stand for the proposition that whether an internet contract is enforceable will vary unpredictably from court to court and case to case.

Businesses, like consumers, do not choose their contracting behavior based on an analysis of applicable legal theories. A company that wished to ensure enforceable contracts could likely achieve such a result by using true

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141. *Id.* at 18–20.
142. Schmitz, *supra* note 122, at 142–43.
143. Lemley & Leslie, *supra* note 139, at 5.
144. Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 633 (1985) ("[I]t is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes.").
145. Schmitz, *supra* note 122, at 139–40.
146. *Id.* at 138.
147. *Id.*
148. *Id.*
149. *Id.* at 139–43.
150. *See* Meyer v. Uber Techs, Inc., 868 F.3d 66, 78 (2d Cir, 2017).
151. *Compare id.* at 71, *with* Cullinane v. Uber Techs, Inc., 893 F.3d 53, 58 (1st Cir. 2018).

clickwrap agreements in all cases.[152] Courts consistently uphold online contracts where the consumer is required to click on a box manifesting assent before proceeding.[153] The fact that Uber, Amazon, and other companies do not do so shows that the enforceability of contracts is not the primary motivation in their design.[154] Companies wish to make transactions with consumers fast and efficient.[155] However, in continuing to apply unpredictable standards of notice, courts are failing to adapt to the way companies are doing business in the modern age. Clearly, the requirement of conspicuousness serves little function in the modern digital economy.

VI. POTENTIAL SOLUTIONS

A. Bite-Size Notice

The FAA limits solutions to arbitration provisions.[156] Even if a blanket refusal to enforce arbitration were desirable, the FAA forbids it.[157] Congress and the Supreme Court have decided that arbitration provisions should be enforceable.[158]

Professor Cheryl B. Preston has suggested requiring what she terms "bite-sized notice," a small chart covering the primary provisions of a contract, to be prominently displayed before a consumer has the opportunity to accept.[159] This proposal solves some of the problems with the fiction of notice. It is likely that more consumers would actually read a small chart rather than the long, legalistic terms of service most websites currently use. Charts do a much better job of communicating the essence of the contract to a consumer. On the whole, such a proposal is much closer to the classical idea of mutual assent than the current regime.

However, the logistics of this proposal are difficult. While Professor Preston provides an example of what might be sufficient, to impose such rigid and specific requirements seems well outside the traditional role of the judiciary. Such a rule might be advisable as legislation, but until such laws may be passed, it is of limited utility to the courts deciding these cases. Common law rules require more flexibility and adaptability.

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152. Marks, *supra* note 42, at 258.
153. Meinel, *supra* note 47, at 187.
154. Marks, *supra* note 42, at 258.
155. *Id.*
156. *See* 9 U.S.C. § 2 (2018).
157. *Id.*
158. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.").
159. Preston, *supra* note 7, at 580–82.

While a requirement of a specific form of notice is likely too rigid for enforcement in the absence of statutory requirements, courts might require more specific language in the assent to the terms of service. The *Cullinane* court placed great weight on the lack of a checkbox that a customer was required to click indicating assent to the terms of service.[160] As discussed, such a checkbox probably does little to ensure that consumers actually read or understand the terms of the contract.[161] However, it is likely that the use of a checkbox does alert consumers to the existence of the terms.[162] Instead of generic language indicating assent to the terms of service, courts could require the text accompanying the checkbox to explicitly give notice of the arbitration provision.

It is hard to say whether such notice would change consumer behavior in any meaningful way. Empirical data on consumer behavior and the effects of contract provisions is mixed.[163] Much of it relies on the self-reporting of consumers regarding their own behavior.[164] This is not necessarily accurate for several reasons. It may well be that consumers intentionally over-report how much contract provisions influence their behavior.[165] It also may be that many people have difficulty accurately judging their behavior retrospectively.[166]

Still, even with these caveats, the data indicates that consumers do, at least sometimes, use contract provisions to inform their decisions when they are aware of them.[167] Therefore, rules calculated to provide actual, rather than constructive, notice, might be good for consumers. Conversely, clear and predictable rules benefit companies by promoting consistency.

B. Presumption Against Assent

Professor Matt Meinel has suggested that courts apply a rebuttable presumption against assent in online contract cases.[168] Professor Meinel proposes that courts should presume both that a consumer had no notice of the terms of the contract and that consumers had no notice that their conduct would manifest assent to the contract.[169] According to Professor Meinel,

160. Cullinane v. Uber Techs, Inc., 893 F.3d 53, 62 (1st Cir. 2018).
161. Schmitz, *supra* note 122, at 136.
162. *See Cullinane*, 893 F.3d at 62.
163. Amy J. Schmitz, *Pizza Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV 863, 888 (2010).
164. *See id.* at 887.
165. *Id.*
166. *Id.*
167. *Id.*
168. Meinel, *supra* note 47, at 203.
169. *Id.*

such a presumption would be closer to the real experiences of consumers than the current law.[170]

While Professor Meinel aptly identifies many of the problems with the modern online contracting doctrine, his solution hews too closely to the status quo. It may well be that a rebuttable presumption would merely be rebutted by the same evidence that is currently used to show conspicuousness. Indeed, Professor Meinel suggests conspicuousness as a factor in rebutting the presumption.[171] Professor Meinel goes on to suggest that the defendant be required to show "evidence of clear and parallel wording between the written notice and the action taken."[172] However, many online contracts already do this—in both of the Uber cases, the notice of the terms provided that creating an account would constitute assent.[173] Thus, this requirement would not solve the problem.

C. Making Consumer Contracts Comprehensible

One of the most difficult issues in consumer contracts is the fact that most contracts are written in a way that is difficult for the average consumer to understand.[174] Ideally, courts should require that notice (if not the contract terms themselves) be in plain language which a consumer of average education might readily understand. The obvious difficulty here is that such a requirement would need to be adjudicated by judges with advanced degrees and extensive experience in the law. No doubt at least some of the problem with overly complex contracts is the result of lawyers writing contracts for judges, rather than for consumers.

But despite the obvious irony, it should be possible for a judge to apply such a standard. These issues go beyond arbitration agreements and internet contracting. The problem of consumer contracts being analyzed by highly educated judges exists throughout the field of consumer contracting.[175] Judges must account for this difficulty in order to make fair and just decisions for consumers. The current rules of constructive notice do almost nothing to account for the ability of a consumer to comprehend the contract terms.[176]

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170. *Id.* at 202–03.
171. *Id.* at 203–04.
172. *Id.* at 205.
173. Cullinane v. Uber Techs, Inc., 893 F.3d 53, 58 (1st Cir. 2018); Meyer v. Uber Techs, Inc., 868 F.3d 66, 80 (2d Cir. 2017).
174. Preston, *supra* note 7, at 553.
175. *See id.* at 546.
176. *See supra* Part V.A.

D. Objective or Subjective?

Another question raised by this issue is that of objective and subjective standards. Mutual assent has traditionally been based on an objective standard.[177] Objective standards are more predictable and provide consistency.[178] An objective standard of a reasonable consumer of average education would therefore have certain advantages. First, this standard would allow for easier development of common law, as every case would apply the same standard. A clear law provides benefits to both corporations and consumers. Both parties to a contract benefit from some predictability. On the other hand, a subjective standard could provide extra protection for some consumers. Applying a standard based on an average education level risks leaving behind those who fall below the average level.

On balance, however, an objective standard is the only workable metric. Trying to apply the law on a case-by-case basis would destroy any chance of predictability and consistency in the application of the law. Furthermore, safeguards already exist in the law for those who would fall below the level of the objective standard. For example, the doctrine of unconscionability considers a party's education level, in addition to other similar factors.[179] Therefore, even if a person were held to have manifested assent under an objective standard, a contract provision might still be held unconscionable in appropriate situations.

E. Putting it Together

When confronted with an online consumer contract of adhesion, courts should adopt the following analysis. First, the court should determine whether the app provided express notice of the arbitration terms on the relevant page. The fiction that a hyperlink to unspecified terms and services is sufficient should be abandoned. Second, the court should ensure that the app or page requires the consumer to positively manifest assent. A traditional clickwrap agreement with a clickable checkbox would suffice here. However, it is not the only possibility.

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177. *E.g.*, Kolodziej v. Mason, 774 F.3d 736, 741 (11th Cir. 2014) ("We use 'an objective test . . . to determine whether a contract is enforceable.'" (quoting Robbie v. City of Miami, 469 So. 2d 1384, 1385 (Fla. 1985))).

178. *E.g.*, OWBR LLC v. Clear Channel Communs., Inc., 266 F. Supp. 2d 1214, 1221 (D. Haw. 2003) ("[C]ourts should apply an objective standard, which ensures predictability in contracting.").

179. *E.g.*, Shema Kolainu-Hear Our Voices v. ProviderSoft, LLC, 832 F. Supp. 194, 201 (E.D.N.Y. 2010) (explaining that the factors of unconscionability include "the experience and education of the party claiming unconscionability.").

For example, an app might have a page dedicated to the terms that customers are required to click through. However, this page should be only for the purpose of giving the consumer notice and the opportunity to manifest assent. It should not be text elsewhere on a page that has another primary function. Finally, the court should ask whether the notice was written in such a way that a reasonable person of average education could have understood it.

VII. CONCLUSION

As the internet becomes more integrated into our daily lives, the process of contracting will continue to change. New circumstances and challenges will continue to arise. The proposed analysis laid out above will hardly solve every problem faced by internet consumers. However, it is clear that the current state of internet contracting requires reformation. The historical rules of arbitration and mutual assent developed in circumstances that were markedly different from the modern information economy.[180] The rules implemented by courts produce contradictory and unpredictable results.[181] Furthermore, they do not reflect the realities of modern consumers or businesses.[182] Courts should therefore require a showing that an online contract provided express notice of the arbitration provisions on the same page where acceptance was manifested, that the terms were written in language that the reasonable consumer of average education and intelligence would understand, and that the consumer manifested affirmative assent to the contract.[183] The proposed analysis laid out above will, at least, provide a step towards a new body of contract law adapted to the needs of today.

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180. *See supra* Parts II–III.
181. *See supra* Part IV.
182. *See supra* Part V.
183. *See supra* Part VI.

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CRIMINAL PROCEDURE—TECHNOLOGY IN THE MODERN ERA: THE IMPLICATIONS OF *CARPENTER V. UNITED STATES* AND THE LIMITS OF THE THIRD-PARTY DOCTRINE AS TO CELL PHONE DATA GATHERED THROUGH REAL-TIME TRACKING, STINGRAYS, AND CELL TOWER DUMPS

I. INTRODUCTION

Cell phones are ubiquitous. In the United States, over ninety percent of the population has a cell phone, and over seventy-five percent of people have smartphones.[1] Today, almost anything can be done with the swipe of a fingertip, even planning, and executing a series of robberies.[2] Consider a person using a cell phone to help his or her accomplices steal phones. To put the leader in jail, the government then tries to obtain cell phone records, containing call details and all the towers the cell phones connected to when the individual used his phone.[3] Authorities can use this information to determine a suspect's proximity to the location of a robbery.[4] However, cell-site location information (CSLI) is not captured occasionally for the interdiction of crime; it is continuously gathered from every phone that connects to every tower—even yours.[5]

Are you providing this information of your own volition when you are using a cell phone?[6] What about when your phone is merely powered on and traveling in your pocket? This is exactly what happened in *Carpenter v. United States*.[7] The advancement of technology has benefitted nearly every sector of society; however, it has unintentionally become a threat to individual privacy.[8] Even though the framers of the Fourth Amendment could not predict the advancements of modern technology, the Fourth Amendment's protection from warrantless searches has expanded into the digital world.[9]

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1. Joe Mitchell & Shawn Webb, *Is Big Brother Watching Us: The Evolving State of the Law on Cell Phone, Digital Evidence, and Privacy*, 88 HENNEPIN LAW. 14, 16 (2019).
2. *See* Carpenter v. United States, 138 S. Ct. 2206, 2209 (2018).
3. *Id.* at 2212–13.
4. *Id.* at 2210.
5. *Id.* at 2211.
6. Laura K. Donahue*, Functional Equivalence and Residual Rights Post*-Carpenter*: Framing a Test Consistent with Precedent and Original Meaning*, SUP. CT. REV. 347, 384 (2018).
7. 138 S. Ct. 2206 (2018).
8. Cal Cumpstone, Note, *Game of Phones: The Fourth Amendment Implications of Real-Time Cell Phone Tracking,* 65 CLEV. ST. L. REV. 75, 76 (2016).
9. Andrew Ferguson, *The "Smart" Fourth Amendment*, 102 CORNELL L. REV. 547, 566 (2017).

Carpenter v. United States exemplifies the increasing need to consider how technological advances impact constitutional rights.[10] Before *Carpenter*, the Court had cultivated what had become known as the third-party doctrine which established that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."[11] However, the *Carpenter* Court held that an individual has a reasonable expectation of privacy in his or her historical CSLI, and that the government must obtain a warrant before accessing detailed location information.[12] In so ruling, the Court declined to "extend" the third-party doctrine, which had been used for over forty years.[13] Instead, the Court restricted the scope of the third-party doctrine as most commentators and courts previously understood it.[14]

Despite the monumental implications of *Carpenter*, the actual holding was narrow; the Court did not decide the implications of government surveillance techniques like real-time tracking and web-browsing.[15] What makes real-time tracking intrusive is that police officers can continuously monitor individuals' cell phones without the individuals noticing.[16]

This note argues that the Supreme Court should extend the holding of *Carpenter v. United States* to real-time tracking, stingrays,[17] and cell tower dumps[18] because they are intrusive and provide intimate details of people's lives that would otherwise not be known. Part II of this note provides background information on *Carpenter v. United States* and analyzes the narrow ruling's impact on an individual's expectation of privacy. Part III analyzes the constitutional implications of *Carpenter* and argues that the Supreme Court should apply its holding to real-time tracking, stingrays, and cell tower dumps because these technologies are just as invasive as CSLI and provide intimate details of an individual's life that may not otherwise be known. Because *Carpenter* has a narrow ruling, Part IV argues that Congress must enact electronic "exhaustion" requirements for surveillance to

10. *Carpenter*, 138 S. Ct. at 2224 (Kennedy, J., dissenting).

11. *Id*. at 2216 (quoting Smith v. Maryland, 442 U.S. 735, 743–44 (1979)).

12. *Id.* at 2221.

13. Greg Nojeim, *Wider Implications of* Carpenter v. United States, 2 INT'L J. DATA PROTECTION OFFICER, PRIVACY OFFICER & PRIVACY COUNS. 8, 8 (2018).

14. Susan Freiwald & Stephen W. Smith, *The* Carpenter *Chronicle: A Near-Perfect Surveillance*, 132 HARV. L. REV. 205, 212–14 (2018).

15. *Carpenter*, 138 S. Ct. at 2220.

16. Cumpstone, *supra* note 8, at 77.

17. Howard W. Cox, *Stingray Technology and Reasonable Expectations of Privacy in the Internet of Everything*, 17 FED. SOC'Y REV. 29, 29–30 (Mar. 31, 2016), http://www.fedsoc.org/publications/detail/stingray-technology-and-reasonable-expectations-of-privacy-in-the-internet-of-everything (describing stingrays as cell-site simulators. Stingrays are used to determine and track cell phones criminals use when they engage in criminal activity. They pose as cell towers and can help law enforcement pinpoint the cell phone the suspect uses.).

18. *Carpenter*, 138 S. Ct. at 2220 (defining "tower dumps" as "a download of information on all the devices that connected to a particular cell site during a particular interval.").

prevent a broad invasion of privacy. Enacting exhaustion requirements[19] will protect people from the invasion of their reasonable expectation of privacy and will establish that law enforcement may only track cellphones when needed; it will not be a first resort. Thus, law enforcement should initially engage in less invasive investigative procedures.

II. BACKGROUND

The Fourth Amendment protects people from unreasonable searches and seizures. As technology is rapidly changing, the law has evolved. This section will provide a brief historical overview of Fourth Amendment jurisprudence pre-*Carpenter* and analyze *Carpenter*'s holding.

A. Historical Overview—Pre-*Carpenter*

Much of the Supreme Court's Fourth Amendment jurisprudence in the last century has reflected the challenges of applying the Fourth Amendment to newly developed technology; in the decade before *Carpenter*, this caused the Court to modify its interpretation of the Fourth Amendment twice to apply to modern technology.[20] As a result, the government has been required to obtain a search warrant before it goes through the contents of a cell phone when it is seized during a search incident to arrest or when it attaches a GPS tracker to follow the movement of a vehicle.[21]

The Fourth Amendment protects privacy from unreasonable government intrusion.[22] Historically, courts have held that a search can occur within the meaning of the Fourth Amendment in one of the three following ways: (1) physical trespass;[23] (2) invasion of an individual's reasonable expectation of privacy;[24] or (3) virtual trespass.[25] In response to new concerns

19. Jake Laperruque, *Congress Should Place More Limits on Cellphone Location Tracking After* Carpenter*,* JUST SECURITY (March 23, 2018), https://www.justsecurity.org/54231/probable-cause-electronic-exhaustion-limits-location-tracking-carpenter/ (highlighting there are no exhaustion requirements currently for the rules of gathering location data similar to the Wiretap Act, "which governs warrants for intercepting communications").

20. Evan Kaminker, *Location Tracking and Digital Data: Can Carpenter Build a Stable Privacy Doctrine?*, SUP. CT. REV. 411, 411 (2018).

21. Riley v. California, 573 U.S. 373, 373 (2014); *See Jones*, 565 U.S. at 400.

22. U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

23. Olmstead v. United States, 277 U.S. 438, 466 (1928) (holding that a search occurs when the government physically occupies a citizen's private property for the purposes of obtaining information).

24. Katz v. United States, 389 U.S. 347, 358–59 (1967) (holding whether a search occurs under a *Katz* analysis depends on whether that person actually exhibited a subjective

created by a world of rapidly evolving technological advancements, *Olmstead v. United States* was the first case that examined the "implications" of technology under the Fourth Amendment.[26] The *Olmstead* Court declined to extend the protection of the Fourth Amendment to wiretapped telephone lines located outside Olmstead's property.[27] The Court held that the government did not conduct a search or seizure because the agents tapped Olmstead's phone lines "without any trespass upon [his] property."[28] The *Olmstead* Court set forth the trespass-doctrine which triggers Fourth Amendment protection when an officer makes "an actual invasion of [the defendant's] house 'or curtilage'[29] for the purpose of making a seizure."[30]

In the 1980s, the Supreme Court established a constitutional framework for tracking devices in *United States v. Knotts*[31] and *United States v. Karo*.[32] In the 1990s, Congress enacted statutes that recognized that customers had some right to privacy in cell phone tracking data, though Congress did not address the legal standard authorizing this type of surveillance.[33] The reasonable expectation of privacy test was established in *Katz v. United States*, in Justice Harlan's concurrence.[34] In *Katz*, the Court held that when law enforcement agents placed a listening device near a public phone booth to eavesdrop and record the defendant's conversation,[35] it was an infringement on the defendant's reasonable expectation of privacy. Once the defendant

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expectation that the object of the alleged search was private, and whether society is prepared to recognize that expectation as reasonable).

25. Kyllo v. United States, 533 U.S. 27, 34 (2001) (holding a virtual trespass occurs when the government uses sense-enhancing technology that is not in general public use to obtain information regarding the interior of a home that could not otherwise have been obtained without "physical intrusion into a constitutionally protected area").

26. Cumpstone, *supra* note 8, at 78.

27. *Olmstead*, 277 U.S. at 466.

28. *Id.* at 457.

29. Oliver v. United States, 466 U.S. 170, 180 (1984) (defining curtilage at common law as "the area to which extends the intimate activity associated with the sanctity of a person's home and the privacies of life" (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

30. *Olmstead*, 277 U.S. at 466.

31. 460 U.S. 276, 281 (1983) (holding that an individual has no reasonable expectation of privacy in his or her movements on public roads and highways).

32. 468 U.S. 705, 716 (1984) (holding that a search occurs within the meaning of the Fourth Amendment when the government agents use electronic surveillance to obtain information about the interior of a private residence that would otherwise not be available through plain view beyond the curtilage of the residence).

33. Freiwald & Smith, *supra* note 14, at 206.

34. Aaron L. Dalton, *Carpenter v. United States: A New Era for Protecting Data Generated on Personal Technology, or a Mere Caveat?*, 20 N.C. J. L. & TECH. ON. 1, 11 (2018); *see also Katz,* 389 U.S. at 361 (holding that under Justice Harlan's test a person must (1) have "exhibited an actual (subjective) expectation of privacy," and (2) society must be prepared to deem that expectation reasonable).

35. *Katz*, 389 U.S. at 348.

entered the telephone booth, shut the door, and paid the toll he had a reasonable expectation that his conversation would not be recorded.[36]

On the other hand, *United States v. Miller* created the third-party doctrine, which limited *Katz*, holding that a person has no Fourth Amendment protection against the government obtaining information that he or she has voluntarily conveyed to a third party.[37] The *Miller* Court found no reasonable expectation of privacy in an individual's bank records that the account holder had voluntarily conveyed to the bank and were also the bank's own business records.[38] *Smith v. Maryland* extended the third-party doctrine to dialed phone numbers.[39] In *Smith*, a telephone company installed a pen register to observe outgoing calls from the defendant's phone.[40] Although the pen register did not record the contents of the conversation, it recorded the telephone numbers dialed.[41] Smith had no expectation of privacy in the dialed telephone numbers because it is common for companies to store numbers.[42] Thus, society would not recognize Smith's expectation of privacy as reasonable because he had voluntarily exposed this information to a third party.[43]

In *United States v. Jones*, instead of relying on the *Katz* test, the Court revived the trespass doctrine.[44] In *Jones*, the government attached a GPS tracking device to the undercarriage of a vehicle and tracked an individual.[45] Even though the data obtained from the device consisted of 2,000 pages of data during the course of four weeks, the majority opinion never addressed whether the "length and comprehensiveness of surveillance" violated Jones' reasonable expectation of privacy.[46] Instead the majority found that the government's action was a "physical intrusion of property for the purpose of obtaining information" and was thus a search within the meaning of the Fourth Amendment.[47] *Jones* did not replace the reasonable expectation of privacy test, which originated in *Katz*.[48] Instead, *Jones* relied on the trespass doctrine; it held that the *Katz* test had supplemented, rather than replaced,

36. *Id.* at 361 (Harlan, J., concurring).
37. *See* United States v. Miller, 425 U.S. 435 (1976).
38. Dalton, *supra* note 34, at 11.
39. Smith v. Maryland, 442 U.S. 735, 741–43 (1979).
40. *Id.*
41. *Id.* at 741.
42. *Id.*
43. *Id.* at 743–44.
44. Cumpstone, *supra* note 8, at 81. *See* United States v. Jones, 565 U.S. 400 (2018).
45. *Jones*, 565 U.S. at 413.
46. Cumpstone, *supra* note 8, at 82.
47. *Id.*
48. *Jones*, 565 U.S. at 406.

the trespass doctrine from *Olmstead*.[49] Before *Jones*, it was long considered that the *Katz* test had replaced the trespass doctrine from *Olmstead*.[50]

CSLI came into the limelight in 2008 when the U.S. District Court for the Western District of Pennsylvania ruled that the government could not obtain CSLI under a Section 2703 D order[51] because the Electronic Privacy Communications Act's text and legislative history did not distinguish between real-time location information and historical CSLI.[52] Conversely, the Fifth Circuit held the release of CSLI did not violate the Fourth Amendment because the CSLI records were business records conveyed to a third-party by the individual; therefore, the individual had no reasonable expectation of privacy against the government obtaining the records.[53] This ushered in a long-standing disagreement among the courts focusing on whether cell phone users "voluntarily convey" location information to telephone carriers and whether CSLI is entirely metadata.[54] However, the Supreme Court's 2018 landmark decision in *Carpenter v. United States* altered the discussion once again.

B. Background on *Carpenter v. United States*

In *Carpenter v. United States,* the government obtained cell phone records of suspects in a robbery, which provided CSLI information of the suspects' activities. The Supreme Court held that cell-site location information is protected under the Fourth Amendment.

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49. *Id.* at 409.

50. *Id.* at 406.

51. 18 U.S.C. § 2703(d) (describing a D order forces an internet service provider to provide detailed electronic records about a customer such as Internet Protocol addresses and addresses of people who the customer exchanged emails with).

52. *In re* United States for an Ord. Directing Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't, 534 F. Supp. 2d 585, 601 (W.D. Pa. 2008); *see also* Freiwald & Smith, *supra* note 14, at 206.

53. *In re* United States for an Ord. Directing Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't, 534 F. Supp. 2d at 601.

54. Peter C. Ormerod & Lawrence J. Trautman, *A Descriptive Analysis of the Fourth Amendment and the Third-Party Doctrine in the Digital Age*, 28 ALB. L.J. SCI. & TECH. 73, 133–34 (2018); *see also* Orin Kerr, *Relative vs. Absolute Approaches to the Content/Metadata Line*, LAWFARE BLOG (Aug. 25, 2016, 4:18 P.M), https://www.lawfareblog.com/relative-vs-absolute-approaches-contentmetadata-line (defining the substance of the message as contents and the information of the message as metadata. Contents receive a higher level of protection compared to metadata. When talking about a phone call, the contents are the actual sounds on the call, whereas the metadata are the numbers dialed and times of the phone call.).

1. Facts

In 2011, the police arrested four suspects for robbing a series of T-Mobile and Radio Shack Stores in Detroit, Michigan.[55] One of the suspects conceded that over the course of four months the group robbed nine stores in Michigan and Ohio; he also gave the FBI phone numbers of some of the accomplices.[56] Prosecutors then applied for an order under the Stored Communications Act to obtain the suspects' cell records.[57] The Stored Communications Act permits the government to demand the disclosure of specific telecommunication records when law enforcement has shown reasonable and articulable facts that the records being requested are "relevant and material to an ongoing criminal investigation."[58] Metro PCS and Sprint, Carpenter's wireless carriers, were ordered to disclose Carpenter's CSLI records during the four months.[59]

CSLI is a "time-stamped location" generated when a phone attaches to a cell site.[60] The magistrate judge issued two orders; the first order sought CSLI records for 152 days of calls but yielded records of 127 days, and the second-order sought seven days of CSLI records from Sprint, but the government obtained only two days of records when Carpenter's phone was in Ohio on "roaming."[61] In total, the government received 12,898 location points that documented Carpenter's movements, and the information showed that Carpenter's cell phone was near four of the robbery locations when the robberies occurred.[62] Carpenter was charged with six counts of robbery and six counts of carrying a firearm.[63]

Before trial, Carpenter moved to suppress the CSLI provided by the wireless carriers.[64] He argued that the collection of data was a search under the meaning of the Fourth Amendment and the police were required to obtain a warrant based on probable cause.[65] At trial, FBI agent Christopher Hess presented maps that showed Carpenter's phone was near four of the charged robberies; the location records confirmed Carpenter was present "at the exact time of the robbery," so the jury convicted him on all except one of the firearm counts and sentenced to more than 100 years in prison.[66]

55. Carpenter v. United States, 138 S. Ct. 2206, 2212 (2018).
56. *Id.*
57. *Id.*
58. 18 U.S.C. § 2703(d).
59. *Carpenter*, 138 S. Ct. at 2212.
60. *Id.* at 2211.
61. *Id.* at 2212.
62. *Id.* at 2212–13.
63. *Id.* at 2212.
64. *Id.*
65. *Carpenter*, 138 S. Ct. at 2212.
66. *Id.* at 2212–13.

2. Holding/Reasoning

The District Court denied Carpenter's motion to suppress the evidence, in which he argued that obtaining his records was a violation of the Fourth Amendment because the Government acquired the records without a warrant.[67] The Sixth Circuit reasoned that Carpenter did not have a reasonable expectation of privacy because he voluntarily disclosed his location information to his cell phone carrier.[68] Yet, the *Carpenter* Court retreated from the third-party doctrine.[69] Instead, the Supreme Court created a new balancing test that weighs the reasonable expectation of privacy against whether the information was voluntarily disclosed to a third-party.[70] The first step is to determine if there is a "reduced" expectation of privacy.[71] To determine this, a court must consider the following: the "nature" of the certain documents sought and if there is a "legitimate expectation of privacy" regarding the details. [72] Pervasiveness is another factor courts may use to determine if there is a "reasonable" or reduced expectation of privacy.[73] Compiling detailed data from a person's day, week, or month provides a "detailed chronicle of a person's presence" and is sufficiently pervasive that the person would have a reasonable expectation of privacy in the chronicled information.[74]

Another factor is the individual's voluntary exposure. The information must be "truly 'shared; if the individual has a choice, then the information is truly shared.'"[75] If the only choice is to consent to disclosure or disconnect the phone, there is no real choice, and the disclosure is not voluntary.[76] Carpenter did not voluntarily and knowingly disclose his CSLI data with his cellphone provider because CSLI was generated without fail by the service provider; he would have had to disconnect his cell phone in order to avoid sharing his CSLI information entirely.[77] In *Carpenter*, the Court found it important that cell phones are "indispensable to participation in modern society."[78] At this stage, the Court evaluates the assumption of risk after an

67. *Id.* at 2212.
68. *Id.* at 2213.
69. *See id.* at 2220 (holding that the third-party doctrine does not apply to CSLI).
70. *See generally id*; *see also* Mary-Kathryn Takeuchi, Note, *A New Third-Party Doctrine: The Telephone Metadata Program and Carpenter v. United States*, 94 NOTRE DAME L. REV. 2243, 2244 (2019).
71. *Carpenter*, 138 S. Ct. at 2219.
72. *Id.*
73. *Id.* at 2220.
74. *Id.* at 2219–20.
75. *See id*. at 2220; Takeuchi, *supra* note 70, at 2253.
76. *Id*.
77. Freiwald & Smith, *supra* note 14, at 225.
78. *Carpenter*, 138 S. Ct. at 2220.

individual makes an affirmative act.[79] Calls, emails, and texts all generate CSLI information; thus, there is no way to stop sending this information other than to disconnect the phone from a network.[80]

Accordingly, the Court found that cell phone users do not voluntarily assume the risk of sharing comprehensive records of their physical movements.[81] The Court held that Carpenter had a reasonable expectation of privacy in the information, meaning there was a search under the Fourth Amendment.[82] Furthermore, the Court held that the search violated Carpenter's Fourth Amendment rights because the circumstances in the case required a warrant to make the search reasonable.[83]

Carpenter reiterated that the purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials."[84] Several states ratified the Fourth Amendment in response to the general warrants and writs of assistance that gave British officers the authority to forage through homes to search for evidence of a crime.[85] As technology advances, most personal information is no longer stored in the traditional way of physical papers; instead, people store their information on digital devices or sometimes in the "cloud," something the Framers of the Fourth Amendment did not anticipate in 1791.[86] However, the doctrine does not completely bar expectation of privacy, because there are limits such as physical space, physical items that are possessed by third parties temporarily,[87] and now CSLI.[88]

3. Dissenting Opinions

Justices Kennedy, Thomas, Alito, and Gorsuch dissented. Justice Kennedy argued that consumers do not have a reasonable expectation of privacy because people do not control these records.[89] He observed that the majority's test suggested that Fourth Amendment protections applied when private

79. Takeuchi, *supra* note 70, at 2253.
80. *Carpenter*, 138 S. Ct. at 2220.
81. *Id.*
82. *See id.* at 2219.
83. *Id.* at 2221.
84. *Id.* at 2213.
85. Riley v. California, 573 U.S. 373, 403 (2014).
86. Kaitlin D. Corey, *How Far Will the Third Party Doctrine Extend*, 51 MD. B.J. 14, 15 (2018).
87. Ormerod & Trautman, *supra* note 54, at 114 (discussing three limitations on the third-party doctrine are "that people retain a reasonable expectation of privacy in physical spaces owned by a third party, in physical things left with another party, and in at least one type of information conveyed to a third party").
88. *See Carpenter*, 138 S. Ct. 2206 (2018).
89. *Id.* at 2224 (Kennedy, J., dissenting).

interests weigh more heavily than the third-party disclosure.[90] Justice Kennedy noted that this balancing test departs from the bright-line rule of the third-party doctrine.[91]

Justice Thomas emphasized that instead of focusing on whether a search occurred, the focus should be "*whose* property was searched."[92] He argued that the records did not belong to Carpenter because he neither generated nor controlled them;[93] the records belonged to MetroPCS and Sprint.[94] Justice Alito argued that probable cause should not be required for mandatory rendering of records but should be required for an actual search on private property.[95] Under Alito's interpretation, any personal information that could be found on paper could be subpoenaed.[96] Justice Gorsuch's dissent resembles a concurring opinion more than a dissent because he rejected the third-party doctrine.[97] He endorsed the "traditional approach" to interpreting the Fourth Amendment, which asks "if a house, paper, or effect was *yours* under the law,"[98] and he suggested his willingness to consider the CSLI to be Carpenter's papers or effects, except that Carpenter had forfeited the argument by failing to preserve it.[99]

4. A qualitative and quantitative test emerged from Carpenter

The *Carpenter* Court applied *Katz*'s reasonable expectation of privacy test in addition to a more favorable multi-factor test.[100] This is a fundamental shift in the jurisprudence of the Fourth Amendment because it traditionally focused on law enforcement's conduct while obtaining this kind of information.[101] The Court shifted its focus to the type of information the government seeks. Under *Carpenter*, in any instance the government obtains a court order for detailed information about individuals that is not available to

90. *Id.* at 2232.
91. Takeuchi, *supra* note 70, at 2250.
92. *Carpenter*, 138 S. Ct. at 2235 (Thomas, J., dissenting).
93. *Id.*
94. *Id.*
95. *Id.* at 2221.
96. *Id.* at 2222.
97. Ashley Baker, *Gorsuch's dissent in 'Carpenter' case has implications for the future of privacy*, THE HILL (June 26, 2018, 2:45 PM), https://thehill.com/opinion/cybersecurity/394215-gorsuchs-dissent-in-carpenter-case-has-implications-for-the-future-of (last visited Sept. 22, 2019).
98. *Carpenter*, 138 S. Ct. at 2268 (Gorsuch, J., dissenting).
99. *Id.* at 2272.
100. *Id.* at 2223.
101. United States v. Jacobsen, 466 U.S. 109, 113 (1984) (stating that the "reasonableness" requirement of the Fourth Amendment has been consistently construed to regulate governmental action); *Katz*, 389 U.S. at 353 (examining law enforcement's actions to determine whether the Fourth Amendment was implicated).

the public, the judge will carry out a qualitative and quantitative assessment of the information.[102] The assessment consists of two questions.[103] First, does the individual whose detailed information is obtained have a reasonable expectation of privacy?[104] And second, even if a third party collects and maintains that information, does the third-party doctrine apply?[105]

The *Carpenter* Court implemented a three-factor test that should be used to evaluate information: (1) its "deeply revealing nature" (2) its "depth, breadth, and comprehensive reach," and (3) whether it "results from an inescapable and automatic form of data collection."[106] The importance of the deeply revealing nature of the information was developed by the Court in *United States v. Jones* and *Riley v. California.*[107] Under observation, an individual's information is protected only if it is deeply revealing.[108] The Court found time-stamped data is similar to GPS information.[109] It can provide private and undisclosed traits about a person such as "familial, political, professional, religious and sexual associations."[110] Arguably, the deeply revealing nature is the most important factor because the Court held that CSLI "hold[s] for many Americans the 'privacies for life.'"[111]

"Depth" refers to the detail and precision of the facts.[112] "Breadth" refers to how often data is collected and the amount of time over which it has been collected; "comprehensive reach" refers to the number of people being tracked in a database.[113] The Court highlighted that CSLI contains "the whole of [a person's] physical movements"[114] and a "detailed chronicle of a person's physical presence."[115] Most wireless carriers store CSLI for five years;[116] it is information "compiled every day, every moment, over several years."[117] The database in *Carpenter* stored "an average of 101 data points every day" of Carpenter's location.[118] "[L]ocation information is continually logged for all of the 400 million devices in the United States—not just those

102. Paul Ohm, *The Many Revolutions of Carpenter*, 32 HARV. J. L. & TECH 357, 369 (2019).
103. *Id.*
104. *Id.*
105. *Id.* at 369–70.
106. *Carpenter*, 138 S. Ct. at 2223 (2018).
107. *Id.* at 2213; *see also Riley*, 573 U.S. at 414; *Jones*, 565 U.S. at 406.
108. Ohm, *supra* note 102, at 371.
109. *Carpenter*, 138 S. Ct. at 2217, 2213.
110. *Id.* at 2217 (quoting *Jones*, 565 U.S. at 415).
111. *Riley*, 573 U.S. at 403 (citing Boyd v. United States, 116 U.S. 616, 630 (1886)).
112. Ohm, *supra* note 102, at 372.
113. *Id.* at 372–73.
114. *Carpenter*, 138 S. Ct. at 2219.
115. *Id.* at 2220.
116. *Id.* at 2218.
117. *Id.* at 2220.
118. *Id.* at 2212.

belonging to persons who might happen to come under investigation—this newfound tracking capability runs against everyone."[119]

Lastly, as discussed above, the Court looks at the "inescapable and automatic nature" of how information is collected.[120] Because cell phones have become such a pervasive part of life, their use cannot be considered "voluntary" or "escapable,"[121] and the automatic nature of CSLI collection suggests no meaningful ability for the user to "opt-out."[122] If cell phone use is an inescapable part of today's society and the collection of data therefrom is automatic, the cell phone owner has no autonomy over the information. He cannot disclose information over which he has no control.[123]

Carpenter also suggests the rule of "technological equivalence."[124] If the police have the ability to gather information from technology that is the "modern-day equivalent" of activity that the Court has held to constitute a search within the meaning of the Fourth Amendment, then the *use* of that equivalent technology also constitutes a search within the meaning of the Fourth Amendment.[125]

The *Carpenter* Court shifts the relevant inquiry from how law enforcement obtains information to how *detailed* is the information that law enforcement obtains. It created a three-factor test that courts use to assess what type of information law enforcement seeks. The Court held that accessing a person's historical cell-site records of seven or more days violates a person's reasonable expectation of privacy, and thus is a search within the meaning of the Fourth Amendment.[126] If CSLI is considered a search, the courts should also consider real-time tracking, stingrays, and cell-tower dumps as searches within the meaning of the Fourth Amendment because they provide more intrusive information than CSLI.

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119. *Id.* at 2218.

120. *Carpenter*, 138 S. Ct. at 2223.

121. Brief for Petitioner, at 39–42, *Carpenter*, 138 S. Ct. 2206 (No. 16-402).

122. *Carpenter*, 138 S. Ct. at 2220 ("Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily "assume[] the risk" of turning over a comprehensive dossier of his physical movements.").

123. *See* Ohm, *supra* note 102, at 376.

124. *Id.* at 360.

125. *Carpenter*, 138 S. Ct. at 2230 (Kennedy, J., dissenting); Ohm, *supra* note 102, at 360.

126. *Id.* at 2266 (Gorsuch, J., dissenting).

III. CONSTITUTIONAL IMPLICATIONS WITH NEW AGE TECHNOLOGY

Today, new technology like real-time tracking, stingrays, and cell tower dumps allow law enforcement to access even more data through cellphones. Real-time tracking is more intrusive than CSLI and can pinpoint the precise location where a person is standing. It reveals detailed information about a person's life, such as phone calls and texts that a person receives. Conveyance of this information is not voluntary. Stingrays, on the other hand, are more invasive than CSLI. They can determine a person's location within six feet. Lastly, cell tower dumps are like a dragnet because they collect detailed information as to a particular area. Cell tower dumps provide information for an unknown number of phones over a short period. As of yet, courts have not settled on a standard approach to evaluating these new technologies under the Fourth Amendment. This section will provide an overview of these modern technologies and current treatment in the U.S.

A. Real-Time Tracking

Real-time tracking occurs when police ping a cell phone and force it to send a signal; this then creates real-time location information.[127] It is prospective collection of information.[128] In real-time tracking, law enforcement can track a person's location as it is occurring.[129] The *Carpenter* Court left open the issue of real-time tracking.[130] A bright-line rule has not been established to determine the amount of time the police must track a person's cell phone in real-time before an individual's reasonable expectation of privacy is violated.[131] Lower courts have held that in determining if an individual has a reasonable expectation of privacy in real-time records, the expectation must be resolved case-by-case.[132]

Distinguishing between long- and short-term surveillance is dangerous because it can result in "arbitrary and inequitable enforcement," which is what the court held in *Tracey v. Florida*.[133] The Florida Supreme Court has rejected an approach based on the length of time that police monitor a cell phone's location.[134] In *Tracey*, the court found that an individual has a rea-

127. Matter of an Application of the U.S.A. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel., 849 F. Supp. 2d 526, 534 (D. Md. 2011).

128. Cumpstone, *supra* note 8, at 84.

129. Samantha G. Zimmer, *Cell Phone or Government Tracking Device: Protecting Cell Site Location Information with Probable Cause*, 56 DUQ. L. REV. 107, 111 (2018).

130. *Carpenter*, 138 S. Ct. at 2220.

131. Sims v. State, 569 S.W.3d 634, 646 (Tex. Crim App. 2019).

132. *Id.*

133. Tracey v. State, 152 So. 3d 504, 521 (Fla. 2014).

134. *Id.* at 521.

sonable expectation of privacy in his or her real-time location information.[135] Furthermore, the court found that people use cell phones for countless purposes, such as banking, sending emails and texts, and scheduling.[136] The court noted that the Fourth Amendment protects the rights of United States citizens to be secure in their own homes.[137] However, the government cannot always anticipate that people carry cell phones on their persons or nearby, which could be in the home.[138] Additionally, since the Fourth Amendment requires a warrant to particularly describe the place being searched, without the government knowing precisely where the cell phone is, tracking the phone without a warrant is the equivalent to a general warrant.[139]

On the other hand, a New York court in *In re Smartphone Geolocation Data Application* held that individuals have no reasonable expectation of privacy in their real-time location.[140] The court held that prospective CSLI was covered under the third-party doctrine.[141] The court stated that a cell phone user is "well aware" that the cell phone tracks the location of the phone and that the user can turn off the phone to prevent it from sending location information.[142] Thus, a user waives any reasonable expectation of privacy because he or she voluntarily conveys this real-time information.[143]

A Texas court held that three hours of real-time tracking did not invade an individual's reasonable expectation of privacy.[144] In *Sims v. State*, the state charged Christian Sims with murder. Sims filed a motion to exclude the evidence of real-time location information used to trace his cell phone by "pinging" without the police having obtained a warrant.[145] The trial court and the appellate court both denied the motion, prompting Sims to appeal his case to the Court of Criminal Appeals of Texas.[146] The court considered *Carpenter* and concluded that the content of the CSLI records were not im-

135. *Id.* at 525.
136. *Id.* at 523.
137. *Id.* at 511.
138. *Id.* at 524.; Matthew DeVoy Jones, *Cell Phones Are Orwell's Telescreen: The Need for Fourth Amendment Protection in Real-Time Cell Phone Location Information*, 67 CLEV. ST. L. REV. 523, 541 (2019).
139. *Tracey*, 152 So. 3d at 524.
140. *In re* Smartphone Geolocation Data Application, 977 F. Supp. 2d 129, 147 (E.D.N.Y. 2013).
141. *Id.*
142. *Id.* at 138.
143. *Id.* at 146.
144. Sims v. State, 569 S.W.3d 634, 646 (Tex. Crim App. 2019).
145. *Id.* at 636.
146. *Id.* at 637.

portant; it instead looked at whether enough information was obtained to violate an individual's reasonable expectation of privacy.[147]

Courts considering information-gathering techniques comparable to CSLI have continued to disagree about real-time tracking. *Carpenter* and *Sims* suggest a spectrum of permissible time to track a cell phone. In *Carpenter*, the court concluded that 127 days of data collection was a search,[148] whereas in *Sims* the data collection was limited to three hours, and the court concluded a search did not occur.[149] *Carpenter* provides a timing standard—when the government accesses seven days of historical CSLI, it constitutes a Fourth Amendment search.[150] The Court declined to decide whether some shorter period might be permissible without implicating the Fourth Amendment.[151]

B. Stingrays

Cell site simulators are more commonly known as "stingrays."[152] Stingrays operate in a manner similar to cell sites by functioning as mock towers, interrupting cell phone signals and collecting information from phones.[153] When a stingray is used, the government obtains information not from a third party, but by intercepting a signal that a user originally intended to send to a carrier's cell-site tower.[154] The government does this surreptitiously.[155] Because a stingray acts like a cell tower, cell phones that are near the vicinity are compelled to connect to the stingray;[156] even phones that are not in use will be connected to the stingray.[157] The data that is collected can consist of the following: serial numbers of the cell phones, the cell phone num-

147. Benson Varghese, *Sims v. State: Can Police Obtain Real-Time Cell Site Location Without Warrant*, https://www.versustexas.com/criminal/sims-v-state/ (last visited Oct. 25, 2019).

148. *Carpenter*, 138 S. Ct. at 2212.

149. *Sims*, 569 S.W.3d at 646.

150. *Carpenter*, 138 S. Ct. at 2217 n.3.

151. *Id.*

152. Hanni Fakhouri & Trevor Trimm, *Stingrays: The Biggest Threat to Cell Phone Privacy You Don't Know About,* ELECTRONIC FRONTIER FOUNDATION (Oct. 22, 2012), https://www.eff.org/deeplinks/2012/10/stingrays-biggest-unknown-technological-threat-cell-phone-privacy.

153. Cody Benway, *You Can Run, But You Can't Hide: Law Enforcement's Use of "Stingray" Cell Phone Trackers and the Fourth Amendment*, 42 S. ILL. U. L. J. 261, 265 (2018).

154. Fakhouri & Trimm, *supra* note 152.

155. State v. Sylvestre, 254 So. 3d 986, 991 (Fla. Dist. Ct. App. 2018).

156. *Id.*

157. Olivia Donaldson, *The StingRay is Exactly Why the 4th Amendment was Written*, FOUNDATION FOR ECONOMIC EDUCATION (Feb 13, 2017), https://fee.org/articles/the-stingray-is-exactly-why-the-4th-amendment-was-written/.

ber, date, and time of calls.[158] Stingrays transmit this information about every seven seconds when the phone is powered on.[159] Stingrays can make a tracked device automatically send text messages or call someone, without the owner of the cell phone having to do anything.[160] Once a suspect is discovered, law enforcement can pinpoint the location using real-time tracking.[161]

In some states, law enforcement is not required to have a warrant when using stingrays to spy on people who are engaged in suspicious criminal activity.[162] However, some lower courts have held that cell site simulators constitute a search within the meaning of the Fourth Amendment.[163] The Maryland Supreme court in *State v. Andrews* held that individuals have a reasonable expectation of privacy that their cell phones will not be tracked in real-time.[164] Therefore, the court held that law enforcement's use of a cell site simulator constitutes a search within the meaning of the Fourth Amendment.[165] Furthermore, the New York Supreme court in *People v. Gordon* held a warrant was required for the extensive use of a cell site simulator because it violates an individual's reasonable expectation of privacy.[166]

The Seventh Circuit was the first circuit to address the use of stingrays.[167] In *Patrick v. United States*, the court stated that a cell site simulator is similar to a pen register, which is not a search because it does not reveal the content of the call, only the making of the call and the number.[168] On the other hand, the Ninth Circuit has not decided whether using cell site simulators to locate cell phones in real time constitutes a search.[169]

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158. Benway, *supra* note 153, at 265.

159. Christopher D. Browne, *Ill-Suited to the Digital Age: Problems with Emerging Judicial Perspectives on Warrantless Searches of Cell Site Location Information*, 6 NW. INTERDISC. L. REV. 57, 62 (2013) (describing that cell phones automatically connect to the closest tower to receive the strongest strength. Every seven seconds, a cell phone sends a ping to nearby towers).

160. *Id.*

161. Jenna Jonassen, *Stingrays, Triggerfish, and Hailstroms, Oh My: The Fourth Amendment Implications of the Increasing Government Use of Cell-Site Simulators*, 33 TOURO L. REV. 1123, 1126 (2017).

162. Harvey Gee, *Almost Gone: The Vanishing Fourth Amendment's Allowance of Stingray Surveillance in a Post-Carpenter Age*, 28 S. CAL. REV. L. & SOC. JUST. 410, 431 (2019).

163. People v. Gordon, 68 N.Y.S.3d 306, 311 (N.Y. Sup. Ct. 2017); *see* State v. Andrews, 134 A.3d 324 (Md. Ct. Spec. App. 2016).

164. *Andrews*, 134 A.3d at 327.

165. *Id.*

166. *Gordon*, 68 N.Y.S.2d at 311 (describing that a cell site simulator acts as an "instrument of eavesdropping").

167. United States v. Patrick, 842 F.3d 540, 546 (7th Cir. 2016) (Wood, J., dissenting).

168. *Id.* at 543.

169. Ellis v. United States, 270 F. Supp. 3d 1134, 1142 (N.D. Cal. 2017).

C. Cell Tower Dumps

A cellular network is comprised of multiple cell towers, also known as "cell sites."[170] Each network covers three or more directional "sectors."[171] When law enforcement requests information from a cell tower dump, which is a request for CSLI,[172] it receives information from every device that connects to the tower and is also provided the particular time the phone connected to a tower.[173] Requesting information from a tower dump provides access to many individuals' personal data.[174] A tower dump provides information over a short period of time for an unknown number of phones.[175] Tower dumps span broadly instead of deeply.[176]

The use of cell tower dumps has become a "relatively routine investigative technique" by law enforcement officials.[177] Currently, there is no federal statute in effect that addresses how law enforcement officers can request data from a cell tower dump from cell phone providers.[178] The United States Department of Justice encourages assistant United States attorneys to apply for court orders authorizing cell tower dumps in conformance to a provision in the Electronic Communications Privacy Act of 1986.[179]

Not many state and federal courts have addressed cell tower dumps.[180] A Texas court denied the requests for cell tower dumps and held a warrant based on probable cause is required to access the records.[181] On the other

170. Mason Kortz & Christopher Bavitz, *Cell Tower Dumps*, 63 BOSTON BAR J. 26, 26 (2019).

171. *Id.*

172. Michael Price & Bill Wolf, *Building on Carpenter: Six New Fourth Amendment Challenges Every Defense Lawyer Should Consider*, THE CHAMPION, 20, 21 (December 2018), https://www.nacdl.org/getattachment/1616158d-493a-4f1b-a0ba-a2ee5707a87c/price-building-on-carpenter.pdf.

173. John Kelly, *Cellphone Data Spying: It's Not Just the NSA*, USA TODAY (Aug. 11, 2015, 11:51 AM), https://www.usatoday.com/story/news/nation/2013/12/08/cellphone-data-spying-nsa-police/3902809/.

174. Kortz & Bavitz, *supra* note 170, at 26.

175. Price & Wolf, *supra* note 172, at 21.

176. *Id.* (explaining cell tower dumps can impact hundreds and hundreds of people for a short period, whereas for CSLI tracks one person for a long period of time).

177. Brian L. Owsley, *The Fourth Amendment Implications of the Government's Use of Cell Tower Dumps in Its Electronic Surveillance*, 16 U. PA. J. CONST. L. 1, 2 (2013) (describing in 2013 Verizon received approximately 3,200 warrants or orders for cell tower dumps in 2016, it received approximately 14,630 warrants or orders for cell tower dumps).

178. *Id.*

179. 18 U.S.C. § 3121(a); 99 P.L. 508, 100 Stat. 1848.

180. Owsley, *supra* note 177, at 2.

181. *In re* an Ord. Pursuant to 18 U.S.C. § 2703(d), 964 F. Supp. 2d 674 (S.D. Tex. 2013); *In re* the Search of Cellular Telephone Towers, 945 F. Supp. 2d 769 (S.D. Tex. 2013); *In re* an Ord. Pursuant to 18 U.S.C. § 2703(D), 930 F. Supp. 2d 698 (S.D. Tex. 2012)

hand, a New York court has held that accessing information from cell tower dumps does not constitute a search within the meaning of the Fourth Amendment.[182] A Texas federal district court has noted that a tower dump will presumably affect "hundreds of individuals' privacy interests."[183]

IV. *CARPENTER*'S HOLDING SHOULD BE EXTENDED TO REAL-TIME TRACKING, STINGRAYS, AND CELL TOWER DUMPS

To function in society in the 21st century, nearly everyone has a phone. While the benefit of a phone is that you can call, text, and search for information on your phone, it comes with a threat of privacy invasion via modern technology such as real-time tracking, stingrays, and cell tower dumps. *Carpenter*'s holding should be extended to real-time tracking, stingrays, and cell tower dumps because they are more invasive than CSLI and implicate higher privacy concerns, if not the same, as the majority posed in the *Carpenter* Court. These modern technologies provide an intimate view of a person's life, which can pierce into the lives and homes of people. This information would generally not be available unless a person's reasonable expectation of privacy is invaded.

A. Real-Time Tracking can Provide Precise and Exact Location of a Person and is More Intrusive than CSLI

Even though the *Carpenter* Court did not deal with real-time tracking, its reasoning can be extended to real-time tracking.[184] The multi-factor analysis in *Carpenter* would apply to real-time location data; this kind of data is hidden, continuous, indiscriminate, and intrusive like historical CSLI.[185] In *Carpenter*, Chief Justice Roberts said monitoring a cell phone is akin to using an ankle monitor, which is a "quintessential tracking device."[186] Furthermore, Rule 41 of Federal Rules of Criminal Procedure provides the requirements to obtain a warrant for a tracking device.[187]

(holding cell tower records are protected by the Fourth Amendment and the SCA does not authorize the request for cell tower records).

182. *In re* an Ord. Pursuant to 18 U.S.C. §§ 2703(c) and 2703(d), 42 F. Supp. 3d 511 (S.D.N.Y. 2014).

183. *In re the Search of Cellular Telephone Towers*, 945 F. Supp. 2d at 770 (S.D. Tex. 2013).

184. Sims v. State, 569 S.W.3d 634, 646 (Tex. Crim. App. 2019).

185. Susan Freiwald, *First Principles of Communications Privacy*, 2007 STAN. TECH. L. REV. 3, ¶ 50 (2007).

186. Freiwald & Smith, *supra* note 14, at 227.

187. FED. R. CRIM. P. 41.

Some courts have held that courts should treat real-time tracking exactly as historical CSLI.[188] Indeed, real-time tracking and historical CSLI should be treated identically because real-time tracking is more intrusive and permeates into an individual's life more than historical CSLI because it can provide the precise and exact location of where a person is currently standing. Like GPS data and historical CSLI, real-time location information is "detailed, encyclopedic, and effortlessly compiled."[189] As with historical CSLI, real-time location information reveals a "detailed chronicle of a person's physical presence compiled . . . every moment."[190] Whether historical CSLI or real-time information is requested, the information provided will be identical; the information that is provided includes the date and time of communications made and received using the phone, telephone numbers involved in these communications, the cell tower the phone was connected to, and call duration.[191]

However, it is also important to consider the *Carpenter* Court's reasoning on why historical CSLI should be considered a more significant intrusion on privacy than the GPS tracking in *Jones*.[192] The *Carpenter* Court suggested historical CSLI is more intrusive than real-time tracking when it stated "[u]nlike with the GPS device in *Jones*, police need not even know in advance whether they want to follow a particular individual, or when."[193] With access to CSLI, the government can now trace a person's approximate historical location, subject to the retention policies of carriers.[194] Carriers currently maintain records of CSLI for up to five years.[195] The government can then access stored data and create a detailed map. In contrast, real-time tracking can only provide information in the moment, and there is not an option to rewind and access data from the past. Though there are strong arguments that historical CSLI is a more significant intrusion than GPS tracking, real-time tracking is much more invasive because it provides "continuous, detailed, and real-time location, speed, direction and duration wherea-

188. Jeremy H. Rothstein, *Track Me Maybe: The Fourth Amendment and the Use of Cell Phone Tracking to Facilitate Arrest*, 81 FORDHAM L. REV. 489, 505–06 (2012).

189. Carpenter v. United States, 138 S. Ct. 2206, 2216 (2018).

190. *Id.* at 2220.

191. Christopher Joseph, *Find My Criminals: Fourth Amendment Implications of the Universal Cell Phone App that Every Cell Phone User Has but No Criminal Wants*, 22 BARRY L. REV. 65, 70 (2016).

192. *Carpenter*, 138 S. Ct. at 2218.

193. *Id.*

194. *Id.*

195. *Id.*

bouts."[196] CSLI tracking is relatively imprecise because it covers a huge geographical area.[197]

Although long-term location information can be comprehensive and disclose intimate details of an individual's daily life, short-term surveillance can be equally as revealing.[198] In *Jones*, Justice Alito, in his concurrence, asserted that constant monitoring of "every single movement" of a person's car for twenty-eight days violated a person's reasonable expectation of privacy and should, for that reason, be deemed a search.[199] He also postulated that short-term tracking would not constitute a search.[200] Justice Alito declined to establish a line that would indicate at what point tracking becomes a search.[201] Justice Sotomayor's concurrence in *Jones* suggested that short-term surveillance could potentially be problematic depending on the amount of information police officers are able to accumulate from aggregate data.[202] Short-term tracking of an individual could reveal private information.[203] For example, attending a religious gathering or political rally can reveal personal information that an individual might want to keep private.[204] Sotomayor was the only Justice who took this position, but did not take an explicit position on whether short-term geolocation monitoring constitutes a search.[205] Nonetheless, it can be inferred from her opinion that Justice Sotomayor believes *any* duration of geolocation surveillance is problematic.[206] While Justice Alito suggests the temporal length of surveillance should be measured, Justice Sotomayor seems more interested in the "*quantity* and *quality*" of information collected.[207] Short-term monitoring generates the same quality of data as long-term monitoring because GPS data "generates a precise, com-

196. Jones, *supra* note 138, at 531 (quoting Lenese C. Herbert, *Challenging the (Un)constitutionality of Governmental GPS Surveillance*, 26 CRIM. JUST. 34, 34 (2011)).

197. *Carpenter*, 138 S. Ct. at 2225.

198. United States v. Jones, 565 U.S. 400, 415–416 (2018) (Sotomayor, J., concurring).

199. *Id.* at 428–31 (Alito, J., concurring).

200. *Id.* at 430.

201. RICHARD M. THOMPSON II, CONG. RESEARCH. SERV., R42511, *UNITED STATES V. JONES:* GPS MONITORING, PROPERTY AND PRIVACY 8 (2012).

202. *Jones*, 565 U.S. at 414 (Sotomayor, J., concurring).

203. Monu Bedi, *Social Networks, Government Surveillance, and the Fourth Amendment Mosaic Theory,* 94 B.U. L. REV. 1809, 1812 (2014).

204. *Id.*

205. *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring) ("I agree with Justice Alito that, at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'" "In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the Katz analysis will require particular attention.").

206. *Id.* at 430.

207. Gabriel R. Schlabach, *Privacy in the Cloud: The Mosaic Theory and the Stored Communications Act*, 67 STAN. L. REV. 677, 684 (2015).

prehensive record of a person's public movements that reflects a wealth of detail about" a person's private life.[208] She further noted

> I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.[209]

Five Justices took the mosaic theory approach.[210] Under the mosaic theory, a search can be analyzed as an aggregation of data rather than individual steps.[211] The notion behind the mosaic theory of the Fourth Amendment is that when it comes to a person's reasonable expectation of privacy, the whole is greater than the sum of its parts.[212] Rather than focusing on individual movements, Justice Sotomayor focused on whether a person has Fourth Amendment rights "in the sum" of his public movements.[213] On the other hand, there is an argument that prolonged surveillance can reveal information that may not be revealed by short-term surveillance, for instance, what a person repeatedly does and does not do.[214]

However, it is important to note the distinction between public movements and private places. *United States v. Knotts* and *United States v. Karo* distinguished the line between public and private space.[215] In *Knotts*, the Court held the warrantless monitoring of a beeper contained in a five-gallon drum of chloroform as it was being transported to a cabin did not implicate the Fourth Amendment because the movements of the vehicle on a public highway were "voluntarily conveyed."[216] Though if law enforcement conducts short-term monitoring of an individual's public movement in a remote

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208. Peter Toren, *The 'Dirtboxes' of the US Marshalls Service*, HILL BLOG (Dec. 12, 2014, 3:00 PM), https://thehill.com/blogs/congress-blog/judicial/226823-the-dirtboxes-of-the-us-marshals-service.

209. Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 GEO. WASH. L. REV. 311, 328 (2012).

210. *Jones*, 565 U.S. at 430 (Alito, J., concurring in the judgment) (embracing the mosaic theory were the following Justices: Sotomayor, Alito, Ginsburg, Breyer, and Kagan).

211. Sohayla M. Roudsari*, Fourth Amendment Jurisprudence in the Age of Big Data: A Fresh Look at the Penumbras Through the Lens of Justice Sotomayor's Concurrence in United States v. Jones*, 9 FED. CTS. L. REV. 139, 156–57 (2016).

212. United States v. Maynard, 615 F.3d 544, 558 (D.C. Cir. 2010) ("[T]he whole of one's movements is not exposed constructively even though each individual movement is exposed, because that whole reveals more—sometimes a great deal more—than the sum of its parts."); *see* Roudsari, *supra* note 211, at 155.

213. Kerr, *supra* note 209, at 328.

214. United States v. Maynard, 615 F.3d 544, 556 (D.C. Cir. 2010).

215. Freiwald & Smith, *supra* note 14, at 207.

216. United States v. Knotts, 460 U.S. 276, 281 (1983).

area where they would not typically be surveilling, it may suggest a reasonable intrusion has occurred.[217] In *Karo*, the Court held that law enforcement monitoring a beeper within a private residence constituted a search within the meaning of the Fourth Amendment.[218] The beeper was hidden in a can of ether.[219] Law enforcement monitoring the beeper obtained information such as if a person was in the home at a specific time.[220] Law enforcement could not have obtained this information by merely observing outside the home.[221]

In the digital world, to exchange ideas or information without revealing information to third parties is impracticable.[222] Compared to 1979, when *Smith v. Maryland* was decided, people disclose more information to third parties now.[223] Justice Sotomayor's concurrence in *Jones* critiqued the third-party doctrine and called it "ill-suited to the digital age."[224] This applies to real-time tracking because individuals convey information about their location while merely carrying their phones.[225] The user of the phone communicates information even when the phone is simply powered on and not being used, so it would be improper to apply the third-party doctrine to real-time tracking—just as it was in *Carpenter*, when the Court chose not to apply the third-party doctrine to historical CSLI.[226]

Furthermore, real-time tracking data should be classified as exhaustive personal data, which is the same as CSLI, instead of limited personal information like pen registers and bank records.[227] Although bank and telephone records may reveal private associations, they do not reveal any information regarding whether a person attended any private meetings or political rallies.[228] In determining whether a reasonable expectation of privacy exists, the length of surveillance should of little importance.[229] Cell phone tracking can quickly and unpredictably invade the right to privacy in a person's home or other private areas because normally phones are carried on one's person.[230] Because a lot of cell phone users keep their cell phone near them or

217. Unite States v. Jones, 565 U.S. 400, 430 (2018) (Alito, J., concurring).
218. United States v. Karo, 468 U.S. 705, 727 (1984) (O'Connor, J., concurring).
219. Freiwald & Smith, *supra* note 14, at 207.
220. *Id.*
221. *Id.*
222. Lindsey Barrett, *Model(ing) Privacy: Empirical Approaches to Privacy Law & Governance*, 35 SANTA CLARA HIGH TECH. L.J. 1, 28 (2018).
223. Rothstein, *supra* note 188, at 508.
224. United States v. Jones, 565 U.S. 400, 415 (2018) (Sotomayor, J., concurring).
225. Jones, *supra* note 138, at 546.
226. *Id.*
227. Carpenter v. United States, 138 S. Ct. 2206, 2219.
228. Jones, *supra* note 138, at 546.
229. *Id.*
230. Tracey v. State, 152 So. 3d 504, 524 (Fla. 2014).

on themselves it is "essentially the corollary of locating the user within the home."[231]

The most common argument is that an individual has no reasonable expectation of privacy in his or her real-time location information because the information is voluntarily conveyed to a third party.[232] However, this argument is weak. It ignores the notion that not all information is conveyed voluntarily.[233] A person voluntarily conveys real-time information when making a call, sending a text or email, but information is not voluntarily conveyed when a user receives calls, texts, messages or emails.[234] While information the user conveyed may be considered "voluntarily" conveyed, that is not the purpose or intention of the user.[235] The information is revealed to use the phone for its intended purpose, not to share location.[236]

In conclusion, real-time tracking is more intrusive than CSLI because it provides detailed and encyclopedic information. Therefore, the Supreme Court should consider it a search within the meaning of the Fourth Amendment. While the *Carpenter* Court argued that CSLI is more invasive than real-time tracking, there are arguments that it's actually the opposite. Real-time tracking is more intrusive and permeates into an individual's life because it can pinpoint the exact location of a person, which CSLI does not. Stingrays, on the other hand, while they do not pinpoint the exact location of a person, are more precise than CSLI because they can locate an individual within a few feet.

B. Stingrays are More Invasive than CSLI, so the Supreme Court Should Extend *Carpenter*'s Holding to Them

The Supreme Court should also extend *Carpenter*'s holding to include stingrays. Protection of stingray data under the Fourth Amendment is compelling because the data is "generated by law enforcement," not the provider, so the third-party doctrine cannot be argued here.[237] Furthermore, sting-

231. *In re* U.S. for an Ord. Authorizing Disclosure of Location Info. of a Specified Wireless Tel., 849 F. Supp. 2d 526, 541 (D. Md. 2011).

232. *See Carpenter*, 138 S. Ct. at 2223–24 (2018) (Kennedy, J., dissenting); *id.* at 2235 (Thomas, J., dissenting); *id.* at 2247 (Alito, J., dissenting); United States v. Riley, 858 F.3d 1012, 1017–18 (6th Cir. 2017); United States v. Davis, 785 F.3d 498, 511–13 (11th Cir. 2015); *In re* Smartphone Geolocation Data Application, 977 F. Supp. 2d 129, 145–46 (E.D.N.Y. 2013).

233. Jones, *supra* note 138, at 545.

234. *Id.*

235. *Id.*

236. *Id.*

237. Harvey Gee, *Stingray Cell-Site Simulator Surveillance and the Fourth Amendment in the Twenty-First Century: A Review of* The Fourth Amendment in an Age of Surveillance*, and* Unwarranted, 93 ST. JOHN'S L. REV. 325, 342 (2019).

rays function like cell site location tracking because they both use the same technology.[238] Stingrays, however, are more precise than CSLI because they can identify the location of an individual within six feet.[239] They "are invaluable law enforcement tools that locate or identify mobile devices during active criminal investigations,"[240] but, at the same time, implicate significant privacy interests.

Stingrays are much more invasive than CSLI; therefore, if a warrant is required for CSLI, a warrant must be required for the use of cell-site simulators.[241] Because stingrays function unsystematically, in addition to its targeted suspect, "the precise location of every device within [their] range" of innocent people is also obtained.[242] Additionally, the government can at times capture the content of communications when a cell phone is connected to a cell site simulator.[243] This indicates that the government can covertly obtain a vast amount of information.[244] Such a sweeping search effectively functions as a general warrant, which are unconstitutional.[245]

The Framers sought to eliminate general search warrants, which allowed officials to rummage anywhere, even in private homes, to look for contraband.[246] Hence, the government must show probable cause before utilizing a stingray. The government's use of a stingray constitutes a search is because it uses a sense-enhancing device that is not available to the general public to obtain information.[247] The Harris Corporation is the main manufacturer of cell-site simulators and sells them to government agencies.[248] The cell site simulators are listed in a catalogue that is not distributed to the general public or provided in detail on the manufacturer's website; all marketing materials that are circulated contain a warning that if the cell site simulators are sold to anyone other than law enforcement agencies, the person distributing them could potentially be committing a crime and face jail

238. William Curtiss, *Triggering a Closer Review: Direct Acquisition of Cell Site Location Tracking Information and the Argument for Consistency across Statutory Regimes*, 45 COLUM. J.L. & SOC. PROBS. 139, 165 (2011).

239. *Id.*

240. U.S. DEP'T OF HOMELAND SECURITY, POLICY DIRECTIVE 047-02, DEPARTMENT POLICY REGARDING THE USE OF CELL-SITE SIMULATOR TECHNOLOGY 1 (2015), https://www.dhs.gov/sites/default/files/publications/Department%20Policy%20Regarding%20the%20Use%20of%20Cell-Site%20Simulator%20Technology.pdf.

241. State v. Sylvestre*,* 254 So. 3d 986, 991 (Fla. Dist. Ct. App. 2018)

242. Browne, *supra* note 159, at 67.

243. Fakhouri & Trimm, *supra* note 152.

244. *Id.*

245. *See id.*

246. Rothstein, *supra* note 188, at 496

247. Cumpstone, *supra* note 8, at 97.

248. Ryan Gallagher, *Meet the Machines that Steal Your Phone's Data*, ARS TECHNICA (Sept 25, 2013, 12:00 PM), https://arstechnica.com/tech-policy/2013/09/meet-the-machines-that-steal-your-phones-data/ (last visited Feb. 20, 2021).

time of up to five years.[249] Furthermore, if the targeted individual's cell phone is inside the home, the cell site simulator can follow the cell phone user throughout his or her home and look inside the home, which is similar to what occurred in *Kyllo*, where the government used a thermal-imaging device to look inside Kyllo's home.[250]

In conclusion, stingrays, like real-time tracking, can provide more precise location information compared to CSLI. Stingrays are also akin to a *Kyllo* search. Thus, stingrays are more invasive than CSLI. Since the Supreme Court considered CSLI a search within the meaning of the Fourth Amendment, it should consider stingrays a search within the meaning of Fourth Amendment. Cell tower dumps, on the other hand, while they provide less information, provide information of the privacies of an individual's life.

C. Cell Tower Dumps are the Equivalent of Dragnet Surveillance, so They Should Be Treated Like CSLI

Lower courts are currently divided on how cell tower dumps should be treated under the Fourth Amendment.[251] Though the Supreme Court has yet to address cell tower dumps, it has suggested that "dragnet surveillance" is unlawful. The *Carpenter* Court suggested that real-time tracking and the use of stingrays could be considered dragnet surveillance, and since cell tower dumps are analogous in nature to both real-time tracking and the use of

249. *Id.*

250. Kyllo v. United States, 533 U.S. 27, 29–30 (2001).

251. RACHEL LEVINSON-WALDMAN, CELLPHONES, LAW ENFORCEMENT, AND THE RIGHT TO PRIVACY 3 (2018); *see In re* Cell Tower Records Under 18 U.S.C. 2703(D), 90 F. Supp. 3d 673, 675 (S.D. Tex. 2015) (holding that a court order was sufficient, and stating that "cell tower logs requested here [are] categorized as ordinary business records entitled to no constitutional protection"); *In re* an Ord. Pursuant to 18 U.S.C. 2703(c), 42 F Supp. 3d 511, 519 (S.D.N.Y. 2014) (finding a court order sufficed because § 2703(d) of the Stored Communications Act applied to cell tower dumps and the third-party doctrine destroyed protections under the Fourth Amendment, but requiring "an amended application that (1) provides more specific justification for the time period for which the records will be gathered and (2) outlines a protocol to address how the Government will handle the private information of innocent third-parties whose data is retrieved"); *see also* Hewitt v. United States, No. 3:08-CR167-B (2), 2018 WL 3853708, at *5 (N.D. Tex. July 25, 2018), report and recommendation adopted, 3:08-CR-167-B (2), 2018 WL 3845232 (N.D. Tex. Aug. 13, 2018) (holding that "[t]he Fourth Amendment does not prohibit the government from obtaining historical cell tower data for all cell phones used at the time of a crime"); United States v. Pembrook, 119 F. Supp. 3d 577, 585 (E.D. Mich. 2015) (holding because the government's lack of a warrant was not deliberate or grossly negligent, the data of the cell tower dump need not be suppressed); United States v. Scott, No. 14-20780, 2015 WL 4644963, at *7 (E.D. Mich. 2015) (holding that when the cell phones are within the tower's range, the individual has no reasonable expectation of privacy in records).

stingrays, cell tower dumps should fall under this category.[252] Though the data is short term tracking, law enforcement also requests from mobile carriers detailed information such as GPS location data, website addresses, and, in some cases, search terms entered into cell phones.[253] Cell tower dumps are only limited in their geographic scope.[254]

Carpenter emphasizes that an individual has a reasonable expectation of privacy in his or her historical cellphone location data.[255] *Carpenter*'s holding should extend to cell tower dumps because information acquired through them can expose the "privacies of life."[256] The government's use of cell-tower dumps violates an individual's reasonable expectation of privacy.[257] Cell tower dumps are known as "virtual time machine[s]."[258] A cell tower dump can provide an intimate window into the privacies of life such as familial, political, and religious associations.[259] Cell tower dumps reveal less information over time compared to CSLI; however, they do involve access to more users' data compared to historical CSLI.[260] Furthermore, at least one United States Magistrate Judge has suggested that the Fourth Amendment impliedly protects information gathered in cell tower dumps.[261]

Although cell tower dumps involve the privacy of many individuals, they can be considered less intrusive on an individual level.[262] Cell tower dumps cover a short period of time and a small area.[263] Law enforcement is not seeking information about a specific user or cell phone number.[264] It looks at cell phones within a certain geographical area on a given date and time.[265] Cell tower data provides general location of the cell phone.[266] Fur-

252. Kortz & Bavitz, *supra* note 170, at 27.

253. Ellen Nakashima, *Agencies Collected Data on Americans' Cellphone Use in Thousands of 'Tower Dumps'*, WASH. POST (Dec. 9, 2013), https://www.washingtonpost.com/world/national-security/agencies-collected-data-on-americans-cellphone-use-in-thousands-of-tower-dumps/2013/12/08/20549190-5e80-11e3-be07-006c776266ed_story.html.

254. Nate Anderson, *How "Cell Tower Dumps" Caught the High Country Bandits—and Why It Matters*, ARS TECHNICA (Aug, 29, 2013), https://arstechnica.com/tech-policy/2013/08/how-cell-tower-dumps-caught-the-high-country-bandits-and-why-it-matters/.

255. Carpenter v. United States*,* 138 S. Ct. 2206, 2219 (2018); *see also* Price & Wolf, *supra* note 172, at 21.

256*. Carpenter,* 138 S. Ct. at 2217.

257. Price & Wolf, *supra* note 172, at 21.

258*. Id.*

259*. Id.*

260*. Id.* at 26.

261. *In re* an Ord. Pursuant to 18 U.S.C. 2703(d) Directing Providers to Provide Historic Cell Site Locations Records, 930 F. Supp. 2d 698, 700 (S.D. Tex. 2012).

262. Kortz & Bavitz, *supra* note 170, at 27.

263*. Id.*

264. Amanda Regan, Note, *Dumping the Probable Cause Requirement: Why the Supreme Court Should Decide Probable Cause Is Not Necessary for Cell Tower Dumps*, 43 HOFSTRA L. REV. 1189, 1220 (2015).

265*. Id.*

thermore, cell tower data is less precise compared to GPS technology.[267] The precision depends on the range of the geographical area covered by the cell site.[268] The greater the clustering of cell sites, the smaller the coverage area.[269] In an urban area, cell site records can be imprecise up to forty times because it can cover hundreds of city blocks.[270] Thus, in *United States v. Adkinson*, *Carpenter*'s holding was not extended to tower dumps in part because the *Carpenter* Court had declined to rule that cell tower dumps were searches requiring warrants.[271]

However, while historical CSLI data received from cell tower dumps for less than seven days is not as intrusive as the longer-term data *Carpenter* addressed, because cell tower data is a subset of historical CSLI[272], it should be considered a search within the meaning of the Fourth Amendment. Cell tower dumps are a "limited dragnet."[273] When a law enforcement officer requests a cell tower dump, he or she is requesting information "on all calls transmitted through a cell tower at a given time, on a given date, near a specific location."[274] Because the officer is not aware of the suspect's phone number, the officer must go through all cell service provider records and find all cell phones that were near the cell tower for the date and time that he is looking for records.[275] Thus, because a cell tower dump collects enormous amount of data, it constitutes as dragnet surveillance, which the Supreme Court has held is unconstitutional.[276]

In conclusion, the Supreme Court should consider cell tower dumps a search within the meaning of the Fourth Amendment. While cell tower dumps do not provide as much information as real-time tracking or stingrays, they reveal the privacies of an individual's life such as familial and political information. The use of cell tower dumps violates an individual's reasonable expectation of privacy as the data involves information for many individuals. To prevent the invasion of privacy, Congress can enact exhaustion laws.

266. Owsley, *supra* note 177, at 6.
267. Regan*, supra* note 264, at 1208.
268. *Carpenter*, 138 S. Ct. at 2211.
269. *Id.*
270. *Id.* at 2225. (Kennedy, J., dissenting).
271. United States v. Adkinson, 916 F.3d 605, 611 (11th Cir. 2019).
272. Regan, *supra* note 264, at 1190.
273. *Id.*
274. *Id.*
275. *Id.* at 1191.
276. Kortz & Bavitz, *supra* note 170, at 26.

V. RECOMMENDATIONS

Because modern technology has advanced to the point where the exact location of an individual can be determined, Congress must enact electronic "exhaustion" requirements for surveillance to protect individual from an invasion of privacy. This would ensure that intrusive surveillance only occurs when it is absolutely necessary.

A. Recommendations for Congress to Prevent Invasion of Privacy

The Supreme Court has acknowledged that this is the "Cyber Age."[277] Before the digital era, Congress passed the Stored Communications Act (SCA) in 1986.[278] The SCA furnishes a scheme to determine when the government can obtain certain kinds of electronically stored information (ESI) from third-party providers.[279] It also sets forth the various tools government officials can use to access ESI, such as obtaining warrants or court orders and permitting searches without a notice.[280] When the government provides "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication are relevant and material" to an investigation underway, then the government can request records.[281]

Because location data is sensitive, obtaining location information should require not only a warrant, but also exhaustion.[282] The Wiretap Act has an exhaustion requirement and is a good model to follow.[283] The Wiretap Act states that less invasive investigative procedures must be attempted first.[284] In order for the government to show that it has met the exhaustion requirement, it must provide more than a standard recitation of the difficulties it faced in gathering usable evidence.[285] "[T]he adequacy of [the government's] showing is to be tested in a practical and commonsense fashion

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277. *Carpenter*, 138 S. Ct. at 2224 (Kennedy, J., dissenting) ("It is true that the Cyber Age has vast potential both to expand and restrict individual freedoms in dimensions not contemplated in earlier times.")

278. 18 U.S.C. § 2703.

279. *Id.*

280. *Id.*

281. § 2703(d) (explaining that contents are permitted only in limited circumstances).

282. 18 U.S.C § 2518(1)(c) ("[A] full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.").

283. *Id.* (The Wiretap Act governs warrants for intercepting communications).

284. Jake Laperruque, *Congress Should Place More Limits on Cellphone Location Tracking After Carpenter,* JUST SECURITY, https://www.justsecurity.org/54231/probable-cause-electronic-exhaustion-limits-location-tracking-carpenter/ (last visited Dec. 18, 2019).

285. United States v. Oriakhi, 57 F.3d 1290, 1297 (1995).

that does not hamper unduly the investigative powers of law enforcement agents."[286] Including an exhaustion requirement would ensure that an intrusive form of surveillance occurs only when it is necessary.[287] When the court is dealing with cellphone tracking, *electronic* investigative procedures should be required to be exhausted before more intrusive approaches are utilized.[288] Electronic exhaustion would prevent an invasion of privacy.

Limiting governmental use of geolocation information for surveillance prevents abusive access and utilization of private individuals' geolocation information. The Geolocation Privacy and Surveillance (GPS) Act has been proposed a few times but has not progressed in the House and Senate Judiciary committees.[289] The GPS Act is a bill that was introduced in order to combat the encroachment on an individual's privacy during the cyber age.[290] The Act lists procedures to which law enforcement must adhere in order to "track an individual's whereabouts"; in addition, it prohibits the disclosure or dissemination of an individual's geolocation information or data without the individual's consent.[291] The GPS Act would protect real-time tracking and "access to records of individuals' past movements."[292]

In conclusion, enacting exhaustion laws and the passage of the GPS bill will provide protection to an individual's location and access of those records. In the long run, these measures will protect activities protected under the First Amendment. If there are no exhaustion laws in place, if the government obtains a warrant, it would be able to place cell tower dumps, stingrays, and use real-time tracking information at political rallies and protests. This would not only target one person, but everyone involved in these settings. Thus, the warrant would create a pretext to install these modern technological devices. If invasive surveillance is necessary, it should only be limited to the particular individual or the smallest geographic area.

VI. CONCLUSION

In 1791, when the states ratified the Fourth Amendment, the Framers had no perception of the technological advances that would one day become an issue under the Fourth Amendment. These advances have made possible

286. *Id.* (quoting United States v. Smith, 31 F.3d 1294, 1297 (4th Cir. 1994)).
287. *Id.*
288. *Id.*
289. *Geolocation Privacy Legislation*, GPS.GOV, https://www.gps.gov/policy/legislation/gps-act/ (last visited Oct. 22, 2019).
290. Katherine A. Mitchell, *The Privacy Hierarchy: A Comparative Analysis of the Intimate Privacy Protection Act vs. the Geolocational Privacy and Surveillance Act*, 73 U. MIAMI L. REV. 569, 571 (2019).
291. *Id.*
292. *GPS Act*, RON WIDEN, UNITED STATES SENATOR FOR OREGON, https://www.wyden.senate.gov/priorities/gps-act (last visited Oct. 22, 2019).

ever-increasing intrusions into the privacies of life. Even when an individual is not using his or her phone, the phone is transmitting data. The world has come a long way— from sending a telegram, to making a call, to using the internet, to gadgets that can track and pinpoint a user's exact location. Because the Supreme Court has decided that historical CSLI requires a warrant, it should extend that reasoning to newer, parallel technology like real-time tracking, stingrays, and cell tower dumps—all more invasive than historical CSLI.

People do not buy phones to share their information with government officials or the police. They buy them to talk to their loved ones and friends and connect with other people. Hence, they buy them to function in modern society. The use of real-time tracking, stingrays, and cell tower dumps is an infringement of an individual's reasonable expectation of privacy. Any police activity that is the "modern-day equivalent of activity" that has been restricted in the past should also be restricted today.[293] Within the last twenty years, technological advancements have turned cell phones into mini-computers that people can carry in their pockets, making it easy for the government to invade individuals' privacy.

The eruption of modern technology has increased law enforcement's ability to thoroughly investigate crimes and efficiently respond to situations. In an effort to make arrests or provide protection to citizens of the community, law enforcement has exceeded its power to obtain personal information that would otherwise not be known. In order to balance the interests and harms of society, it is also important to impose limitations upon law enforcement to prevent abuse or overly pervasive surveillance. The enactment of exhaustion requirements will prevent the encroachment of an individual's reasonable expectation of privacy. The government must use less invasive investigative procedures first before it requests location records of an individual. As technology involves, it is important that Congress takes important measures to protect the interests of individuals.

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293. Ohm, *supra* note 102, at 394.

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EMPLOYMENT LAW—JUST LET THEM HANDLE IT AMONGST THEMSELVES: AN ARGUMENT IN FAVOR OF ABANDONING THE APPLICATION OF THE *LYNN'S FOOD STORES* STANDARD TO FLSA SETTLEMENT AGREEMENTS

I. INTRODUCTION

> *The heavy hand of the federal government, with its gigantic bureaucracy practicing suffocating paternalism, reaches all things and all people.*[1]

The story of the American worker is one of exploitation and abuse by employers. From the birth of our country through the passing of the Thirteenth Amendment, wealthy and powerful white men held millions of people in bondage and stole the fruits of their labor, without any compensation. And even after the Emancipation Proclamation, workers were often paid wages far below the minimum needed to survive and care for one's family.[2] Not uncommonly, children were employed in unsafe conditions just so the family could afford a roof over their heads and food on the dinner table.[3]

This relentless trend of exploitation was curtailed in 1933 when President Roosevelt sent an initial draft of the Fair Labor Standards Act ("FLSA") to Congress with a message that said America should be able to give "all our able-bodied working men and women a fair day's pay for a fair day's work."[4] Congress later enacted the FLSA to further this lofty goal by ensuring all employees are paid at the rate necessary to support themselves, and that they are adequately compensated for sacrificing significant amounts of time away from their personal lives for the benefit of their employer.[5] In

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1. Brennan v. Iowa, 494 F.2d 100, 107 (8th Cir. 1974) (Gibson, J., dissenting).

2. *See* Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 642–50 (2019) (discussing the historic backdrop preceding the enacting of the FLSA).

3. *See id.*

4. Jonathon Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LABOR REVIEW (June 1978), https://www.dol.gov/general/aboutdol/history/flsa1938; *see also* Tenn. Coal, Iron, & R. Co. v. Muscoda, 321 U.S. 590, 606 (1944) (Roberts, J., dissenting) ("The committee reports upon the bill which became the Fair Labor Standards Act make it clear that the sole purpose was . . . to require a fair day's pay for a fair day's work[.]") (footnote omitted).

5. *See* Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 606–07 (Roberts, J., dissenting); *see also* Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981) ("[T]he FLSA was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive '[a] fair day's pay for a fair day's work' and would be protected from 'the evil of "overwork"' as well as

short, the FLSA is a remedial statute enacted to set certain minimum requirements for employers regarding how they compensate their employees.[6] Unfortunately, notwithstanding this lofty purpose, employers sometimes misread—or willfully disregard—the FLSA's requirements and cheat their employees out of their earned wages.[7] Facing a recalcitrant employer, employees generally have no other choice than to pursue litigation.

As with most civil lawsuits, the vast majority of FLSA wage-and-hour claims are resolved before ever going to trial.[8] Typically, attorneys will litigate all issues up to the point of trial and then discuss a settlement if neither party prevails on a motion for summary judgment. This is often because litigants think the costs of a trial outweigh the risk of either side losing and walking away empty-handed or incurring further financial losses in the way of damages.[9]

Unlike most causes of action, the FLSA was born of a congressional desire to remedy abuses suffered by employees at the hands of employers.[10] Due to the FLSA's remedial nature, some courts—applying the reasoning articulated in the *Lynn's Food Stores*[11] decision—have determined that any settlement resolving wage-and-hour issues under the FLSA *must* be evaluated prior to execution to ensure it is "fair and reasonable."[12] However, courts requiring prior judicial review of FLSA settlements are widely inconsistent in their fairness and reasonableness analysis.[13] This piecemeal approach to settlement review and approval has resulted in inconsistency regarding judicial reasonableness and fairness analyses and, consequently, uncertainty among parties during settlement negotiations.[14] Often, a court may approve

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'underpay.'" (second alteration in original) (emphasis omitted) (quoting Overnight Motor Trans. Co. v. Missel, 316 U.S. 572, 578 (1942)).

6. *See* 29 U.S.C. § 202 (2018).

7. *See* ADMIN. OFFICE OF THE U.S. COURTS, 2018 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 12 tbl.C–2 (2018), https://www.uscourts.gov/sites/default/files/data_tables/jb_na_distciv_0930.2018.pdf (noting that 7,600 FLSA civil lawsuits were filed in 2018).

8. *See id.* at 57 tbl.C-4 (noting that only 1.4% of private FLSA cases were resolved by trial in 2018).

9. *See, e.g.*, McDermott, Inc. v. Amclyde, 511 U.S. 202, 215 (1994) ("[P]ublic policy wisely encourages settlements[.]").

10. *See Barrentine*, 450 U.S. at 739.

11. Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350 (11th Cir. 1982).

12. *Id*; *see infra* Part III.

13. *See infra* Part IV.A.2.

14. Keith W. Diener, *Judicial Approval of FLSA Back Wages Settlement Agreements*, 35 HOFSTRA LAB. & EMP. L.J. 25, 40–52 (2017) (examining the several different multi-factor tests used by courts across the country in evaluating the fairness and reasonableness of FLSA settlements).

of a practice that it later condemns.[15] The end result is that a judge can render a carefully negotiated settlement that benefits all parties involved a complete waste of time.[16] The defendant's legal costs multiply as the parties continue to litigate the matter, and the plaintiff's unpaid wages remain in the employer's pocket.

This note argues that such judicial paternalism born *sua sponte* runs contrary to both the statutory text and legislative goals of the FLSA. Parties should, of course, always have the opportunity to have a court evaluate a potential settlement agreement prior to the parties committing to it, but courts should not force such a review upon them. Furthermore, this note argues that courts being asked to enforce FLSA settlements that were not subject to judicial review prior to execution should adopt a specific "construe against the employer" maxim of contract interpretation.

Part II of this note will provide an overview of the FLSA, including the public policy goals it seeks to accomplish and a brief explanation of the FLSA's protections. Part III of this note will introduce the "fairness and reasonableness" standard applied by those courts requiring judicial review of all FLSA settlement agreements and explain the split among the appellate circuits, including the basis for the two approaches being employed. Specifically, it will discuss the lay of the land across the circuits and discuss the public policy and reasoning of those circuits that have explicitly adopted or declined to adopt the review requirement. Part IV of this note will argue in favor of the "No Review Required" reasoning adopted by the U.S. Court of Appeals for the Fifth Circuit. In addition, this note will offer two additional requirements necessary to balance out the "No Review Required" approach: an open-door policy allowing, but not requiring, any party to seek judicial review of a potential FLSA settlement agreement, and a "construe against the employer" maxim of contract interpretation to be used in interpreting an FLSA settlement agreement.[17]

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15. *Compare* White v. Gregory Kistler Treatment Ctr., Inc., No. 2:16-CV-02259, 2018 U.S. Dist. LEXIS 204557, at *4 (W.D. Ark. Dec. 4, 2018) (approving settlement that reduced liquidated damages), *with* Kappelmeier v. Wil-Shar, Inc., No. 5:18-CV-05181, 2019 U.S. Dist. LEXIS 111297, at *3 (W.D. Ark. July 3, 2019) (denying approval of FLSA settlement, stating that a liquidated damages award was mandatory).

16. *See, e.g.*, Bouzzi v. F&J Pine Rest., LLC, 841 F. Supp. 2d 635, 640–42 (E.D.N.Y. 2012) (refusing to allow the filing of an FLSA settlement under seal, which resulted in the settlement no longer being acceptable to the parties because confidentiality was a term the employer required as a condition of settling the matter).

17. *See infra* Part IV.

II. BACKGROUND

In the wake of the Great Depression, Congress introduced several statutes colloquially referred to as the "New Deal."[18] One of these statutes was the Fair Labor Standards Act of 1938.[19] During the decades leading up to the FLSA's enactment, employees regularly worked excessive hours for wages far below the level required to sustain a respectable standard of living.[20] Furthermore, companies gained an unfair competitive advantage in the burgeoning national marketplace by manufacturing goods in states with no minimum wage laws for sale in states with their own minimum hourly wages.[21] Congress addressed these issues through the minimum hourly wage and overtime requirements in the FLSA.[22] The FLSA also expressly disallows employees from bargaining away their rights. For example, an employer may not hire an employee at lower than the minimum wage, even if the employee were to agree to the term.[23] The FLSA allows for exemptions to its terms in specified circumstances,[24] but the risk lies entirely with the employer if it mistakenly classifies an employee as exempt.[25]

As with several other laws bestowing additional rights onto a large swath of the American citizenry, the FLSA expressly allows for private lawsuits to enforce its requirements.[26] The FLSA promotes enforcement of wage-and-hour rights by allowing a prevailing plaintiff to recover reasonable attorneys' fees, and costs as part of his or her judgment.[27] Furthermore, a prevailing employee is allowed double his or her unpaid wages in the form of liquidated damages.[28] By both allowing for recovery of attorneys' fees and inflating any judgment through liquidated damages, Congress encour-

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18. *See* Andrew C. Kuettel, *A Call to Congress to Add a "Knowing and Voluntary" Waiver Provision to the Fair Labor Standards Act to Enable Private Resolution of Wage Disputes*, 30 A.B.A. J. LAB. & EMP. L. 409, 409–10 (2015) (discussing the historic backdrop behind the FLSA being enacted); Alex Lau, Note, *The FLSA Permission Slip: Determining Whether FLSA Settlements and Voluntary Dismissals Require Approval*, 86 FORDHAM L. REV. 227, 232–33 (2017) (same).

19. *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945) (examining the legislative history of the FLSA).

20. *See id.*

21. *See id.*; *see also* 29 U.S.C. § 202(a).

22. 29 U.S.C. § 202(b).

23. *See id.* § 206.

24. *See id.* § 213.

25. *See id.* § 216.

26. *Id.* § 216(b); *see also* Barrentine v. Ark.-Best Freight Sys., 450 U.S. 728, 740 n.16 (1981); *Brooklyn Sav. Bank*, 324 U.S. at 709.

27. 29 U.S.C. § 216(b).

28. *Id.* § 216(b); D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 110 (1946).

aged private attorneys to litigate wage-and-hour cases on behalf of wronged employees.[29]

III. THE CIRCUIT SPLIT

Settlement of legal disputes outside the courthouse is universally encouraged.[30] Settlements and other alternative dispute resolution options minimize the strain on an already overworked judiciary, allow compromises unavailable in the all-or-nothing trial verdict, and minimize the legal costs both parties must incur to litigate their dispute. Settlement agreements are generally enforced through contract law, like any other binding agreement.[31] If the terms of a negotiated settlement agreement are against public policy, a court may invalidate a clause or the entire agreement.[32] Based on a strained interpretation of the FLSA and landmark decisions from the Supreme Court of the United States, however, some courts of appeals require prior judicial review of a settlement under the FLSA.[33] A settlement agreement that has not been reviewed and approved by a court is treated as void in those circuits requiring such a review.[34]

The U.S. Court of Appeals for the Fifth Circuit expressly does not require review so long as certain thresholds are met.[35] Most circuits are undecided.[36] District courts in those circuits often require judicial review of set-

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29. *Barrentine*, 450 U.S. at 740 n.16.

30. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1968 (2015) (Thomas, J., dissenting) ("[T]he law has long encouraged and permitted private settlement of disputes . . . .").

31. *See, e.g.*, Samra v. Shaheen Bus. & Inv. Grp., Inc., 355 F. Supp. 2d 483, 495–96 (D.D.C. 2005) (applying contract law to settlement agreement between the parties).

32. *Id.* at 508; *see also* 15 CORBIN ON CONTRACTS § 79.1 (2020) (discussing the impact of public policy on contract enforceability).

33. *See* Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206 (2d Cir. 2015); Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350 (11th Cir. 1982).

34. *See Cheeks*, 796 F.3d at 206; *Lynn's Food Stores, Inc.*, 679 F.2d at 1351.

35. Martin v. Spring Break '83 Prods., L.L.C., 688 F.3d 247, 255 (5th Cir. 2012) (allowing for settlements of FLSA claims without judicial review when a bona fide dispute exists and the employee is represented by an attorney).

36. *See, e.g.*, Barbee v. Big River Steel, LLC, 927 F.3d 1024, 1026–27 (8th Cir. 2019) (acknowledging circuit split but declining to decide the issue); O'Connor v. United States, 308 F.3d 1233, 1240–44 (Fed. Cir. 2002) (acknowledging that some courts require review prior to enforceability but finding the reasoning inapplicable to public employment collective bargaining agreements); Donaldson v. MBR Cent. Ill. Pizza, LLC, No. 18-cv-3048, 2019 U.S. Dist. LEXIS 158121 (C.D. Ill. Sept. 16, 2019) (reviewing FLSA settlement in the Seventh Circuit); Johnson v. Helion Techs., Inc., Civil Action No. DKC 18-3276, 2019 U.S. Dist. LEXIS 155920 (D. Md. Sept. 12, 2019) (noting lack of guidance from the Fourth Circuit on FLSA settlement review factors and reviewing acceptance of offer of judgment in an FLSA case); Heath v. Google LLC, Case No. 15-cv-01824-BLF, 2019 U.S. Dist. LEXIS 138526, at *9 (N.D. Cal. Aug. 15, 2019) (noting lack of guidance from Ninth Circuit on

tlement agreements to protect the parties from the settlements being found unenforceable if their corresponding court of appeals decides that judicial review is a requirement under the FLSA.[37]

A. Most Courts Require a "Fairness and Reasonableness" Review for an FLSA Settlement Agreement to Be Enforceable

The review employed by district and appellate courts in evaluating an FLSA settlement agreement is a two-step test.[38] Step one is determining whether a "bona fide dispute" exists, and step two is evaluating the terms of the settlement agreement for "fair[ness] and reasonable[ness]."[39]

A bona fide dispute is any legitimate disagreement between the parties regarding whether the employer violated the FLSA.[40] Typical examples of a bona fide dispute are whether an employee worked unpaid hours, whether a worker classified as an independent contractor or volunteer was actually an employee as defined in the FLSA, or whether an employer even falls within the FLSA's authority.[41] A bona fide dispute does not exist when an employer simply seeks a general release of any potential claims, including FLSA claims.[42]

The fairness and reasonableness review district courts use at step two in evaluating FLSA settlement agreements varies so widely throughout the

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FLSA settlement approval); Batista v. Tremont Enters., CASE NO. 1:19CV361, 2019 U.S. Dist. LEXIS 121658 (N.D. Ohio July 22, 2019) (reviewing FLSA settlement in the Sixth Circuit); Wilson v. DFL Pizza, LLC, Civil Action No. 18-cv-00109-RM-MEH, 2019 U.S. Dist. LEXIS 114039, at *3–4, *3 n.2 (D. Colo. July 10, 2019) (noting that the Tenth Circuit has not yet ruled on whether FLSA settlements require judicial approval but reviewing FLSA settlement); Binienda v. Atwells Realty Corp., C.A. No. 15-253 WES, 2018 U.S. Dist. LEXIS 203019 (D.R.I. Nov. 30, 2018) (reviewing FLSA settlement in the First Circuit); Carrillo v. Dandan Inc., 51 F. Supp. 3d 124, 130–31 (D.D.C. 2014) (acknowledging the circuit split but declining to decide the issue).

37. *See, e.g.*, Pendergrass v. Bi-State Utils. Co., Case No. 4:18-CV-01092-NCC, 2019 U.S. Dist. LEXIS 129143, at *2–3 (E.D. Mo. Aug. 2, 2019) (acknowledging that the circuits are split regarding pre-approval of FLSA settlements but opting to review to protect the parties if the Eighth Circuit later rules in favor of pre-approval).

38. *See Lynn's Food Stores*, 679 F.2d. at 1355; *see also* Shepardson v. Midway Indus., CASE NO. 3:18-CV-3105, 2019 U.S. Dist. LEXIS 111839, at *4–5 (W.D. Ark. July 1, 2019) (discussing the two-part test).

39. *Shepardson*, 2019 U.S. Dist. LEXIS 111839, at *5.

40. Stainbrook v. Minn. Dep't of Pub. Safety, 239 F. Supp. 3d 1123, 1126 (D. Minn. 2017) (citing D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 115 (1946)) ("A settlement addresses a bona fide dispute when it reflects a reasonable compromise over issues that are actually in dispute.").

41. *See, e.g.*, Woll v. West Publ'g Corp., File No. 19-CV-295-KMM, 2019 U.S. Dist. LEXIS 143420, at *2–3 (D. Minn. Aug. 23, 2019) (pointing out three issues that were "bona fide disputes," including the number of overtime hours worked).

42. *See* Bodle v. TXL Mortg. Corp., 788 F.3d 159, 165 (5th Cir. 2015).

country that attempting to catalog the approaches employed would be a Herculean task and is beyond the scope of this note.[43] The factors employed can vary from district to district within a circuit,[44] from judge to judge within a district,[45] and even from decision to decision by a single judge.[46] With that said, there are some factors that are judges commonly include in their reviews.

An employee's award of attorneys' fees, costs, and expenses is often the most common and contentious factor courts evaluate.[47] District court judges meticulously scrutinize the billing records, hourly billing rate, and overall fee award in comparison to damages awarded when evaluating a settlement's award of attorneys' fees.[48] The judge may deny approval of the settlement altogether or arbitrarily reduce the attorneys' fees awarded then approve the settlement.[49]

Another factor often evaluated is whether negotiations between the parties occurred at "arms-length."[50] Judges often fear that an employee's attorney and the employer will collude to ensure the lawyers are handsomely

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43. *See* Diener, *supra* note 14, at 63–64 (discussing the impact of inconsistent standards on practitioners seeking settlement of FLSA disputes).

44. *Compare* Kappelmeier v. Wil-Shar, Inc., No. 5:18-CV-05181, 2019 U.S. Dist. LEXIS 111297, at *2–3 (listing factors used in evaluating FLSA settlement agreements), *with* McCallie v. Transplace Stuttgart, LP, No. 4:19-cv-503-DPM, 2019 U.S. Dist. LEXIS 165250 (E.D. Ark. Sept. 26, 2019) (providing no reasoning for finding the FLSA settlement was "fair, reasonable, and adequate").

45. *Compare* Green v. West Foods, Inc., Case No. 2:18-cv-2170, 2019 U.S. Dist. LEXIS 179765 (W.D. Ark. Oct. 17, 2019) (citing no authority in evaluating FLSA settlement agreement), *with* Bates v. Spa City Steaks, Inc., Civil No. 6:18-cv-6019, 2019 U.S. Dist. LEXIS 183342, at *3 n.2 (W.D. Ark. Oct. 23, 2019) (citing five factors the court relied upon in evaluating an FLSA settlement agreement).

46. *Compare* Hutchinson v. Equilibrium Homes of St. Louis, LLC, Case No. 4:18-cv-02127-JAR, 2019 U.S. Dist. LEXIS 143358 (E.D. Mo. Aug. 23, 2019) (providing no standard for evaluating whether FLSA settlement agreement was fair and reasonable), *with* Kumar v. Tech Mahindra (Ams.) Inc., Case No. 4:16-cv-00905-JAR, 2019 U.S. Dist. LEXIS 168335, at *3 (E.D. Mo. Sept. 30, 2019) (providing explicit factors used when evaluating FLSA settlement agreements).

47. *See* Melgar v. OK Foods, 902 F.3d. 775, 779–80 (8th Cir. 2018) (reversing a district court decision to conduct a "line-item veto" of attorneys' fees in the name of fairness and reasonableness when evaluating an FLSA settlement agreement).

48. *See, e.g.*, Lopez v. Nights of Cabiria, LLC, 96 F. Supp. 3d 170, 181–82 (S.D.N.Y. 2015) (denying approval of an FLSA settlement because, among other problems, the plaintiff's attorneys did not provide detailed billing records for each attorney, the hours worked, and the nature of work performed).

49. *See, e.g.*, Johnson v. Thomson Reuters, Case No. 18-CV-0070 (PJS/HB), 2019 U.S. Dist. LEXIS 44397, at *15–16 (D. Minn. Mar. 19, 2019) (voicing skepticism as to the reasonableness of the plaintiff's attorneys' fees).

50. *See, e.g.*, Binissia v. ABM Indus., Case No. 13 cv 1230, 2017 U.S. Dist. LEXIS 153686, at *10–22 (N.D. Ill. Sept. 21, 2017) (evaluating whether an FLSA settlement disproportionately benefits the plaintiff's attorney at the expense of the plaintiffs).

paid while the employee is robbed of his or her wages.[51] Some judges may insist that parties separately negotiate liability and damages before negotiating attorneys' fees with little regard to the practical difficulty that separation entails.[52]

There is a grab-bag of other factors looked at by various courts. Some will not approve a settlement if it contains a confidentiality clause.[53] Other judges may deny approval if the settlement releases non-FLSA claims[54] or allows a reversion of unclaimed funds to the employer as being a deal-breaker.[55]

The common theme is that district courts take a paternalistic view regarding disputes between employers and employees when the FLSA is involved.[56] Judges will evaluate a carefully negotiated settlement agreement representing several hours of back-and-forth bargaining and deny approval because it includes an objectional clause or because the employee's attorneys' fees are too high. The end result is that the ease of settling an FLSA claim outside of the courtroom is a roll of the dice determined by which judge a plaintiff is assigned after filing a complaint within the district.

B. Courts Have, Until Recently, Required a "Fairness and Reasonableness" Analysis for All FLSA Settlement Agreements

1. The "Fairness and Reasonableness" Standard Originated in the Eleventh Circuit in Lynn's Food Stores, Inc. v. United States

The practice of requiring judicial review of FLSA settlements began with the U.S. Court of Appeals for the Eleventh Circuit in *Lynn's Food*

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51. *See* Christopher Theodorou, Note, *A Facial Reconstruction of Settlements: Analyzing the* Cheeks *Decision on FLSA Settlements*, 35 HOFSTRA LAB. & EMP. L.J. 209, 233 (2017) ("The court's true fear reside[s] in the abuse of the employee, not by his own employer, but by his attorney.").

52. *See, e.g.*, Gamble v. Boyd Gaming Corp., Case No. 2:13-cv-01009-JCM-PAL, 2015 U.S. Dist. LEXIS 107279, at *28–31 (D. Nev. Aug. 13, 2015) (rejecting an FLSA settlement agreement in part because the motion did not specify whether the plaintiff's attorneys' fees were negotiated separately from the settlement award to the plaintiffs).

53. Crabtree v. Volkert, Inc., CIVIL ACTION 11-0529-WS-B, 2013 U.S. Dist. LEXIS 20543, at *12–13 (S.D. Ala. Feb. 14, 2013) (discussing the inclusion of confidentiality clauses in FLSA settlement agreements).

54. *See, e.g.*, Moreno v. Regions Bank, 729 F. Supp. 2d 1346 (M.D. Fla. 2010) (rejecting an FLSA settlement agreement because it included a general release of potential non-FLSA claims).

55. *See, e.g.*, Otey v. Crowdflower, Inc., Case No. 12-cv-05524-JST, 2015 U.S. Dist. LEXIS 86712, at *5, *18–19 (N.D. Cal. July 2, 2015) (approving an FLSA settlement agreement only after the removal of a reversion clause).

56. Diener, *supra* note 14, at 70–73 (arguing that judicial review is necessary because "[t]he FLSA is inherently paternalistic.").

Stores v. United States.[57] There, the DOL began investigating the plaintiff-employer and determined that the employer owed some employees back wages under the FLSA.[58] When settlement negotiations between the DOL and the employer broke down, the employer settled the matter directly with the affected employees.[59] In the course of doing so, the employer used its significant economic power to leverage a beneficial settlement that included, among several concessions, a complete waiver of back wages by some employees.[60] The employer then filed a lawsuit against the DOL for a declaratory judgment regarding the validity of the settlement.[61] The district court dismissed the case, holding that the action violated the FLSA.[62]

On appeal, the Eleventh Circuit affirmed. Relying heavily on its interpretation of two cases from the Supreme Court of the United States,[63] the Eleventh Circuit held that the FLSA required judicial approval of any settlement agreement negotiated between employer and employee to ensure it was a fair and reasonable resolution of one or more bona fide disputes.[64]

In the following decades, district courts throughout the nation adopted the *Lynn's Food Stores* approach with little to no input from the courts of appeals.[65] District courts essentially had unchecked discretion to develop their own tests, factors, and thresholds for determining whether an FLSA settlement was "fair" and "reasonable."[66] There was, however, no binding precedent *requiring* district courts to apply the *Lynn's Food Stores* two-part test outside of the Eleventh Circuit.

2. *The Fifth Circuit Rejects the "Fairness and Reasonableness" Standard in* Martin v. Spring Break '83 Productions, LLC

Thirty years after the *Lynn's Food Stores* decision set the standard across the nation requiring judicial approval for FLSA settlements, the United States Court of Appeals for the Fifth Circuit moved away from requiring

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57. 679 F.2d 1350 (11th Cir. 1982); Lau, *supra* note 11, at 244–45 (discussing the rise of the *Lynn's Food Stores* standard).

58. *Lynn's Food Stores*, 679 F.2d at 1352.

59. *Id.*

60. *Id.* at 1354–55.

61. *Id.* at 1351–52.

62. *Id.* at 1352.

63. *See infra* Part IV.A for discussion of *Lynn's Food Stores* reasoning. The cases were *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946), and *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945).

64. *Lynn's Food Stores*, 679. F.2d. at 1355.

65. *See* Lau, *supra* note 18, at 244 (describing the *Lynn's Food Stores* approach as the majority approach throughout the country).

66. *See* Diener, *supra* note 14, at 40–46 (attempting to outline the three major approaches devised by district courts in the decades following the *Lynn's Food Store* decision).

a judicial stamp of approval on settlements agreements.[67] In *Martin*, several employees working on a film crew alleged that their employer failed to pay them each for all of their hours worked.[68] Because the employees were part of a union, their union representatives negotiated a settlement with the employer.[69]

Unhappy with the terms of the settlement, the employees filed a lawsuit against their employer.[70] The district court, noting that there was no Fifth Circuit authority requiring it to void an FLSA settlement agreement lacking judicial approval, granted summary judgment for the employer.[71]

On appeal, the Fifth Circuit affirmed.[72] The employees argued that the reasoning from *Lynn's Food Stores* applied and that any settlement agreement of FLSA claims between employee and employer must be judicially approved to be enforceable.[73] The Fifth Circuit rejected this argument, distinguishing *Lynn's Food Stores*.[74] The Fifth Circuit reasoned that unlike the employees in *Lynn's Food Stores*, who had no legal counsel and were unaware that the DOL determined they were owed back wages, the employees in *Martin* knew their rights under the FLSA and retained counsel long before the parties negotiated and executed the settlement agreement.[75] The court held that FLSA settlements do not require prior judicial approval to be enforceable so long as 1) a bona fide dispute exists, and 2) the negotiations occur after the employee is represented by counsel.[76]

3. The Second Circuit Adopts the "Fairness and Reasonableness" Standard in Cheeks v. Freeport Pancake House, Inc.

Three years after *Martin*, the United States Court of Appeals for the Second Circuit) confronted a case implicating the newly-emerged circuit split between the *Martin* and *Lynn's Food Stores* standards.[77] In *Cheeks v. Freeport Pancake House, Inc.*, Cheeks sued his employer to recover unpaid

67. Martin v. Spring Break '83 Prods., LLC, 688 F.3d. 247 (5th Cir. 2012); *see also* Kuettel, *supra* note 18, at 415–17 (discussing the cases within the Fifth Circuit leading up to the *Martin* decision).

68. *Martin*, 688 F.3d at 249.

69. *Id.*

70. *Id.* at 249–50.

71. *Id.* at 250, 254–55.

72. *Id.* at 257.

73. *Id.* at 254, 256 n.10.

74. *Martin*, 688 F.3d at 256 n.10.

75. *Id.*

76. *See id.* at 257.

77. Cheeks v. Freeport Pancake House, Inc., 796 F.3d. 199, 201–04 (2d Cir. 2015). *See generally* Theodorou, *supra* note 51 (discussing the impact that the *Cheeks* decision had on FLSA settlement agreements).

overtime wages, liquidated damages, and attorneys' fees under the FLSA.[78] The parties then reached a settlement agreement and moved to have the lawsuit dismissed.[79] The district court denied their request, holding that Cheeks "could not agree" to a settlement agreement not submitted to the court for approval.[80] The district court ordered the parties to submit the settlement to the court for review as to whether it was "fair and reasonable"; the parties then moved to certify the question to the U.S. Court of Appeals for the Second Circuit as an interlocutory appeal. [81]

On appeal, the Second Circuit weighed the *Martin* and *Lynn's Food Stores* approaches in deciding whether prior judicial approval of an FLSA settlement agreement was required prior to dismissal.[82] Ultimately, the court found the standard adopted by the Eleventh Circuit more persuasive and held that FLSA settlements require a judicial reasonableness-and-fairness review prior to a dismissal with prejudice.[83]

IV. ARGUMENT

This note takes the position that the Fifth Circuit's standard articulated in *Martin* is the better approach to FLSA settlement agreements for three reasons. First, the reasoning employed by the *Lynn's Food Stores* court was fundamentally flawed.[84] Second, the "fair and reasonable" standard has yet to coalesce into a uniform and predictable standard.[85] Third, the "No Review Required" approach furthers the goals of the FLSA while allowing parties the freedom to resolve their issues outside of the watchful eye of district courts.[86] The *Lochner*-esque decision in *Lynn's Food Stores* and its accompanying "fairness and reasonableness" standard should be laid to rest.[87]

In its place, the standard should be that a settlement agreement that resolves a bona fide dispute between parties being represented by attorneys should be enforceable. This note argues, however, that two additional requirements should augment the Fifth Circuit's standard: the freedom of either party to request review of a settlement agreement prior to its execution

78. 796 F.3d at 200.
79. *Id.*
80. *Id.*
81. *Id.* at 200–01.
82. *Id.* at 203–04.
83. *Id.* at 206.
84. *See* Diener, *supra* note 14, at 66–69 (noting the lack of textual support for the judicial review requirement within the text of the FLSA).
85. *Id.* at 52.
86. *See id.* at 66–69.
87. *See id.* at 65 n.244 (invoking Lochner v. New York, 198 U.S. 45 (1905), in its discussion of the lack of textual support for the *Lynn's Food Stores* judicial review requirement).

and the adoption of a "construe against the employer" doctrine of contract interpretation when a court is asked to enforce an FLSA settlement agreement.

A. The *Martin* Standard is Superior to *Lynn's Food Stores*

Congress expressly included the right for employees to pursue their minimum wage and overtime claims through private action under the FLSA.[88] In doing so, Congress must have foreseen that parties would often reach a settlement rather than risk a lengthy and expensive trial.[89] And yet there is no textual requirement within the FLSA itself requiring a court to evaluate a settlement agreement if an employer is to be able to enforce it later.[90] The only conclusion available is that Congress did not intend such a requirement.

This is the critical failure of the Eleventh Circuit's reasoning in *Lynn's Food Stores*. It is a common idiom that "hard cases make bad law."[91] In *Lynn's Food Stores*, the court faced egregious actions by an employer in procuring a settlement from employees who lacked legal counsel or any real understanding of their situation.[92] In response, the Court reasoned that such situations could only be prevented in the future by requiring prior judicial review of all FLSA settlements.[93] In protecting future employees from similar acts, the Court effectively amended the statute by creating a new requirements with no textual basis within the FLSA itself.[94]

In *Lynn's Food Stores*, the Eleventh Circuit relied heavily on the Supreme Court's decision in *D.A. Schulte, Inc. v. Gangi*[95] in creating its new law.[96] There, the Supreme Court held that an employee could not waive his or her right to liquidated damages in a subsequent agreement.[97] Such a waiver would violate the public policy as enacted in the FLSA.[98] The Court

88. 29 U.S.C. § 216(b) (2018).

89. *See* Kuettel, *supra* note 18, at 419–20 (comparing the FLSA to other employment law causes of action which do not require judicial approval).

90. *See* Diener, *supra* note 14, at 66–69.

91. *See* United States v. Rabinowitz, 339 U.S. 56, 68 (1950) (Frankfurter, J., dissenting) ("The old saw that hard cases make bad law has its basis in experience.").

92. Lynn's Food Stores v. United States, 679 F.2d 1350, 1352–54 (11th Cir. 1982); *see supra* Part III.B.1.

93. *Lynn's Food Stores*, 679 F.2d at 1354–55.

94. *See supra* Part III.A.

95. 328 U.S. 108 (1946).

96. *Lynn's Food Stores*, 679 F.2d at 1353–54.

97. *D.A. Schulte*, 328 U.S. at 114.

98. *Id.* at 116.

compared a waiver of liquidated damages to the waiver of one's right under the FLSA to overtime compensation or a minimum hourly wage.[99]

The Eleventh Circuit interpreted this decision broadly and reasoned that the FLSA does not allow employees to voluntarily waive any of their rights to minimum wage and overtime payments.[100] To reconcile its interpretation of the FLSA with the goal of encouraging the settlement of lawsuits rather than through litigation, it created an entirely new requirement for employees seeking to settle their disputes.[101] To prevent the Lynn's Food Stores of the world from wringing out settlements from their employees, the Eleventh Circuit decided to act as a super-legislature and rule that all employers were potentially as bad and could not be trusted.[102]

Between *Lynn's Food Stores* and *Martin*, courts across the nation applied the Eleventh Circuit's reasoning and required a fairness-and-reasonableness evaluation of all FLSA settlements.[103] In that time, no national standard emerged regarding what is "fair" and "reasonable" in an FLSA settlement agreement.[104] The circuits do not agree on which factors courts should evaluate.[105] Districts within an appellate circuit do not have any unified standards for evaluation.[106] Even judges within a district vary as to what will or will not render a settlement unfair or unreasonable.[107]

The only reasonable conclusion is that the standard itself is unworkable. Federal courts have been unable to apply the *Lynn's Food Stores* in a manner that protects employees, encourages settlement of employees' claims, and allows the parties to predict whether or not their hours of negotiations will amount to an expensive waste of time.[108] If it were going to

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99. *Id.* at 115.

100. *Lynn's Food Stores*, 679 F.2d at 1353–55.

101. *Id.* at 1354.

102. *See* Diener, *supra* note 14, at 29–31 (discussing the egregious conduct of the defendant in *Lynn's Food Stores* and how it influenced the judicial review requirement).

103. *Id.* at 32–38 (discussing the near-uniform adoption of *Lynn's Food Stores* across the nation prior to 2012, when the Fifth Circuit split in *Martin v. Spring Break '83 Prods*).

104. *Id.* at 40–52 (discussing the myriad of approaches in applying the "fairness and reasonableness" test to FLSA settlement agreements submitted to district courts for approval).

105. *Id.*

106. *Id.*; *see also supra* Part III.A (discussing the inconsistent application of tests across circuits, across districts within a circuit, and across judges within a district).

107. Diener, *supra* note 14, at 40–52.

108. *Id.* at 52 (summarizing the divergent approaches to fairness and reasonableness evaluations as having "led to inconsistencies in the application of FLSA provisions, diminishing predictability as to the potential for enforcement of FLSA settlement agreements, and, disharmony in the application of the FLSA across the United States"); *see also* Picerni v. Bilingual Seit & Preschool, Inc., 925 F. Supp. 2d 368, 376–77 (E.D.N.Y. 2013) (discussing the practical ramifications of hindering private settlement of FLSA disputes).

happen, it would have happened in the forty-odd years since the *Lynn's Food Stores* decision.

Since diverging from the *Lynn's Food Stores* approach, the standard articulated in *Martin* has proved to be a workable standard in evaluating FLSA settlements.[109] Parties are now entering into settlement agreements away from the watchful eye of the court. Employers seeking to enforce their agreements still run into public policy issues, such as whether confidentiality clauses are against public policy[110] and the effect that arbitration has on substantive FLSA rights.[111] When parties voluntarily ask a court to review their settlement agreement, the district court continues to do so.[112] Dockets within the Fifth Circuit are no longer clogged with lawsuits going through several rounds of renegotiations simply because a settlement agreement includes a term which a district judge finds objectionable such as, for example, the enhancement fees given to key employees who came forward or the amount in attorneys' fees awarded to plaintiffs' counsel are too high.[113]

B. The *Martin* Standard Should Be Augmented with Two Pro-Employee Protections

The Fifth Circuit's approach is superior to the *Lynn's Food Stores* standard, but this note argues that the pendulum swings a little too far in favor of the employer as articulated in *Martin*.[114] Courts should adopt two additional protections for employees: (1) the parties should be able to voluntarily submit a proposed settlement agreement for evaluation by a district court, and (2) courts should adopt a "construe against the employer" maxim of contractual interpretation when one party seeks to enforce a private FLSA settlement agreement.

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109. *See, e.g.*, Cunningham v. Kitchen Collection, LLC, Civil Action No.: 4:17-cv-770-ALM-KPJ, 2019 U.S. Dist. LEXIS 111894, at *3 (E.D. Tex. June 25, 2019).

110. *See* Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. EMP. & LAB. L. 109 (2013) (discussing the public policy against the FLSA being stymied by allowing employers to include confidentiality clauses in settlement agreements).

111. *See* Hope Brinn, Note, *Improving Employer Accountability in a World of Private Dispute Resolution*, 118 MICH. L. REV. 285 (2019) (discussing the unique challenges arbitration and alternative dispute resolution pose in resolving employment discrimination claims).

112. *See infra* Part IV.B.1.

113. *See* Kuettel, *supra* note 18, at 422–26 (discussing the advantages reaped when employees and employers can privately resolve FLSA claims).

114. *See infra* Part IV.B.2.

1. Parties Should Be Free to Seek Judicial Evaluation of a Proposed Settlement Agreement

Due to the unique nature of the public policy considerations involved in any FLSA dispute, there will be limitations on what terms may and may not be enforceable in a private settlement.[115] Some courts have held that confidentiality clauses are impermissible in FLSA settlements.[116] Others have held that any clauses allowing for the reversion of unclaimed funds to an employer are against public policy.[117] These uncertainties may result in employees bargaining for the exclusion of terms that simply would not be enforceable if allowed to remain.

Because of this possibility, courts should allow parties to submit their private settlements for review as they have done under the *Lynn's Food Stores* standard for the past thirty years. District courts within the Fifth Circuit have already allowed parties to do so since the *Martin* decision.[118] Partly, this is due to the uncertainty among the circuits as to whether judicial review of all FLSA settlements is required.[119] This note simply argues that courts should adopt a uniform standard of allowing, but not requiring, any party negotiating an FLSA settlement to submit settlements for review prior to execution to avoid the district-to-district variance present among the decisions applying the *Lynn's Food Stores* standard.[120]

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115. *See generally* Barrentine v. Ark.-Best Freight Sys., 450 U.S. 728, 737 (1981); D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 110 (1946); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 709–10 (1945).

116. *See supra* Part II.A (discussing varied holdings on unique FLSA clauses across the nation).

117. *See supra* Part II.A.

118. *See, e.g.*, Zamalloa v. Thompson Landscape Servs., Case No. 4:17-cv-00519-ALM-KPJ, 2018 U.S. Dist. LEXIS 155472, at *1–2 (E.D. Tex. Aug. 27, 2018) (discussing the uncertainty that the Fifth Circuit's split has created); Espinosa v. Stevens Tanker Div., LLC, Civil Action No. SA-15-CV-879-XR, 2018 U.S. Dist. LEXIS 228333, at *2–3 (W.D. Tex. Jan. 19, 2018).

119. *See, e.g.*, Hamilton v. Enersafe, Inc., Civil Action No. 5:17-CV-965-JKP, 2019 U.S. Dist. LEXIS 184036, at *8–9 (W.D. Tex. Oct. 23, 2019) (discussing the lack of a requirement of judicial approval of a settlement but reviewing settlement at the request of the parties).

120. *See supra* Part II.

2. *When Reviewing Private FLSA Settlement Agreements, Courts Should Apply a "Construe Against the Employer" Maxim of Contract Interpretation When a Party Later Attempts to Enforce Its Terms*

Settlement agreements are interpreted and enforced under contract law.[121] As first-year law students learn, courts employ several maxims of contract interpretation when one party seeks to enforce its terms against another and a term or clause is susceptible to two or more meanings offered by the parties.[122] One such maxim is "construe against the drafter."[123] If a court determines that an ambiguity exists within a contract, a factfinder faced with two equally plausible interpretations must rule in favor of the non-drafting party.[124] *Contra proferentem* acts as a tiebreaker because the court must adopt one party's interpretation in the end.[125] The reasoning is that the party who drafted the contract had control over the process and could have eliminated the ambiguity.[126]

The FLSA's requirements and penalties apply exclusively to employers.[127] Employees face no risk if they voluntarily work for below minimum wage or waive their right to overtime compensation.[128] Such an employee could later sue its employer under the FLSA without worry.[129] As a matter of public policy, then, any risk associated with non-enforceability of a private settlement agreement should similarly fall exclusively on employers.

When a party seeks to enforce an otherwise valid private settlement agreement and an ambiguity exists, "construe against the employer" should effectively replace "construe against the drafter" as the tie-breaking maxim of contract interpretation regardless of who actually drafted the settlement agreement. *Contra dominus* would ensure the FLSA's public policy determination that the employer bears the risk of failing to pay its employees correctly would be carried forth from the beginning of the employment rela-

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121. *See, e.g.*, Samra v. Shaheen Bus. & Inv. Grp., Inc., 355 F. Supp. 2d 483, 493 (D.D.C. 2005) (applying contract law to settlement agreement between the parties).

122. *See generally* 9 JAY E. GRENIG, LABOR AND EMPLOYMENT LAW § 226.02 (2019) (generally discussing the various maxims of contract interpretation).

123. RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW. INST. 1981).

124. *Id.*

125. *See* 5 CORBIN ON CONTRACTS § 24.27 (2019).

126. *Id.*

127. *See generally* 29 U.S.C. § 216 (2018) (containing no provisions under the FLSA for sanctions, fines, penalties, or other negative effects levied against employees).

128. *See, e.g.*, *In re* Food Lion Effective Scheduling Litig., 861 F. Supp. 1263, 1277 (E.D.N.C. 1994) (holding employer accountable for not preventing employees from working off-the-clock).

129. *See id.*

tionship all the way through litigation and eventual enforcement of a settlement agreement.

V. CONCLUSION

The fundamental goals of an employee wishing to settle an FLSA claim against an employer are to mitigate the risk of continued litigation, to minimize the mounting legal fees incurred by all involved, and to get stolen wages into the employee's pocket where they rightfully belong. Requiring prior judicial review of all FLSA settlements runs contrary to these goals and those articulated by Congress in enacting the FLSA. The FLSA does not explicitly require judicial review of private settlement agreements to be enforceable, and courts should not judicially amend the FLSA to require such a review, as articulated in *Lynn's Food Stores*.

Courts should adopt the Fifth Circuit's reasoning in *Martin v. Spring Break '83 Productions, LLC*. The Martin standard should be paired with the express allowance for either party to obtain prior approval of a settlement agreement and the adoption of a "construe against the employer" maxim of contractual interpretation when evaluating an unapproved FLSA settlement agreement that was not previously subject to judicial evaluation. Under this framework, employees will be able to resolve their claims without needlessly crowding judicial dockets, obtain their earned wages more quickly, and, most importantly, allow parties to amicably resolve their differences without costly litigation.

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EMPLOYEE BENEFITS LAW— SHIFTING THE BURDEN OUT OF NEUTRAL: WHY BURDEN-SHIFTING IS NECESSARY IN ERISA BREACH OF FIDUCIARY DUTY CLAIMS

I. INTRODUCTION

Imagine handing over your 401(k) to an investment firm, a fiduciary,[1] who has its own portfolios available in the financial market.[2] As someone who does not work in the financial industry and who has little knowledge of investing, you trust that fiduciary to protect your money. You trust that your investments will be handled wisely. Now, you come to learn that your funds have been mishandled.[3] You are left with the loss of a large percentage of your retirement funds.[4] When you file suit against the fiduciary for causing your retirement funds to be cut in a short period of time, your attorney tells you that you will be expected to prove that your loss was occasioned by your fiduciary's breach of its duty owed to you—no small feat.[5] Further, you will be expected to explain how the fiduciary breached its duty, to analyze comparative market conditions, and to use complex financial formulas and data to which you will have restricted access.[6]

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1. *See* 29 U.S.C. § 1002(21)(A) (2019) (defining a fiduciary as someone who, with respect to a retirement plan, "(i) . . . exercises any discretionary authority or discretionary control," "(ii) . . . renders investment advice for a fee or other compensation . . . with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) . . . has any discretionary authority or discretionary responsibility in the administration of such plan.").

2. *See, e.g.*, Brotherston v. Putnam Invs., LLC (Brotherston I), No. CV 15-13825-WGY, 2017 WL 2634361, at 1 (D. Mass. June 19, 2017).

3. *Excessive Fee Litigation*, GROOM LAW GRP. (Oct. 2019), http://www.groom.com/resources-1086.html (classifying such claims as "Proprietary Fund Cases," where "plan sponsors used affiliated investment products and service providers to increase the financial institution's revenue. Such self-interested actions, the plaintiffs claim, are breaches of fiduciary duty and ERISA prohibited transactions.").

4. *See* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 414 (2014) ("Fifth Third's stock price fell by 74% between July 2007 and September 2009 . . . . Since the [beneficiaries' Employee Stock Ownership Plan's] funds were invested primarily in Fifth Third stock, this fall in price eliminated a large part of the retirement savings that the participants had invested.").

5. *See* Brotherston v. Putnam Invs., LLC (Brotherston II), 907 F.3d 17, 26 (1st Cir. 2018) (noting the lower court's rejecting of testimony of plaintiff-beneficiaries' expert Dr. Steve Pomerantz, who has a Ph.D. in Mathematics from the University of California at Berkeley, and nearly thirty years of experience in investment research.).

6. *See, e.g.,* Meiners v. Wells Fargo & Co., 898 F.3d 820, 822–23 (8th Cir. 2018).

Plaintiffs in five of the nine federal circuits that have ruled on the issue have experienced this frightening reality of proving loss causation.[7] The majority of these plaintiffs lacked even basic investment knowledge, and their portfolios primarily consisted of passive index funds.[8] Nevertheless, these plaintiffs were required to explain the under-performance of their 401(k)'s and supplement their cases with evidence of existing market conditions, comparative management fees, and applicable rates of return.[9] Further, if a plaintiff and his or her attorney met this initial burden, his or her task was not finished.[10] The onus in these cases is akin to asking the still-anesthetized victim of a botched surgery to explain to the court what the surgeon should have done differently and then show that the acceptable medical procedure would have prevented the victim's injury in specific medical terminology to reference procedures only known by physicians.[11]

The Employee Retirement Income Security Act of 1974 (ERISA) governs employee benefit plans and affords protections for employees in situations such as the hypothetical above.[12] Congress' primary policy goal when it enacted ERISA was "to protect . . . the interests of participants in employee benefit plans and their beneficiaries."[13] Prior to ERISA, the common law of trusts and breach claims governed employee benefit plans.[14] State courts most often resolved disputes against employees pre-ERISA, largely because

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7. Pioneer Ctrs. Holding Co. Empl. Stock Ownership Plan v. Alerus Fin., N.A., 858 F.3d 1324, 1337 (10th Cir. 2017); Silverman v. Mut. Benefit Life Ins. Co., 138 F.3d 98, 105–06 (2d Cir. 1998) (Jacobs, J. and Meskill, J., concurring); *see also* Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1099 (9th Cir. 2004); Kuper v. Iovenko, 66 F.3d 1447, 1459–60 (6th Cir. 1995), *abrogated on other grounds by Dudenhoeffer*, 573 U.S. at 415; Willett v. Blue Cross & Blue Shield of Ala., 953 F.2d 1335, 1343–44 (11th Cir. 1992).

8. *See* John Sullivan, *401k Assets Continue to Climb*, 401K SPECIALIST MAG (Sept. 26, 2019), https://401kspecialistmag.com/401k-assets-continue-to-climb/ (reporting that 65% of 401(k) assets were held in passive mutual funds as of September 2019).

9. *Meiners*, 898 F.3d at 822; *see also* Jamie Hopkins, *When It Comes to Managing Retirement Savings, Confusion Reigns*, MARKETWATCH (Oct. 11, 2016, 11:20 AM), https://www.marketwatch.com/story/when-it-comes-to-managing-retirement-savings-confusion-reigns-2016-10-11 (finding in a TIAA survey on financial literacy that 80% of respondents were unfamiliar with how an annuity functioned).

10. *Pioneer Ctrs. Holding Co.*, 858 F.3d at 1337 (explaining that ERISA requires plaintiffs to prove losses to the plan resulting from the alleged breach of fiduciary duty); Evans v. Akers, 534 F.3d 65, 74 (1st Cir. 2008) ("ERISA § 409 . . . requires fiduciaries who breach their duties 'to make good to such plan the losses to the plan resulting from such breach.'") (citing 29 U.S.C. §§ 1109(a) (2016), 1132(a)(2) (2014)).

11. Adolyn B. Clark, *ERISA Breach of Fiduciary Duty: Shifting the Burden of Proving Causation to the Defendant*, 83 DEF. COUNS. J. 180, 198 (2016) ("The fiduciary should bear the burden of disproving causation because of his heightened knowledge and familiarity with the evidence.").

12. *See generally* 29 U.S.C. §§ 1001–1461 (2018).

13. *Id.* § 1001(b).

14. Varity Corp. v. Howe, 516 U.S. 489, 496 (1996).

these courts considered employer-provided benefits "gratuities that an employer could withdraw at will."[15] With its principles rooted in trust doctrine, ERISA is permeated with underlying logic and theory from traditional trust law that translates to a burden-shifting framework.[16]

The Supreme Court of the United States has yet to rule definitively on which party bears the burden of proof once loss causation is initially proved by a plaintiff alleging a breach of fiduciary duty, and specifically on whether this burden should shift to the employer.[17] The federal circuit courts are split on the issue.[18] The split stems from disagreement about whether the plaintiff or the defendant must bear the burden of proving loss causation, which involves proof that the fiduciary's negligent conduct resulted in the financial losses attributable to the plaintiff's assets.[19] Burden-shifting in breach of fiduciary duty actions is "more than a mere technicality; [oftentimes] it is [outcome-determinative]."[20]

Part II of this note provides background on ERISA's promulgation, its roots in the common law of trusts, the structure of breach of fiduciary duty actions, the history of the existing circuit split, and the relevant purpose of Title VII.[21] Part III of this note argues in favor of adopting the burden-shifting framework in order to: (1) align the knowledge of the parties to their respective legal responsibilities; (2) follow settled precedent in applying the common law of trusts to ERISA actions where there is no explicit statutory guidance; and (3) analogize ERISA breach of fiduciary duty burden shifting to Title VII and ERISA § 510 burden shifting.[22] Part IV of this note recommends that the Supreme Court grant certiorari in an ERISA breach of fiduciary case in the near future, and that it then rule in favor of a burden-shifting framework.[23]

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15. *Id.* at 497.

16. Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828 (2015) (quoting Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 570 (1985)); *see also Varity*, 516 U.S. at 497.

17. Nancy E. Musick*, Whose Burden Is It Anyway? Protecting ERISA from an Unnecessary Burden-Shifting Framework*, 67 U. KAN. L. REV. 665, 666 (2019).

18. *Id.*

19. *Id.* at 672 (explaining that loss causation in the breach of fiduciary duty context means "proving that a fiduciary breach caused a loss" experienced by the employee's retirement account).

20. Joseph E. Clark, *INSIGHT: View from Proskauer—ERISA Burdens of Proof Ripe for SCOTUS Review*, BLOOMBERG LAW (July 3, 2019, 3:00 AM), https://news.bloomberglaw.com/us-law-week/insight-view-from-proskauer-erisa-burdens-of-proof-ripe-for-scotus-review.

21. *See infra* Part II.

22. *See infra* Part III.

23. *See infra* Part IV.

II. BACKGROUND

Congress enacted ERISA to protect beneficiaries in the wake of growing corruption and judicial inaction.[24] The statutory scheme was the product of over a decade's worth of research and legislative policy discussions.[25] Legislators looked not only to the weaknesses of the existing law surrounding retirement benefits, but also to the common law of trusts, from which American retirement benefits are derived.[26] Among ERISA's causes of action is breach of fiduciary duty, where the entity responsible for the funds' performance does not meet its duties of prudence or loyalty.[27] This section addresses ERISA's origins and its current application and explores the shared purpose between Title VII and ERISA.

A. The Birth of ERISA

The dawn of employee-sponsored retirement plans came in 1875 when American Express established the first private pension plan in the United States.[28] The Internal Revenue Service (IRS) began regulating pension plans in the 1920s.[29] From that point until the 1940s, pension plans grew explosively, due in large part to the plans' preferential tax-exempt treatment under their classification as "trust income."[30]

As employee-sponsored retirement plans became increasingly common among Americans prior to ERISA's enactment,[31] state courts almost unanimously ruled against employees in cases related to private retirement plans because the courts viewed the plans as unenforceable gratuities.[32] As such, employees were subject to reduced income over the course of their careers for retirement income that was unsecured under any legislation or by the courts.[33] Under this framework, employers had terminated "lifelong employ-

24. Michael J. Goldberg, *Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement*, 1989 DUKE L.J. 903, 944–45 (1989).

25. Colleen E. Medill, INTRODUCTION TO EMPLOYEE BENEFITS LAW 6 (5th ed. 2018); *see also* Clark, *supra* note 11, at 182.

26. Varity Corp. v. Howe, 516 U.S. 489, 496 (1996).

27. *See infra* Part II, Section B.

28. *See* WORKPLACE FLEXIBILITY 2010, GEORGETOWN UNIV. L. CTR., A TIMELINE OF THE EVOLUTION OF RETIREMENT IN THE UNITED STATES 1 (2010), http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1049&context=legal.

29. *Id.*

30. *Id.* (Under the Revenue Act of 1921, trust income coming from profit sharing plans was deductible from an employee's taxable income. Additionally, such income was taxed at the point that it was distributed to the employee, similar to present-day defined contribution 401(k) plans.).

31. *See generally* Clark, *supra* note 11.

32. Haralampu, *supra* note 15 at § 30.1.1.

33. *Id*.

ees right before they reached retirement age to prevent [the employees] from collecting *promised* pensions."[34] Thus, prior to ERISA, employers could effectively avoid legal liability while retaining the collective revenue each employee had withdrawn for retirement. Often no remedy existed for the employee-retiree.[35]

In 1963, a controversy involving the Studebaker automobile plant in South Bend, Indiana brought the lack of pension protection into the national spotlight and Congress's purview.[36] At the time, the plan consisted of just over 10,000 employees. [37] 3,600 of these employees were already retired and thus had already received their full benefit.[38] 4,000 employees, ranging in age from 40-52, received only 15% of their accrued benefits.[39] The final 2,900 employees, with less than 10 years of service, did not receive a single dollar.[40]

Additionally, fraud began to permeate some of the largest pension plans in existence.[41] A number of pension plans, most notably the "Central States, Southeast and Southwest Areas Pension Fund" (Central States Teamsters Plan), were subject to repeated allegations of organized crime influence.[42] Due to the inconsistent and inequitable administration of these plans by various pre-ERISA legislative efforts, President Kennedy pioneered the decade-long legislative study aiming to curb public corruption that would lead to ERISA.[43]

ERISA's promulgation was tedious. Enacted as a "comprehensive and reticulated statute," ERISA was the product of a decade of congressional inquiry into the country's "private employee benefit system."[44] Initiated by President Kennedy in 1962,[45] the congressional study revealed the need to regulate retirement plans, where "employees with long years of employment

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34. *Id.* (emphasis added).

35. *Id.*

36. Rebecca J. Miller, Robert A. Lavenberg & Ian A. Mackay, *ERISA: 40 Years Later,* J. OF ACCOUNTANCY, Sept. 1, 2014, https://www.journalofaccountancy.com/issues/2014/sep/erisa-20149881.html.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. Goldberg, *supra* note 24, at 911–12, 943–46.

42. *Id.* at 944–45 (referring to the Teamsters Pension Fund, the largest multi-employer pension fund in the country, as "the most abused, misused pension fund in America" and "the mob's bank, where loans depended almost always on the right kickbacks or the right organized-crime connection . . . according to one estimate, the fund's losses, due to loans repaid at below-market interest rates or never repaid at all, amounted to $385 million.").

43. Medill, *supra* note 25.

44. Mertens v. Hewitt Assocs., 508 U.S. 248, 251 (1993) (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980)).

45. S. REP NO. 93-127, at 1 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4843.

[were] losing anticipated retirement benefits" due to "the lack of vesting provisions in such plans."[46] ERISA was enacted to protect employees, to establish minimal standards for fiduciaries of employee benefit plans, and to provide adequate remedies, sanctions, and ready access to state and federal courts.[47] The Senate provided a concise list of the "major issues" that employee benefit plans faced: "a. Vesting, b. Funding, c. Reinsurance, d. Portability, and e. Fiduciary responsibility and disclosure."[48]

Once enacted, ERISA litigation arose in a wide array of areas due to its breadth.[49] Because the legislation imposed strict obligations, ERISA was of particular concern to plan fiduciaries.[50] A large volume of breach of fiduciary duty litigation began to establish the contours of the "new fiduciary responsibility regime."[51] ERISA's fiduciary duties are derived from the common law of trusts, which governed most benefit plans before ERISA's enactment in concert with statutes.[52] However, the Supreme Court has determined that the common law of trusts "inform[s], but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties."[53] The Court further provided that when courts in breach of fiduciary duty actions look to the common law of trusts and ERISA, they must consider "competing congressional purposes."[54] These are: (1) to provide enhanced protection for employees' benefits, and (2) to create a system that is not in practice so complex that it discourages employers from offering benefit plans altogether.[55]

B. Breach of Fiduciary Duty Actions

ERISA breach of fiduciary duty actions are governed by § 409(a).[56] A fiduciary under ERISA is defined differently from the term in a more traditional setting.[57] An ERISA fiduciary is defined as one who "(i) . . . exercises any discretionary authority or discretionary control[,] (ii) . . . ren-

46. 29 U.S.C. § 1001(a) (2018).
47. H.R. REP NO. 93-533, at 1 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4655.
48. S. REP NO. 93-127, at 1, *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4844–47.
49. Peter J. Wiedenbeck, *Untrustworthy: ERISA's Eroded Fiduciary Law*, 59 WM. & MARY L. REV. 1007, 1013–17 (2018).
50. *Id.* at 1013–15.
51. *Id.* at 1017 (noting that "most issues that would determine the effect of the new fiduciary responsibility regime [would] be worked out, for good or ill, by the federal courts.").
52. *Id.* at 1014 (citing Varity Corp. v. Howe, 516 U.S. 489, 496–97 (1996)).
53. *See Varity*, 516 U.S. at 497 (1996).
54. *Id.*
55. *Id.*
56. *See* Musick, *supra* note 17, at 665–66; ERISA § 409, 29 U.S.C. § 1109(a) (2018).
57. Musick, *supra* note 17, at 671.

ders investment advice for a fee or other compensation . . . with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) . . . has any discretionary authority or discretionary responsibility in the administration of such plan."[58] Under ERISA, one can assume the role of fiduciary either by the responsibility one has undertaken for the plan or by being explicitly designated as such in the plan's language, as fully defined *infra*.[59] Section 1109(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.[60]

Under ERISA, fiduciaries owe duties of prudence and loyalty to their beneficiaries.[61] For a party (beneficiary or fiduciary, depending on the circuit) to prove the presence or absence of breach of the duty of prudence, that party must show that a prudent fiduciary "would [or would not] have selected a different fund based on the cost or performance of the selected fund."[62] The critical inquiry is whether there is a "sound basis for comparison—a meaningful benchmark."[63] What constitutes a meaningful benchmark is contested among courts, but as recently as 2018, the Eighth circuit held that "[t]he fact that one fund with a different investment strategy ultimately performed better does not establish" a meaningful benchmark.[64] Thus, there is an ambiguous standard for what a beneficiary must show to prove a fiduciary's breach of its duty of prudence.

C. The Common Law of Trusts

The common law of trusts is relevant to this circuit split because, as mentioned,[65] it governed most benefit plans before ERISA's enactment in concert with the Revenue Act of 1921 and other ineffective statutes enacted by the IRS. The Restatement (Third) of Trusts provides an outline for the

58. 29 U.S.C. § 1002(21)(A) (2018).
59. *Id.*
60. 29 U.S.C. § 1109 (2018).
61. RESTATEMENT (THIRD) OF TRUSTS §§ 76–78 (AM. L. INST. 2012).
62. Meiners v. Wells Fargo & Co., 898 F.3d 820, 822 (8th Cir. 2018).
63. *Id.*
64. *Id.* at 823.
65. *See* WORKPLACE FLEXIBILITY 2010, *supra* notes 28–30, and accompanying text.

common law of trusts. A trust is a legal organization or entity that holds assets for the benefit of another, the beneficiary.[66] The trustee is the person who holds or controls the assets in the trust.[67] The trustee has a duty to act in the beneficiary's best interest while managing the assets.[68] The Restatement (Third) recognizes that without a breach, a trustee is not liable for a loss, but is accountable for a profit arising out of the trust.[69] For example, a trustee is not liable for loss resulting from theft if the trustee acted with reasonable care to protect the property from loss.[70]A trustee whose breach causes a loss to the trust can be sued to "restore the values of the trust . . . to what they would have been" had the breach not occurred.[71] A trustee is, therefore, personally liable to the trust beneficiaries for breaches resulting from the trustee's failure to act prudently or to satisfy other duties.[72] After the plaintiff-beneficiary successfully presents a prima facie showing of breach and loss, the Restatement places the burden of proof for the causation element of a "breach of trust claim" on the defendant-trustee.[73] The comments in the Restatement conclude that equity also requires moderating the default rule burdening the plaintiff-beneficiary because of the defendant-trustee's generally superior knowledge of the trust.[74]

D. The Purpose of Title VII

After hearing "overwhelming" evidence of employment discrimination on the basis of race in employment, Congress enacted Title VII of the Civil Rights Act of 1964.[75] The legislation was passed, inter alia, "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices [that] have fostered racially stratified job environments to the *disadvantage of minority citizens*."[76] Further, through Title VII Congress vested in the federal courts broad equitable discretion to ensure that "persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have

66. WARD L. THOMAS & LEONARD J. HENZKE, JR., TRUSTS: COMMON LAW AND IRC 501(C)(3) AND 4947 4 (2003), https://www.irs.gov/pub/irs-tege/eotopica03.pdf.
67. *Id.* at 5.
68. *Id.*
69. RESTATEMENT (THIRD) OF TRUSTS § 99 (AM. L. INST. 2012).
70. *Id.* § 99 cmt. b.
71. *Id.* § 100.
72. *Id.* § 100 cmt. a.
73. *Id.* § 100 cmt. f.
74. *Id.*
75. *See* H.R. REP. NO. 88-914, pt. 2, at 26 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2513.
76. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (emphasis added).

been were it not for the unlawful discrimination."[77] Title VII and ERISA have a shared purpose in providing enhanced protections to historically disadvantaged employees.

E. Circuit Split History

Nearly every regional circuit has now weighed in, and their holdings are diametrically opposed: five follow the default rule in federal statutory cases and place the burden on plaintiffs;[78] and four shift the burden to defendants.[79] The earliest courts to rule in favor of burden-shifting provided little justification for their decisions. However, recent circuit court decisions have elaborated, explaining that burden-shifting aligns the knowledge of the parties with their burdens, is consistent with the Congressional purposes of ERISA, and with the common law of trusts.[80]

1. Circuit Courts in Favor of a Burden-Shifting Framework

In 1992, the Eighth Circuit became the first circuit court to address burden shifting in ERISA breach of fiduciary duty actions in *Martin v. Feilen*.[81] The Eight Circuit ruled in favor of burden-shifting, becoming the first federal intermediate appellate court to do so,[82] and noted that ERISA's high standards for fiduciaries derive from trust law.[83] The court also relied on trust law to guide procedure for ERISA litigation.[84]

The court agreed with the Department of Labor Secretary's amicus brief, holding that "once the ERISA plaintiff has proved a breach of fiduciary duty and a prima facie case of loss to the plan or ill-gotten profit to the fiduciary, the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by, or his profit was not attributable to, the breach of duty."[85]

The next circuit to rule in favor of the burden-shifting framework was the Fifth Circuit in the 1995 case of *McDonald v. Provident Indem. Life Ins.*

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77. 118 CONG. REC. 7565 (1972).
78. *Supra*, note 7.
79. *See* Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 361–62 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015); McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234, 237 (5th Cir. 1995); Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992); *Brotherston II*, 907 F.3d 17, 35 (1st Cir. 2018).
80. *See infra* Part III.B.
81. 965 F.2d at 671.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*

Co.[86] The *McDonald* court adopted the reasoning of the Eighth Circuit without significant elaboration,[87] using a three-step analysis analogous to Title VII's *McDonnell Douglas v. Green* burden-shifting framework. [88]

In 2014, The Fourth Circuit issued the only burden-shifting circuit decision (prior to *Brotherston II*) that explicitly addressed the split, in *Tatum v. RJR Pension Inv. Committee*.[89] *Tatum* held in favor of a burden-shifting scheme for two reasons.[90] First, the Fourth Circuit agreed with the district court that the shift approach was the "most fair."[91] Second, the Fourth Circuit noted that it had used a burden-shifting framework in an "analogous context" under the Labor Management Reporting and Disclosure Act.[92]

The Fourth Circuit stated that "[i]t is generally recognized that one who acts in violation of his fiduciary duty bears the burden of showing that he acted fairly and reasonably."[93] The *Tatum* court, discussing *Brink,* stated, "[W]e held that the district court in that case had erred when, after finding that the defendant breached his fiduciary duty, it placed the burden on the plaintiffs to prove what, if any, damages were attributable to that breach."[94] RJR Pension Investment Committee filed a writ of certiorari, which the Supreme Court denied in 2015.[95]

Most recently, the First Circuit joined the circuits in favor of burden-shifting.[96] In the *Brotherston* cases, the fiduciary (Putnam Investments) offered beneficiaries a "selection" of exclusively proprietary mutual funds, without consideration of nonproprietary investment alternatives, despite alleged issues with performance and fees.[97] The First Circuit explained that the plaintiffs had only proved the first two of the three required elements to a breach of fiduciary duty claim.[98] The first two elements were established by showing that the defendants failed to monitor the plan investments *independently*, and that those plan investments underperformed alternative in-

86. 60 F.3d 234, 237 (5th Cir. 1995).

87. *Id.* (stating that "once the plaintiff has satisfied these burdens, 'the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by [. . .] the breach of duty." (quoting Roth v. Sawyer–Cleator Lumber Co., 16 F.3d 915, 917 (8th Cir. 1994)).

88. *Id*. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 792 (1973)).

89. 761 F.3d 346, 362-64 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015).

90. *Id*. at 362–63.

91. *Id.* at 362.

92. *Id*. at 362–63.

93. *Id.* at 363 (quoting Brink v. DaLesio, 667 F.2d 420, 426 (4th Cir. 1982)).

94. *Id*. (citing *Brink*, 667 F.2d 420).

95. Petition for Writ of Certiorari, 761 F.3d 346 (No. 14-656).

96. *See Brotherston II*, 907 F.3d 17, 35 (1st Cir. 2018).

97. *Id.* at 23.

98. *Id.* at 30–34. "[A claim for breach of fiduciary duty] has three elements: breach, loss, and causation." *Id.* at 30.

vestments.[99] Referencing testimony from the plaintiff-beneficiaries' expert that the lower court had rejected,[100] the First Circuit ultimately held that the element of causation was not for the plaintiff to prove.[101] The First Circuit explained that, because the plaintiffs had made a prima facie showing of a violation and loss, the burden shifted to the defendants to disprove causation.[102]

The First Circuit's holding resulted in a 5-4 Circuit split on the issue, with the majority of courts not shifting the burden.[103] This further encourages forum shopping and increases procedural confusion for litigants.[104] After the First Circuit's reversal, Putnam submitted a petition for writ of certiorari to the Supreme Court. The writ was denied on January 13, 2020.[105]

2. Circuit Courts that Require the Plaintiff to Prove Causation

The first federal intermediate appellate court to hold that the beneficiary was required to prove causation was the Second Circuit in *Silverman v. Mut. Ben. Life Ins. Co.*[106] The Second Circuit reasoned that the "resulted from" language in ERISA § 1109 indicated the plaintiff must prove that the loss resulted from the breach.[107] Among the five total circuit courts that require the plaintiff to bear the burden, the Tenth Circuit's position in *Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.* is clearest.[108] *Pioneer* held, as the aforementioned cases in the split have, that there is no reason to implement an exception to the default rule of statutory construction[109] because the plain language of "§ 1109(a) of ERISA" does not require such an approach.[110]

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99. *Id*. at 30–34.

100. *Brotherston II*, 907 F.3d 17, 26 (1st Cir. 2018). The plaintiff-beneficiaries hired Dr. Steve Pomerantz, a Ph.D. in Mathematics from the University of California at Berkeley, who had "nearly thirty years of experience in investment research."

101. *Id.* at 35.

102. *Id.*

103. *See supra*, note 7.

104. Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1142 (2012) (noting that "[s]plits also create a variety of practical difficulties: they present difficult choice of law questions . . . ; complicate whether a right is 'clearly established' in constitutional tort litigation or 'settled' for purposes of the 'good faith' exception to the exclusionary rule; and contribute to possible federal forum shopping.").

105. Petition for Writ of Certiorari, *Brotherston II*, 907 F.3d 17 (No. 18-926).

106. 138 F.3d 98, 104 (2d Cir. 1998).

107. *Id.* (ERISA § 1109(a) requires a plaintiff "to demonstrate in a suit for compensatory damages that the plan's losses "result[ed] from" [the fiduciary's] breach of § 1105(a)(3).").

108. 858 F.3d 1324, 1337 (10th Cir. 2017).

109. The Supreme Court has held that plaintiffs bear the burden of proof in a variety of cases where the statute or Constitution is silent. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509

Finally, these circuit courts have argued that burden-shifting has the ability to impede plan growth.[111] The circuits reason that burden-shifting will increase litigation, and with this litigation will come more costs. These costs in turn will dissuade companies' utilization of employer-sponsored retirement plans.[112]

III. ARGUMENT

Courts that adhere to a burden-shifting approach stress the inherent congruence between the parties' knowledge and their respective burdens and follow settled judicial precedent in applying the common law of trusts to matters in which ERISA is textually silent. The following discussion addresses these two routinely articulated arguments, as well as the justification of burden-shifting in analogous litigation, namely the Title VII *McDonnell-Douglas* burden-shifting approach found in employment law disputes and the burden-shifting approach in ERISA § 510 cases.

A. The Knowledge and Information Gap between Fiduciaries and Beneficiaries Provides a Basis for Burden-Shifting

The fiduciaries responsible for a plan are in a better position to show what happened to cause a loss to the plan. Shifting the burden is the fairest approach, and this shift will produce better fiduciaries and, consequently, more protection for beneficiaries.[113]

In congressional discussions during the promulgation of ERISA, it was stated that it is "grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan booklets."[114] In breach of fiduciary duty ERISA actions, the above quote applies due to the reliance employees place on company-sponsored retirement plans without any specific knowledge of the investments that are

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U.S. 502, 511 (1993) (Title VII, burdens of proof and of persuasion); Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992) (Endangered Species Act).

110. *Pioneer Centres*, 858 F.3d at 1337 (citing ERISA § 409, 29 U.S.C. § 1109(a)).

111. *See* Conkright v. Frommert, 559 U.S. 506, 517 (2010) ("Congress sought 'to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'" (quoting Varity Corp. v. Howe, 516 U.S. 489, 497 (1996))).

112. Supplemental Brief for Petitioners at 12, *Brotherston II*, 907 F.3d 17 (1st Cir. 2018) (No. 18-926).

113. Clark, *supra* note 11, at 181.

114. S. REP NO. 93-127, at 1 (1974) *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4847.

bundled within their retirement plans.[115] Additionally, both the legislature and the courts agree that ERISA is dense and difficult to understand.[116] As a result, the average American beneficiary can hardly be expected to comprehend it fully.

The dual, competing purposes of ERISA are: (1) to provide enhanced protection for employees' benefits; and (2) to create a system that is not in practice so complex that it discourages employers from offering benefit plans altogether.[117] To accomplish these dual purposes, a burden-shifting framework is necessary.[118]

These dual purposes suggest a burden-shifting framework for two compelling reasons. First, beneficiaries choose to invest the bulk of their retirement assets in company-sponsored retirement plans due in part to the perceived "security" it provides. The "enhanced protections" of ERISA are lessened when fiduciaries repeatedly fail to apply their duties of prudence and loyalty to plan beneficiaries.[119] When beneficiaries must also prove loss causation, the benefit becomes a burden that is less lucrative than the investment options available to the public (IRAs, mutual funds, ETFs, bond portfolios) that are not governed by ERISA. When fiduciaries clearly act in opposition to their duty of protection under ERISA,[120] this leads to less security for beneficiaries, the polar opposite of the enhanced security ERISA promises to provide.[121]

Second, it follows logically that if the second congressional aim of ERISA is to avoid its complexity from discouraging employers to enter into benefit plans for their companies, the complexity expected to be understood by the employees is even less.[122] In fact, a Congressional study found that an average beneficiary, even when given a technical explanation of his plan's

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115. Clark, *supra* note 11, at 198 (stating that "[t]he fiduciary should bear the burden of disproving causation because of his heightened knowledge and familiarity with the evidence," as opposed to the beneficiary who often lacks both such knowledge and familiarity).

116. *See* Ruth Bader Ginsburg, *A Woman's Voice May Do Some Good*, POLITICO (Sept. 25, 2013), https://www.politico.com/story/2013/09/women-oconnor-ginsburg-supreme-court-097313 (calling ERISA a "candidate for the most inscrutable legislation Congress ever passed"); *see also Conkright*, 559 U.S. at 509 (stating "[a]s in many ERISA matters, the facts of this case are exceedingly complicated").

117. Varity Corp. v. Howe, 516 U.S. 489, 497 (1996).

118. *See* Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 363 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015) (concluding that the "burden-shifting framework comports with the structure and purpose of ERISA").

119. *Varity*, 516 U.S. at 497.

120. *See Brotherston I*, No. CV 15-13825-WGY, 2017 WL 2634361, at 7 (D. Mass. June 19, 2017) (noting that fiduciary Putnam Benefits Investment Committee had no "independent standards or criteria for monitoring the Plan investments," and "never once removed a fund from the Plan lineup").

121. *See Varity*, 516 U.S. at 497.

122. S. REP NO. 93-127, at 1 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4847.

provisions, often cannot comprehend them because of the "technicalities and complexities" associated with the plan.[123]

In most ERISA cases involving a breach of fiduciary duty, the relative sophistication of the parties is heavily weighted in favor of the fiduciary.[124] Not only is there a difference in knowledge, but also in the resources available to the parties.[125] The fiduciary is more easily able to show that any alleged loss would have occurred regardless of the breach with substantially lower costs than the beneficiary.[126]

If the beneficiary is forced to bear the burden of proof in breach of fiduciary actions, fiduciaries are tempted to act insincerely and in opposition to the duties to their clients. Examples of such actions include overloading plan funds with in-house investment portfolios or refusing to re-allocate investments due to market risk when doing so would reduce the number of in-house investments in the portfolio.[127] The Seventh Circuit noted that burden shifting is "in accord with the overall purpose of ERISA, described as "to protect the interest of plan beneficiaries," and that as applied to damages burden shifting was consistent with the "flexible remedial powers provided in 29 U.S.C. § 1109(a).[128] The Seventh Circuit concluded that §1109's "disgorgement requirement[]," which is "intended to promote [beneficiaries'] interests by removing the fiduciary's incentives to misuse trust assets" would "be of little value if, in cases such as this, beneficiaries confronted an insurmountable obstacle in proving the extent of a fiduciary's profits."[129] Therefore, fiduciaries could engage in complex and deceptive investment practices with the knowledge that the beneficiaries would not have the experience to establish proof of the fiduciary's self-serving investments that are in breach of the fiduciary's duties of prudence and loyalty.

The Supreme Court of the United States has stated that, in statutory interpretation analysis, "[t]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary."[130] The Department of Labor Secretary, Seth Harris, postulated in an amicus brief filed in *Tatum v. RJR Pension Investment Committee*[131] that because ERISA holds fiduciaries to "the

123. *Id.; see generally* MARKETWATCH, *supra* note 9.
124. S. REP. NO. 93-127, at 1 (1974) *as reprinted in* 1974 U.S.C.C.A.N. 4838.
125. *Id*.
126. *Id*.; *see also* Meiners v. Wells Fargo & Co., 898 F.3d 820, 822 (8th Cir. 2018).
127. Haralampu, *supra* note 15, at § 30.5.3(e)-(f).
128. Leigh v. Engle, 727 F.2d 113, 139 (7th Cir. 1984) (discussing burden-shifting when determining damages) (citing Brink v. DaLesio, 667 F.2d 420, 426 (4th Cir. 1982) (placing the burden of proof on the beneficiary to show that the prohibited transaction did not damage trust)).
129. *Id.*
130. United States v. New York, N.H. & H.R. Co., 355 U.S. 253, 256 n.5 (1957).
131. 761 F.3d 346, 361–62 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015).

highest [standard] known to the law,"[132] the higher standard of burden-shifting is in accord with the principle of fairness ERISA is founded upon.[133]

It can be argued that ERISA plaintiffs who bear the burden of proof are not as helpless as the burden-shifting argument concludes. After all, the discovery process is the mechanism through which these plaintiffs obtain all of these complex formulas and portfolio statistics. Further, if the material is complex and hard to comprehend to laypersons and attorneys alike, an expert witness can be hired to resolve any knowledge deficiencies.

However, these arguments fail to consider two factors. First, in many cases, including *Brotherston*, expert witnesses—from incredibly distinguished mathematicians to accomplished financiers—are held to give insufficient, "flawed" testimony that the court rejects.[134] Second, the availability of information plays a role in the depth of information plaintiff-beneficiaries may obtain. While ERISA plaintiffs "typically have extensive information regarding the selected funds because of ERISA's disclosure requirements[,] . . . they typically lack extensive information regarding the fiduciary's methods and actual knowledge because those details tend to be in the sole possession of [that fiduciary]."[135] A beneficiary can make extensive discovery requests, but inevitably fiduciaries will not or cannot always disclose intangible investment preferences or strategies that are largely undocumented.[136]

B. An Exception to the Default Rule of Statutory Interpretation Exists When ERISA's Text Is Silent.

In ordinary civil litigation, when a statute's text is silent in regards to a specific claim, the plaintiff "bear[s] the burden of persuasion regarding the essential aspects of [his or her] claim."[137] This default rule is subject to exceptions.[138] One of those exceptions is the law of trusts, to which courts have repeatedly and explicitly subjected fiduciaries in their duties of loyalty and prudence.[139] According to trust law, "when a beneficiary has succeeded in

132. Brief of Seth D. Harris, the Acting Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants and Urging Reversal at 10, *Tatum*, 761 F.3d at 346 (No. 13-1360).

133. *Id.*

134. *Brotherston II*, 907 F.3d 17, 26 (1st Cir. 2018) (explaining that "the court rejected the analysis of plaintiff's expert, Dr. Steve Pomerantz, who purported to show that Putnam's fees were materially higher on average than the fees paid by other funds, on the grounds that his comparators were flawed").

135. Meiners v. Wells Fargo & Co., 898 F.3d 820, 822 (8th Cir. 2018) (internal quotations omitted).

136. *Id*.

137. Schaffer *ex rel*. Schaffer v. Weast, 546 U.S. 49, 57 (2005).

138. *Id.*

139. Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828 (2015).

proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach."[140]

A burden-shifting framework is necessary to follow settled precedent in applying the common law of trusts to ERISA actions where there is no explicit statutory guidance. ERISA breach of fiduciary duty litigation does not meet the common law standard for when trust law is *inapplicable* to ERISA.[141] The Supreme Court outlined the standard for the applicability of trust law to parts of ERISA in *Varity Corp. v. Howe.*[142] The Court noted, "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection."[143] Therefore, ERISA's framers clearly intended for it to provide a heightened standard of beneficiary protection compared to that formerly provided to beneficiaries under trust law principles. Until 1974, even with trust law's high standard for beneficiaries, corruption among fiduciaries was prevalent and increasing.[144] Based on the principles from which ERISA was created, trust law unambiguously governs ERISA breach of fiduciary duty litigation.[145] When interpreting ERISA's fiduciary duty sections, courts have recognized that "history demonstrates Congress' intent that principles of trust law govern construction of ERISA."[146] The Senate report on ERISA from 1973 explained the importation of trust law into ERISA statutory law,[147] stating "[t]he fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts."[148] Thus, Congress intended for uniform trust law principles to form ERISA's foundation.[149]

ERISA's burden-shifting framework in breach of fiduciary duty actions is layered in overlapping and foundational statutory and common law justifications. These include the common law of trusts' explicit exception from the default rule, ERISA's roots in the common law of trusts, and ERISA's framers' intent to provide a heightened level of protection.

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140. RESTATEMENT (THIRD) OF TRUSTS § 100, cmt. f (AM. L. INST. 2012); *see, e.g.*, George Gleason Bogert & George Taylor Bogert, THE LAW OF TRUSTS AND TRUSTEES § 871 (rev. 2d ed. 1995) (Bogert) (stating "[i]f the beneficiary makes a prima facie case, the burden of contradicting it or showing a defense will shift to the trustee").

141. *Schaffer*, 546 U.S. at 57.

142. 516 U.S. 489, 497 (1996).

143. *Id*.

144. Goldberg, *supra* note 24, at 944-45.

145. Clark, *supra* note 11, at 191.

146. Youngberg v. Bekins Co., 930 F. Supp. 1396, 1401 (E.D. Cal. 1996).

147. S. REP NO. 93-127, at 1 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4865.

148. *Id*.

149. *Id*.

C. The Common Purpose Between Title VII and ERISA Implies a Common Framework.

ERISA and Title VII both provide legislative protections for historically and systemically vulnerable populations in their given contexts. Title VII of the Civil Rights Act of 1964 was created to "prohibit discrimination on the basis of . . . legislatively enumerated grounds," such as race, national origin, and sex.[150] Both minority populations in the context of private employment and beneficiaries who rely on fiduciaries to manage their retirement income are in positions of submission to decision-makers who carry nearly all of the power. Thus, employees historically mistreated in employment decisions (Title VII) and employee benefits (ERISA) both receive enhanced protections. These protections are in place to prevent further mistreatment of such classes, and to provide leverage when such mistreatment inevitably occurs.

Under Title VII, the *McDonnell-Douglas* burden-shifting framework requires a plaintiff to establish a prima facie case of discrimination.[151] Once the plaintiff has satisfied this burden, the burden of persuasion shifts to the employer to rebut the prima facie case by providing a "legitimate, nondiscriminatory reason" for its adverse employment action towards the employee.[152] If the employer sufficiently makes such a showing, the employee may prevail only if the employer's proffered reason is merely pretextual.[153] Justice Powell reasoned in *McDonnell Douglas* that "[t]he broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions."[154] Title VII's goal of preventing discrimination in the workplace translates clearly to ERISA's goal of a workplace where employees may work with the comfort of a secure retirement in their future.[155] Heightened protections for at-risk members in the workplace whose rights have been disregarded and unprotected justify the burden-shifting approach under both legislative schemes.

Additionally, courts uniformly apply a burden-shifting framework in the context of other ERISA subsections. Section 510 of ERISA uses a burden-shifting framework in claims of benefit discrimination.[156] The Second

150. Lightner v. City of Wilmington, N.C., 545 F.3d 260, 262 (4th Cir. 2008).
151. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
152. *Id.*
153. *Id.* at 804–05.
154. *Id.* at 801.
155. *Id*.
156. *See* 29 U.S.C. § 1140 (2018) (describing that if an employee succeeds in establishing elements of a prima facie case against his employer under ERISA section 1132 prohibiting

Circuit explained that the burden-shifting method in the § 510 context is due to the existence of a "specific intent to interfere with an employee's benefit rights is critical in § 510 cases—yet is seldom the subject of direct proof—the district court allocated the burdens of production and order of proof in a manner similar to the approach used in Title VII."[157] This line of logic holds in breach of fiduciary duty actions due to the lack of direct, smoking-gun evidence as well.[158] "As Title VII prohibits discrimination on the basis of race with respect to such employment, [ERISA § 510 prohibits] discrimination with respect to pension benefits on the basis of one's proximity to such benefits."[159] In ERISA breach of fiduciary duty cases, the fiduciary hides behind complex investment formulas and large portfolios of investments that serve to attenuate a breach by diverting the observant beneficiary from any glaring over-utilization of fiduciary-owned portfolios, or other breach-worthy conduct.[160]

The Eighth Circuit reasoned that "Title VII standards and methods of analysis are otherwise applicable to employment discrimination cases under ERISA."[161] Again, while breach of fiduciary duty cases do not hinge on discrimination by a fiduciary against different beneficiaries, the underlying protection from a situation where an institution or person in a position of power brandishes that power unlawfully against a vulnerable population is present in both contexts.[162]

The *McDonald* court addressed the issue using a three-step analysis analogous to Title VII's *McDonnell Douglas v. Green* burden-shifting framework.[163] To establish a breach of fiduciary duty claim, an ERISA plaintiff must prove a breach of a fiduciary duty and a prima facie case of loss to the plan.[164] "Once the plaintiff has satisfied these burdens, 'the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by . . . the breach of duty."[165]

While perhaps not as morally repugnant as discrimination against a protected class in Title VII, in the context of employee benefits the beneficiary is almost always the least knowledgeable and most vulnerable party

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interference with protected rights under employee benefit plan, a rebuttable presumption is created that the section has been violated).

157. Dister v. Cont'l Grp., Inc., 859 F.2d 1108, 1111 (2d Cir. 1988).

158. 29 U.S.C. § 1140.

159. Jared A. Goldstein, *Employment Discrimination Claims Under ERISA Section 510: Should Courts Require Exhaustion of Arbitral and Plan Remedies?*, 93 MICH. L. REV. 193, 194 (1994) (quoting Gavalik v. Cont'l Can Co., 812 F.2d 834, 847 (3d Cir. 1987)).

160. Clark, *supra* note 11, at 198.

161. Morris v. Winnebago Indus., Inc., 936 F. Supp. 1509, 1517 (N.D. Iowa 1996).

162. *See generally* MARKETWATCH, *supra* note 9.

163. *Id.*; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

164. RESTATEMENT (THIRD) OF TRUSTS § 100, cmt. f (AM. L. INST. 2012)

165. McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234, 237 (5th Cir. 1995).

with the most to lose. Just as in Title VII or ERISA § 510 claims, where employees cannot be asked to enter into the mind of an employer to determine his or her internal motivations for a given employment or benefit decision, ERISA beneficiaries who have experienced a breach of duty by their fiduciary likewise cannot be expected to enter into the mind of the fiduciary.

Beneficiaries cannot be expected to produce an accurate theory of what the fiduciary's hypothetical actions for investment selection would be. Even if a plaintiff can determine *what* investment choices a fiduciary made, the more challenging aspect of a plaintiff's burden is overcoming different levels of knowledge regarding *what* investment choices a plan fiduciary made as compared to *how* a plan fiduciary made those choices.[166] To require beneficiaries to forecast a fiduciary's internal and undocumented decision-making process is out of line with the protections that ERISA was designed to create.

IV. CONCLUSION

A burden-shifting framework in ERISA breach of fiduciary duty claims optimizes the inherent congruence between the parties' knowledge and their respective burdens. Burden-shifting follows settled judicial precedent in applying the common law of trusts to matters in which ERISA is textually silent and its accompanying exception from the default rule. Lastly, the background and purpose of ERISA analogizes strongly to Title VII's *McDonnell-Douglas* burden-shifting approach and ERISA § 510's burden-shifting.

The Employee Retirement Income Securities Act of 1974 was created to uniformly protect the interests of employees who sacrifice their income in exchange for a promise that this income would be wisely invested for their future retirement. ERISA's purpose and plain language support the application of a burden-shifting framework to prove causation in a breach of fiduciary duty action.

In order for ERISA to fulfill the dual purposes for which it was enacted,[167] it is clear that a burden-shifting framework is necessary. The Supreme Court of the United States should align ERISA's causation framework with its purpose and plain language and rule in favor of a burden-shifting framework. With multiple denials of certiorari petitions for ERISA breach of fiduciary duty claims in the last five years,[168] a definitive holding from the Court is past due. At the time of this writing, the nine circuit courts across

166. *See* Meiners v. Wells Fargo & Co., 898 F.3d 820, 822 (8th Cir. 2018).

167. *See* Varity Corp. v. Howe, 516 U.S. 489, 497 (1996).

168. *See* Petition for Writ of Certiorari, Tatum v. RJR Pension Inv. Comm., 761 F.3d 346 (4th Cir. 2014) (No. 14-656).

the country that have weighed in are split nearly evenly, and the circuit courts continue to reach opposite conclusions.[169]

A certiorari grant is necessary in order to prevent forum shopping and inequitable administration of a statute that was created to provide uniformity. The majority of Americans rely heavily on retirement plans to fund the final years of their lives.[170] Americans deserve the same level of consistency with the courts as accountability with their fiduciaries. Because ERISA permits venue anywhere a defendant can be found, the circuit split creates a substantial incentive to forum shop.[171] The decision of the circuits to utilize either burden-shifting or non-burden-shifting frameworks are often outcome-determinative.[172] Litigants in circuits that have not yet entertained breach of fiduciary duty cases currently know how their jurisdictions will treat them, leaving beneficiaries and fiduciaries alike in the dark.[173] If presented with another opportunity to rectify this problem, the Supreme Court should no longer avoid the question.

*William G. McGrath**

169. Petition for Writ of Certiorari at 21, *Brotherston II*, 907 F.3d 17 (1st Cir. 2018) (No. 18-926).

170. *See generally* MARKETWATCH, *supra* note 9.

171. *Id.* at 22 (quoting 29 U.S.C. § 1132(e)(2) (2014)).

172. *See Brotherston II*, 907 F.3d at 39 n.16.

173. Supplemental Brief for Petitioners, *Brotherston II*, 907 F.3d 17 (No. 18-926) (concluding that "[t]he parties, and the circuits, have not just answered the burden question differently, they have taken fundamentally different approaches. This Court should finally resolve the issue and restore the nationwide uniformity that ERISA requires.").

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In *Craig v. Simon*,[1] the Eighth Circuit Court of Appeals faced an interesting and unfortunate question—what happens when a candidate running for U.S. House of Representatives dies prior to election day?[2] In the 2020 election, the appellant Tyler Kistner was the Republican candidate for the United States House of Representatives seat in the Second Congressional District of Minnesota.[3] The incumbent Representative for the district was Angela Craig, of the Democratic-Farmer-Labor Party. Craig, as well as Jenny Winslow Davies, a voter in the district, were the appellees in this action.[4]

Kistner, Craig, and a third candidate, Adam Charles Weeks of the Legal Marijuana Now Party, were set to run against each other for the district's seat in the House of Representatives.[5] However, on September 21, 2020, Weeks passed away.[6] According to Minnesota statute, if a "major political party" candidate dies within the seventy-eight days prior to the election, "the general election ballot shall remain unchanged, but the county and state canvassing boards must not certify the vote totals for that office from the general election, and the office must be filled at a special election."[7] Subsequently, the governor "shall issue a writ calling for a special election to be conducted on the second Tuesday in February of the year following the year the vacancy in nomination occurred."[8]

Craig argued that federal law preempted the Minnesota statute.[9] Article I of the Constitution gives Congress the power to regulate the timing of elections for Representatives.[10] Further, a federal statute outlines that the election for Representatives is "[t]he Tuesday next after the 1st Monday in November, in every even numbered year."[11] However, another section of the same federal statute permits States to determine "the time for holding elections in any State . . . for a Representative . . . to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected."[12] Accordingly,

1. 980 F.3d 614 (8th Cir. 2020).
2. *See generally id.*
3. *Id.* at 616.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Craig*, 980 F.3d at 616 (quoting Minn. Stat. § 204B.13, subdiv. 2(c)).
8. *Id.* (quoting Minn. Stat. § 204B.13, subdiv. 7).
9. *Id.*
10. *Id.*
11. *Id.* (alteration in original) (quoting 2 U.S.C. § 7).
12. *Id.* at 616–17 (alteration in original) (emphasis omitted) (quoting 2 U.S.C. § 8(a)).

Kistner argued that candidate Weeks's death caused the November 3 vote to be uncertifiable under Minnesota law.[13] Further, Kistner alleged that the State's inability to certify the vote led to a failure to elect, which in turn permitted the State to decide the time for a special election to fill the Congressional seat.[14]

The district court entered a preliminary injunction after finding that the appellee was likely to prevail on her claim that the Minnesota statute was preempted by federal law.[15] The injunction subsequently enjoined the Minnesota Secretary of State[16] from refusing to give the November 3 ballots cast for the Representative seat legal effect.[17] The district court held that candidate Weeks's death would not create a failure to elect; therefore the State could not refuse to certify the November 3 votes.[18]

The Eighth Circuit was tasked with determining whether the district court erred in granting the preliminary injunction.[19] To determine whether a preliminary injunction should be granted, a court considers the following factors: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest."[20] The most important factor is the likelihood of success on the merits.[21]

In analyzing whether the injunction was properly granted, the court had to determine whether the Minnesota statute authorizing a special election upon the death of a major political party candidate was preempted by federal law.[22] Specifically, the Eighth Circuit addressed whether candidate Weeks's death caused a failure to elect in the November 3 election, thus giving Minnesota the authority to schedule a special election in February 2021 to fill the vacant Representative seat.[23]

The court agreed that the Minnesota statute was likely preempted because federal law prescribes a uniform date for congressional elections.[24]

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13. *Craig*, 980 F.3d at 617.
14. *Id.*
15. *Id.*
16. The Minnesota Secretary of State was the official named as the defendant in this case and the party subject to the injunction issued, though both the Minnesota Secretary of State and the Attorney General declined to file a brief on appeal. *See id.* at 617 n.2.
17. *Id.* at 617.
18. *Id.*
19. *Craig*, 980 F.3d at 617.
20. *Id.* (quoting Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981)).
21. *Id.* (citing Shrink Mo. Gov't PAC v. Adams, 151 F.3d 763, 764 (8th Cir. 1998)).
22. *Id.* at 617–18.
23. *Id.* at 617.
24. *Id.* at 617–18.

The court declined to specify the precise circumstances that constitute a "failure to elect," but the court did assert that it is unlikely that a State is permitted to cancel an election and produce a "failure to elect" absent actual "exigent" conditions.[25] The court held that the death of candidate Weeks was most likely not an exigent circumstance that excuses a state from holding a general election for a congressional seat on the date set according to federal law.[26]

While less important to the analysis, the court also addressed the other factors considered by the district court in granting the injunction.[27] The court found no error in the district court's holding that the appellees would suffer irreparable harm, and that the balance of harms and public interest did not weigh against granting the injunction.[28] Therefore, the court affirmed the district court's order granting the preliminary injunction and prohibiting the Minnesota Secretary of State from not giving legal effect to the November 3 ballots.[29]

In sum, *Craig v. Simon* stands for the principle that state laws allowing for special elections in congressional races are likely preempted by the federal law prescribing that such elections take place on a specified date in November.[30] While federal law does allow special elections in certain exigent situations, the Eighth Circuit concluded that the death of a candidate six weeks prior to the general election is not exigent enough.[31]

Frances A. Amick-Lytle

25. *Craig*, 980 F.3d at 618 (citing Busbee v. Smith, 549 F. Supp. 494, 525 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983)).
26. *Id.*
27. *See id.*
28. *Id.*
29. *Id.* at 617–18.
30. *See id.* at 618.
31. *Craig*, 980 F.3d at 618.

CRIMINAL LAW—CAPITAL FELONY-MURDER REQUIRES AN ELEMENT OF THE UNDERLYING FELONY TO OCCUR IN ARKANSAS

In 2019, *Torres v. State* brought a unique issue to the Supreme Court of Arkansas relating to felony-murder and jurisdiction.[1] The court addressed whether a felony-murder conviction could be upheld when the underlying felony was wholly committed in a different state, but the death of the victim occurred within the borders of Arkansas.[2] Further complicating the issue were the circumstances surrounding the verdict. The jury found Torres guilty of capital murder but did so using a general verdict form.[3] Because the State sought two differing theories of capital murder which were not distinguished on the verdict form, it was impossible to determine on which theory the jury found Torres guilty.[4]

The facts of the case are truly horrific, yet they are not found in the opinion. Rather, the dissent articulated the facts in detail. To summarize, the defendant-father was alleged to have raped his six-year-old son while camping with their family in Missouri.[5] The act, which involved the father inserting a stick into his son's rectum as punishment, ultimately led to the child's death later that night in an Arkansas hospital after returning home.[6] The child's autopsy revealed chronic child abuse.[7] Hence, the State sought charges of capital murder under two different theories; (1) felony murder, with the underlying felony of rape, and (2) child-abuse murder.[8]

The complications of this case are grounded in Arkansas's extraterritorial jurisdiction statute.[9] In order for a person to be convicted of a crime in Arkansas the statute requires that "[e]ither the conduct or a result that is an element of the offense occur[] within this state."[10] For Torres however, the conduct amounting to the underlying felony, namely rape, occurred in Missouri.[11] The State argued that there was a sufficient connection between the rape and the victim's death in Arkansas for Arkansas to have jurisdiction, specifically because the death was a result of the rape.[12] But because no el-

1. Torres v. State, 2019 Ark. 101, 571 S.W.3d 456.
2. *Id*.
3. *Id.* at 1–2, 571 S.W.3d at 458.
4. *Id.* at 14–15, 571 S.W.3d at 465.
5. *Id.* at 18–19, 571 S.W.3d at 466–67. (Womack, J., dissenting).
6. *Id.* at 18, 571 S.W.3d at 466–67. (Womack, J., dissenting).
7. *Torres*, 2019 Ark. 101, at 18–19 , 571 S.W.3d at 467.
8. *Id.* at 19, 571 S.W.3d at 467.
9. ARK. CODE ANN. § 5-1-104. (Repl. 2017).
10. *Id.* § 5-1-104(a)(1).
11. *Torres*, 2019 Ark. 101, at 11, 571 S.W.3d at 463.
12. *Id.* at 9, 571 S.W.3d at 462.

ement of the rape was alleged to have occurred in Arkansas, the court found the State's argument unpersuasive.[13] Specifically, the court noted that death—as a result of rape—is not delineated as an element in Arkansas's rape statute.[14] Therefore, the alleged crime did not fall under the extraterritorial jurisdiction statute.[15]

The court conducted an analysis of Arkansas case law that makes distinctions between crimes that include a consequence of an act as an element of the crime, and crimes that only concern the conscious act of the perpetrator.[16] The analysis expounded that crimes only covering conscious acts of the accused are deemed to have occurred where the act takes place and consequently are only punishable within that jurisdiction.[17] Alternatively, where a crime includes consequences of the act as elements, the crime will typically be held as taking place where the consequences occur.[18] This analysis, and the precedent the court ultimately relied on, was mostly drawn from *Cousins v. State* where the defendant was accused of writing bad checks from a Missouri bank and depositing them in an Arkansas bank.[19] The court reversed the defendant's conviction of issuing insufficient-funds checks because the overdraft was not from an Arkansas bank account but rather from a Missouri bank account.[20]

Applying this precedent, the court in *Torres* found that the Arkansas rape statute did not contemplate the consequence of death as an element of the offense, so the crime of rape Torres allegedly committed was deemed to have occurred entirely in Missouri, as no element occurred in Arkansas.[21] Perhaps the final blow to the State's case was its own concession at oral argument that it could not have prosecuted Torres with rape in Arkansas.[22] The court noted "[i]f Torres could not have been charged in this state, that necessarily means that the elements of rape could not have been met in this state. If the elements of rape cannot be met, rape cannot serve as an element of capital murder."[23]

The court, in concluding its opinion, summarized its reasoning simply: "[h]ere, the death is the consequence or result of the rape, but death is not an

13. *Id.* at 12–14, 571 S.W.3d at 463–65.
14. *Id.* at 14, 571 S.W.3d at 464–65; ARK. CODE ANN. § 5-14-103.
15. *Torres*, 2019 Ark. 101, at 14, 571 S.W.3d at 464.
16. *See id.* at 12–13, 571 S.W.3d at 463–64 (citing State v. Chapin, 17 Ark. 561, 65 Am. Dec. 452).
17. *Id.* at 13, 571 S.W.3d at 464 (quoting 22 C.J.S., *Criminal Law: Substantive Principles*, § 134).
18. *Id*.
19. Cousins v. State, 202 Ark. 500, 151 S.W.2d 658 (1941).
20. *Id.* at 501, 151 S.W.2d at 659.
21. *Torres*, 2019 Ark. 101, at 13–14, 571 S.W.3d at 464–65.
22. *See id.* at 13–14, 571 S.W.3d at 464.
23. *Id*.

element of the rape offense."[24] Without an element of the rape offense occurring in Arkansas, the court held that its jurisdiction could not reach the alleged conduct and thus the rape-felony-murder theory was insufficient to sustain a conviction.[25]

After the concurrence addressed other grounds related to sentencing and due process, the dissent criticized the majority decision as a misunderstanding of the extraterritorial jurisdiction statute.[26] In his dissent, joined by Chief Justice Kemp and Justice Wood, Justice Womack proffered that the "offense" referred to in the jurisdiction statute, as related to the "offense" in which Torres was convicted of, was felony-murder and not necessarily rape.[27] He wrote that, while it is necessary to prove the underlying felony, it is less of an element of capital murder and more of an establishment of *mens rea*.[28] For the dissent, the true offense was capital felony-murder and the result of that offense, the death of the victim, occurred in Arkansas.[29] Accordingly, the dissent believed the state had jurisdiction.[30]

In the end, the case was reversed due to the insufficiency of the felony-murder charge and was remanded for a new trial because the verdict form was inconclusive as to the grounds on which the jury found Torres guilty.[31]

If the case was not unique enough, on remand in Benton County the presiding judge declared a mistrial due to a courtroom scuffle during the sentencing hearing after Torres was again convicted.[32] The Arkansas Supreme Court agreed to review the case yet again, this time to determine if the trial could proceed from the sentencing phase or if a complete retrial was necessary.[33] On February 11th, 2021 the court held that the circuit court did not err in declaring a mistrial for both the guilt and penalty phases, noting

24. *Id.* at 14, 571 S.W.3d at 464–65.
25. *Id.* at 14–15, 571 S.W.3d at 464–65.
26. *Id.* at 15–17, 571 S.W.3d at 465–67.
27. *Torres*, 2019 Ark. 101, at 20–21, 571 S.W.3d at 468.
28. *Id.* at 21–22, 571 S.W.3d at 468.
29. *See id.* at 20–23, 571 S.W.3d at 468.
30. *Id.* at 23, 571 S.W.3d at 469.
31. *Id.* at 14–15, 571 S.W.3d at 465.
32. *Arkansas Supreme Court to Address a Petition for the Mauricio Torres Mistrial Case*, KFSM-TV CHANNEL 5 NEWS (June 18, 2020), https://www.5newsonline.com/article/news/local/arkansas-supreme-court-mauricio-torres-mistrial-petition/527-b04fa8f9-b507-4a5e-aaf7-1ec84595c90a.
33. Tracy Neal, *Arguments Before Arkansas Supreme Court Scheduled in Torres Murder Case*, NW. ARK. DEMOCRAT GAZETTE (Dec. 24, 2020), https://www.nwaonline.com/news/2020/dec/24/arguments-before-arkansas-supreme-court-scheduled/.

that the same jury must sit for both phases in a capital case.[34] At the time of this writing, Mauricio Torres is scheduled to be tried for a third time.[35]

In conclusion, what may ultimately be garnered from *Torres v. State* is that for a conviction of capital felony-murder to stand, the predicate felony must have an element of the crime, either an act or a consequence, occur within the borders of Arkansas.

Joe Brunett

34. State v. Torres, 2021 Ark. 22, 10, __ S.W.3d __.

35. Tracy Neal, *Torres to Receive Third Murder Trial Involving Death of Son*, NW. ARK. DEMOCRAT GAZETTE (Feb. 12, 2021), https://www.nwaonline.com/news/2021/feb/12/torres-to-receive-third-murder-trial-involving/.

LABOR & EMPLOYMENT LAW—*PASKERT V. KEMNA-ASA AUTO PLAZA, INC.*, 950 F.3D 535 (8TH CIR. 2020)

Recently, the United States Supreme Court declined to resolve a circuit split regarding a Title VII of the Civil Rights Act of 1964 sexual harassment/hostile work environment standard. In *Paskert v. Kemna-Asa Auto Plaza, Inc.*, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's grant of a motion for summary judgment in favor of the employer.[1] It held that the manager's behavior towards the employee was not severe or pervasive enough to change the conditions of the employee's employment under Title VII and the Iowa Civil Rights Act.[2] The manager's behavior included instances of "unwelcome physical conduct" and multiple statements that he made to the employee saying he should never have hired a female.[3] Furthermore, the Eighth Circuit held that the employee did not fully exhaust her administrative remedies and failed to allege a sex discrimination claim.[4]

Title VII prohibits sexual harassment, specifically hostile work environment.[5] If harassment is "severe or pervasive" enough to alter the conditions of employment, and creates a hostile work environment, an employee can sue under Title VII.[6] The Eighth Circuit has set a high threshold for conduct to be sufficiently "severe or pervasive" before holding an employer liable under Title VII. In fact, the Eighth Circuit has noted that "some conduct well beyond the means of respectful and appropriate behavior is nonetheless insufficient to prevail on a claim under Title VII."[7] For example, the Eighth Circuit has found conduct to be not be sufficiently severe or pervasive, even when graphic sexual propositions are involved.[8] *Paskert* calls attention to the difference between inappropriate supervisor conduct and

1. Paskert v. Kemna-Asa Auto Plaza, Inc., 950 F.3d 535, 536 (8th Cir. 2020).
2. *Id.* at 536.
3. *Id.* at 538.
4. *Id.* at 536.
5. *Id.* at 538.
6. *Id*. (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (describing the standard of hostile environment as "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment.")).
7. McMiller v. Metro, 738 F.3d 185, 188 (8th Cir. 2013) (The Eighth Circuit did not find severe or pervasive conduct when a supervisor suggested sexual intercourse and touched her hand multiple times among other things).
8. LeGrand v. Area Res. for Cmty. & Human Servs., 394 F.3d 1098, 1100–03 (8th Cir. 2005).

conduct that rises to a point where it is considered actionable hostile work environment under Title VII.[9]

From May to November, Jennifer Paskert was a sales associate of Auto$mart, Inc. ("Auto Smart") in Spirit Lake, Iowa, where she directly reported to her supervisor Brent Burns.[10] Her job duties consisted of preparing cars for sale, selling cars, and collecting payments.[11] Paskert alleges that she was not allowed to complete her training.[12] She further alleges that whenever Burns or James Bjorkland, another associate, were giving their sales pitch to customers, Burns would not let her shadow them and would instead send her back inside the dealership to answer phone calls.[13]

Burns was aggressive and frequently lost his temper.[14] His treatment towards women was "demeaning, sexually suggestive, and improper."[15] Furthermore, he boasted at work about his sexual conquests.[16] At one point, Burns met with Kenneth Kemna, the operator of Auto Smart, who advised that Paskert should be fired since she did not make a single sale from the time she began working.[17] She had been working there for four months, yet she was still making the same amount of money as Bjorkland, who was actually selling cars.[18] Burns did not agree to this and instead proposed that Paskert continue but that her pay structure and job title be changed.[19]

Three days after accepting her new job title and payment structure, Burns fired her for insubordination. [20] Specifically, Burns claimed that he fired Paskert because of her lack of car sales and use of profanity.[21] He further claimed that after he discharged her, she took all of her computer passwords with her and threw candy all over her desk; she denied doing both.[22] In January 2016, Paskert filed a complaint against Auto Smart alleging "sex discrimination based on hostile work environment and retaliation,"[23] The Iowa Civil Rights Commission (ICRC) issued a right-to-sue letter in No-

9. *See* Alexis Shanes, *High Court Asked to Weigh Scope of Sexual Harassment*, LAW 360 (Nov. 13, 2020, 7:04 PM), https://www.law360.com/articles/1328737/high-court-asked-to-weigh-scope-of-sexual-harassment.

10. *Paskert*, 950 F.3d at 536.

11. *Id.* at 537.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Paskert*, 950 F.3d at 537.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Paskert*, 950 F.3d at 537.

23. *Id.*

vember 2016, but the district court granted defendant's motion for summary judgment.[24]

The Eighth Circuit held that Paskert did not allege behavior that was severe or pervasive enough to state a claim under Title VII.[25] Furthermore, the court found that while the behavior was "reprehensible and improper," the behavior was not pervasive or severe enough to change the plaintiff's terms of employment.[26]

The court also dismissed Paskert's retaliation claim. The court held that Paskert did not exhaust her administrative remedies before filing the lawsuit.[27] A plaintiff exhausts her administrative remedies when she files the lawsuit in a timely manner and receives the right-to-sue letter.[28] When Paskert filed the complaint with ICRC, she did not allege retaliation—in fact, she did not answer question 18 on the form, which asked specifically how she was retaliated against and by whom.[29] Paskert argued that a reasonable person could have inferred she faced retaliation, especially based on her answer to question 27, where she described how Burns did not allow her to finish her training, detailed his remarks about how he should not have hired a woman, and claimed that Burns made her answer phones instead of engaging in sales.[30] The court rejected Paskert's claim, finding that she failed to allege that reporting her harassment was the cause of her discharge.[31] Under established precedent, retaliation claims must be "distinct[] and separately alleged, "[32] which Paskert failed to do when she submitted her complaint to the ICRC.

On another note, the court also makes a distinction between discriminatory treatment and hostile work environment claim.[33] Paskert, in her complaint, uses the term "discrimination based on sex," but the crux of her complaint is based on hostile environment.[34] The district court held that they are separate claims and, because she did not make any separate allegations regarding her sex discrimination claim, there was no claim.[35] She never set out her prima facie argument and merely used general terms like discrimination and hostile work environment.[36] On these grounds, the Eighth Circuit af-

24. *Id.*
25. *Id*. at 539–40.
26. *Id*. at 538.
27. *Id.* at 539–40.
28. Faibisch v. Univ. of Minn., 304 F.3d 797, 803 (8th Cir. 2002).
29. *Paskert*, 950 F.3d at 539.
30. *Id.*
31. *Id.*
32. *Id*. (citing Wallin v. Minn. Dep't of Corrs., 153 F.3d 681, 688–89 (8th Cir. 1998)).
33. *See Paskert*, 950 F.3d at 539–40.
34. *Id.* at 540.
35. *Id.* at 539–40.
36. *Id.* at 540.

firmed the district court.[37] Lastly, the court held that even if she did plead a sex discrimination claim, she waived the claim in her appeal because she did not oppose it on summary judgment.[38] Similarly, the Eight Circuit affirmed the district court's ruling.[39]

In conclusion, in the Eighth Circuit, the threshold is higher in a sexual harassment case to meet the severe or pervasive standard. Generally, the court will not infer any responses in a civil rights commission complaint form. If the plaintiff does not check off something or leaves a blank response to a question, the court will not deduce what the plaintiff thought or was trying to allege unless the plaintiff is explicit in her answers. Therefore, the standard makes it difficult for employers to be liable under Title VII for a hostile work environment claim. Because this creates a high burden for the plaintiff, it makes it difficult for people who suffer sexual harassment, more specifically, hostile work environment, to come forward with a claim.

Deepali Lal

37. *Id.*
38. *Id.*
39. *Paskert*, 950 F.3d at 540.

EMPLOYMENT DISCRIMINATION—*BOSTOCK V. CLAYTON COUNTY*, 140 S. CT. 1731 (2020).

In *Bostock v. Clayton County*, the Supreme Court of the United States addressed whether homosexuality and transgender status are included in the term "sex" under Title VII of the Civil Rights Act of 1964 ("Title VII").[1] The Court concluded that they are.[2] This conclusion means an employer cannot fire an employee because the employee identifies as gay or a transgender person.[3]

In this opinion, the Court addressed three different cases with similar facts.[4] Gerald Bostock was an employee for Clayton County, Georgia, for over ten years.[5] Following Bostock's participation in a gay softball league, community members began to comment about Bostock's sexuality, and he was soon fired from his long-time job as a child welfare advocate.[6] In New York, Donald Zarda was a skydiving instructor for Altitude Express.[7] Zarda disclosed that he was gay, and was fired shortly thereafter.[8] Aimee Stephens, in Garden City, Michigan, worked for R.G. & G.R. Harris Funeral Homes.[9] When she started working for this employer, she identified as a male.[10] However, after diagnosing Stephens with gender dysphoria, Stephens' clinicians advised her to begin living as a woman.[11] Prior to a vacation, Stephens wrote a letter to her employer expressing her intention of presenting herself as a woman after her vacation.[12] Before she left, Stephens's employer fired her after six years of employment.[13]

Although all three cases had similar beginnings, each case fared differently in the federal courts of appeals, demonstrating a circuit split.[14] The Eleventh Circuit Court of Appeals held, in Bostock's case, that Title VII does not prohibit an employer from firing an employee for his sexual orien-

1. 140 S. Ct. 1731, 1737 (2020).
2. *Id.*
3. *Id.* at 1754.
4. *Id.* at 1737.
5. *Id.*
6. *Id.* at 1737–38.
7. *Bostock*, 140 S. Ct. at 1738.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Bostock*, 140 S. Ct. at 1738.
14. *Id.*

tation.[15] In Zarda's case, the Second Circuit Court of Appeals ("Second Circuit") held that employment discrimination on the basis of sexual orientation is a violation of Title VII.[16] The Sixth Circuit Court of Appeals ("Sixth Circuit") came to a similar conclusion as the Second Circuit, holding that Title VII prohibits an employer from firing an employee for transgender status.[17] In addressing this issue, the Supreme Court sought to resolve the inconsistency among the circuit courts of appeals.[18]

The Court started by analyzing the plain language of Title VII.[19] In analyzing the language, the Court considered terms' definitions as they were in 1964 when the statute was enacted.[20] For example, the Court acknowledged that the word sex was defined as the biological assignment at birth.[21] The Court, however, only used that as a starting point and moved on to how the term is used within Title VII.[22] This leads to a "but-for" analysis.[23] The majority reasoned that prohibiting employers from discriminating "because of" sex equates to saying *but for* sex the outcome would have been different.[24] To further this analysis, the Court emphasized that although there can be multiple but-for causes, Title VII prohibits sex from being a but-for cause entirely, regardless of whether it is the sole reason or only one of several.[25]

Continuing its analysis, the Court drew the connection between sex and homosexuality and transgender status.[26] It began by acknowledging precedent that held sex is in no way relevant to the employment process.[27] Similarly, the Court stated that a person's sexual orientation or transgender status is not relevant to hiring, firing, or other employment decisions.[28] Further, in support of its position, the Court noted that homosexuality and transgender status are not too attenuated from sex; in fact, discrimination on those bases requires an employer to treat an employee differently based on the employee's sex.[29] Ultimately, firing an employee based on homosexuality or

15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Bostock*, 140 S. Ct. at 1738.
20. *Id.* at 1738–39.
21. *Id.* at 1739.
22. *Id.*
23. *Id.*
24. *Id.* (citing University of Tex. Southwestern Medical Center v. Nassar, 570 U.S. 338, 350 (2013)).
25. *Bostock*, 140 S. Ct. at 1739.
26. *Id.* at 1741.
27. *Id.* (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (plurality opinion)).
28. *Id.*
29. *Id.* at 1742.

transgender status is intentional discrimination based in part on sex, which Title VII provides is unlawful.[30]

The opinion highlights three key points.[31] First, it does not matter what the employer names his acts or his reasoning when treating employees disparately.[32] The Court explained that if the employer fired an employee based on sexual orientation, the employer still intentionally discriminated against the employee based in part on the individual's sex.[33] Second, the individual's sex does not need to be the sole or even main reason for the employer's adverse decision.[34] Last, a showing that an employer treats males and females equally as groups does not allow the employer to escape liability.[35] Precedent shows that Title VII focuses on the effect on the individual, even if all other employees in the group are subject to the same standards.[36]

The remainder of the opinion focuses on the employers' arguments.[37] The employers first argued that the plain language of Title VII does not include homosexuality or transgender status, and therefore, Title VII does not apply.[38] Next, the employers argued that the Court's interpretation of the law goes beyond the intent of the original drafters of Title VII.[39] The Court did not find either of these arguments persuasive.[40] The Court emphasized that one cannot have homosexuality or transgender status without sex itself, and so discrimination in reliance on these bases is discrimination based on sex.[41] As to the policy argument, the Court contended that legislative history cannot override the plain language of a statute.[42] The opinion also pointed out that the employers did not provide much support for what the expected result should be.[43] The Court further suggested that there are more flaws in the employers' arguments than solutions.[44]

In conclusion, the Court held that an employer cannot fire an individual because he or she identifies as gay or as a transgender person.[45] Ultimately, this decision granted Title VII protections to individuals who identify as gay

30. *Id.* at 1743.
31. *Bostock*, 140 S. Ct. at 1743–44.
32. *Id.* at 1744.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* (citing L.A. Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978)).
37. *Bostock*, 140 S. Ct. at 1744–54.
38. *Id.* at 1744.
39. *Id.* at 1749.
40. *Id.* at 1744–45.
41. *Id.* at 1747.
42. *Id.* at 1749–50.
43. *Bostock*, 140 S. Ct. at 1750.
44. *Id.* at 1750–51.
45. *Id.* at 1754.

or transgender. Upon further litigation, this decision could lead to more protection against discrimination for gay or transgender persons under federal laws.

Altimease Lowe

LABOR & EMPLOYMENT LAW—*LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME V. PENNSYLVANIA*, 140 S. CT. 2367 (2020).

In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, the Supreme Court of the United States addressed whether the federal government, in implementing the Patient Protection and Affordable Care Act of 2010 (ACA), created lawful religious and moral exemptions from a regulatory requirement known as the "contraceptive mandate."[1] The Court held that the religious and moral exemptions were both substantively and procedurally lawful.[2] Ultimately, this holding protected the Health Resources and Services Administration's rulemaking authority and an employer's ability to claim an exemption to the contraceptive mandate under the ACA.[3]

The contraceptive mandate requires specific employers to include contraceptive coverage in their group health insurance plans.[4] Although this mandate was not explicitly a part of the enacted statutory language, the statute did provide coverage for "preventive care and screenings."[5] To provide guidance on what health services are covered, Congress gave rulemaking authority to the Health Resources and Service Administration (HRSA), an agency within the Department of Health and Human Services.[6] Upon the legislation's enactment, HRSA quickly began promulgating interim final rules (IFRs) related to the ACA, and among those rules was the contraceptive mandate.[7]

After promulgation of the contraceptive mandate in 2011, religious employers raised concerns of infringement on their religious freedoms.[8] Considering the concerns, HRSA explored various exceptions.[9] First, HRSA created an exemption for religious employers.[10] To qualify for this exemption, an employer needed to satisfy a four-part test that required the entity be a church, an "integrated auxiliary," a church association or convention, or exclusively engaged in religious activities.[11] Eventually, HRSA expanded a

1. 140 S. Ct. 2367, 2372–73 (2020) (hereinafter *Little Sisters*).
2. *Id.* at 2386.
3. *See id.*
4. *Id.* at 2372–73.
5. *Id.* at 2373.
6. *Id.*
7. *Little Sisters*, 140 S. Ct. at 2374.
8. *Id.*
9. *See id.*
10. *Id.*
11. *Id.*

temporary exemption to religious non-profits and other non-profit organizations that had religious objections to the contraceptive mandate.[12]

In 2013, HRSA sought to simplify the definition of religious employer for the purpose of identifying who qualifies for the exemption.[13] In doing so, HRSA established a self-certification requirement which requires an eligible organization to provide its group health plan issuer with a copy of a self-certification form.[14] The form states that (1) the organization opposed providing coverage for some or all contraceptives due to religious reasons, (2) the organization was a non-profit, and (3) the organization held itself out to be religious in nature.[15] This exemption became known as the "self-certification accommodation."[16]

Little Sisters of the Poor ("Little Sisters"), among other religious non-profit organizations, filed suit challenging the self-certification accommodation as a violation of the Religious Freedom Restoration Act of 1993 (RFRA).[17] RFRA provides that a law that substantially burdens religious exercise will be subject to strict scrutiny.[18] Although the issue was widely litigated, most courts of appeals did not find a violation of RFRA.[19] The Supreme Court of the United States did not take up the issue of whether the self-certification accommodation violated RFRA.[20] Instead, in a 2016 decision, the Court simply instructed the federal agency to accommodate religious employers as well as women seeking health coverage through their employer.[21]

Following several cases involving for-profit entities, HRSA revisited its religious accommodation in hopes of striking a balance between religious freedoms and women's access to health care coverage.[22] In 2017, HRSA promulgated two new IFRs.[23] One broadened the definition of exempt religious employers to include for-profit and publicly traded business entities.[24] The other IFR created a "moral exemption."[25] This exemption allowed em-

12. *Id.* at 2374–75.
13. *Little Sisters*, 140 S. Ct. at 2375.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 2375–76.
18. *Id.* at 2376.
19. *Little Sisters*, 140 S. Ct. at 2376.
20. *Id.*
21. *Id.*
22. *Id.* at 2376–77.
23. *Id.* at 2377.
24. *Id.*
25. *Little Sisters*, 140 S. Ct. at 2378.

ployers to avoid the mandate if they had "'sincerely held moral' objections'" to coverage of contraceptives, some or all forms.[26]

Shortly after the promulgation of the 2017 IFRs, Pennsylvania challenged the IFRs on the grounds that, under the Administrative Procedure Act (APA), the IFRs were substantially and procedurally invalid.[27] Pennsylvania sought declaratory and injunctive relief, and New Jersey (collectively with Pennsylvania "Respondents") quickly joined Pennsylvania in the action.[28] The district court held that Pennsylvania was likely to win both claims and issued a nationwide preliminary injunction halting the implementation of the religious and moral exemptions.[29] Little Sisters intervened to protect its religious interest, and the federal government and Little Sisters appealed the decision of the district court.[30] The Court of Appeals for the Third Circuit affirmed the district court's decision.[31]

The Respondents put forth both substantive and procedural arguments. Substantively, the Respondents alleged that HRSA did not have the statutory authority under ACA or RFCA to promulgate exemptions to the ACA.[32] In support of their procedural argument, the Respondents contended that, in effort to avoid the APA's notice and comment procedure, HRSA improperly used the IFR good-cause bypass procedure.[33] Further, the Respondents argue that HRSA lacked the prerequisite "open-mind" to promulgate the final rules.[34] The Supreme Court of the United States did not find any of these arguments persuasive.[35]

Addressing the substantive arguments first, the Court first emphasized the language of the ACA statute.[36] The statute granted actual authority to HRSA to establish guidelines for preventive care under the ACA.[37] The Court also acknowledged that this authority is without any limitations, which supports that Congress gave strong deference to HRSA.[38] This authority includes the discretion to identify and create exemptions.[39] Next, the Court refuted the Respondents' position that the government could not con-

26. *Id.*
27. *Id.* at 2378.
28. *Id.*
29. *Id.* at 2378–79.
30. *Id.* at 2379.
31. *Little Sisters*, 140 S. Ct. at 2379.
32. *Id.* at 2378.
33. *Id.*
34. *Id.* at 2385.
35. *See id.* at 2386.
36. *Id.* at 2379–80.
37. *Little Sisters*, 140 S. Ct. at 2380.
38. *Id.*
39. *Id.* at 2380–81.

sider RFRA in forming its exemption.[40] The Court reasoned that the contraceptive mandate alone had potential to violate RFRA.[41] Agencies are charged with creating rules that are not arbitrary or capricious, and in the majority's opinion, ignoring the RFRA issues would make the rules susceptible to claims of arbitrary and capricious rules.[42] For this reason, the Court rejected the Respondents' substantive arguments, holding that the religious and moral exemptions are substantively valid under ACA and RFRA.[43]

Moving on to the procedural arguments, the Court began by explaining the rulemaking process under the APA.[44] The APA has two requirements for notice of a proposed rule: (1) an agency must reference legal authority under which the rule is proposed, and (2) the notice must contain either the issue and subjects of the rule or the terms and substance of the rule.[45] The Court concluded that HRSA satisfied these two requirements through the IFR procedure.[46] The Court further contended that even if these requirements were not satisfied, there was no evidence of prejudicial error, which would make the final rules invalid.[47] Finally, the Court rejected the "open-mindedness" test which was the basis of the Respondents' second procedural argument.[48] The Court cautioned the lower court against imposing "judge-made procedures."[49] The Court looked to the APA for guidance on administrative rulemaking requirements and concluded that HRSA satisfied all the APA's requirements.[50]

Ultimately, with a rejection of both the substantive and procedural arguments, the Court reversed the judgment of the Third Circuit, holding instead that HRSA had statutory authority to create the exemptions and that the final rules were in accordance with procedural requirements.[51] This decision upholds HRSA's rulemaking authority, and in upholding that authority, the Court deemed the moral and religious exemptions to the contraceptive mandate lawful.[52]

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40. *Id.* at 2382–83.
41. *Id.* at 2383.
42. *Id.* at 2383–84.
43. *Little Sisters*, 140 S. Ct. at 2384.
44. *Id.*
45. *Id.*
46. *Id.* at 2385.
47. *Id.*
48. *Id.*
49. *Little Sisters*, 140 S. Ct. at 2385 (citing Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 102 (2015) (alterations omitted)).
50. *Id.* at 2385–86.
51. *Id.* at 2386.
52. *See id.*

LABOR & EMPLOYMENT LAW—*HARRIS V. HUTCHINSON*, 2020 ARK. 3, 591 S.W.3D 778

In *Harris v. Hutchinson*, the Supreme Court of Arkansas addressed two issues: (1) whether a plaintiff is barred by sovereign immunity from bringing claims under the Arkansas Whistle-Blower Act (AWBA) against state employees in their official capacity, and (2) whether a plaintiff is barred by sovereign immunity from bringing claims pursuant to AWBA against state employees in their individual capacity.[1]

The court assumed all the facts alleged in the complaint as true for the purpose of the motion to dismiss.[2] Appellant Christopher H. Harris was employed by the Arkansas Livestock and Poultry Commission, an Arkansas Department of Agriculture division.[3] In his position, Harris interviewed applications for a field livestock-inspector position.[4] The applicants interviewed included an unqualified candidate who was favored by Governor Asa Hutchinson, one of the appellees.[5] Harris selected Morgan Keener, another applicant, for the position.[6] Harris alleged that Patrick Fisk, appellee and the Commission's Deputy Director, directed Harris to hire the applicant favored by Governor Hutchinson.[7] Harris claimed that he refused to hire the favored applicant because it "violate[d] the state's policy to hire the most qualified candidate."[8] The day after Harris's refusal, he was terminated for insubordination.[9]

Harris brought claims pursuant to the AWBA and the state and federal constitutions.[10] As a remedy, Harris sought reinstatement, other injunctive relief, and damages against Governor Hutchinson and Fisk in their individual capacities.[11] In June 2018, the appellees filed a motion to dismiss on several grounds, including that the appellees were entitled to sovereign immunity as to the claims against them in their official capacities and statutory and qualified immunity as to the claims against them in their individual capacities.[12] The Pulaski County Circuit Court granted the motion to dismiss for all

1. *See* 2020 Ark. 3, at 1–3, 591 S.W.3d 778, 780.
2. *Id.* at 3, 591 S.W.3d 780.
3. *Id.* at 2, 591 S.W.3d at 780.
4. *Id.*, 591 S.W.3d at 780.
5. *Id.*, 591 S.W.3d at 780.
6. *Id.*, 591 S.W.3d at 780.
7. *Harris*, 2020 Ark. 3, at 2, 591 S.W.3d at 780.
8. *Id.*, 591 S.W.3d at 780.
9. *Id.*, 591 S.W.3d at 780.
10. *Id.*, 591 S.W.3d at 780.
11. *Id.*, 591 S.W.3d at 780.
12. *Id.*, 591 S.W.3d at 780.

claims "on the basis of sovereign immunity."[13] Harris appealed to the Supreme Court of Arkansas, and the court reviewed the decision de novo.[14]

First, the court considered the claims brought against the appellees in their official capacities.[15] Harris provided multiple arguments for his position that sovereign immunity does not bar his AWBA and constitutional claims against the appellees in their official capacities.[16]Acknowledging the holdings in *Board of Trustees of University of Arkansas v. Andrews*[17] and *Arkansas Community Corrections v. Barnes*,[18] Harris first argued that article 2, section 13[19] of the Arkansas Constitution has priority over article 5, section 20.[20] Second, Harris argued that the governor's signature on the AWBA legislation constituted a waiver of sovereign immunity as a defense.[21] Third, Harris contended that because the State was not included as a defendant, sovereign immunity is not an appropriate defense.[22] Last, Harris asked the court to overturn *Andrews*.[23]

Addressing the first argument, the court cited *Bryant v. Arkansas State Highway Commission*[24] and rejected Harris's argument.[25] In the previous case, the court explained that the plain language of article 5, section 20 of the Arkansas Constitution must be applied.[26] Article 5, section 20 provides that "[t]he State of Arkansas shall never be made defendant in any of her courts."[27] The court also noted that the creation of the Arkansas State Claims Commission provides an avenue for claims against the State while protecting the State's sovereign immunity.[28] Next, the court held that the signing of the ABWA did not constitute a waiver of the sovereign-immunity defense.[29] Quoting *Milligan v. Singer*, the court reasoned that the governor's signature

13. *Harris*, 2020 Ark. 3, at 2–3, 591 S.W.3d at 780.
14. *Id*. at 3, 591 S.W.3d at 780–81.
15. *Id.* at 4, 591 S.W.3d at 781.
16. *Id.* at 5, 591 S.W.3d at 781–82.
17. 2018 Ark. 12, 535 S.W.3d 616.
18. 2018 Ark. 122, 542 S.W.3d 841.
19. "Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase; completely, and without denial; promptly and without delay; conformably to the laws." Ark. Const. art. 2, § 13.
20. *Harris*, 2020 Ark. 3, at 5, 591 S.W.3d at 781–82. Article 5, section 20 is the sovereign immunity clause of the Arkansas Constitution.
21. *Id.* at 6, 591 S.W.3d at 782.
22. *Id.* at 7, 591 S.W.3d at 782.
23. *Id.*, 591 S.W.3d at 783.
24. 233 Ark. 41, 342 S.W.2d 415 (1961).
25. *Harris*, 2020 Ark. 3, at 6, 591 S.W.3d at 782.
26. *Id.*, 591 S.W.3d at 782 (quoting *Bryant*, 233 Ark. at 44, 342 S.W.2d at 417 (1961)).
27. Ark. Const. art. 5, § 20.
28. *Harris*, 2020 Ark. 3, at 6, 591 S.W.3d at 782 (citing Milligan v. Singer, 2019 Ark. 177, 574 S.W.3d 653).
29. *Id.* at 6–7, 591 S.W.3d at 782.

is simply fulfilling the responsibilities of office, not evidence of executive waiver.[30] Further, the court rejected the argument that the State must be named as a defendant for sovereign immunity to apply.[31] The court emphasized that a suit against a state official in his or her official capacity is a suit against the State.[32] The State need not be named in the action.[33] Finally, seeing "no compelling reason" to overturn precedent, the court rejected Harris's request to overturn *Andrews*.[34] Rejecting all four of Harris's arguments, the court concluded that sovereign immunity barred all the official-capacity claims.[35]

Following that conclusion, the court considered whether the complaint raised any facts that suggested "illegal, unconstitutional, or ultra vires acts" that would render sovereign immunity inapplicable.[36] The court highlighted that the complaint lacked detail of the interactions with the appellees prior to his termination.[37] The court also acknowledged that Harris failed in the complaint to specify when a report was made about the misuse of state money.[38] Ultimately, the court held that the facts alleged in Harris's complaint were insufficient to allege illegal, unconstitutional, or ultra vires acts as an exception to the application of sovereign immunity.[39] Thus, sovereign immunity was applicable and precluded Harris's official-capacity claims.[40]

The second issue the court addressed was whether sovereign immunity barred Harris's claims against the appellees in their individual capacities.[41] Citing *Banks*, the court emphasized that appellees in their individual capacities are not granted sovereign immunity under the Arkansas Constitution.[42] Therefore, reversing the dismissal of the individual-capacity claims, the court held that the circuit court erred when it dismissed the claims against the appellees in their individual capacities on the basis of sovereign immunity.[43] This resulted in the court affirming in part and reserving in part the decision of the circuit court.[44]

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30. *Id.*, 591 S.W.3d at 782 (quoting *Milligan*, 2019 Ark. 177, at 4, 574 S.W.3d at 656).
31. *Id.* at 7, 591 S.W.3d at 782–83.
32. *Id.*, 591 S.W.3d at 782–83 (citing Banks v. Jones, 2019 Ark. 204, 575 S.W.3d 111).
33. *Id.*, 591 S.W.3d at 782–83.
34. *Harris*, 2020 Ark. 3, at 7–8, 591 S.W.3d at 783.
35. *Id.* at 8, 591 S.W.3d at 783.
36. *Id.* at 8–9, 591 S.W.3d at 783.
37. *Id.* at 8, 591 S.W.3d at 783.
38. *Id*. at 8, 591 S.W.3d at 783.
39. *Harris*, 2020 Ark. 3, at 8–9, 591 S.W.3d at 783.
40. *Id.*, 591 S.W.3d at 783.
41. *Id.* at 9, 591 S.W.3d at 783.
42. *Id.*, 591 S.W.3d at 783 (citing Banks v. Jones, 2019 Ark. 204, 575 S.W.3d 111).
43. *Id.*, 591 S.W.3d at 783.
44. *Id.* at 9, 591 S.W.3d at 783.

This case is in line with the *Andrews* decision.[45] A state employee may not bring an AWBA claim against a state official in his or her official capacity due to sovereign immunity.[46] However, sovereign immunity does not protect state officials from AWBA claims in their individual capacity.[47]

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45. *See Harris*, 2020 Ark. 3, at 9, 591 S.W.3d 778.
46. *See id.*, 591 S.W.3d 778.
47. *See id.*, 591 S.W.3d 778.

BUSINESS LAW—THE EIGHTH CIRCUIT COURT OF APPEALS ISSUES PERMANENT INJUNCTION AGAINST WALMART TO PREVENT FUTURE TRADE SECRET MISAPPROPRIATION.

In *Walmart Inc. v. Cuker Interactive, LLC*, the United States Court of Appeals for the Eighth Circuit ruled on a case, the significance of which extends beyond its substantive holding related to trade secret misappropriation.[1] The case also serves as an example of the Eighth Circuit's willingness to protect small business in Arkansas and throughout the circuit when a small business has its hand forced by a larger and more powerful company it works or consults with.

In its holding, the Eighth Circuit addressed, inter alia, whether Cuker Interactive ("Cuker") took reasonable measures to maintain the secrecy of four trade secrets and whether Cuker was entitled to the injunctive relief awarded by the United States District Court for the Western District of Arkansas ("Western District").[2]

The litigation originated from a January 2014 consulting agreement between Cuker, a California-based "digital marketing, design, and eCommerce agency,"[3] and Walmart, under which Cuker agreed to help modernize the e-commerce website for ASDA Stores Ltd., a UK wholly owned subsidiary of Walmart that the company purchased in 1999.[4] Per the contractual terms, Walmart would pay Cuker a fixed fee to design Walmart's ASDA Groceries ("ASDA") website.[5] The contract provided a series of deliverables that Cuker would complete over the course of the contract.[6] Walmart envisioned

1. *See* Walmart Inc. v. Cuker Interactive, LLC, 949 F.3d 1101 (8th Cir. 2020).
2. *Id*.; Wal-Mart Stores, Inc. v. Cuker Interactive, LLC, 5:14-CV-5262, 2018 WL 1597976 (W.D. Ark. Mar. 31, 2018).
3. *About*, CUKER, https://www.cukeragency.com/about/ (last visited Feb. 21, 2021).
4. *Cuker*, 949 F.3d at 1106; Serenah McKay, *Walmart Hits $8.8B Deal for Asda*, NW. ARK. DEMOCRAT GAZETTE (Oct. 3, 2020, 1:59 AM), https://www.nwaonline.com/news/2020/oct/03/walmart-hits-88b-deal-for-asda/ (briefly describing Walmart's acquisition of Asda and noting that Walmart recently reached "an $8.8 billion agreement with an investor group consisting of private equity firm TDR Capital and brothers Mohsin and Zuber Issa" to sell Asda).
5. *Cuker*, 949 F.3d at 1106.
6. *Id.*

that Cuker would create a "responsive mobile site"[7] for ASDA.[8] Cuker is a market leader in this area.[9]

Shortly after the project began, the parties experienced fundamental disagreements over the terms of the contract that ultimately led to the instant litigation. Specifically, "[l]ess than two weeks after the contract was signed, Walmart began demanding additional work outside the scope of the contract and then threatened to withhold approvals and . . . payments for completed within-scope work."[10] Cuker routinely protested these demands from Walmart.[11] Additionally, "Walmart never provided a workable development environment,[12] as required under the contract, forcing Cuker to take on this additional responsibility in order to perform the contracted work."[13]

Walmart began the litigation by filing a breach-of-contract lawsuit against Cuker in Arkansas state court in July 2014.[14] Cuker removed the action to federal court and filed counterclaims for "breach of contract, unjust enrichment, and misappropriation of four technologies it considered trade secrets."[15] Cuker specifically alleged that Walmart pressured it into providing more work than the written contract specified, and withheld approvals and payments in an effort to generate more production.[16]At trial in April 2017, a jury awarded Cuker $12,438,665 in damages.[17]

The bulk of the award ($12,008,036) related to the misappropriation of the four trade secrets.[18] "The jury found that Walmart's misappropriation of

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7. *See What Is Responsive Design?*, INTERACTION DESIGN FOUND., https://www.interaction-design.org/literature/topics/responsive-design (last visited Feb. 21, 2021) (defining a responsive site design as "a graphic user interface (GUI) design approach used to create content that adjusts smoothly to various screen sizes" and "ensure[s] content consistency across devices").

8. *Cuker*, 949 F.3d at 1106.

9. *See Cuker Wins Three Communicators Awards*, CUKER (June 23, 2020) https://www.cukeragency.com/news/2020/06/23/cuker-wins-three-communicators-awards/ (Cuker received three awards at the 2020 Communicator Awards competition, including an award for best "Business to Consumer for Integrated Campaign." Cuker's work for Walmart was a business to consumer campaign.).

10. *Cuker*, 949 F.3d at 1107.

11. *Id.*

12. *See Test Environment*, LAW INSIDER, https://www.lawinsider.com/dictionary/test-environment (last visited Feb. 21, 2021) (defining a test environment as "the collection of defined hardware and software components with appropriate configuration settings that are necessary to test or validate the application or features under test").

13. *Cuker*, 949 F.3d at 1107 (footnote added).

14. *Cuker*, 949 F.3d at 1106.

15. *Id.*

16. *See* Wal-Mart Stores, Inc. v. Cuker Interactive, LLC, No. 5:14-CV-5262, 2018 WL 1597976, at *3 (W.D. Ark. Mar. 31, 2018).

17. *Id.*

18. *Id.*

Cuker's trade secrets was 'willful and malicious,' except with respect to a trade secret identified as the 'CMS Tweak Development Tool.'"[19]

Post-verdict, the parties briefed but could not agree on what permanent injunctive relief Cuker was entitled to.[20] After the parties were unable to reach an agreement on the issue of injunctive relief, the Western District intervened and concluded that by misappropriating Cuker's trade secrets, Walmart "saved itself roughly six months of development time" and was entitled to injunctive relief against Walmart.[21]

In summary, the Western District's injunction:

> (1) prohibited Walmart from utilizing specific codes, files, and programmatic references from all websites, code platforms, code repositories, and file repositories within its control, and required Walmart to permanently delete these items;
>
> (2) mandated that Walmart provide written notice instructing all third parties to whom it may have given any of Cuker's trade secrets to cease and desist from using Cuker's trade secrets and to destroy any copies of them; and
>
> (3) compelled Walmart to file an affidavit signed by a corporate officer attesting to compliance with the court's order.[22]

After the court entered judgment in favor of Cuker, Walmart raised numerous arguments in support of its motion for judgment as a matter of law and alternatively for a new trial.[23] In addressing these arguments, the Western District found that the evidence showed that Cuker had been forced to decide between two "unacceptable" choices:

> (1) perform an enormous amount of extra work that it never agreed to perform under the fixed-price contract and risk being unable to meet the "milestone" dates set out in the contract for the work it was obligated to do, or (2) refuse to do the additional work at the risk of not being paid for work it did perform under the contract.[24]

The Western District did find, however, that Cuker failed to prove that it used "reasonable efforts to maintain the secrecy" of three of the four trade secrets.[25] The Western District "overturned the jury's damages award re-

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19. *Id.*
20. *Id.* at 1106–07.
21. *Cuker*, 949 F.3d at 1107.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* (providing that Cuker failed to prove it undertook reasonable efforts to protect three of the trade secrets as required by Ark. Code Ann. §4-75-601).

garding the three trade secrets, and, of the $2,788,690 in damages awarded for the fourth trade secret, the court upheld only . . . $314,392 of the award [as] supported by the evidence."[26] The court entered an amended judgment in Cuker's favor, changing the terms of the judgment to "$745,021 in damages and $2,664,262.44 in sanctions, attorney fees, and taxable costs."[27]

Cuker appealed "the district court's decisions relating to misappropriation of its trade secrets and the reduction in the jury's award."[28] Walmart cross-appealed the injunction, denial of a new trial, and denial of its Rule 50(b) motion.[29]

On appeal, the United States Court of Appeals for the Eighth Circuit began its discussion by analyzing the misappropriation of each of the four alleged trade secrets.[30] First the Eighth Circuit analyzed the three trade secrets for which the Western District held Cuker failed to maintain secrecy.[31] The Eighth Circuit affirmed the District Court's conclusions that none of the three was subject to trade secret protection under the Arkansas Trade Secret (ATSA) because of Cuker's "failure to take reasonable efforts to protect" the other alleged trade secrets.[32] The court also pointed out that Cuker never described its Phased Release Support Technique or Zoning Tools as trade secrets at any time before disclosing the information to Walmart.[33]

The Eight Circuit did confirm, however, that sufficient evidence was produced to the Western District to support that the Adobe Source Files were a protected trade secret.[34] The Eighth Circuit based this finding on a number of facts, including that the lower court testimony revealed the Adobe Source Files contained information that predated the Walmart contract and that was developed internally over a period of years, that Cuker "had never before shared its Adobe Source Files with a client," and that Walmart "did not need [the] Source Files to utilize the templates" that Cuker provided Walmart per the contract.[35] Walmart internal emails produced as evidence to the Western District court showed that Walmart intended to create an excuse for requesting the Adobe Source Files because it foresaw that Cuker would consider such a request "irregular," even before Walmart had made its first request for Cuker's Adobe Source Files.[36]

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26. *Id*.
27. *Cuker*, 949 F.3d at 1107.
28. *Id.*
29. *Id.* at 1107–08.
30. *Id.* at 1108.
31. *Id.* at 1108–09.
32. *Id.*
33. *Cuker*, 949 F.3d at 1109.
34. *Id.*
35. *Id.* at 1109–10.
36. *Cuker*, 949 F. 3d at 1109; *see* Wal-Mart Stores, Inc. v. Cuker Interactive, LLC, 5:14-CV-5262, 2018 WL 1597976, at *6 (W.D. Ark. Mar. 31, 2018) (quoting Defendant's Exhibit

The Eighth Circuit held that there was sufficient evidence for the jury to find that Walmart used Cuker's Adobe Source Files and disclosed them to others.[37] Additionally, the court held that the jury could easily find that Cuker's Adobe Source Files were a trade secret and that Walmart misappropriated it.[38] Lastly, the Eight Circuit affirmed the Western District's mitigation of the total damages for trade secret misappropriation[39] due to "Cuker's failure to establish proximate causation" for the other alleged damages.[40] Specifically, the court found that the "record lack[ed] evidence demonstrating that by obtaining Cuker's Adobe Source Files, Walmart's ASDA . . . website[] w[as] made responsive any more quickly or less expensively than [it] otherwise would have" through another company.[41]

Relatedly, Walmart challenged the district court's injunction, which directed Walmart to delete Cuker's Adobe Source Files from its computers.[42] The Eighth Circuit noted that "[i]f allowed to keep the Adobe Source Files in its possession, Walmart could use them, or share them, in connection with another project"; the court therefore found that the district court did not abuse its discretion in granting the injunction.[43]

In this case, the Eighth Circuit issued a permanent injunction, prohibiting Walmart from future trade secret misappropriation. In addition to the legal significance of case, however, the court's holding serves as a cautionary tale for large businesses within the circuit seeking to exploit the smaller businesses they consult with. Small businesses comprise a large majority of businesses in Arkansas as well as the other states within the Eighth Circuit.[44] Specifically, the case is illustrative of a corporate version of a theory typi-

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485, p. 1, a Walmart internal email: ("We don't however have source files so wouldn't be able to edit these easily. Are you expecting us to ask for these? It could seem a little irregular but I'm sure I could phrase it that the team here need to start working on pages and flows that Cuker will not be covering.") (emphasis omitted)).

37. *Cuker*, 949 F. 3d at 1110–11.

38. *Id*. at 1110.

39. The Eighth Circuit opinion notes that the Western District mitigated trade secret misappropriation damages to $547,090. However, the Western District opinion notates that it "enter[ed] judgment as a matter of law in the amount of $314,392 for Cuker's claims for misappropriation of trade secrets against Walmart." Wal-Mart Stores, Inc. v. Cuker Interactive, LLC, No. 5:14-CV-5262, 2018 WL 1597976, at *12 (W.D. Ark. Mar. 31, 2018).

40. *Id.* at 1111.

41. *Id.* at 1110.

42. *Id.* at 1112.

43. *Id.* at 1113.

44. *See* U.S. SMALL BUS. ADMIN. OFF. OF ADVOC., 2019 SMALL BUSINESS PROFILE, ARKANSAS 1 (2019), https://cdn.advocacy.sba.gov/wp-content/uploads/2019/04/23142640/2019-Small-Business-Profiles-AR.pdf (classifying 99.3% of Arkansas businesses as small businesses); *see also, e.g.*, U.S. SMALL BUS. ADMIN. OFF. OF ADVOC., 2019 SMALL BUSINESS PROFILE, MISSOURI 1 (2019), https://cdn.advocacy.sba.gov/wp-content/uploads/2019/04/23142652/2019-Small-Business-Profiles-MO.pdf (classifying 99.4% of Missouri Businesses as small businesses).

cally referenced in the context of the retail market entitled (ironically here) the "Walmart Effect."[45] The Walmart effect refers to a larger company wielding its power to manipulate a smaller company it consults with into compliance with unfavorable terms due to the large percentage of the smaller company's revenue that is contingent on the contract with the larger company.[46] Here, Walmart attempted to utilize the "Walmart Effect" in the corporate setting, attempting to coerce Cuker into complying with its extra-contractual requests or alternatively risk losing Walmart's business, which was undoubtedly one of Cuker's largest clients. However, both the Western District of Arkansas and Eighth Circuit courts made clear that small businesses within Arkansas and the circuit at large would be protected from such manipulative practices.

William G. McGrath

45. Will Kenton, *Walmart Effect*, INVESTOPEDIA (Dec. 30, 2020), https://www.investopedia.com/terms/w/walmart-effect.asp.

46. *Id.*

ENVIRONMENTAL LAW—*NAT'L FAMILY FARM COALITION V. U.S. EPA*, 960 F.3D 1120 (9TH CIR. 2020)

In *Nat'l Family Farm Coalition v. U.S. EPA*, the United States Court of Appeals for the Ninth Circuit held that the Environmental Protection Agency's ("EPA") decision to approve conditional registration[1] for three dicamba-based herbicides for two more years, and the subsequent conditional new-use registration of three dicamba-based products, violated the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").[2]

Dicamba is a chemical herbicide that farmers have widely used over the past fifty years to combat weeds.[3] While dicamba is an effective weed killer, it is also effective at killing plants that are not weeds and is notoriously volatile.[4] However, as weeds became more resistant to glyphosate, another widely used herbicide, herbicide manufactures attempted to reformulate dicamba-based herbicides to make them more effective.[5] These reformulation efforts culminated in the EPA's 2016 decision to grant a conditional, two-year registration to three herbicide manufacturers' dicamba-based herbicides for over-the-top application on soybeans and cotton.[6]

Unfortunately, wide-spread reports of devastating off-target dicamba damage marred the two-year conditional period.[7] In 2018, the EPA conducted a second review for conditional registration.[8] In its review, the EPA found the following two benefits from over-the-top dicamba application: 1) it provided growers a tool to control broadleaf weeds during the crop growing season and 2) it provided a tool to delay crops growing resistant to other herbicides.[9] The EPA also listed some costs or risks associated with dicamba use, but stated that it did not have sufficient information to quantify reduc-

1. *See Conditional Pesticide Registration*, EPA, https://www.epa.gov/pesticide-registration/conditional-pesticide-registration (last visited March 28, 2021) (conditional registration means that the pesticide may be used, but additional registration requirements must still be met).

2. *Nat'l Family Farm Coalition v. U.S. EPA*, 960 F.3d 1120, 1124 (9th Cir. 2020).

3. *Id.* at 1123.

4. *Id.*

5. *Id.*

6. *Id.* ("over-the-top application" means applying the herbicide once the crop has sprouted, or emerged, from the ground).

7. *Nat'l Family Farm Coalition*, 960 F.3d at 1127–28 (Reports indicated that state departments received thousands of complaints that off-target dicamba damaged millions of acres of soybeans across twenty-four states during the two-year period.).

8. *Id.* at 1129.

9. *Id.*

tion yields that off-target dicamba could cause.[10] Therefore, the EPA decided to authorize an additional two-year conditional registration with additional restrictions on over-the-top dicamba application.[11]

Petitioners, who are farmers, the general public, and organizations focused on protecting the environment, farmers, and the general public,[12] sought review of the EPA's decision on the basis that the EPA did not satisfy the two requirements to approve a conditional use registration, which meant that the decisions violated FIFRA.[13] Conversely, the EPA and Monsanto, one of the herbicide manufacturers, argued that the two requirements had been met; therefore, EPA's decision did not violate FIFRA.[14]

FIFRA provides that two requirements must be met for the EPA to conditionally amend the registration of a pesticide for new uses.[15] First, the EPA must determine that the applicant has submitted satisfactory data pertaining to the proposed additional use.[16] Second, the EPA must determine that amending the registration for the proposed new use would not "significantly increase the risk of any unreasonable adverse effect on the environment."[17] FIFRA defines unreasonable adverse effect on the environment to include "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide."[18]

In *Nat'l Family Farm Coalition*, the Ninth Circuit discussed both requirements when analyzing whether the EPA's registration approval violated FIFRA.[19] In its review of the first requirement, the Ninth Circuit noted that the EPA had considered field studies that Monsanto conducted in 2016 and 2018, telephone reports of alleged off-target dicamba damage, and other field studies numerous universities had conducted.[20] Ultimately, however, the Ninth Circuit stated that it did not need to determine whether the submit-

10. *Id.* at 1130.
11. *Id.*
12. *See About Us*, NAT'L FAM. FARM COAL., www.nffc.net/about-us/ (last visited Feb. 21, 2021); *About Us*, CTR. FOR FOOD SAFETY, www.centerforfoodsafety.org/about-us (last visited Feb. 21, 2021); *About the Center*, CTR. FOR BIOLOGICAL DIVERSITY, www.biologicaldiversity.org/about/ (last visited Feb. 21, 2021); *About Us*, PESTICIDE ACTION NETWORK NORTH AM., www.panna.org/about-us-0 (last visited Mar. 30, 2021).
13. *Nat'l Family Farm Coalition*, 960 F.3d at 1124.
14. *Id.* at 1130.
15. 7 U.S.C. § 136a(c)(7)(B) (West 2021).
16. *Id.* § 136a(c)(7)(B)(i).
17. *Id.* § 136a(c)(7)(B)(ii).
18. *Id.* § 136(bb) (West 2021).
19. *Nat'l Family Farm Coalition*, 960 F.3d at 1133–35.
20. *Id.*

ted data was "satisfactory," because the court held that the EPA had not met the second requirement.[21]

The EPA had concluded that extending the over-the-top use of dicamba for an additional two-years would not cause unreasonable adverse effects on the environment.[22] The court, however, determined that the EPA understated the risks associated with dicamba use.[23] Specifically, the court found that the EPA had understated the number of dicamba resistant seeds planted in 2018, underreported dicamba damage, and refused to quantify, estimate, or even acknowledge the amount of damage caused by over-the-top dicamba application.[24]

The court further noted that the EPA did not only understate the risk, but it also entirely failed to acknowledge other risks associated with over-the-top dicamba application—some of which the EPA was statutorily required to consider.[25] First, the EPA had not addressed the substantial difficulty that farmers faced in complying with the complex label instructions for dicamba. The "label" consisted of a forty-page-long document of instructions and restrictions on the use of dicamba.[26] Second, the EPA failed to consider the economic, social, and environmental costs of applying dicamba over-the-top of crops, which FIFRA requires to be considered as part of a cost-benefit analysis.[27] As to the economic cost, the court found that farmers felt obligated to switch to dicamba-tolerant seeds to avoid off-target damage.[28] This would potentially lead to a monopoly or near-monopoly for dicamba herbicide manufactures.[29] With regard to the social cost, the court emphasized the strain on social relations in the farming communities where neighbors fought over off-target dicamba damage.[30]

Based on this analysis, the Ninth Circuit ultimately decided that the EPA substantially understated and ignored the cost associated with approving dicamba in its cost-benefit analysis.[31] Therefore, the court vacated the registrations.[32] The court acknowledged that the decision caused practical adverse complications for growers who had already purchased dicamba tol-

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21. *Id.* at 1136.
22. *Id.*
23. *Id.*
24. *Id.* at 1136–39.
25. *Nat'l Family Farm Coalition*, 960 F.3d at 1139.
26. *Id.* at 1142.
27. *Id.*
28. *Id.*
29. *Id.* at 1142–43.
30. *Id.* at 1143 (one dispute led to an Arkansas farmer being shot and killed in an argument over dicamba damage).
31. *Nat'l Family Farm Coalition*, 960 F.3d at 1144.
32. *Id.*

erant seeds and dicamba products.[33] Still, the court determined that without substantial evidence to support the EPA's decision that the benefits outweighed the costs, the registration could not be upheld.[34]

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33. *Id.*
34. *Id.*