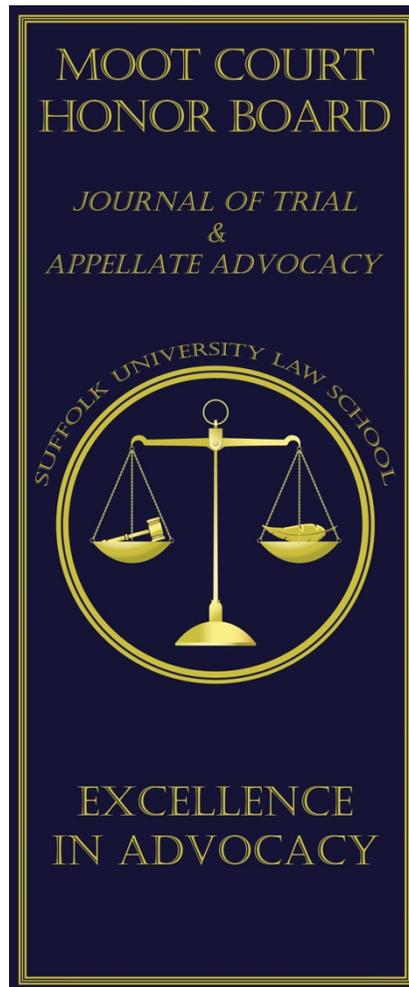

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EDITOR'S NOTE

Dear Reader:

On behalf of the Suffolk University Law School Moot Court Honor Board, I am honored to present the first issue in Volume XXVII of the *Suffolk Journal of Trial & Appellate Advocacy*. This issue contains seven student-written pieces from Moot Court Honor Board's third-year staff. Each piece is designed to provide insight and be of practical use to lawyers and judges at both the trial and appellate levels.

The lead article, *How Do Lawyer Disciplinary Agencies Enforce Rules Against Litigation Misconduct? Or Do They? Results of a Case Study and a National Survey of Disciplinary Counsel* was written by Jona Goldschmidt. Jona Goldschmidt is a Professor Emeritus at Loyola University, where he taught all law courses in the Department of Criminal Justice and Criminology. He earned his J.D. at DePaul University College of Law and his Ph.D. in the Interdisciplinary Program in Justice Studies at Arizona State University, where his area of concentration was Dispute Resolution. He has written numerous articles on pro se litigation, and recently authored a book entitled *Self-Representation: Law, Ethics, and Policy*. We are honored to publish his article analyzing how state lawyer disciplinary agencies address allegations of litigation misconduct, specifically in cases where courts have imposed sanctions, or declined to impose sanctions, for the same misconduct.

The student-written pieces discuss the following legal topics and cases:

- An analysis of the federal sentence modification process, the failure of the Bureau of Prisons to perform its prescribed role in the process, and potential statutory solutions that promote both equity and judicial efficiency (Katherine Chenail);
- An exploration of inhumane conditions of confinement during COVID-19, the Eighth Amendment's purported avenues for relief, and a proposed reworking of the subjective element of the deliberate indifference test (Mary Levine);
- An examination of the Third Circuit's holding that placing an inmate in administrative segregation for obtaining a new criminal charge does not constitute an "arrest" within the meaning of the Sixth Amendment's right to a speedy trial (Madison Carvello);
- An examination of whether the United States Olympic and Paralympic Committee may be constitutionally barred from requiring American athletes to sign away their right to protest (Leon Rotenstein);
- A review of the state-created danger doctrine and whether violations of the doctrine are dismissed under qualified immunity (Bianca Tomassini);
- An intersectional review of a Massachusetts Supreme Judicial Court decision assessing the application of the ministerial exemption to an employment discrimination claim involving a Christian liberal arts college (Margaret R. Austen); and
- A critique of the Fifth Circuit's use of a contemporaneous review when determining student eligibility under the IDEA (Sydney Doneen)

I sincerely appreciate the hard work of our twenty-two staff members of the Moot Court Honor Board, who worked diligently to edit and cite-check these pieces throughout the semester. A special thanks to our Executive Editor, Alexandra Held, whose dedication was vital throughout the editing process; our Managing Editor, Bianca Tomassini, who provided exceptional support for our staffers and editors; and our Associate Managing Editor, Katherine Chenail, who provided essential editing assistance and diligently formatted this issue. I would also like to thank our President, James Lockett, for his continued support in the editing and publication process; Conner Lang, for his assistance during executive editing; our Associate Executive Editors, Margaret Austen, Madison Carvello, Mary Levine, and Mark Shettle, for providing quality editorial feedback and encouraging staff members throughout the editing process; and our Lead Article Editors, Sam Fowler and Matthew Milward, for their work in editing our lead article. Finally, I extend my utmost gratitude to our Board's advisor, Professor Richard G. Pizzano, the Board's Staff Assistant, Janice Quinlan, and the Deans and Faculty of Suffolk University Law School for their continued support of the *Suffolk Journal of Trial & Appellate Advocacy*.

I sincerely thank you for reading our first issue in Volume XXVII of the *Suffolk Journal of Trial & Appellate Advocacy*. I am confident that judges, practitioners, professors, and students will benefit from our scholarship. I hope that you will find this Issue through-provoking, relevant, and useful.

Sincerely,

A handwritten signature in blue ink that reads "Kori Dean". The signature is written in a cursive, flowing style.

Kori Dean

Editor-in-Chief

ARTICLE

**HOW DO LAWYER DISCIPLINARY AGENCIES
ENFORCE RULES AGAINST LITIGATION
MISCONDUCT?
OR DO THEY?
RESULTS OF A CASE STUDY AND A NATIONAL
SURVEY OF DISCIPLINARY COUNSEL**

Jona Goldschmidt¹

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¹ Professor Emeritus, Department of Criminal Justice and Criminology, Loyola University Chicago; Ph.D., Arizona State University, 1990; J.D., DePaul University, 1975; B.S., University of Illinois, 1972. I want to first thank the pro se litigant identified as PG in the case study described in this article, who in my view suffered a grave injustice at all levels of the court and lawyer disciplinary system. It is my hope that his case will prompt a greater commitment by lawyer discipline agencies to seriously review all lawyer misconduct allegations. In addition, thanks are due to all the state lawyer disciplinary counsel who responded to my survey regarding their practice upon receipt of litigation misconduct complaints. Thanks also to the student editors and staff of the Journal for their expert editing of this manuscript.

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I. INTRODUCTION

Lawyers everywhere, beginning with their law school training through the bar admission process, and later in continuing legal education courses, know that they may not make false statements of law or fact in litigation, or conceal material evidence. They are also forbidden from filing and pursuing non-meritorious actions. The professional ethical duties and prohibitions imposed on lawyers in litigation are enumerated under the ABA Model Rules of Professional Conduct (“MRPC”) and its state variants. These obligations collectively fall under the general duty to act with “candor towards the tribunal,”² and related prohibitions against dishonesty

² See MODEL RULES OF PRO. RESP. CONDUCT r. 3.3 (AM. BAR ASS’N 2020). Rule 3.3 states:

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Id. Comment 2 of Rule 3.3 states:

and acts prejudicial to the administration of justice.³ While the phrase, “candor towards the tribunal” has multiple meanings, this and related ethical duties will be referred to in shorthand form as litigation misconduct.

This article examines the relationship between courts and lawyer discipline agencies with respect to sanctions for litigation misconduct. It will focus on the enforcement or non-enforcement of sanctions by lawyer discipline agencies subsequent to court-ordered sanctions in the predicate case. In other words, this article will address what happens when litigation misconduct occurs, but (a) neither the court nor an aggrieved party was aware of it during the litigation; (b) the trial court grants a sanctions request against the offending lawyer; or (c) the sanctions request was considered and denied, thus “exonerating” the lawyer. In these cases, the question is whether lawyer discipline agencies investigate and prosecute subsequent

This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate’s duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Id. at cmt. 2.

³ See *id.* at r. 8.4. Rule 8.4 states, in relevant part:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so[;] . . .
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or]
- (d) engage in conduct that is prejudicial to the administration of justice

Id. Rule 3.4 states in relevant part:

A lawyer shall not:

- (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; . . .
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Id. at r. 3.4.

complaints made against lawyers for litigation misconduct, or whether they defer to the courts on the issue.

Part II presents a review of the literature on the subject, which is scant. Some commentators note the reluctance of disciplinary agencies to prosecute lawyers for litigation misconduct, preferring to refer the matter back to the courts. Professor Peter Joy's empirical study of the relationship between Rule 11 sanctions and state disciplinary referrals is described. While he supports the institutional choice made by lawyer discipline agencies toward non-prosecution, this article takes the opposite view.

Part III begins with a description of the three-stage process for lawyer discipline in Illinois, which is initiated by the Illinois Attorney Registration and Disciplinary Commission ("ARDC"). It reviews recent prosecution data regarding cases of litigation misconduct. This is followed by a review of the state supreme court cases relevant to litigation misconduct, and the purpose and independence of the ARDC.

Part IV reviews the relevant standards that guide professional ethics and disciplinary enforcement for lawyer misconduct. These are contained in two sources: the *Restatement of Law Governing Lawyers* and the ABA's *Guidance on Lawyer Disciplinary Enforcement*. As judged by these standards, it appears that the ARDC failed to meet its responsibility to the general public by refusing to investigate the litigation misconduct described herein.

Part V presents a case study of two lawyers alleged to have made false statements of law and fact, concealed evidence, and filed an unwarranted sanctionable sanctions petition against a pro se litigant in an Illinois small claims court. It then summarizes the reasons given by the ARDC for refusing to investigate the allegations.

Part VI reports the results of a national survey of state lawyer disciplinary counsel regarding their willingness to conduct investigations into litigation misconduct where courts either failed to rule on the misconduct or ordered sanctions against offending lawyers. This part reports survey responses from disciplinary counsel in twenty-nine jurisdictions (twenty-seven states, plus the District of Columbia, and the U.S. Department of Justice).

Part VII discusses the reasons for prohibiting lawyer discipline agencies from making the "institutional choice" to defer to courts in cases involving litigation misconduct. This is followed by my recommendations for disciplinary agencies' review and investigation of litigation misconduct complaints, as well as suggestions for future research. I conclude with the hope that lawyer discipline agencies will maintain their independence from

courts and pursue cases of litigation misconduct to retain public trust and confidence in the justice system.

II. LITERATURE REVIEW

The issues raised in this article are linked to the role of the lawyer as a zealous advocate for his or her client. The Preamble to the Model Rules of Professional Conduct (“MRPC”) states: “As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”⁴ The role of advocate, however, is often inconsistent with the purported truth-finding function of courts. As Judge Marvin E. Frankel noted in his classic article critical of the adversary system:

The advocate in the trial courtroom is not engaged much more than half the time—and then only coincidentally—in the search for truth. The advocate’s primary loyalty is to his client, not to truth as such The business of the advocate, simply stated, is to win if possible without violating the law His is not the search for truth as such [T]he truth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time.⁵

But “[t]he duty to represent a client zealously and vigorously has its limits.”⁶ The limits, of course, are the applicable state ethics rules that

⁴ See MODEL RULES OF PRO. CONDUCT pmb. (AM. BAR ASS’N 2020) (“[W]hen an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.”)

⁵ See Marvin E. Frankel, *The Search for Truth: An Umpireal View*, LAWYERS’ ETHICS: CONTEMPORARY DILEMMAS 99, 102-03 (Allan Gerson ed., 1980).

⁶ See James J. Brosnahan & Carol S. Brosnahan, *The Attorney’s Ethical Conduct During Adversary Proceedings*, PROFESSIONAL RESPONSIBILITY: A GUIDE FOR ATTORNEYS 143, 148 (1978). The authors cite former ABA Canon 15 for this proposition:

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client’s cause

Id. at 148 (quoting ABA CANONS OF PROFESSIONAL ETHICS, CANON 15); see also J.E. Singleton, CONDUCT AT THE BAR AND SOME PROBLEMS OF ADVOCACY 25 (1933) (“[T]he Court is entitled to rely on Counsel to draw the attention of the Court to any case which is contrary to his contention if he knows of that case.”). The author also cites to an 1857 authority that states:

are generally based on the MRPC. We know there are limits to zealous advocacy, but do lawyers face disciplinary actions for their litigation misconduct? In Jerome Carlin's 1966 seminal study of lawyer ethics, he notes: "The most frequent charges against lawyers involve wrongdoing against a client, usually misappropriation of client funds. Much less frequent are accusations of offenses against the administration of justice, mainly submission of false or misleading testimony in a court or administrative agency."⁷

The Restatement of Law Governing Lawyers acknowledges that "[m]ost bar disciplinary agencies rely on the courts in which litigation occurs to deal with abuse. Tribunals usually sanction only extreme abuse. Administration and interpretation of prohibitions against frivolous litigation should be tempered by concern to avoid overenforcement."⁸ Professor Deborah Rhode concurs with this observation:

Lawyers and judges rarely report professional abuses, and little effort has focused on counteracting the obvious economic and psychological barriers to reporting. Many attorneys do not feel sufficiently blameless to cast the first stone unless they are sure of a fellow practitioner's serious misconduct As a consequence, most ethical violations never reach regulatory agencies In the unusual cases where judges or lawyers report abuses to bar agencies,

The zeal of the advocate may lead him into bye-paths, may tempt him to deviate from that strict truthfulness for which he should ever be distinguished If . . . there should be two eminent advocates in one Court, the loss of one of them would be a great public evil. Should such a state of things exist as one commanding mind only at the Bar, with a weak Judge upon the bench, the public interest would suffer. And if that one barrister should not withal be strictly scrupulous, the nuisance would be intolerable.

Id. at 26. This is the risk when a self-represented litigant faces a lawyer representing their adversary, an illustration of which is the case study described herein.

⁷ See JEROME E. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 152-55 (1966). An early ABA report evaluating disciplinary enforcement included the following two of thirty-six "Problems" observed by the committee that are relevant to this study: "No permanent record of complaints and their processing," and "Processing of complaints involving material allegations that also are the subject of pending civil or criminal proceedings." GEOFFREY C. HAZARD JR. AND DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 425-26 (1985).

⁸ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. (b) (AM. L. INST. 2000) (prohibiting "Frivolous Advocacy"). The definition of a "frivolous position" is "one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it[.]" whereas a nonfrivolous argument is one that "includes a good-faith argument for an extension, modification, or reversal of existing law." *Id.* at cmt. (d).

*these agencies will often refer the case back to the courts for final resolution, leaving the injured party stranded in between.*⁹

Commentators have noted the leniency of lawyer disciplinary agencies in responding to allegations of litigation misconduct in the form of false statements to the court.¹⁰ Professor Peter Joy conducted a relevant study of the relationship between Rule 11 violations and professional discipline for the same misconduct.¹¹ Rule 11 of the Federal Rules of Civil Procedure authorizes discretionary sanctions on lawyers or parties who engage in various forms of litigation misconduct. It provides that, by signing any paper submitted to the court, “or later advocating it,” an attorney or “unrepresented party”:

certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:¹²

⁹ See Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 694-95 (1994) (emphasis added); see also David L. Hudson, Jr., *Questionable Claims: Election Fraud Cases Highlight Ethics Rule on Baseless Complaints*, ABA JOURNAL (Apr.–May, 2021) 32, 33 (quoting Columbia law professor Leslie Levin: “As a practical matter, discipline authorities almost never get involved in these sorts of matters . . . If the court doesn’t sanction the lawyer, disciplinary authorities often conclude that discipline is not warranted. If the courts do sanction the lawyer, disciplinary authorities often feel like lawyers have been punished enough.”)

¹⁰ See Stephen Gillers, *Lowering The Bar: How Lawyer Discipline in New York Fails to Protect the Public*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 485, 507-10 (2014).

[A] dishonest lawyer can cause more harm to more people than a lawyer who takes on one matter she is not competent to handle or is tardy in her work. . . . Given the high value of truth, we might expect that lawyers who lie in court matters will face harsh sanctions, especially if those lies are under oath. Indeed, lawyers have often been disciplined for lies, whether to tribunals or third persons, but a review of decisions across more than five years reveals that sanctions are far more lenient in the Second Department than in the First Department—even when the lies are in connection with litigation . . . Leniency runs deep in Second Department cases that discipline lawyers for dishonesty in court matters. It has imposed public censure even when lawyers have lied directly to the courts.

Id.

¹¹ See Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 785-97 (2004) (“Rule 11 Study”).

¹² See FED. R. CIV. P. 11 advisory committee’s note to 1983 amendment.

The rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer’s conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasona-

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.¹³

Rule 11 misconduct encompasses the making of, *inter alia*, false statements of law or fact, the obstruction of access to evidence, or equally serious professional misconduct. Such acts, while not given as specific examples under the rule's scope, no doubt fall within the bounds of the Rule 11 when done for an "improper purpose," such as making a claim or defense that is "unwarranted" by existing law or evidence, or false denials of

able inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Id.

¹³ See FED. R. CIV. P. 11(b)(1)-(4). The comparable rule relevant to the case study presented here is Ill. S. Ct. R. 137(a), which states:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Ill. S. Ct. R. 137(a). In addition, Ill. S. Ct. R. 375(b), provides for sanctions on appeal:

If, after consideration of an appeal or other action pursued in a reviewing court, it is determined that the appeal or other action itself is frivolous, . . . an appropriate sanction may be imposed upon any party or the attorney or attorneys of the party or parties. An appeal or other action will be deemed frivolous where it is not reasonably well grounded in fact and not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law.

Ill. S. Ct. R. 375(b).

factual contentions. But does the fact that there is overlap between Rule 11 misconduct and conduct prohibited by ethics norms mean that lawyer discipline agencies should defer such matters to the courts? Is that what they do now?

Professor Joy's Rule 11 Study examined ten years of federal district court (N = 274) and circuit court (N = 437) cases involving Rule 11 sanctions. He coded the cases by court, party sanctioned or exonerated, frequency of sanctions awarded and denied, and frequencies of circuit court affirmances and reversals of sanctions.¹⁴ Data regarding state civil procedural rules modeled on Rule 11 and referrals to disciplinary agencies was not within the scope of this study.¹⁵

The Rule 11 Study then examined those cases with opinions that included the words "discipline," "ethics," or "refer" (N = 51).¹⁶ Of these, only three specifically involved disciplinary referrals to state lawyer discipline agencies for Rule 11-based misconduct.¹⁷ After an examination of these cases and searching for subsequent state disciplinary agency records and state supreme court case law, the study noted:

[O]ne cannot say for certain that any of their discipline was based in whole or in part on the same conduct giving rise to their Rule 11 sanctions. It is also important to remember that judges could be making private disciplinary referrals, and such referrals would not appear in current case databases.¹⁸

The study concludes that there is "little empirical evidence of a relationship between Rule 11 sanctions and subsequent lawyer discipline."¹⁹ Given this lack of correlation, Professor Joy argues that these data show that an implicit and appropriate "institutional choice" was made by federal

¹⁴ See Joy, *supra* note 11, at 788. The study does not report separately the cases of circuit courts imposing their own sanctions. *Id.*

¹⁵ See Joy, *supra* note 11, at 767 ("It is beyond the scope of this article to discuss discipline under the state counterparts to Rule 11, or to explore state analogs to other federal laws, rules, and the inherent power of federal courts to regulate lawyers' litigation conduct."). *Id.*

¹⁶ See *id.* at 792-93. "Because only the public discipline cases appear as reported cases, correlating Rule 11 sanctions that include referrals to disciplinary authorities with resulting discipline captures only the public discipline cases, which comprise slightly less than sixty percent of all lawyer discipline cases." *Id.*

¹⁷ See *id.* at 792.

¹⁸ See *id.* at 795. We know lawyer disciplinary agencies may recommend that a lawyer be given a private or public censure or reprimand, but it is unclear what Joy means by judges making "private disciplinary referrals." *Id.*

¹⁹ See *id.* at 797. Frankly, a more accurate statement of the results is that no correlation was found between court sanctions and subsequent disciplinary action. *Id.*

judges and state disciplinary agencies to defer Rule 11-type cases to courts rather than referring the matters to the agencies for possible ethics prosecutions.

The empirical analysis points to an implicit division of authority concerning the regulation of lawyer litigation conduct in federal courts. In this division of authority, federal district court judges wield primary control over the litigation conduct of lawyers appearing before them. Structural features of both Rule 11 and prevailing ethics rules, both of which do not require either judges or lawyers to report Rule 11 violations to lawyer disciplinary authorities, reinforce this division of authority by virtually guaranteeing that in most instances the Rule 11 sanctions will be the only public sanctions imposed on lawyers for their litigation conduct.²⁰

Professor Joy supports his position by citing other commentators' arguments,²¹ studies,²² and a bar journal²³ finding that disciplinary agencies are unwilling to control litigation conduct.²⁴ He contends that courts are more effective at handling litigation conduct, as reflected in the Rule 11 sanctions cases studied.²⁵ Lastly, he notes that the standards for imposing discipline for litigation misconduct "disfavor lawyer discipline for litigation conduct,"²⁶ and that there is a lack of coordination between courts and

²⁰ See *id.* at 806 (footnotes omitted).

²¹ See Richard H. Underwood, *Curbing Litigation Abuses: Judicial Control of Adversary Ethic—The Model Rules of Professional Conduct and Proposed Amendments to the Rules of Civil Procedure*, 56 ST. JOHN'S L. REV. 625, 630-31, 642 (1982) (arguing that escalating frivolous litigation and the "perceived inability or reluctance by the bar to police its ranks through disciplinary actions" served to "encourage the use of rule 11 as a sanctioning mechanism for deterring groundless litigation").

²² See Jeffrey A. Parness, *Disciplinary Referrals Under New Federal Civil Rule 11*, 61 TENN. L. REV. 37, 44 (1993) (arguing that only the most serious litigation misconduct should be referred to lawyer disciplinary agencies and trial judges presiding over cases are better than disciplinary agencies for handling less serious litigation misconduct).

²³ See Maridee F. Edwards, *Report of the Office of Chief Disciplinary Counsel for the Year 2002 Together with the Financial Report of the Treasurer of the Advisory Committee Fund for 2002*, 59 J. MO. B. 238, 242 (2003) (discussing complaints filed against Missouri lawyers in 2002).

²⁴ See Joy, *supra* note 11 at 806-08.

²⁵ See *id.* at 810-11.

²⁶ See *id.* at 812. For this proposition, Joy argues:

The [ABA] Model Rules for Disciplinary Enforcement set forth a category described as "lesser misconduct," which is described as "conduct that does not warrant a sanction restricting the respondent's license to practice law." Rather than defining "lesser mis-

disciplinary agencies, supporting the presence of an implicit institutional choice of favoring judges over disciplinary agencies in these matters.²⁷

I argue that the institutional choice of deference to courts will effectively immunize many members of the bar from scrutiny for ethics violations arising from their litigation misconduct. That is, miscarriages of justice will result when a lawyer's misconduct is not known until after the litigation is concluded, or where a court exonerates the lawyer under court rules, and the disciplinary agency thereby declines to investigate the matter. Professor Joy noted the absence of data of court referrals to disciplinary agencies, and there is a similar lack of available data regarding cases in which lawyer discipline agencies defer to courts and decline to investigate complaints from non-judicial sources, such as aggrieved litigants, opposing counsel, or non-adversary lawyers who become aware of the misconduct.

III. BACKGROUND TO CASE STUDY

A. *Illinois Attorney Registration and Disciplinary Commission*

The Illinois Attorney Registration and Disciplinary Commission (“ARDC”) is the agency designated by the Illinois Supreme Court to inves-

conduct,” the rules state that conduct may not be viewed as lesser misconduct if the conduct involves the “misappropriation of funds,” “results in or is likely to result in substantial prejudice to a client or other person,” “involves dishonesty, deceit, fraud, or misrepresentation,” is a serious crime, is the same as conduct for which the respondent was disciplined within the past five years, or “is part of a pattern of similar misconduct.” Thus, *except in extreme cases of Rule 11 violations, or for lawyers who repeatedly violate Rule 11, the disciplinary enforcement rules permit potential ethics violations based on Rule 11 violations to be treated as lesser misconduct* that would, if pursued by disciplinary authorities, not normally result in sanctions restricting the putative lawyer's right to practice law.

Id. at 812-13 (footnotes omitted) (emphasis added). Also, the ABA Model Standards for Lawyer Sanctions:

do not usually treat litigation misconduct prohibited by Rule 11 as a serious matter. The standard describing “abuse of the legal process” mentions the possibility of sanctions for “failure to expedite litigation or bring a meritorious claim.” Examples of sanctions under this standard focus on knowing violations of a court order or rule to gain an advantage in a matter, or other violations that do not involve violations of Rule 11. Although it is possible that a Rule 11 sanction may fit the definition of the sanction standard for abuse of legal process, the Model Standards fail to illustrate this possibility with an example. *This failure to discuss or illustrate how Rule 11 conduct may lead to discipline appears to suggest that disciplinary sanctions for Rule 11 violations are not a priority under the Model Standards for Lawyer Sanctions.*

Id. at 813 (footnotes omitted) (emphasis added).

²⁷ See *id.* at 813-14.

tigate and prosecute lawyer discipline cases and make recommendations to it. The supreme court makes the ultimate decision on discipline cases because it “has the exclusive authority to regulate the practice of law” and “has the power to impose sanctions for unprofessional conduct so as to protect the public interest and guard the legal profession against reproach.”²⁸

The rules of the Illinois Supreme Court dictate that the ARDC be comprised of seven members with oversight authority over the disciplinary process.²⁹ The Commission appoints an Administrator “to serve as the principal executive officer of the registration and disciplinary system.”³⁰ The Administrator “shall”:

(a) On his own motion, on the recommendation of an Inquiry Board, or at the instance of an aggrieved party, *investigate* conduct allegations of violations of the Rules of Professional Conduct of attorneys licensed in Illinois . . . whose conduct tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute³¹

Assuming the ARDC staff attorneys decide the complaint has merit, the prosecution process is as follows: an Inquiry Board is convened to “inquire into and investigate matters referred to it by the Administrator. The Board may also initiate investigations on its own motion and may refer matters to the Administrator for investigation.”³² After investigation and consideration, the Board “shall dispose of matters before it by voting to dismiss the charge, to close an investigation, to file a complaint with the Hearing Board, or to institute unauthorized practice of law proceedings.”³³ If the Inquiry Board refers the matter to the Hearing Board, that board “shall make findings of fact and conclusions of fact and law, together with a recommendation for discipline, dismissal of the complaint or petition, or nondisciplinary disposition. The Hearing Board may order that it will ad-

²⁸ See *In re Nesselson*, 390 N.E.2d 857, 858 (Ill. 1979) (citing *In re Day*, 54 N.E. 646, 650 (Ill. 1899)).

²⁹ See Ill. S. Ct. R. 751.

³⁰ See *id.* at r. 752(a)(1).

³¹ See *id.* (emphasis added). Noteworthy is the explicit duty to investigate a complaint brought “at the instance of an aggrieved party.” While I was not a directly affected “aggrieved party,” my duty as an Illinois attorney to report the misconduct as described herein was clearly established under the *Himmel* case. *Infra* Part V. In addition, PG, the plaintiff in the case study described herein, filed his own ARDC complaint on the heels of my filing, to which the ARDC never responded beyond an initial acknowledgement of receipt. *Infra* Part V.

³² See Ill. S. Ct. R. 753(a)(2).

³³ See *id.* at para. (a)(3).

minister a reprimand to the respondent in lieu of recommending disciplinary action by the court.”³⁴ Thereafter, the Review Board

may approve the findings of the Hearing Board, may reject or modify such findings as it determines are against the manifest weight of the evidence, may make such additional findings as are established by clear and convincing evidence, may approve, reject or modify the recommendations, may remand the proceeding for further action or may dismiss the proceeding. The Review Board may order that it will administer a reprimand to the respondent in lieu of recommending disciplinary action by the court.³⁵

Thus, it appears the Hearing and Review Boards may enter “reprimands” to accused lawyers that never reach the supreme court and are publicly inaccessible.

According to the ARDC’s 2020 Annual Report, the bulk of filed complaints (“grievances”) are client-centered matters:

Grievances that stem from a breakdown in the attorney-client relationship (neglect of a client’s cause, failure to communicate, billing and fee issues, and failure to provide competent representation) are consistently the top areas of grievance each year and account for 66.4% of all grievances. Neglect of a client’s matter was alleged in 32.1% of all grievances in 2020.³⁶

In 2020, 3,936 complaints were “investigated.”³⁷ The report shows that, of all the complaints that were “docketed” in 2020, only fifteen cases involved false statements: ten of them concerned bar applications or occurred during disciplinary proceedings, and five concerned false statements about a judge, a judicial candidate, or a public official. None of the complaints docketed involved false statements of law or fact, or concealment of

³⁴ *See id.* at para. (c)(3).

³⁵ *See id.* at para. (d)(3).

³⁶ *See* MARY F. ANDREONI, *ANNUAL REPORT OF 2020, ATT’Y REGISTRATION AND DISCIPLINARY COMM’N* 5, 36 (2021), <https://www.iardc.org/Files/AnnualReports/AnnualReport2020.pdf>.

³⁷ *See id.* at 20. “1,001 fewer investigations than in 2019; a 20.3% drop from the previous year and the largest single-year decline.” *Id.* “The sharp decline in 2020 over 2019 was attributed to the impact of the pandemic[,]” “slowdown of the legal system[,]” the reported five-year decline in the number of new cases filed in Illinois courts, and “a significant rise in the number of consumers with legal matters who are self-represented, the graying of the legal profession, and the continuing decline in the Illinois population.” *Id.* (footnotes omitted).

evidence. However, 231 complaints were docketed involving other litigation misconduct such as filing of frivolous or non-meritorious claims or pleadings, and 138 involved charges of conduct prejudicial to the administration of justice, including conduct that is the subject of a contempt finding or court sanction (none of the subcategories of which are specified). Interestingly, eleven cases were docketed involving failure to report misconduct of a lawyer or judge.³⁸

The report also notes that, in 2020, 4,284 investigations were “concluded,” 4,158 of them by the Administrator’s staff: “1,222 grievances were closed after initial review of the complainant’s concerns and 2,936 were closed after investigation did not reveal sufficiently serious, provable misconduct.”³⁹ That left only 126 cases (or 0.03 percent of all complaints filed that year) that were prosecuted, leaving 4,158 that were dismissed by ARDC staff attorneys. There are no available data on the nature of these complaints or reasons for their dismissal.

The prosecuted complaints require evidence of “serious misconduct” and are referred to the Inquiry Board, the first of the three-stage review process.⁴⁰ Of the 37 cases referred to the Hearing Board in 2020 by the Inquiry Board, six involved “misrepresentations to a tribunal,” and one involved “assertion of frivolous pleadings.”⁴¹ Once the Hearing Board files its report in a case, either party may file a notice of exceptions with the Review Board, which serves as an appellate tribunal.⁴² Seven cases were filed with the Review Board in 2020, and eleven were “concluded”; however, the report does not indicate the nature of the cases heard by that board.⁴³ Ultimately, “In 2020, the [Illinois Supreme] Court entered 81 sanctions against 81 lawyers. The Hearing Board reprimanded one lawyer.”⁴⁴

In sum, in 2020 only a handful of litigation misconduct cases of over 4,000 complaints survived the review and investigations conducted by ARDC staff. Only seven cases heard by the Hearing Board involved litigation misconduct. The ARDC does not report the disposition of all those cases which resulted in a mere private reprimand.⁴⁵ Given the paucity of

³⁸ See *id.* at 48, chart 12.

³⁹ See *id.* at 21.

⁴⁰ See *id.*

⁴¹ See ANDREONI, *supra* note 36.

⁴² See *id.* at 26.

⁴³ See *id.* at 56, chart 20E.

⁴⁴ See *id.* at 27.

⁴⁵ See Ill. S. Ct. R. 753(d)(3) (“The Review Board may order that it will administer a reprimand to the respondent in lieu of recommending disciplinary action by the court.”); Ill. S. Ct. R. 766(a)(5) (“Proceedings . . . shall be public with the exception of the following matters, which shall be private and confidential: . . . (5) deliberations of the Hearing Board, the Review Board and the court.”)

the data, it is unclear whether the ARDC aggressively pursues litigation misconduct complaints.

B. *Relevant Illinois Supreme Court Opinions*

1. Litigation Misconduct and Ethics

The supreme court imposes discipline on lawyers for a variety of litigation misconduct. The court has considered (but not always imposed) discipline for lawyers accused of filing frivolous actions.⁴⁶ This includes filing frivolous suits without factual or legal basis.⁴⁷ Filing of frivolous complaints, failure to make a reasonable inquiry before drafting and filing a complaint or other document with a tribunal, and other pleading-related actions can also lead to professional discipline.⁴⁸

The ARDC is a “tribunal” for purposes of Illinois ethics rules, and frivolous filings with the commission are sanctionable.⁴⁹ In fact, there are

⁴⁶ See Ill. S. Ct. R. 137 (permitting court sanctions for frivolous filings); *McCarthy v. Taylor*, 155 N.E.3d 359, 363-64, (Ill. 2019) (“Rule 137 authorizes a court to impose sanctions against a party or counsel for filing a motion or pleading that is not well grounded in fact; that is not supported by existing law or lacks a good-faith basis for the modification, reversal, or extension of the law; or that is interposed for any improper purpose. It is settled that ‘[t]he purpose of Rule 137 is to prevent abuse of the judicial process by penalizing claimants who bring vexatious and harassing actions.’” (quoting *Sundance Homes, Inc. v. County of DuPage*, 746 N.E. 2d 254, 285-86 (2001)). “[T]he predecessor to Rule 137, was to ‘penalize the litigant who pleads frivolous or false matters, or who brings a suit without any basis in the law’ []. In other words, the clear purpose of Rule 137 is to prevent the filing of false and frivolous lawsuits.” *Id.* (quoting *In re Estate of Wernick*, 535 N.E.2d 876, 883 (Ill. 1989)).

⁴⁷ See *In re Sarelas*, 277 N.E.2d 313, 318 (Ill. 1971).

The respondent here has taken out in litigious storm, not only against the judiciary, but also against fellow lawyers and laymen who have in some manner been connected with prior disputes wherein he was involved. He has charged them with all manner of fraud and corruption and with the purpose of maliciously inflicting harm upon him. To borrow from his own complaints, he has made these charges with scurrilous and defamatory invective. He has demonstrated an unfortunate and insistent propensity to sue other lawyers with whom he has been involved in litigation, as well as members of the judiciary who have rendered judgments against him or his clients. He has consistently exercised this propensity with unprofessional and contemptuous language.

Id.; see also *In re Jafree*, 444 N.E.2d 143, 149 (Ill. 1982) (explaining that respondent instituted numerous defamatory and frivolous lawsuits, appeals and administrative actions).

⁴⁸ See *In re Mitran*, 518 N.E.2d 1000, 1008 (Ill. 1987). The test for such misconduct is whether “no objectively reasonable inquiry was made into the pertinent facts and law” before filing the document with a tribunal, in this case, a verified reinstatement petition to the ARDC. *Id.*

⁴⁹ See *In re Smith*, 659 N.E.2d 896, 908 (Ill. 1995) (“[P]rior to the hearing, respondent repeatedly filed frivolous requests and meritless motions which appear solely calculated to delay the proceedings.” (quoting *In re Samuels*, 535 N.E.2d 808, 817 (Ill. 1989)).

numerous cases in the supreme court's jurisprudence addressing false statements made to that tribunal as part of the lawyer discipline process. This conduct is a separate ethics violation from breaches of candor-towards-the-tribunal requirements.⁵⁰

The few Illinois Supreme Court cases involving false statements to courts imposed discipline for the filing of factually false documents. Examples include: the filing of a false pauper affidavit;⁵¹ the filing of a false affidavit submitted to another state supreme court that failed to disclose that the lawyer was admitted to practice law in Illinois;⁵² the failure to disclose in a *pro hac vice* application to a federal court that the lawyer was previously disciplined by another court;⁵³ the unauthorized filing of a factually false pauper affidavit in the bankruptcy court;⁵⁴ the filing of a false and misleading final account of an estate in probate;⁵⁵ and the like.⁵⁶ Research discloses no Illinois Supreme Court cases involving discipline of lawyers for making a false statement of *law* to a tribunal, nor the withholding of material evidence.

2. ARDC Independence

In theory, the ARDC maintains its independence from courts to carry out its purpose of determining lawyers' fitness to practice law by applying the state's Rules of Professional Conduct. The Illinois Supreme

⁵⁰ See Ill. S. Ct. R. 8.1(b) cmt. (1) (“[I]t is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer’s own conduct.”); *In re* Timpone, 804 N.E.2d 560, 563 (Ill. 2004); see also *In re* McAuliffe, 506 N.E.2d 1300, 1300 (Ill. 1987).

⁵¹ See *In re* Ingersoll, 710 N.E.2d 390, 392 (Ill. 1999).

The charges concerned respondent's role in the preparation and filing of a pauper's affidavit Flexner filed in circuit court in connection with the slander suit. The form, entitled 'Application to Sue or Defend as a Poor Person,' sought information on the applicant's financial standing. Question 4, regarding real and personal property, stated, 'Applicant owns (A) no real estate except: (Location and Value),' and was followed by a blank line on which the applicant could provide information regarding his interests in real estate. Flexner's application did not contain any answer for question 4A. Flexner, however, owned a home in Morton, where he lived with his wife and three sons.

Id.

⁵² See *In re* Bell, 588 N.E.2d 1093, 1096 (Ill. 1992).

⁵³ See *In re* Howard, 721 N.E.2d 1126, 1129 (Ill. 1999).

⁵⁴ See *In re* Lewis, 562 N.E.2d 198, 206 (Ill. 1990).

⁵⁵ See *In re* Gordon, 524 N.E.2d 547, 549-50 (Ill. 1988).

⁵⁶ See *In re* Mehta, 413 N.E.2d 1265, 1265-66 (Ill. 1980) (ordering respondent be suspended for three years for filing false statements in connection with immigration cases); *In re* Mitran, 387 N.E.2d 278, 282 (Ill. 1978) (ordering respondent be disbarred for making false statements on application for admission to the bar).

Court has held that trial court rulings are a factor to be considered in the disciplinary process but are not binding on the Hearing Board (where the evidentiary discipline hearing takes place).⁵⁷ Criminal court judgments are similarly non-binding in the disciplinary process.⁵⁸

In re Ettinger involved a lawyer charged criminally in federal court with a scheme to bribe a police officer.⁵⁹ He was acquitted by a jury, but the ARDC thereafter pursued multiple ethics violations against him.⁶⁰ In response to his claim that his acquittal precluded an ARDC prosecution, the court stated:

Illinois, along with the majority of other States, has adopted the position that an acquittal in a criminal proceeding against an attorney will not act as a bar to subsequent disciplinary proceedings based upon substantially the same conduct The rationale underlying this rule is the differing purposes of criminal as opposed to disciplinary proceedings. While the purpose of a criminal prosecution is to punish the wrongdoer, the purpose of a disciplinary proceeding is to determine whether an individual is a proper person to be permitted to practice law.⁶¹

⁵⁷ See *In re Owens*, 581 N.E.2d 633, 636 (Ill. 1991) (“Although a civil judgment may not be the only factor of consideration of a Hearing Board, it nevertheless may be a component in the greater whole of the Board’s decision.”) ARDC Hearing Boards publish their own opinions and follow this rule. See *In re Stolfo*, No. 2742217, 2018 WL 2123647, at *3 (Ill. Atty. Reg. Disp. Comm. Apr. 16, 2018).

Findings in related civil proceedings are not binding or dispositive in disciplinary matters, although those findings can be considered, along with the other evidence presented, in determining whether the Administrator has met his burden of proving the misconduct charged. The Hearing Panel may not find misconduct based solely on a decision in a civil case, but may consider the record and rulings in an underlying civil case, as part of the evidence and part of the basis for its decision. We considered the evidence in this case as a whole, mindful of these principles.

Id. (citations omitted).

⁵⁸ See *In re Ettinger*, 538 N.E.2d 1152, 1160 (Ill. 1989).

⁵⁹ See *id.* at 1153.

⁶⁰ See *id.* at 1155. The one-count complaint contained the following alleged rule violations (under a previous ethics code): Rule 1–102(a)(3) (engaging in illegal conduct involving moral turpitude); Rule 1–102(a)(4) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); Rule 1–102(a)(5) (engaging in conduct which is prejudicial to the administration of justice); Rule 7–102(a)(5) (knowingly making a false statement of law or fact); Rule 7–102(a)(6) (participating in the creation or preservation of evidence when he knows or when it is obvious that the evidence is false); and Rule 7–102(a)(7) (counseling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent). *Id.* at 1115.

⁶¹ See *id.* at 1160-61. The court added:

Despite this distinction, the ARDC does not always invoke the independence the state supreme court declares it has.

IV. STANDARDS GOVERNING LAWYER DISCIPLINE

A. *Restatement Rules and Procedural Guidance*

The Restatement of Law Governing Lawyers offers guidance regarding attorney discipline proceedings.⁶² It provides that “[A] professional, independent disciplinary counsel is charged with responsibility to prosecute offenses, often following review by a screening body to determine whether probable cause exists warranting formal charges.”⁶³ The standard of proof in most jurisdictions, including the ARDC, is clear and convincing evidence; “that is, evidence establishing the truth of the charged offense beyond a mere preponderance of the evidence but not necessarily beyond a reasonable doubt.”⁶⁴ Lawyers are subject to discipline for violating any provision of an applicable lawyer code of ethics, as well as “for attempting to commit a violation.”⁶⁵ Fellow lawyers “who know of another lawyer’s violation of applicable rules of professional conduct raising a substantial question of the lawyer’s honesty or trustworthiness or the lawyer’s fitness as a lawyer in some other respect must report that information to appropri-

Thus, a disciplinary proceeding seeks to protect the public and monitor the legal profession. Additionally, the burden of proof in the two proceedings is different. In a criminal prosecution, charges must be established beyond a reasonable doubt; in a disciplinary proceeding, charges need be proved by clear and convincing evidence. In this respect, evidence deemed insufficient to convict an attorney on criminal charges may be sufficient to show a deviation from required standards of professional conduct, warranting disciplinary action. Respondent’s acquittal in the Federal district court has no bearing upon the professional misconduct alleged. . . . More importantly, however, as we have already discussed, respondent’s acquittal in a criminal case has little effect upon these proceedings. Disciplinary proceedings serve a different purpose and are governed by different rules. The respondent has been charged with different wrongs. Thus, even if respondent could convince us that he withdrew from the bribery scheme, this would not alleviate the professional errors he engaged in.

Id. (citations omitted); see also *In re Browning*, 179 N.E.2d 14, 17-19 (Ill. 1961); Robert Brazener, Annotation, *Effect of Acquittal or Dismissal in Criminal Prosecution as Barring Disciplinary Action Against Attorney*, 76 A.L.R.3d 1028 § 2[b] (1977) (“[There is] little doubt but that an acquittal of an attorney in a criminal proceeding will not bar disciplinary action against the attorney arising out of the same facts.”)

⁶² See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (AM. L. INST. 2000).

⁶³ See *id.* § 4.

⁶⁴ See *id.*

⁶⁵ See *id.* § 5(2).

ate disciplinary authorities.”⁶⁶ Regarding the accused lawyer’s state of mind, “[m]ost disciplinary offenses involve acts that, in themselves, reflect a concern with moral blameworthiness and thus require that the lawyer’s conduct be knowing What a lawyer knows may be inferred from the circumstances. Accordingly, a finding of knowledge does not require that the lawyer confess to or otherwise admit the state of mind required for the offense.”⁶⁷

Section 106, Comment [d] notes that “opposing advocates should bear toward each other “a respectful and cooperative attitude marked by civility, consistent with their primary responsibilities to their clients.”⁶⁸ Comment [d] also prohibits “charges of wrongdoing made recklessly or knowing them to be without foundation,” “legally impermissible forms of partisanship,” and “misrepresenting the record.”⁶⁹ Regarding sanctions petitions, the Restatement cites authority for the proposition that the filing of frivolous motions for sanctions against an opponent may itself incur sanctions, and result in discipline under ABA Model Rule 3.1, which has been adopted in Illinois.⁷⁰

Lawyers under the Restatement “may not knowingly: (1) make a false statement of a material proposition of law to the tribunal; or (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position asserted by the client and not disclosed to opposing counsel.”⁷¹ Comment [b] to this rule states that the rule also prohibits a lawyer from “making an apparently complete recital of relevant authorities but *omitting an adverse decision* that should be considered by the tribunal for a fair determination of the point.”⁷² Similarly, Restatement § 118 states that a lawyer “may not falsify documentary or other evidence, and “may not destroy *or obstruct* another party’s access to documentary or other evidence when doing so would violate a court order or other legal requirements”⁷³ The “evidence” includes materials

⁶⁶ *See id.* § 5(3).

⁶⁷ *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. (d) (AM. L. INST. 2000). The Restatement cites, inter alia, ABA Model Rules of Professional Conduct, Terminology, ¶¶ [1], [5], and [9] (1983) (citing definitions of “belief,” “knowingly,” and “reasonably should know.”) *Id.* Reporter’s Note, cmt. (d).

⁶⁸ *See id.* § 106 cmt (d).

⁶⁹ *See id.* The section does permit a lawyer to make a “vigorous argument and to attack an opposing position on all legal available grounds.” *Id.*

⁷⁰ *See id.* § 166 Reporter’s Note cmt. (d) (citing *Hauswald Bakery v. Pantry Pride Enters., Inc.*, 553 A.2d 1308, 1314, n. 3 (Md. Ct. Spec. App. 1989)).

⁷¹ *See id.* § 111.

⁷² *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 111 cmt. (b) (AM. L. INST. 2000) (emphasis added).

⁷³ *See id.* § 118 (1)-(2).

“that a reasonable lawyer would understand may be relevant to an official proceeding.”⁷⁴ The Restatement also prohibits a lawyer from “allud[ing] to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.”⁷⁵ This includes the prohibition against “‘backdoor’ methods of proof of an inadmissible matter.”⁷⁶

As noted earlier, the most apt statement in the Restatement is the acknowledgement that most lawyer disciplinary agencies rely on the courts to deal with litigation abuses.⁷⁷

B. ABA Guidance on Lawyer Disciplinary Enforcement

The ABA publishes the Model Rules for Lawyer Disciplinary Enforcement (“MRDE”), which provide guidance to regulatory bodies for processing lawyer misconduct complaints.⁷⁸ The ARDC has its own rules,⁷⁹ which will be compared to the ABA procedural rules. MRDE Rule 4 defines the duties of disciplinary counsel. These include the power and duty “[t]o investigate all information coming to the attention of the agency which, if true, would be grounds for discipline . . .”⁸⁰ Counsel also has the power to “dismiss or recommend probation, informal admonition, a stay, the filing of formal charges” or to transfer a lawyer to inactive status.⁸¹

Despite the supreme court rule stating that the ARDC Administrator “shall” investigate allegations of lawyer misconduct, the ARDC’s Rule 51 states that the Administrator “may” initiate an investigation on his own motion based upon information from any source. ARDC Rule 52 provides, in relevant part, that “the Administrator is not required to investigate any charge which does not meet the requirements of this rule, although in his discretion he may do so.” The only “requirements” of that rule are that the

⁷⁴ See *id.* § 118 cmt. (a).

⁷⁵ See *id.* § 107(2).

⁷⁶ See *id.* § 107 cmt. (c).

⁷⁷ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. (b) (AM. L. INST. 2000) (prohibiting “[f]rivolous [a]dvocacy”). The definition of a “frivolous position” is “one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it.” *Id.* Whereas a nonfrivolous argument is one that “includes a good-faith argument for an extension, modification, or reversal of existing law.” *Id.* at cmt. (d).

⁷⁸ See MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT (AM. BAR. ASS’N 2007).

⁷⁹ See Ill. R. of the Att’y Registration and Disciplinary Comm’n (2021) (“ARDC Rules”), <https://iadc.org/Home/Rules>. The previous iteration of the rules, dated December 7, 2011, were not posted on the ARDC website.

⁸⁰ See MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT r. 4(B)(2) (AM. BAR. ASS’N 2007) (emphasis added).

⁸¹ See *id.* at (B)(3).

charge be in writing, and “shall identify the respondent and the person making the charge, and shall be sufficiently clear to apprise the respondent of the misconduct or unauthorized practice charged.” The ARDC initiation-of-investigation rule appears to be narrower than the ABA rule; the latter requires that “all information” regarding lawyer misconduct be investigated, while the former states that the Administrator “may” in his or her discretion investigate complaints received.

MRDE Rule 11 further provides that disciplinary counsel “shall evaluate all information coming to his or her attention by complaint or from other sources alleging misconduct”⁸² If the lawyer is subject to the jurisdiction of the court, “and the information alleges facts which, if true, would constitute misconduct or incapacity, disciplinary counsel *shall conduct an investigation*.”⁸³ Upon conclusion of an investigation, disciplinary counsel may dismiss the case or recommend formal charges.⁸⁴

ARDC Rule 54 provides that the Administrator “shall close an investigation . . . upon the Administrator’s conclusion that there is insufficient evidence to establish that the respondent has engaged in misconduct” or an unauthorized practice violation. The rule further provides that the Administrator’s closure decision “shall not bar the Administrator from resuming the investigation if circumstances warrant.”

MRDE Rule 11 states that, upon conclusion of an investigation, the complainant “shall be notified of the disposition of a matter following investigation.” ARDC Rule 54 also provides that, in the case of closure, “[t]he Administrator shall notify the complaining witness of the decision to close an investigation.” Disciplinary counsel’s duties under the ABA rules also include the requirement “[t]o notify promptly the complainant and the respondent of the status and the disposition of each matter,” and to, *inter alia*, provide “to the complainant” the following: (a) a copy of any notice, motion, or order sent to respondent; (b) a copy of any written communication from the respondent relating to the matter, except privileged material; (c) a concise written statement of the facts and reasons a matter has been dismissed prior to a hearing, and a copy of the relevant guidelines for dismissal, “provided that the complainant shall be given a reasonable opportunity to rebut statements of the respondent before the case is dismissed.” No such requirements exist under ARDC rules. There is also no right to rebut the closure rationale.

Interestingly, a complainant under MRDE Rule 11 “may file a written request for review of counsel’s dismissal decision within [thirty]

⁸² See *id.* at r. 11(A).

⁸³ See *id.* (emphasis added).

⁸⁴ See *id.* at (A)(1)(a)-(c).

days of receipt of notice of disposition[.]”⁸⁵ The request for review of disciplinary counsel’s dismissal decision “shall be reviewed by the chair upon the complainant’s request for review.”⁸⁶ There is no parallel provision in the ARDC rules, which deprives complainants of all recourse once a closure decision is made.

The MRDE provides that rules are needed “to determine which matters should be dismissed for failing to allege facts that, if true, would constitute grounds for disciplinary action.”⁸⁷ The case described below is an example of the need to have very specific dismissal rules. Dismissal rules would place an affirmative burden on the ARDC to make findings even in cases where the alleged acts occurred in courts that chose not to sanction the behavior. Members of the public, according to the MRDE, “who come to the agency seeking its services are entitled to be advised of the disposition of their complaints.”⁸⁸ This guideline also exists in ARDC Rule 54.

Another interesting provision in the MRDE pertains to situations where a complaint is filed against, *inter alia*, “a member of a hearing committee.”⁸⁹ In that event, the chair of the board “shall appoint a special hearing committee for the case.”⁹⁰ No such parallel procedure exists under the ARDC rules. ARDC counsel merely refers the matter involving one of the agency’s own Hearing Board members to Special Counsel, who subsequently decides whether to recommend an investigation.

V. THE HIMMEL COMPLAINT

Lawyers in Illinois have a duty to report fellow lawyers’ misconduct to the ARDC. *In re Himmel*⁹¹ is an Illinois Supreme Court disciplinary case on point.⁹² Here, the respondent lawyer was retained to compel

⁸⁵ See MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT r. 11(B)(3) (AM. BAR. ASS’N 2007).

⁸⁶ *See id.*

⁸⁷ *See id.* at r. 4(B)(7).

⁸⁸ *See id.* at r. 4 cmt.

⁸⁹ *See id.* at r. 18(K).

⁹⁰ See MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT r. 18(K)(2) (AM. BAR. ASS’N 2007).

⁹¹ 533 N.E.2d 790 (Ill. 1988).

⁹² *See In re Himmel*, 533 N.E.2d 790, 793-94 (Ill. 1988).

This court has also emphasized the importance of a lawyer’s duty to report misconduct . . . [‘A] lawyer has the duty to report the misconduct of other lawyers. Petitioner’s belief in a code of silence indicates to us that he is not at present fully rehabilitated or fit to practice law.’ Thus, if the present respondent’s conduct did violate the rule on reporting misconduct, imposition of discipline for such a breach of duty is mandated.

another lawyer to pay their mutual client the latter's share of an accident settlement that he never paid.⁹³ This was because the second lawyer had converted the client's funds.⁹⁴ Rather than reporting the misconduct, the respondent lawyer entered into a contract with the offending lawyer, agreeing to a settlement in exchange for his agreement not to report the other lawyer's misconduct to the ARDC, nor file a civil or criminal complaint against him.⁹⁵

The supreme court held that respondent's failure to report the misconduct of the lawyer who converted client funds was itself an ethical violation, rejecting his defense that his acts were not taken for financial gain, but rather for his client's benefit.⁹⁶ The applicable disciplinary rule at the time was Rule 1–103(a) of the lawyer ethics code, which stated: "A lawyer possessing unprivileged knowledge of a violation of Rule 1–102(a)(3) or (4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."⁹⁷ Rule 1–102 of the code stated:

(a) A lawyer shall not

- (1) violate a disciplinary rule;
- (2) circumvent a disciplinary rule through actions of another;
- (3) engage in illegal conduct involving moral turpitude;
- (4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or

Id. (citations omitted). This case was "the first reported decision imposing discipline solely for an attorney's failure to report collegial misconduct." DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 853 (1995); *see also* DEBORAH RHODE & GEOFFREY C. HAZARD, JR., *PROFESSIONAL RESPONSIBILITY AND REGULATION* 237 (2002) (noting that "Illinois is the only jurisdiction that has made (if sporadic) attempts to enforce reporting requirements," and that *Himmel* "is the first published decision imposing discipline solely for a lawyer's failure to report collegial misconduct.")

⁹³ *See In re Himmel*, 533 N.E.2d at 791.

⁹⁴ *See id.*

⁹⁵ *See id.*

⁹⁶ *See id.* at 794.

Though respondent repeatedly asserts that his failure to report was motivated not by financial gain but by the request of his client, we do not deem such an argument relevant in this case. This court has stated that discipline may be appropriate even if no dishonest motive for the misconduct exists. In addition, we have held that client approval of an attorney's action does not immunize an attorney from disciplinary action. We have already dealt with, and dismissed, respondent's assertion that his conduct is acceptable because he was acting pursuant to his client's directions.

Id. (citations omitted).

⁹⁷ *See* 107 Ill.2d r. 1–103(a).

(5) engage in conduct that is prejudicial to the administration of justice.⁹⁸

Today, Mr. Himmel's acts would constitute a violation of the Illinois Rules of Professional Conduct ("IRPC"), namely, Rule 8.3, Reporting Professional Misconduct: "A lawyer who knows that another lawyer has committed a violation of Rule 8.4(b) or Rule 8.4(c) shall inform the appropriate professional authority." The latter paragraphs of IRPC 8.4 prohibit acts that reflect adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, and conduct involving dishonesty, fraud, deceit, or misrepresentation.⁹⁹ MRPC 8.3 (Reporting Professional Misconduct) contains different language: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

After reading the entire record of the case noted below, I suspected that the two attorneys involved had engaged in professional misconduct. As such, I had an ethical obligation to report it. I did so in a twenty-nine-page complaint.

⁹⁸ See 107 Ill.2d r. 1-102.

⁹⁹ See Ill. R. Prof'l Conduct R. 8.4(b)-(c) (effective Jan. 1, 2010). An article on the ARDC's web site by their senior counsel for ethics education explains the duty to report another lawyer's misconduct, and makes multiple relevant points. Mary Andreoni, Senior Ethics Education Counsel, *Answering the Top 10 Questions About a Lawyer's Duty to Report Misconduct*, <https://www.illinoiscourts.gov/News/993/Answering-the-Top-10-Questions-About-a-Lawyers-Duty-to-Report-Misconduct/news-detail/>. First, "[r]eporting can be awkward and uncomfortable, but most lawyers recognize that the duty to report fulfills our collective responsibility to maintain the public's confidence in the integrity of the justice system and legal profession." *Id.* Second, "[t]he three elements triggering a required duty to report another lawyer under ILRPC 8.3(a) are: (1) that a lawyer 'knows' of another lawyer's conduct; (2) involving a violation of ILRPC 8.4(b) (criminal acts that reflect adversely on the trustworthiness, honesty or fitness as a lawyer) or ILRPC 8.4(c) (fraudulent or deceitful conduct); and (3) where that knowledge is not otherwise protected by the attorney-client privilege or by law." *Id.* Lastly, "[t]he duty to report is 'absolute' and a lawyer cannot be prevented or excused from discharging this duty by a court, a client (unless the lawyer's knowledge is based on attorney-client privilege), by a report already made by the client or someone else or even if the information about the misconduct has become 'common knowledge.'" *Id.* (first citing *Skolnick v. Alzheimer & Gray*, 730 N.Ed.2d 4, 15 (Ill. 2000); and then citing *In re Daley*, M.R. 17023, 98SH2 (IL Nov. 27, 2000)). In *In re Daley*, the "Hearing and Review Boards rejected lawyer's argument that he was relieved of the duty to report because the other lawyer's conduct had been disclosed in a court proceeding, was widely disseminated in the press, and was disclosed to various law enforcement agencies." *Id.* (citing *In re Daley*, M.R. 17023, 98SH2 (IL Nov. 27, 2000)).

A. *Allegations*

PG filed a complaint for monetary relief in an Illinois small claims court.¹⁰⁰ He filed his pro se complaint in six counts. I read the record in this case and filed the aforementioned *Himmel* complaint against the two lawyers for the defense. In brief, my complaint made the following allegations: (1) the lawyers made a false statement of law when they denied the existence of a relevant statutory section that their pro se adversary relied upon and was detrimental to their case (a conflict which the court failed to resolve through research, accepting the lawyers' misrepresentation as to the law); (2) the lawyers made false statements of fact regarding PG's character, calling him a vexatious pro se litigant whose claims were merely a matter of "personal opinion," and whose case was "baseless" and "frivolous"; (3) the lawyers obstructed the pro se litigant's access to evidence; and (4) the lawyers filed an unwarranted sanctionable sanctions petition against PG.

B. *Rationales for Dismissal of Complaint Without Investigation*

Along with the *Himmel* complaint, I sent a voluminous package to the ARDC containing the entire record in the aforementioned case, including pleadings, motions, orders, transcripts of motion hearings, the trial, and the sanctions hearings, the appellate decision affirming the trial court and its modified opinion on rehearing, plus briefs filed in the appellate and supreme courts.¹⁰¹ The ARDC senior counsel acknowledged receipt of my complaint, and advised that, because one of the accused lawyers was a member of the ARDC's Hearing Board (the second of three bodies that review ARDC complaints), the ARDC was referring the matter to special counsel for review and recommendation.

¹⁰⁰ For confidentiality purposes, I am not providing the full name of the plaintiff, the accused lawyers, the trial judge, the circuit court in which this arose, or the appellate court that affirmed the trial court's decision. All transcripts, pleadings, briefs, court orders, and appellate opinions are on file with the author, and have been provided to and verified by this Journal. The Supreme Court of Illinois moved the case to a "confidential" docket at the request of the ARDC; *see also*, Jona Goldschmidt, *Equal Injustice for All: High Quality Self-Representation Does Not Ensure a Matter is "Fairly Heard,"* 44.2 SEATTLE L. REV. SUPRA 75, 86-88 (2021) (citing this case study and two others in support of the proposition that high-functioning "expert" pro se litigants are still subject to experiencing miscarriages of justice).

¹⁰¹ For his appeal, PG submitted the entire trial court record, which was Bates stamped. The *Himmel* complaint made references to this record by page number for each allegation of the complaint.

1. Deference to Courts

Senior ARDC counsel's initial response to the *Himmel* complaint raised two interesting issues. She wrote that: "The ARDC does not review and cannot nullify court decisions or orders."¹⁰² She, however, misconstrued the complaint as being one seeking to overturn a judgment or order. My complaint asked the ARDC to "review" the record for ethical misconduct, but not to "nullify," the court proceedings as such.

Counsel's position that the ARDC cannot "review" court proceedings in a disciplinary case appears to state a general policy of deference to courts in litigation misconduct cases. One wonders what circumstances *would* justify the ARDC "reviewing" court records, not for nullification-of-court-order purposes, but for investigation of candor-toward-the-tribunal complaints. The ARDC's position on this point appears to be that their hands are tied; they must respect court rulings. This may sound reasonable in theory, but how would lawyers engaging in breaches of the duty of candor to the tribunal ever be disciplined, particularly in cases in which their side prevails? Or, where a judge has acted unethically, enabling the offending lawyer's misconduct to be overlooked? In such cases the offending lawyers may never be held accountable.

Professor Rhode observes that disciplinary agencies often refer cases involving litigation misconduct back to the courts.¹⁰³ Here, the ARDC did not refer the matter back to the courts, and took no steps to bring the matter to the trial, appellate, or supreme court's attention. As such, the agency forfeited its power to investigate a lawyer-filed complaint, which could have led to an opportunity to enforce the Illinois Rules of Professional Conduct and hold lawyers accountable for litigation misconduct.¹⁰⁴

¹⁰² Letter from Althea K. Welsh, Senior Counsel, ARDC, to author (March 30, 2017) (on file with author).

¹⁰³ See *supra* note 9 and accompanying text.

¹⁰⁴ At the end of my *Himmel* complaint I suggested that, if the complaint were sustained, the attorneys' fees awarded to the lawyers by the trial and appellate courts should be disgorged, since they were the product of a fraud upon the court through misrepresentations of law and fact, and by the lawyers' withholding of, or obstruction to, critical evidence. In response, senior disciplinary counsel wrote: "Additionally, there is no legal authority for making disgorgement of fees and costs paid as court-ordered sanctions part of a lawyer disciplinary sanction."

ARDC counsel apparently interpreted S. Ct. R. 772(b)(5), authorizing "restitution" as one of the possible conditions of disciplinary probation, as having no application to disgorgement of sanctions by a court as a result of their unethical conduct. But, she never explained why a trial or appellate court would object to a Supreme Court-ordered sanctions restitution, recommended by its own lawyer discipline agency, and which was the product of unethical conduct. The specific issue is, however, addressed in disciplinary enforcement guidance.

In her decision letter declining to investigate the complaint, ARDC counsel wrote:

[I]t is not unusual for parties and representatives to maintain that opposing lawyers in court proceedings have made false claims and statements. This circumstance does not in itself justify a disciplinary investigation into the professional conduct of the opposing lawyers. Issues regarding the truth and validity of factual and legal claims made in court proceedings are appropriately addressed and resolved in the courts rather than through the lawyer disciplinary process.”¹⁰⁵

This statement implies that there are no circumstances under which a false statement of law or fact made to a tribunal during litigation may be examined by the ARDC. This is a startling proposition, and, if true, completely abrogates *de facto* the professional responsibility of candor toward a tribunal. This will allow lawyers who engage in such misconduct to avoid

According to the Restatement, the traditional sanctions imposed upon lawyers found guilty of professional misconduct include impediments to the lawyer’s right to practice and other sanctions such as, most relevant here, “ordering restitution.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Title C, Introductory Note (AM. L. INST. 2000). The ABA Model Rules state otherwise. Rule 10 specifically provides that, among the other well-known sanctions of disbarment, suspension, probation, reprimand, or admonition, the supreme court or disciplinary agency may order “restitution to persons financially injured, disgorgement of all or part of the lawyer’s or law firm’s fee” MODEL RULES OF PRO. RESP. CONDUCT r. 10 (AM. BAR ASS’N 2020). Unlike a financial sanction by way of a fine (opponents of which argue it constitutes punishment and not public protection and where a double jeopardy argument could be made), RHODE & HAZARD, *supra* note 7, at 244-45, restitution to a victim of professional misconduct has multiple purposes: compensation, deterrence, and rehabilitation, all of which further public protection. Interestingly, Rhode and Hazard suggest that with the imposition of fines (which they note lawyer discipline agencies generally do not allow), “more of those victims might report misconduct and feel fairly treated by the disciplinary process.” RHODE & HAZARD, *supra* note 7, at 245.

Admittedly, these provisions contemplate a sustained complaint involving improper retention or theft of client funds, rather than being a recipient of unwarranted court-ordered sanctions. Yet, both consist of attorneys’ fees improperly and unethically received. Whether fees are unethically retained versus a product of unethical conduct is a distinction without a difference. Comparatively, court-awarded sanctions earned unethically should be considered a much more serious breach of professional responsibility; fees stolen from a client should not be given preference over fees stolen from an adverse party through chicanery in litigation (i.e., through official corruption and betrayal of the public trust).

This again raises the issue of whether court-ordered sanctions that are based on a lawyer’s misrepresentation of law or facts can ever be remedied. It brings us to senior counsel’s next observation regarding the ARDC’s inability to review court proceedings.

¹⁰⁵ Letter from Althea K. Welsh, Senior Counsel, ARDC, to author (August 31, 2017) (on file with author).

sanctions in that category of cases where the court is unaware of the misconduct during the pendency of the case.

2. Mere “Argumentation, Characterization, or Conclusion”

In her decision letter, ARDC counsel stated: “We observe that *many* of the statements you allege constituted misrepresentations by [the lawyers] were in the nature of *argument, characterizations or conclusions*.”¹⁰⁶ Here, it appears she is arguing that one should expect such conduct in litigation given its rough-and-tumble nature. Additionally, ARDC counsel failed to identify which statements were in the nature of argument, characterizations, or conclusions. One would assume that any lawyer who submits a complaint against a non-adversary lawyer based on alleged false statements of law and fact is entitled to know the basis for the ARDC’s prosecutorial decision regarding each allegation.

Second, although ARDC’s counsel claimed that some of the alleged misrepresentations were part of the lawyers’ arguments, characterizations, and conclusions, they rested upon alleged falsehoods about the law and the facts of the case. Here, again, the implication of the ARDC’s position is that when attorneys make arguments, characterizations, or conclusions, it will not scrutinize the facts or law on which they base those statements. This position taken by the ARDC runs counter to the stated principles of both the MRPC and the IRPC, which forbid the making of false statements of law or fact to a tribunal.

3. Likelihood of Meeting Clear and Convincing Burden

ARDC counsel also wrote:

We would not be able to prove that such statements constituted factual misrepresentations. We have concluded that any effort to bring formal disciplinary charges against [the lawyers] based on your allegations would not be successful and would not result in the imposition of disciplinary sanctions. Accordingly, the ARDC will take no further action with respect to your request.¹⁰⁷

¹⁰⁶ See *id.* (emphasis added).

¹⁰⁷ See *id.*

Nothing in the first sentence quoted speaks to the false statement of law; it only refers to false statements of fact, despite the complaint raising both issues.¹⁰⁸

In a later letter, ARDC counsel wrote:

Our decisions regarding whether to pursue disciplinary charges against lawyers based on alleged rule violations are made on a case-by-case basis and are generally the product of a confluence of factors, including our interpretation of applicable rules of professional conduct, our analysis of available information and evidence, our assessment of potential harm to the public and to the administration of justice, or *policies relating to non-interference with the judicial process and respect for court decisions*, and our judgment on the appropriate use of our limited resources.¹⁰⁹

The ARDC's refusal to investigate the complaint did not indicate any differences in rule interpretation; my complaint did not cite to any specific rules on the assumption that it is the province of the ARDC to make its own judgments regarding which, if any, ethics rules were violated. It appears that the "analysis of available information and evidence" was not even conducted. Nor does it appear that an "assessment of potential harm to the public or the administration of justice" was conducted. Most telling is ARDC counsel's adherence to its inexplicable hands-off policy regarding review of court records to determine whether professional responsibility rule violations occurred, as reflected in the italicized language in the quotation above.

Subsequently, I requested that the Illinois Supreme Court order the ARDC to investigate my complaint. I did this first through two attempted amicus curiae filings during the pendency of PG's petition for leave to appeal to the state supreme court, wherein I attempted to bring to the alleged miscarriage of justice to the court's attention. Both amicus filings were rejected because the supreme court only allows amicus brief filings when a petition for leave to appeal has been granted (and PG's was not). In addition, I asked the same court to enter a supervisory order directing the ARDC to investigate the complaint, but this too was denied without opin-

¹⁰⁸ As to whether the ARDC could prove its case, the pleadings and transcripts to which reference was made in the *Himmel* complaint (by document or transcript page numbers) for each and every allegation of misconduct, clearly evidenced the misstatements of law and fact. Here, too, one wonders what else the ARDC needs to prove its case under these circumstances.

¹⁰⁹ See Letter from Althea K. Welsh, Senior Counsel, ARDC, to author (September 8, 2017) (on file with author).

ion after the matter was moved to the “Confidential Docket” of the court on the ARDC’s motion.

VI. NATIONAL SURVEY OF LAWYER DISCIPLINE AGENCIES

A. *Method*

The case study described above led me to inquire of all states’, the District of Columbia, and the U.S. Department of Justice’s (“DOJ”) policies for handling complaints received regarding litigation misconduct. The survey letter asked disciplinary counsel for their response to the following hypothetical:

It is the hypothetical case of a lawyer who intentionally makes a false statement of fact or law in litigation and is not sanctioned by the court. The failure to sanction could be because the matter was undetected by the adverse party, or the court considered the matter but determined that the lawyer had not violated the relevant statute or court rule (or was found not to be in contempt). But the adverse party—believing the lawyer acted unethically—thereafter files a disciplinary complaint against the lawyer.

Does your agency have a general policy to (a) decline to investigate such allegations because the court did not rule on it, or because of the court’s ruling exonerated the lawyer? or (b) does your agency nevertheless investigate the allegation in the context of professional ethics norms?

After excluding the responses from several agencies indicating that they do not respond to hypotheticals, I received valid responses from twenty-nine disciplinary counsel.

B. *Results*

The hypothetical posed three scenarios: (1) the court failed to address the alleged misconduct; (2) the court addressed the alleged misconduct and imposed sanctions; and (3) the court denied sanctions against (“exonerated”) the lawyer after considering the sanctions request. In analyzing the responses, the following issues arose.

1. Policies Regarding Investigations

The responses of disciplinary counsel were grouped into the categories of “Yes – would investigate,” “No – wouldn’t investigate,” and “Other.” Nineteen counsels’ responses fell into the “Yes – would investigate” category; none fell into the “No – wouldn’t investigate” category; and ten fell into the “Other” category. Counsel sorted into the “Other” category all stated their concern about the likelihood of a successful prosecution where a court exonerates the accused lawyer, given the agencies’ “clear and convincing” burden of proof. Arguably, these ten cases could be included in the “Yes – would investigate” category because these respondents stated they would nevertheless independently review or investigate the complaint.

Viewed in this light, the responses appear unanimous. Counsel all indicated that they did not have a prosecution policy for the scenarios presented. As one respondent succinctly put it, Florida “does not have a general policy wherein we decline to investigate allegations because there is no court order or because the court did not sanction an attorney.”¹¹⁰ The agencies universally consider each complaint on a case-by-case basis. As counsel noted: “the Disciplinary Commission would look at these allegations on a case-by-case basis to determine whether reasonable cause exists to pursue formal disciplinary action”¹¹¹

Therefore, without exception, but with some qualifications noted below, these twenty-nine disciplinary counsel would not be deterred from pursuing an investigation under any of the scenarios presented.

2. Defining “Investigation”

Another interesting issue arising from the survey is counsels’ distinction between a “review” and an “investigation” of litigation misconduct cases. Counsel, of course, must possess evidence establishing a reasonable likelihood or probable cause of an ethics violation before sending the case to the first hearing stage of the process. As one counsel put it, “Ultimately, what matters is whether the State Bar can sustain the facts that establish the violation.”¹¹²

¹¹⁰ See E-mail from Allison C. Sackett, Div. Legal Div. Dir., The Fla. Bar, to author (March 26, 2021, 04:05 CST) (on file with author).

¹¹¹ See Letter from Charles M. Kidd, Deputy Exec. Dir., Disciplinary Comm’n, Ind. Sup. Ct. Off. Of Jud. Admin., to author (May 13, 2021) (on file with author).

¹¹² See E-mail from James S. Lewis, Assistant Gen. Couns., State Bar of Ga., to author (July 13, 2021, 11:58 CST) (on file with author); *see also* Letter from Alan D. Pratzel, Chief Disciplinary Couns., Off. Of Disciplinary Couns., Sup. Ct. of Mo., to author (July 8, 2021) (on file with

Before a formal complaint is lodged and the first formal evidentiary “reasonable cause” hearing takes place, however, counsel must necessarily review the incoming complaint and supporting materials and decide whether to elevate the matter to an “investigation” stage, however defined. Counsels’ survey responses distinguish between an informal and formal “investigation,” so it is difficult to determine the extent to which these matters are in fact investigated beyond a reading of the complaint by a staff attorney. Will counsel limit their review to the four corners of the complaint, or will they request the accused lawyer’s response? Will they check court records to substantiate the allegations, or call the complainant or witnesses for their statements? There appears to be no consistency across jurisdictions with respect to the elements and parameters of a “review” versus an “investigation,” whether formal or informal.

3. Statutory or Rule Requirements

Several respondents indicated that their agency operated under procedural rules that address the specific situation of a pending civil or criminal matter. These agencies’ rules either mandate that the agency not be deterred from initiating a prosecution,¹¹³ or expressly permit a prosecution in that situation.¹¹⁴ In contrast, one agency’s rules explicitly defer complaints of litigation misconduct in federal court to those courts (with no similar reference requirement to state courts).¹¹⁵

author). Counsel in Missouri stated his office “makes determinations as to whether or not to open investigative files based on complaints and/or reports made to the office. Each complaint or report received is reviewed based on the factual allegations contained therein.” Pratzel, *supra* note 112.

¹¹³ See Haw R. Sup. Ct. 2.10 (“Processing of complaints shall not be deferred or abated because of substantial similarity to the material allegations of pending criminal or civil litigation, unless authorized by the Board in its discretion, for good cause shown.”)

¹¹⁴ See Ala. St. R. Disc. P. 14 (“Disciplinary proceedings shall not be deferred or abated because of substantial similarity to the material allegations of pending criminal or civil litigation involving the respondent, unless authorized by the Disciplinary Board, in its discretion, for good cause shown.”)

¹¹⁵ See Neb. S. Ct. R. § 3-309(A)(2). Section 3-309 of the Supreme Court Rules of Nebraska states, in relevant part:

Upon receipt of a grievance against a member arising out of conduct in a pending or closed federal case, including civil, criminal, bankruptcy, grand jury, or federal proceeding in which the lawyer may be a witness, Counsel for Discipline shall disclose and refer such grievance to the federal judge assigned to the case for consideration of discipline under the federal attorney discipline rules. Any investigation of such grievance by Counsel for Discipline shall be held in abeyance until the federal court resolves the matter, provided, however, that if the federal court fails to resolve the grievance in a timely manner, Counsel for Discipline may take further action without regard to the referral to the federal court. Discipline by the federal court under its disciplinary

What if a state supreme court finds that a prosecutor's statements were not prejudicial and do not require reversal? Will that same court later find the prosecutor sanctionable for litigation misconduct if the lawyer discipline agency finds his or her statements were false? One respondent cited this specific problem, noting that, while his agency would not be deterred from investigating the matter despite a court's exoneration, these circumstances may negate the possibility that the same court would find the non-reversible conduct to be unprofessional.¹¹⁶

4. Exoneration Cases

Disciplinary counsel generally expressed concerns regarding (1) the likelihood of meeting their clear and convincing burden in such cases; and (2) noted that these cases are the most problematic. One respondent wrote that his office "typically" does not seek additional sanctions if court sanctions were imposed; but he added that "our rules do allow us to prosecute cases regardless of what a judge may do in any given situation concerning unethical conduct. There are instances where we have continued to prosecute cases even when a judge acts."¹¹⁷

One counsel responded forthrightly to this hypothetical: "The fact that a lawyer was found not to be in contempt of court would certainly not be determinative because the State Bar is limited to addressing whether a lawyer violated the Rules of Professional Conduct, which could certainly have occurred notwithstanding a court determination that the lawyer was not in contempt of court."¹¹⁸ Even more direct was counsel who stated "[i]f someone submits a complaint that an attorney intentionally made a misrepresentation to a court, that alleged rule violation would trigger the opening

rules does not preclude discipline under these rules pursuant to the Nebraska Rules of Professional Conduct.

¹¹⁶ See E-mail from Mark A. Weber, Counsel for Discipline & the Unauthorized Practice of Law, Neb. Sup. Ct., Admin. Off. of the Ct. and Prob., to author (March 16, 2021, 9:14 CST) (on file with author).

¹¹⁷ See Letter from Roman A. Shaul, Gen. Couns., Off. of Gen. Couns., Ala. Bar Assoc., to author (April 15, 2021) (on file with author); see also Ala. St. R. Disc. P. 14 (stating rule to which counsel was referring).

¹¹⁸ See E-mail from Katherine Jean, Couns., N.C. State Bar, to author (March 18, 2021, 2:06 CST) (on file with author); see also Email from Anne Taylor, Chief Disciplinary Couns., The Disciplinary Bd. of the N.M. Sup. Ct., to author (May 4, 2021, 10:46 CST) (on file with author) ("This office independently investigates alleged violations of the Rules of Professional Conduct, regardless of whether the attorney has been sanctioned by a court."); E-mail from Kara J. Erickson, Disciplinary Couns., Disciplinary Bd. of the Sup. Ct. of N.D. Sup. Ct., to author (March 24-2021, 1:38 CST) (on file with author) ("In response to your inquiry, we would prosecute regardless. In fact, I have a few of those matters pending currently.")

of a disciplinary complaint requiring the attorney to provide a response.”¹¹⁹ Another responding counsel stated that “this office routinely investigates cases of alleged intentional false statements made by a lawyer to a tribunal, regardless of whether the tribunal addressed such conduct.”¹²⁰

Regarding these cases, some counsel responses reflected dissonance about an investigation decision in exoneration cases: “We would generally open such an investigation, though if the Court considered the statement and made a substantive ruling, we might defer to the Court’s determination and not investigate, or if we do investigate, not find misconduct.”¹²¹ Similarly, another noted: “Decisions by a trial court in an underlying matter, although potentially of assistance, may or may not impact this Office’s investigation and docketing of a matter.”¹²²

Other counsel noted the difficulty in such cases: “Where a judge has evaluated the alleged falsity of a statement and the evidence available to the court is the same as that available to [the agency], it is likely to be difficult or impossible to get a special master to substitute a different finding.”¹²³ Another agreed, stating that she would not decline to investigate simply due to the fact of exoneration, but would like to have “other corroborating evidence.”¹²⁴ One disciplinary counsel stated that his agency would

¹¹⁹ See Letter from Kelly Reilly Travers, Chief Disciplinary Counsel, Disciplinary Board, R.I. Sup. Ct., to author (July 12, 2021) (on file with author); see also Email from John S. Nichols, Disciplinary Couns., Sup. Ct. of S.C., to author (July 8, 2021, 6:38 CST) (on file with author):

If the information, if true, would be misconduct, then we open a case and investigate the information. . . . Our burden of proof is clear and convincing evidence, and proving misconduct under that standard is not foreclosed by the trial court’s ruling since the court likely exercised discretion under our version of Civil Procedure Rule 11 not to find contempt or enter sanctions. . . . [T]he trial court’s ruling cannot “exonerate” the lawyer even if the trial court decides not to act. We would vigorously pursue a case against the lawyer before our Commission on Lawyer Conduct and then the Supreme Court. Assuming no disciplinary history, the lawyer would face a suspension of at least 9 months up to disbarment, depending upon aggravating or mitigating circumstances.

Email from Nichols, *supra* note 119; see also Letter from Keith L. Sellen, Dir., Off. of Lawyer Regul., Sup. Ct. of Wis., to author (March 19, 2021) (on file with author) (“Upon a court sanction or lack thereof, we would nevertheless investigate We receive allegations and investigate them in the context of professional ethics norms.”)

¹²⁰ See E-mail from Mark W. Gifford, Off. of Bar Couns., Wyo. State Bar, to author (July 15, 2021, 9:54 CST) (on file with author).

¹²¹ See E-mail from Tara M. van Brederode, Dir. of Att’y Discipline & Admin., Att’y Disciplinary Bd., Iowa Sup. Ct. Off. of Pro. Regul., Iowa Jud. Branch, to author (July 12, 2021, 10:43, CST) (on file with author).

¹²² See Letter from Brian R. Moushegian, Gen. Couns., Att’y Discipline Off., N.H. Sup. Ct. to author (July 12, 2021) (on file with author).

¹²³ See E-mail from James S. Lewis, *supra* note 112.

¹²⁴ See E-mail from Seana Willing, Chief Disciplinary Couns., State Bar of Tex., to author (March 22, 2021, 3:06 CST) (on file with author).

consider the court's reasoning in making its decision to pursue a prosecution: "We would investigate the allegation notwithstanding the court's determination that the lawyer had not violated the relevant statute of court rule. Of course, we would analyze the court's reasoning in making our own determination whether there was a violation of the RPCs."¹²⁵

D.C. disciplinary counsel gave the following thoughtful response:

If the court before which the representations were made found that the lawyer should not be sanctioned, that would be a formidable, but perhaps not dispositive barrier. Again, the facts would govern. It could be, for example, that under the court rules only intentional, as opposed to reckless, misstatements are sanctionable, whereas under our different rules, reckless statements were sanctionable. Also, many judges will make findings that statements of law or fact are unsupported, but are reluctant to impose sanctions, just because judges don't like to do that. If the judge makes an affirmative finding that the statements are not false, we would be hard pressed to proceed, however. We have to prove our cases by clear and convincing evidence, and if the judge to whom the statements were directed does not find that she had been misled, it would be almost impossible to prove there is sufficient evidence of a violation.¹²⁶

The DOJ would also review a complaint despite exoneration:

Our office would nonetheless review the allegation, even if the court made an affirmative ruling that no such statement was made. As you point out, defense attorneys may later raise such an issue even though it was not brought to the court's attention. We would review those allegations as well. Whether we would conduct a full investigation regarding the allegations would be based on a review of all available information and a preliminary determination

¹²⁵ See E-mail from Charles Centinaro, Dir., Off. Of Att'y Ethics, Sup. Ct. of N.J., to author (July 20, 202, 9:02 CST) (on file with author).

¹²⁶ See Email from Phil Fox, Disciplinary Couns., D.C. Bd. of Pro. Resp., to author (March 25, 2021, 10:24 CST) (on file with author).

based on that review that additional investigation could result in a finding of professional misconduct.¹²⁷

Other counsel responded variously that exoneration would be “a factor” in their decision to investigate, but would “not be determinative”;¹²⁸ that they would take a court decision “into consideration when deciding whether to proceed with a formal charge or dismiss the matter”;¹²⁹ that exoneration would be “relevant in the overall assessment of a report of misconduct”;¹³⁰ or that it would “impact” their decision to investigate but not prevent it, noting that “other or additional allegations” would make it more likely that an investigation would be conducted.¹³¹

5. Relative Severity of False Statements of Law and Fact

An interesting point was raised by discipline counsel for South Carolina. He wrote:

[A] false statement of law violates a different rule and is generally not as egregious as a false statement of fact (i.e., a lie). The adversary or the judge are certainly capable of verifying the holding of a cited case, the provisions in a statute, the terms of a regulation or other authority so as to not rely on a false statement of the law. But a false statement of fact is not easily uncovered and may lead the decision-maker to rule based upon the lie, which strikes at the

¹²⁷ See E-mail, from Jeffrey R. Ragsdale, Chief Couns., Dep’t of Just. Off. Of Pro. Resp., to author (April 2 2021, 7:30 CST) (on file with author).

¹²⁸ See Letter from Douglas J. Ende, Chief Disciplinary Couns., Off. of Disciplinary Couns., Wash. State Bar Assoc. to author (April 1, 2021) (on file with author). Counsel wrote:

The Office of Disciplinary Counsel (ODC) has no general policy to decline to investigate such allegations. ODC would review a grievance alleging such misconduct and make a decision about whether to further investigate based on the totality of the circumstances presented. If the court had reviewed the allegations and made a decision to ‘exonerate’ the lawyer, that could be a factor in determining whether further investigation or action would be warranted.

Id.

¹²⁹ See Email from Joseph M. Caligiuri, Disciplinary Couns., Off. of Disciplinary Couns., Sup. Ct. of Ohio, to author (July 23, 2021, 9:06 CST) (on file with author).

¹³⁰ See Letter from Kate F. Baird, Deputy Disciplinary Admin., Off. of the Kan. Disciplinary Admin., to author (March 22, 2021) (on file with author).

¹³¹ See Email from Pamela D. Buey, Chief Disciplinary Couns., Off. of Disciplinary Couns., Mont. Sup. Ct., to author (March 15, 2021, 2:05 CST) (on file with author).

heart of the system of justice (that's why perjury is so detrimental and so serious an offense).¹³²

This would be true in an ideal world. Unfortunately, some judges are not so conscientious and do not conduct their own research to ascertain the correct statement of the law. Where opposing counsel is not present to contradict the alleged false statement of law, there are judges who will simply rely on a sole lawyer's representations regarding the law when the opponent is a pro se litigant. It is true that judges need not conduct legal research for a pro se litigant; but neither should they ignore the pro se's disadvantages when arguing against a lawyer about what the law is. While affirmative legal research assistance may not be required, a judge should conduct independent research where a pro se litigant's statement of law is in direct conflict with that of opposing counsel.

VII. DISCUSSION

A. *The Institutional Choice Question*

Professor Joy's aforementioned position is that an appropriate institutional choice (or, implicit agreement) has been made by and between federal courts and state lawyer discipline agencies that the latter will defer to the courts for disposition of litigation misconduct complaints; this was based on data showing little or no disciplinary enforcement of such complaints. While this conclusion appears sound, it should be noted that there are numerous possible causes for a lack of enforcement, such as: the reluctance of lawyers to report each other's misconduct; clients' lack of knowledge that misconduct occurred; the misconduct was not known to the court, or it was assumed not to have occurred because the offending lawyer prevailed in his or her client's case; and other possibilities. A separate issue is whether leaving litigation to the courts is a good idea.

Joy argues for deference to courts because judges have "both the historical role of the judiciary and . . . play a key role in regulating lawyers' behavior in bringing and defending cases."¹³³ He cites the lack of recidivism in Rule 11 offenders as support of his contention that "judicially imposed sanctions are working."¹³⁴

Professor Joy's position fails to recognize that lawyer discipline agencies do not enforce court rules, though the ethical norms they enforce

¹³² See Email from Nichols, *supra* note 119.

¹³³ See Joy, *supra* note 11, at 811.

¹³⁴ See Joy, *supra* note 11, at 812.

prohibit similar acts. The agencies determine fitness to practice law, whereas courts are instead focused on instances of misconduct defined by a single court rule in a single case. Courts themselves may be unwilling to address misconduct for a variety of reasons, including possible bias in favor of the offending lawyer, not wanting to hurt a lawyer's career, not wanting to get tangled up in possible future disciplinary hearings, etc. There are many possible reasons not to impose sanctions on a lawyer, and a lack of reporting to the discipline agency—or an agency's unwillingness to prosecute such a case—allows lawyers who engage in unprofessional litigation misconduct to remain unaccountable.

Professor Joy is also incorrect in his view that the ABA Model Rules of Disciplinary Enforcement do not consider Rule 11-type complaints as falling into the “serious misconduct” category, warranting severe sanctions. Litigation misconduct, he argues, (a) does not involve misappropriation of funds; (b) does not result in or is not likely to result in prejudice to a client or other person; and (c) does not involve dishonest, deceit, fraud or misrepresentation.¹³⁵ “Thus, except in extreme cases of Rule 11 violations, or for lawyers who repeatedly violate Rule 11, the disciplinary enforcement rules permit potential ethics violations based on Rule 11 violations to be treated as lesser misconduct that would, if pursued by disciplinary authorities, not normally result in sanctions restricting the putative lawyer's right to practice law.”¹³⁶

The deficiency in his argument is obvious. Litigation misconduct often involves dishonesty and misrepresentation; that is the essence of false statements of law or fact, concealment of material evidence, and other serious ethics rule violations. Such misconduct can result in prejudice to a client, not to mention the public trust, when the outcome of litigation is a product of the misconduct. Clarification of the matter by the ABA standards committee would be useful.

Professor Joy's last reason in support of his position that deference to courts is preferable is that the legal profession has failed to coordinate with state disciplinary agencies following imposition of Rule 11 sanctions. This, he argues, is “a wise choice, one that enables judges to control lawyers' litigation conduct directly, to fashion appropriate remedies, and to also impose remedies close in time to the offense.”¹³⁷

I submit that the facts of the case study described above establish the real possibility that serious litigation misconduct can be overlooked by

¹³⁵ See Joy, *supra* note 11, at 813.

¹³⁶ See Joy, *supra* note 11, at 812-13 (citing MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT r. (9)(B) (AM. BAR. ASS'N 2007)).

¹³⁷ See Joy, *supra* note 11, at 814.

courts and disciplinary agencies. The results of the survey of disciplinary counsel reflect unanimity among them that their agencies will not be deterred from conducting a review of such allegations despite a court ruling on the matter, or lack thereof. Moreover, the weakness of the arguments favoring deference to courts for lawyer discipline—illustrated by the ARDC’s rationales for refusing to investigate in this case study—establishes that leaving litigation misconduct to judges will not adequately address such misconduct.

B. *Recommendations*

The making of false statements to a tribunal or engaging in other litigation misconduct has been prohibited in the practice of law for centuries.¹³⁸ The ABA’s model lawyer discipline enforcement rules state that “[p]roviding a regulatory system to deter unethical behavior should remain the highest priority of the judicial branch.”¹³⁹

Do the justifications cited by the ARDC for its refusal to investigate the case (i.e., that deference must be given to court orders and that complaints of misrepresentation of law and fact made in litigation are merely “arguments, characterizations, or conclusions”) have any merit? I suggest not. The agency failed in its duty to ensure that the public is protected from unethical lawyers, in court or out of court. Its “institutional choice” to defer to courts is not easily understood by those who file litigation misconduct complaints, especially those complaints in which a lawyer is inappropriately exonerated by the court. Nor does the ARDC uphold its duty to the legal profession in disciplining unethical lawyers who misrepresent the law and the facts and take advantage of pro se litigants.¹⁴⁰ While,

¹³⁸ See HON. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 72 (1884) (quoting Gilbert Burnet, LIFE OF SIR MATHEW HALE 72 (5th ed. 1681). “It need hardly be added that a practitioner ought to be particularly cautious, in all his dealings with the court, to use no deceit, imposition, or evasion—to make no statements of facts which he does not know or believe to be true—to distinguish carefully what lies in his own knowledge from what he has merely derived from his instructions—to present no paper-books intentionally garbled . . . [such as] ‘quoting precedents of books falsely.’” See *id.*

¹³⁹ See MODEL RULES OF PRO. RESP. CONDUCT r. 2 cmt. (AM. BAR ASS’N 2020). (“Public confidence in the discipline and disability process will be increased as the profession acknowledges the existence of lawyer misconduct, and shows the public what the agency is doing about it.”)

¹⁴⁰ See MODEL CODE OF PRO. CONDUCT §7.2-2 (FED’N. OF LAW SOC’Y OF CAN. 2004). Under Canadian legal ethics rules, the kind of chicanery engaged in by the lawyers in this case, including the sanctions sought against their pro se adversary, is referred to as “sharp practice.” *Id.* “A lawyer must avoid sharp practice and must not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client’s rights.” *Id.* Additional provisions in the Canadian Code in-

as lawyers, we are proud to say that ours is a self-regulated profession, the case described herein raises serious questions as to the viability of that position.¹⁴¹

The data reported here shows minimal enforcement of litigation misconduct in Illinois, which, admittedly, could be attributable to the issuance of private reprimands that are undetectable in ARDC records and reports. This is consistent with the literature and data from other jurisdictions.¹⁴² In contrast, discipline counsel responding to the survey uniformly noted that they would consider litigation misconduct complaints independently of court sanctions imposed, or lack thereof. The contradiction between the weak enforcement data and responding disciplinary counsels' willingness to pursue complaints of litigation misconduct needs further study.

There appears to be a gaping hole in lawyer ethics enforcement with respect to litigation misconduct. It requires the promulgation of rules to prevent the *de facto* immunity of litigators who are given a pass by trial courts, wittingly or unwittingly, whose misconduct is never referred to a disciplinary agency, or whose misconduct is not investigated by a disciplinary agency. I propose the following measures to address this problem:

- Establish a disciplinary rule mandating that all litigation conduct complaints filed by lawyers be investigated (not just “reviewed”); and include a definition of “investigation.”

clude knowingly attempting to deceive the tribunal, knowingly misstating information, deliberately refraining from “informing the tribunal” and placing the lawyer’s credibility at issue. *Id.* r. 5.1-2(e) (stating rule that prohibits “knowingly attempt[ing] to deceive or participate in the deception of a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime or illegal conduct”); *id.* r. 5.1-2(f) (prohibiting “knowingly misstating the contents of a document”); *id.* r. 5.1-2(i) (stating rule that prohibits “deliberately refrain[ing] from informing the tribunal of any pertinent adverse authority that the lawyer considers to be directly in point and that has not been mentioned by an opponent”); *id.* r. 5.2-1 cmt. (noting “[t]he lawyer must not in effect become an unsworn witness or put the lawyer’s own credibility in issue”).

¹⁴¹ See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 21 (1986). “[A]s in other areas in which occupations and professions are licensed and credentialed, it seems clear that the claim of the legal profession for special and total exemption from external, nonlawyer control faces a skeptical public and uncertain future.” *Id.* The case described is a good example of the reason for public skepticism of the claim that self-regulation is preferred over public regulation.

¹⁴² See Joy, *supra* note 11, at 807-08 (citing ABA survey results confirming that the overwhelming number of disciplinary complaints generally are dismissed, and citing Missouri opened-complaint data showing “not a single complaint involved filing frivolous lawsuits.”)

- An initial investigation should include the requesting of a response from the accused and examining the records submitted by the complainant and any relevant court records in the case.
- Discipline agencies should follow Restatement and ABA guidelines for disciplinary enforcement, including, *inter alia*: (1) the opportunity of a complainant to receive and reply to an accused lawyer's response to a complaint; and (2) notice of closure of a complaint and an opportunity for the complainant to request a review of the closure decision.
- All reprimands or other disciplinary sanctions regarding *litigation* misconduct (as distinguished from client-centered complaints) should be publicly accessible so potential clients, lawyer adversaries, and judges will know whether a lawyer has been sanctioned for such conduct in the past.
- Eliminate the "institutional choice" policy made by some disciplinary agencies to defer litigation conduct complaints to courts, or defer them to courts in specific cases, by adopting a rule expressly permitting the agencies to pursue such complaints despite a closed or pending civil or criminal case.
- Do not consider a court's refusal to impose sanctions on a lawyer dispositive of the discipline question; rather consider the order and its reasoning as one factor to be considered in making a separate disciplinary finding based on the record, other corroborating evidence, the requirements imposed by the rules of professional responsibility, and the legal obligations of the lawyer discipline agency.
- Clarify and elevate the characterization of litigation misconduct complaints to "serious misconduct" under the ABA's Model Rules for Disciplinary Enforcement and Model Standards for Lawyer Sanctions.

C. *Counter Argument*

Some will disagree with my position and argue that prosecutions by lawyer disciplinary agencies should not be conducted based on the same conduct considered by a court before it imposed or refused to impose sanctions. They would argue that disciplinary prosecutions resulting from court referrals or party complaints under these circumstances would be a form of double jeopardy.

The double jeopardy clause appears in the Fifth Amendment, which states individual rights in criminal prosecutions.¹⁴³ The Clause

¹⁴³ See U.S. CONST. amend. V. ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb")

protects only against the imposition of multiple *criminal* punishments for the same offense, . . . , and then only when such occurs in successive proceedings, . . .¹⁴⁴

The Supreme Court has long held that “a crime under one sovereign’s laws is not ‘the same offence’ as a crime under the laws of another sovereign. Under this ‘dual-sovereignty’ doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute.”¹⁴⁵ The Double Jeopardy Clause only applies to criminal prosecutions and is not violated by successive prosecutions by different sovereigns. Thus, it cannot apply to the case of a state court sanctions decision that is followed by the same state’s disciplinary enforcement proceedings.

But, objectors would argue, the general concept should apply. Why should a lawyer be sanctioned twice for the same misconduct? Or sanctioned at all for unprofessional conduct when the court just didn’t—or refused—to impose sanctions? I suggest several reasons justifying subsequent disciplinary agency review and potential additional sanctions.

First, sanctions may have been considered, but inappropriately denied, such as by a judge biased in favor of the accused lawyer. The propriety of later disciplinary action in that case is unquestionable. Alternatively, the court may have imposed sanctions, but limited them to the actual attorneys’ fees incurred by the opposing party as a product of the misconduct. Such an award might not be proportional to the severity of the misconduct.

It’s also possible that, if court sanctions were imposed, they were only assessed for particular acts within the scope of a pleading misconduct rule (e.g., Fed. R. Civ. P. 11). Related acts of misconduct may not be included in the court’s award. Similarly, the court awarding sanctions may not be aware of prior similar acts when imposing sanctions, assuming the conduct is a “one-off” situation. A discipline agency would have that information and could impose a more appropriate sanction.

If sanctions are imposed, courts are limited to attorneys’ fees awards and orders barring a lawyer from making future filings; but a discipline agency, whose purpose is to protect the public from unethical lawyers, can recommend a wide range of sanctions from public and private reprimands, restitution, attorneys’ fees, orders to attend drug treatment, anger management training, or continuing legal education classes, license

¹⁴⁴ See *Hudson v. United States*, 522 U.S. 93, 99 (1997) (citations omitted) (first quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938); and then *Breed v. Jones*, 421 U.S. 519, 528 (1975)).

¹⁴⁵ See *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (rejecting a challenge to the dual-sovereignty rule).

suspension, and disbarment. These are sufficient reasons to ensure the independence of lawyer disciplinary agencies from the courts in matters involving alleged litigation misconduct that also constitutes potential professional misconduct.

D. Future Research

There are many issues that require empirical study in the realm of lawyer discipline. Confidentiality rules in every state prevent access to case data reflecting complaints against lawyers that were dismissed by disciplinary counsel (or resulted in a private censure or reprimand). These data from state discipline agencies would be useful in ascertaining the source, frequency, and nature of alleged litigation misconduct. To know the reasons for declining to investigate such claims would also be useful with respect to the issue of public protection. What level of severity of a breach of the duty of candor towards the tribunal is sufficient to invoke the disciplinary process? Legislation or court rules are needed to provide scholars access to aggregate data of this type, which will help us answer the last question while maintaining the need for lawyer confidentiality before initiation of a formal complaint.

More importantly, such data would be useful in determining whether disciplinary counsel's strong sense of independence from courts translates to actual prosecutions for litigation misconduct. Limited disciplinary data from Illinois and other states show very little activity in this regard, despite this state supreme court's pronouncements in a handful of cases that litigation misconduct is not tolerated. Studies should be undertaken of more state disciplinary agencies' prosecution practices for litigation misconduct cases to the extent data are made available.

VIII. CONCLUSION

We return to the original issue of whether the lawyer disciplinary process can be viewed as an example of legal profession protectionism, as is often alleged in the case of unauthorized practice of law prohibitions. Thankfully, the encouraging results of the data collected from the national survey of disciplinary counsel reflect their firm belief in disciplinary agencies' independence from courts. They unanimously believe their agency has a duty to hold lawyers accountable for violating ethics norms notwithstanding the imposition (or non-imposition) of court sanctions. This appears to stand in stark contrast to the view of commentators that lawyer discipline agencies have a hands-off policy with respect to litigation mis-

conduct complaints, as well as the decision of the Illinois ARDC to refuse to investigate the complaint described herein. One would hope that the agency's decision does not reflect a general policy of deference to courts which, in light of the survey responses, would make it a pariah among the majority of state disciplinary agencies. The ARDC should come into conformity with the independence standard enunciated by disciplinary counsel in twenty-seven states, the District of Columbia, and the DOJ.

In addition to making more data available regarding rejected complaints or private reprimands of litigation misconduct, implementation of the aforementioned recommendations, and requiring that discipline agencies evaluate lawyer litigation misconduct independently from courts, will ensure that the public is protected from lawyers who engage in such conduct. That is the institutional choice that should be made by courts and regulatory bodies. By not deferring to courts, a robust lawyer disciplinary process justifies the legal profession's right of self-governance, evidences a lack of protectionism, and maintains the public's trust and confidence in the justice system.

AMERICA’S EXTRAORDINARY AND COMPELLING PROBLEM: AN ASSESSMENT OF THE SENTENCE MODIFICATION PROCESS IN THE FEDERAL DISTRICT COURTS AND THE NEED TO REMOVE THE BUREAU OF PRISON’S GATEKEEPER ROLE

I. INTRODUCTION

The Eighth Amendment provides, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹ The brevity of the Eighth Amendment leaves unanswered many questions regarding federal sentencing and has required Congress to create guidelines structuring the sentencing process in an attempt to reduce sentencing disparities.² After the sentencing process, however, federal courts relinquish their power to modify or reduce a sentence barring narrow exceptions.³ Instead, the Bureau of Prisons (“BOP”) assumes the position of judge and determines when an inmate qualifies for a sentence modification or a statutory sentence reduction.⁴

The ability to release inmates from prison or move inmates to home confinement became a focal issue during the coronavirus (“COVID-19”) pandemic (“pandemic”), as federal prisons experienced COVID-19 outbreaks on a massive scale.⁵ In the early months of the pandemic, the BOP sought to move individuals to home confinement in an effort to slow the spread of the virus and protect vulnerable inmates.⁶ Despite the BOP’s

¹ See U.S. CONST. amend. VIII.

² See *Federal Sentencing Guidelines*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/federal_sentencing_guidelines (last visited Jan. 12, 2022) (presenting brief overview of Federal Sentencing Guidelines).

³ See 18 U.S.C. § 3582(c) (outlining circumstances when court may modify sentence).

⁴ See 18 U.S.C. § 3624(c)(2) (authorizing BOP power over prerelease custody and power to grant home confinement).

⁵ See *COVID-19 Coronavirus*, FEDERAL BUREAU OF PRISONS, <https://www.bop.gov/coronavirus/> (last visited Jan. 12, 2022) (counting positive COVID-19 cases in federal prisons). Currently, 4,377 inmates and 928 staff in federal prisons have confirmed positive COVID-19 tests. *Id.* Currently, 42,491 inmates and 8,944 staff have recovered from COVID-19. *Id.*

⁶ See *Examining Best Practices for Incarceration and Detention During COVID-19: Hearing on Examining Best Practices For Incarceration and Detention During Covid-19 Before the H. Comm. on the Judiciary*, 116th Cong. 5 (2020) (statement of Michael D. Carvajal, Director of Bureau of Prisons) (explaining BOP COVID-19 response). The Director of Bureau of Prisons,

attempts to move vulnerable inmates to home confinement, many inmates looked to the courts for relief in the form of compassionate release after the BOP either denied their release or failed to respond to their requests.⁷

The pandemic did not cause the failures in the BOP's system for prisoner release, but it brought those failures to light in a devastating way.⁸ This note addresses those shortcomings, focusing on the widespread disparity among compassionate release decisions, and argues that these failures will continue unless Congress establishes clarifications and amendments to the current statutory framework.⁹ To achieve parity for sentence modification, (1) the home confinement and compassionate release statutes should be amended to include stricter regulations for BOP conduct;¹⁰ (2) Congress must explicitly make the compassionate release statute's exhaustion requirement waivable, thereby removing the BOP's "gatekeeper" role over sentence modification;¹¹ and (3) Congress must explicitly state that extraordinary and compelling circumstances must be assessed on the facts of each compassionate release motion.¹²

II. HISTORY

In the second half of the twentieth century, reformers focused on revising federal sentencing policies that gave wide discretion to sentencing

Michael D. Carvajal, testified before the Senate that BOP staff were conducting individualized assessments to ensure inmates' appropriateness for community placement. *Id.* at 4; *see also* FEDERAL BUREAU OF PRISONS, *supra* note 5 (counting inmates moved to home confinement). Between March 26, 2020, and October 2, 2020, the BOP placed 7,799 inmates on home confinement. FEDERAL BUREAU OF PRISONS, *supra* note 5. As of November 5, 2021, the BOP had 7,615 inmates on home confinement. FEDERAL BUREAU OF PRISONS, *supra* note 5.

⁷ See Neena Satija, 'Come on, we're human beings': Judges Question Response to Coronavirus Pandemic in Federal Prisons, THE WASHINGTON POST (May 13, 2020, 12:16 PM), https://www.washingtonpost.com/investigations/come-on-were-human-beings-judges-question-response-to-coronavirus-pandemic-in-federal-prisons/2020/05/12/925e5d32-912a-11ea-a9c0-73b93422d691_story.html (discussing rise in compassionate release cases in U.S. District Courts). In May of 2020, thousands of federal inmates had applied for compassionate release through the courts. *Id.*

⁸ See Joseph Neff & Keri Blakinger, *Few Federal Prisoners Released Under COVID-19 Emergency Policies*, THE MARSHALL PROJECT (Apr. 25, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies> (describing limited compassionate release grants). Between 2018 and the initial months of the pandemic, the BOP had released only 144 people, indicating that the issue was present before the pandemic. *Id.*

⁹ See discussion *infra* Section IV.

¹⁰ See discussion *infra* Section IV(A).

¹¹ See discussion *infra* Section IV(B).

¹² See discussion *infra* Section IV(C).

judges.¹³ In an attempt to ensure uniformity in criminal sentences across the federal court system, Congress passed the Sentencing Reform Act in 1984, which granted the U.S. Sentencing Commission the power to create sentencing policies for the federal courts.¹⁴ Congress instructed the Sentencing Commission to fashion its policies in a way that met the objectives of federal statutes governing punishment.¹⁵ Judges in the federal district courts follow statutory guidelines as well as the Sentencing Commission's guidelines to meet the policy and statutory objectives in the sentencing process.¹⁶

Once a court sentences a defendant, it maintains limited options for changing the sentence.¹⁷ Generally, the power to change an inmate's sentence rests with the BOP, which has two options for sentence modification.¹⁸ First, the BOP may move an inmate to home confinement after determining that the inmate has demonstrated a reduced recidivism risk and has served the requisite percentage of his sentence.¹⁹ Second, the BOP may motion the court to grant compassionate release if it finds "extraordinary

¹³ See Kate Stith & Steve Y. Koh, Article, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225-227 (1993) (detailing origins of federal sentencing reform). Reformers' central criticism of the sentencing system focused on the disparity of sentences handed down to persons who committed the same crimes. *Id.* at 227.

¹⁴ See Paul J. Hofer & Mark H. Allenbaugh, Article, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 43 (2003) (explaining Congressional delegation of power); see also 28 U.S.C. § 994 (outlining Sentencing Commission's duties).

¹⁵ See 18 U.S.C. § 3553 (instructing judges to impose sentences that are sufficient but not greater than necessary); 18 U.S.C. § 3582(a) (explaining factors federal courts must consider in sentencing).

¹⁶ See *Federal Sentencing Guidelines*, *supra* note 2 (presenting brief overview of Federal Sentencing Guidelines). The guidelines became effective in 1987 and "provide for 'very precise calibration of sentences, depending upon a number of factors. These factors relate both to the subjective guilt of the defendant and to the harm caused by his facts.'" *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 820 (1991)); see also *Mission*, UNITED STATES SENT'G COMM'N, <https://www.ussc.gov/about-page> (last visited Jan. 12, 2022) (listing objectives of the U.S. Sentencing Commission).

¹⁷ See 18 U.S.C. § 3582(c) (outlining court's options for modifying a sentence). The court may only modify a sentence if the BOP brings a motion for the inmate's release or if, after a lapse of thirty days from the warden receiving an inmate's request, the inmate brings a motion before the court. *Id.*

¹⁸ See 18 U.S.C. § 3624(c)(2) (authorizing BOP to place prisoners in home confinement); 18 U.S.C. § 3582(c) (stating BOP may bring motion for compassionate release on inmate's behalf).

¹⁹ See 18 U.S.C. § 3624(c)(2) (authorizing BOP to place prisoners in home confinement). Under the statute, the BOP has the authority to place a prisoner in home confinement for ten percent of the sentence or six months, whichever is shorter. *Id.*; see also Operations Memorandum from Hugh J. Hurwitz, Acting Dir. of the Fed. Bureau of Prisons, on Home Confinement under the First Step Act (April 4, 2019), <https://www.bop.gov/policy/om/001-2019.pdf> (explaining BOP's interpretation of First Step Act's language).

and compelling reasons” justify release.²⁰ Before a sentencing court may grant the BOP’s motion for compassionate release, the judge must find that extraordinary and compelling reasons warrant a reduction in sentence and that reducing an inmate’s sentence would still accomplish the goals of the Federal Sentencing Guidelines (“FSG”).²¹ Congress attempted to define the terms “extraordinary and compelling” by outlining specific factors for courts to consider when judging a compassionate release motion, including medical condition, age, and family circumstances.²² Before a court can consider a prisoner’s motion for compassionate release, however, the BOP must either (1) file a motion with the court or (2) deny the prisoner’s request through all stages of the administrative process.²³ While the system itself is inefficient, the BOP’s poor handling of the compassionate release program has compounded those inefficiencies.²⁴

The most recent change to the federal sentencing system occurred in 2018 when Congress passed the FIRST STEP Act (“FSA”), which modified sentencing guidelines as well as methods of release available to both the BOP and the courts.²⁵ Many of the changes enacted by the FSA aimed

²⁰ See 18 U.S.C. § 3582(c)(1)(A)(ii) (explaining statutory requirements for prisoner’s eligibility for compassionate release).

²¹ See 18 U.S.C. § 3582(c)(1)(A)(ii) (explaining statutory grant of compassionate release). A court may reduce a term of imprisonment if the judge finds the inmate’s circumstances to be extraordinary and compelling, and the judge also makes a finding regarding the factors set out in § 3553(a). *Id.*; see also 18 U.S.C. § 3553 (a)(1)-(2) (outlining factors courts must consider when imposing sentences). When imposing a sentence, courts must consider the nature of the offense as well as the defendant’s history and characteristics. 18 U.S.C. § 3553 (a)(1)-(2). Further, courts must consider the need to provide just punishment, afford adequate deterrence, protect the public, and provide the defendant with correctional treatment. 18 U.S.C. § 3553 (a)(1)-(2).

²² See 18 U.S.C. app. § 1B1.13 (explaining meaning of “extraordinary and compelling”). Medical conditions that qualify as extraordinary and compelling include terminal illnesses, serious physical or medical conditions, serious functional or cognitive impairments, or a deterioration of physical or mental health due to advanced age that inhibits an inmate’s ability to provide self-care in prison. *Id.* The policy statement also noted that the inmate’s age and family circumstances could potentially create extreme and extraordinary circumstances. *Id.* Finally, the statement notes that the Director of the BOP has the power to determine that extraordinary and compelling circumstances exist for a reason independent of health, age, or family circumstances. *Id.*

²³ See *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm’n* (2016) (statement of Michael E. Horowitz, Inspector General, Dep’t of Justice) (explaining department’s review of BOP’s compassionate release program).

²⁴ See *id.* (explaining flaws in BOP’s compassionate release procedures). “In our 2013 review, we found the BOP’s compassionate release program had been poorly managed and implemented inconsistently resulting in, among other things, deaths of inmates waiting to have their applications considered.” *Id.* Further, the BOP did not evaluate recidivism rates for the individuals that it did release, relying instead upon the general recidivism statistics of federal offenders, which was 41%. *Id.* However, the Office of the Inspector General’s evaluation found the recidivism rate of inmates granted compassionate release to be 3.5%. *Id.*

²⁵ See Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law – and What Happens Next*, BRENNAN CENTER FOR JUSTICE (Jan. 4, 2019), <https://www.brennancenter.org/our->

to actively lower the federal prison population, demonstrating a concerted effort to reduce incarceration levels.²⁶ The FSA explicitly directed the BOP to move qualifying prisoners to home confinement for the maximum time period.²⁷ Despite the new congressional directive, the BOP did not move inmates en masse to home confinement, which may be a result of the FSA's new system for gauging recidivism.²⁸ The FSA also amended the statutory structure for bringing a compassionate release claim by allowing inmates to bring a motion to the court in the event that the BOP either refused their request or failed to respond to their request within thirty days.²⁹ This amendment indicates a congressional acknowledgement of the BOP's failures in effectuating aspects of its gatekeeper role.³⁰

At the state level, forty-nine states have some form of early release statutes, which allow prisoners to request early release in situations of im-

work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next (describing the efforts of prison reform groups in passing First Step Act). "The FIRST STEP Act's overwhelming passage demonstrates that the bipartisan movement to reduce incarceration remains strong." *Id.*

²⁶ See Jonathan Feniak, *The First Step Act: Criminal Justice Reform at a Bipartisan Tipping Point*, 96 DENVER L. REV. ONLINE 166, 167-68 (2019) (describing objectives of FIRST STEP Act). The Act retroactively increased the good behavior credits that prisoners earn and also increased access to pre-release custody, such as home confinement and placement in residential reentry facilities. *Id.* "These provisions could lead to the immediate release of individuals who are currently incarcerated." *Id.* at 168.

²⁷ See First Step Act of 2018, Pub. L. No. 115-391, § 602, 132 Stat. 5194 (2018) (instructing BOP to increase use of home confinement).

²⁸ See Operations Memorandum from Hugh J. Hurwitz, Acting Dir. of the Fed. Bureau of Prisons, *supra* note 19 (instructing staff on proper interpretation of FIRST STEP Act directive regarding home confinement). The memorandum instructed Bureau staff to refer eligible inmates for home confinement at the maximum amount of time permitted under statutory scheme. *Id.*; see also Ames Grawert, *What Is the First Step Act – And What's Happening With It?*, BRENNAN CTR. FOR JUST. (June 23, 2020), <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it> (describing issues implementing aspects of FIRST STEP Act). The Department of Justice focuses its transfers on individuals who are at a low risk for recidivism as determined under a system called "PATTERN." Grawert, *supra* note 28. However, the system "appears to have been quietly revised to make it more difficult to reach a "minimum" score." Grawert, *supra* note 28.

²⁹ See First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194 (2018). ("[I]ncreasing the use and transparency of compassionate release.") The Act amended the provision in 18 U.S.C. § 3582 to allow a defendant to bring his own motion for compassionate release after he has exhausted all administrative appeals within the BOP or after thirty days from the warden's receipt of such request if there is no response. *Id.*

³⁰ See *United States v. Rodriguez*, 451 F. Supp. 3d 392, 395 (E.D. Pa. 2020) (noting BOP's failure to move inmates to home confinement). Although Congress first authorized the BOP to file compassionate release motions in 1984, between the period of 1984 and 2013, the BOP only released an average of twenty-four inmates through BOP motions to the court each year. *Id.* The BOP lacked clear standards governing compassionate release, which resulted in staff members having inconsistent understandings of which circumstances warranted compassionate release. *Id.* at 395-96.

minent death or significant illness.³¹ The Massachusetts legislature, for instance, recently enacted a medical parole statute, which allows prisoners to request medical parole in cases of illness or permanent incapacitation.³² Notably, the Massachusetts statute imposes requirements on the superintendent of the prison, including a timeframe for responding to requests as well as what the response must entail.³³ In this way, the Massachusetts statute differs from the federal statute, which imposes no affirmative duty on the BOP to respond to requests for home confinement or compassionate release.³⁴

III. FACTS

In early 2020, the novel coronavirus began spreading through the country, rapidly evolving into a pandemic.³⁵ During the first few months of the pandemic, the virus reached the federal prison system and quickly spread through facilities across the country.³⁶ As the federal government worked to ameliorate the pandemic's damaging effects on the economy and public health, Congress passed the CARES Act, which in part addressed

³¹ See Mary Price, *Everywhere and Nowhere Compassionate Release in the States*, FAMILIES AGAINST MANDATORY MINIMUMS 8 (June 2018), <https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf> (comparing number of states with compassionate release to number of inmates granted compassionate release); CAL. PENAL CODE § 3550 (2017) (outlining medical parole procedure). The head physician of the prison shall make a determination within thirty days of receiving a request. CAL. PENAL CODE § 3550(d) (2017); MASS. GEN. LAWS ANN. ch. 127, § 119A (2018) (describing medical parole procedure).

³² See MASS. GEN. LAWS ANN. ch. 127, § 119A (2018) (describing medical parole procedure); MASS. GEN. LAWS ANN. ch. 127, § 119A(b) (2018) (explaining who qualifies for medical parole).

³³ See MASS. GEN. LAWS ANN. ch. 127, § 119A(c)(1) (2018) (detailing superintendent's statutory duties).

³⁴ See 18 U.S.C. § 3582(c)(1)(A)(ii) (explaining statutory grant of compassionate release); see also 18 U.S.C. § 3624(c)(2) (granting home confinement power to BOP).

³⁵ See AJMC Staff, *A Timeline of COVID-19 Developments in 2020*, AJMC (January 1, 2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020> (providing timeline of COVID-19 outbreak).

³⁶ See Josh Gerstein, *Judge Orders Transfer or Release for Some Inmates at Virus Wracked Ohio Federal Prison*, POLITICO (Apr. 22, 2020, 11:58 PM), <https://www.politico.com/news/2020/04/22/coronavirus-prisoners-released-ohio-louisiana-202953> (discussing COVID-19 outbreaks at FCI Elkton and FCI Oakdale); Byron Tollefson, *70% of Inmates at Waseca Prison Have Contracted COVID-19, FMC Outbreak Reaches New High*, KTTCC (Oct. 1, 2020, 11:08 AM), <https://kttc.com/2020/10/01/70-of-inmates-at-waseca-prison-have-contracted-covid-19-fmc-outbreak-reaches-new-high/> (noting 70% of prisoners at FCI Waseca contracted COVID-19); Keegan Hamilton & Keri Blakinger, *'Con Air' Is Spreading COVID-19 All Over the Federal Prison System*, THE MARSHALL PROJECT (Aug. 13, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/08/13/con-air-is-spreading-covid-19-all-over-the-federal-prison-system> (describing prison outbreaks after U.S. Marshal Service's transport of inmates without testing for coronavirus).

COVID-19 outbreaks among the federal prison population and specifically instructed the BOP to increase home confinement for qualified inmates.³⁷

After Congress issued this directive, Attorney General William Barr distributed a memorandum to the BOP on March 26, 2020, directing staff to prioritize granting home confinement to inmates seeking transfer in connection with the pandemic, while also requiring a fourteen-day quarantine period for inmates pre-release.³⁸ Barr's first memorandum included a non-exhaustive list of factors for BOP staff to consider when reviewing requests for home confinement, including the inmate's vulnerability to COVID-19, the inmate's score under the PATTERN system for gauging recidivism, the inmate's re-entry plan, and the seriousness of the original offense.³⁹ Barr issued a subsequent memorandum on April 3, 2020, in which he instructed the BOP to immediately expand transfers of eligible inmates to home confinement from the three federal prisons with the worst outbreaks, while cautioning against releasing inmates who pose a danger to the public.⁴⁰

Despite Congressional directive through the CARES Act and Attorney General Barr's instructions, the BOP demonstrated difficulty controlling outbreaks and efficiently moving inmates to home confinement.⁴¹

³⁷ See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281 (2020) (outlining increased home confinement power). As part of the CARES Act, Congress gave the Attorney General the power to increase the maximum amount of time that the BOP is authorized to place an inmate in home confinement under 18 U.S.C. § 3624(c)(2). *Id.*

³⁸ See Memorandum from the Att'y Gen. to the Dir. of Bureau of Prisons on the Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic (Mar. 26, 2020), https://www.bop.gov/resources/news/pdfs/20200405_covid-19_home_confinement.pdf (instructing BOP to prioritize granting home confinement due to COVID-19).

³⁹ See *id.* (outlining factors to consider when granting home confinement). Barr noted that he believed there were inmates who would be safer remaining in the prison environment, "where the population is controlled and there is ready access to doctors and medical care." *Id.*

⁴⁰ See Memorandum from the Att'y Gen. to the Dir. of Bureau of Prisons on Increasing Use of Home Confinement at Institutions Most Affected by COVID-19 (Apr. 3, 2020), <https://www.justice.gov/file/1266661/download> (instructing increased use of home confinement at FCIs Oakdale, Danbury, and Elkton). Barr specifically noted that BOP staff should review all at-risk inmates, not only those who were already eligible for home confinement. *Id.* Barr discussed the risk this policy posed to the public, saying:

The last thing our massively overburdened police forces need right now is the indiscriminate release of thousands of prisoners onto the streets without any verification that those prisoners will follow the laws when they are released Thus, while I am directing you to maximize the use of home confinement it is essential that you continue making the careful, individualized determinations BOP makes in the typical case.

Id.

⁴¹ See Neff & Blakinger, *supra* note 8 (describing failure to move inmates to home confinement). In the three weeks following Barr's April 3 memorandum, the BOP moved 1,027 people

At Federal Correctional Institution (“FCI”) Oakdale, one of the prisons Attorney General Barr specifically addressed as a hotspot, eleven prisoners died of COVID-19 between late March and April 25, 2020; the facility only released thirteen inmates total.⁴² In a report that the Department of Justice (“DOJ”) compiled regarding COVID-19 policies at FCI Lompoc in California, the DOJ specifically noted that the BOP’s use of home confinement to stop the spread of COVID-19 was extremely limited, reporting that as of May 13, 2020, over 900 inmates at Lompoc had contracted COVID-19.⁴³ During that time period, the BOP had transferred only eight inmates to home confinement from that prison.⁴⁴

During the early stages of the pandemic, BOP confusion over its own home confinement policy compounded its mismanagement of the program.⁴⁵ The BOP frequently changed its policy regarding the requisite percentage of a sentence an inmate must serve before the BOP can consider home confinement.⁴⁶ This lack of clarity led BOP staff to inform prisoners, who were set to be released, that they no longer qualified.⁴⁷ The BOP also

to home confinement, which is about half of one percent of the total BOP population at the start of April. *Id.*; see also Gerstein, *supra* note 36 (discussing outbreak at FCI Elkton). A district court judge in Ohio ordered the BOP to release hundreds of elderly or vulnerable inmates from FCI Elkton, noting that, “efforts to combat the virus at the Elkton prison in Lisbon, Ohio were failing.” Gerstein, *supra* note 36. The judge further stated that although the prison had the highest infection rates in the country, “with fewer than 100 of the 2,400 inmates at Elkton tested, the actual infection rate could be much higher . . .” *Id.* In contrast, the state prison nearby had conducted thousands of tests. *Id.*

⁴² See Neff & Blakinger, *supra* note 8 (describing issues implementing Attorney General Barr’s policies). Several family members of inmates shared stories in which the BOP moved prisoners into pre-release quarantine for up to two weeks before moving them back to the general population without an explanation. *Id.*

⁴³ See *Pandemic Response Report 20-086, Remote Inspection of Federal Correctional Complex Lompoc*, DEP’T OF JUST., OFF. OF THE INSPECTOR GEN. (July 2020), <https://oig.justice.gov/sites/default/files/reports/20-086.pdf> (detailing problems with COVID-19 policy at FCC Lompoc).

⁴⁴ See *id.* (noting problems with COVID-19 policy at FCC Lompoc).

⁴⁵ See Josh Gerstein, *Feds again shift guidance on prisoner releases due to coronavirus*, POLITICO (Apr. 23, 2020, 11:57 PM), <https://www.politico.com/news/2020/04/23/coronavirus-prisons-206155> (describing confusion with Barr’s new policy regarding home confinement); Neff & Blakinger, *supra* note 8 (discussing issues with fourteen-day quarantine period); see also *United States v. Scparta*, 18-cr-578, 2020 U.S. Dist. LEXIS 68935, at *1-2 (S.D.N.Y. Apr. 19, 2020) (discussing impracticality of quarantine procedure).

⁴⁶ See Gerstein, *supra* note 45 (describing confusion with Barr’s changing policies regarding home confinement).

⁴⁷ See *id.* (describing confusion with Barr’s changing policies regarding home confinement). Initially, BOP policy required inmates to serve twenty-five percent of their sentences before being considered for home confinement; however, in April, the BOP issued new guidance indicating that inmates must serve fifty percent of their sentences before being considered. *Id.* The BOP then retracted that guidance and issued a new policy requiring inmates to serve more than twenty-five percent of their sentence and have less than eighteen months remaining in their sentence. *Id.*

sowed confusion through changing policies surrounding pre-release quarantine for inmates eligible for home confinement.⁴⁸ In practice, it proved difficult for prison facilities to safely quarantine prisoners who were set for home confinement due to an inability to individually isolate inmates.⁴⁹ Facilities housed inmates set for home confinement with other similarly-situated inmates, leading to cycles of infection, which kept inmates who qualified for release in prison.⁵⁰

As the BOP struggled to move individuals to home confinement, more inmates took their requests to the courts, utilizing their newly granted right under the FSA to bring compassionate release motions without a motion from the BOP.⁵¹ However, a federal circuit split formed as judges analyzed compassionate release motions in the setting of the pandemic.⁵² Further, federal appellate courts are limited in reviewing sentencing matters for abuse of discretion, resulting in very few precedent-setting decisions to aid

Some inmates were preparing to be released, had their release revoked during the first policy change, and then qualified again after the second policy change, but had to start their fourteen-day quarantine period from the beginning. *Id.*

⁴⁸ See Memorandum from the Att’y Gen. to the Dir. of Bureau of Prisons, *supra* note 38 (requiring fourteen-day quarantine period prior to release).

⁴⁹ See *Scparta*, 2020 U.S. Dist. LEXIS 68935, at *1-2 (discussing impracticality of quarantine procedure).

⁵⁰ See *id.* (outlining impracticality of quarantine procedure). The BOP determined *Scparta* was eligible for home confinement but required a fourteen-day custodial quarantine. *Id.* at *1. However, the judge explained the BOP’s quarantine policy, stating:

Mr. *Scparta* is housed with many other people in conditions that will inevitably permit the virus to spread. Moreover, as of April 14, the BOP determined that Mr. *Scparta*’s 14-day-clock must *start over* because one of the many people he is now housed with tested positive. Under the BOP’s policy, if any one of the individuals in Mr. *Scparta*’s unit, most of whom have *also* been approved for home confinement, tests positive, the 14-day waiting period for *all* inmates in the unit starts anew. The Government also revealed that, despite express authority from the Attorney General to do so, the BOP has not and will not consider permitting Mr. *Scparta* to self-quarantine in his residence for 14 days.

Id. at *2. The judge went on to term this policy “Kafkaesque” and immediately released the defendant. *Id.*; see also *Neff & Blakinger*, *supra* note 8 (discussing judge’s decision in *Scparta*’s case).

⁵¹ See First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194 (2018) (“increasing the use and transparency of compassionate release”); *Satija*, *supra* note 7 (noting rise of compassionate release cases). According to federal public defenders, over the first three months of the pandemic, thousands of inmates sought compassionate release. *Satija*, *supra* note 7.

⁵² See *Walter Pavlo*, *Federal Judge Rulings Across Country Inconsistent on Compassionate Release*, FORBES (June 19, 2020, 2:57 PM), <https://www.forbes.com/sites/walterpavlo/2020/06/19/federal-judge-rulings-across-country-inconsistent-on-compassionate-release/#2eff55c24c38> (describing inconsistencies in decisions across circuits).

sentencing judges in making compassionate release decisions.⁵³ Within circuits themselves, judges remain split on issues pertinent to compassionate release.⁵⁴

District courts disagree on the exhaustion requirement under the compassionate release statute, which mandates that an inmate must either exhaust his options for administrative appeals, or wait until the warden fails to respond to his request within thirty days before bringing a compassionate release motion.⁵⁵ The exhaustion requirement became the focal issue in many compassionate release cases during the pandemic, as the BOP often failed to make an initial response to many inmates' requests.⁵⁶ When interpreting the statute, judges first looked to whether the exhaustion requirement creates a grant of jurisdiction or whether it is a waivable claims processing rule for judicial efficiency.⁵⁷ Most federal district courts have found the exhaustion requirement to be a claims-processing rule, which a judge may waive if an inmate has not exhausted his administrative appeals or waited thirty days after submitting a request to the warden.⁵⁸ However, both the Third Circuit and the Tenth Circuit have held that the exhaustion requirement is jurisdictional, meaning the district courts cannot hear a motion unless the inmate meets the exhaustion requirement.⁵⁹ The Sixth Cir-

⁵³ See *United States v. Raia*, 954 F.3d 594, 596 (3d Cir. 2020) (stating court's inability to hear defendant's motion for compassionate release); *United States v. Borden*, 564 F.3d 100, 101 (2d Cir. 2009) (holding abuse of discretion as appropriate standard of review for appeal of compassionate release motion).

⁵⁴ See *United States v. Haney*, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020) (holding court has power to waive exhaustion where strict enforcement does not serve Congressional objectives). *But see* *United States v. Roberts*, 18-CR-528-5, 2020 U.S. Dist. LEXIS 62318, at *9 (S.D.N.Y. Apr. 8, 2020) (holding court does not have power to waive exhaustion).

⁵⁵ See 18 U.S.C.S. § 3582(c)(1)(A) (explaining statutory grant of compassionate release to enable modified term of imprisonment).

⁵⁶ See *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 446 (D. Conn. 2020) (highlighting BOP's failure to efficiently review compassionate release requests).

⁵⁷ See *Bowles v. Russell*, 551 U.S. 205, 212 (2007) (noting claims processing rules may be waived while jurisdictional rules may not); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013) (discussing principal inquiry when analyzing whether rules are jurisdictional). Unless Congress clearly states that a rule is jurisdictional, courts should presume it is non-jurisdictional. *Auburn Reg'l Med. Ctr.*, 568 U.S. at 154.

⁵⁸ See *United States v. Salvagno*, 5:02-CR-51, 2020 U.S. Dist. LEXIS 109879, at *47 (N.D.N.Y. June 22, 2020) (finding exhaustion requirement non-jurisdictional). The exhaustion requirement controls the process for inmates bringing compassionate release claims, making it a non-jurisdictional claims-processing rule. *Id.*; *United States v. Haney*, 454 F. Supp. 3d 316, 320 (S.D.N.Y. 2020) (finding exhaustion requirement non-jurisdictional). The statute "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [federal] courts." *Haney*, 454 F. Supp. 3d at 320 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)).

⁵⁹ See *United States v. Raia*, 954 F.3d 594, 596 (3d Cir. 2020) (noting inability to hear defendant's case). The text of the statute requires the sentencing courts to hear motions for compassionate release. *Id.*; *United States v. Davis*, 19-CR-64-F, 2020 U.S. Dist. LEXIS 85409, at *8-9

cuit also found an inability to waive the exhaustion requirement, focusing on the administrative necessity of the BOP's role in the compassionate release process.⁶⁰

Although a majority of district court judges have found the exhaustion requirement to be non-jurisdictional, these courts are split on whether to waive the exhaustion requirement in the setting of the pandemic.⁶¹ District court judges that have waived the exhaustion requirement point to the unique complications a pandemic poses along with the BOP's difficulties in efficiently responding to inmate's requests for compassionate release.⁶²

(D. Wyo. May 13, 2020) (holding court lacks jurisdiction to hear defendant's motion); *United States v. Baca*, CR 16-1613, 2020 U.S. Dist. LEXIS 163305, at *40 (D.N.M. Sept. 8, 2020) (recognizing during COVID-19, all Tenth Circuit district courts have held exhaustion requirement jurisdictional).

⁶⁰ See *United States v. Alam*, 960 F.3d 831, 834 (6th Cir. 2020) (explaining government's reasoning in maintaining exhaustion requirement). "[The government] wants to implement an orderly system for reviewing compassionate-release applications, not one that incentivizes line jumping." *Id.*

⁶¹ See *United States v. Ramirez*, 459 F. Supp. 3d 333, 344 (D. Mass. 2020) (holding court has discretion to waive exhaustion requirement). The court found that the COVID-19 pandemic allowed for an exception because "the coronavirus can enter a prison and spread undetected, [so] a wait of even 28 days . . . would render futile any attempt by the BOP to 'resolve' a compassionate release request 'in the applicant's favor' because the defendant may have already been exposed to the virus." *Id.* But see *United States v. Eberhart*, 448 F. Supp. 3d 1086, 1088-90 (N.D. Cal. 2020) (finding court without authority to hear defendant's claim). The court noted that the defendant failed to demonstrate the futility in exhaustion, pointing to the BOP's outbreak control plan. *Id.*

⁶² See *United States v. Pena*, 459 F. Supp. 3d 544, 549 (S.D.N.Y. 2020) (holding "the statute's exhaustion requirement is amenable to equitable exceptions.") Equitable exceptions to the exhaustion requirement are necessary in the setting of COVID-19 to ensure that inmates "obtain timely judicial review before the virus takes its toll." *Id.* The court pointed to the text and legislative history of the First Step Act when concluding that the statute's purpose is to ensure the expeditious review of applications, and that this purpose is best served through equitable exceptions to the exhaustion requirement. *Id.*; see also *United States v. Haney*, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020) (holding court has power to waive exhaustion requirement). The court points to the hybrid requirement, which allows an inmate to either exhaust or wait thirty days for a response, as evidence that Congress foresaw situations where the BOP could not respond in thirty days and "was determined not to let such exigencies interfere with the right of a defendant to be heard in court on his motion for compassionate release . . ." *Haney*, 454 F. Supp. 3d at 321. The court also addressed the argument that the exhaustion requirement benefits judicial efficiency and found that, in the setting of a pandemic, it has the opposite effect. *Haney*, 454 F. Supp. 3d at 321. Because prisoners are frustrated with the pace of the BOP's response to the high number of requests received, they are bringing petitions to the court "en masse." *Haney*, 454 F. Supp. 3d at 321. As a result, courts must determine each motion twice: first, to hold that the exhaustion requirement is not satisfied; and second, to decide the motion on its merits once the thirty-day period has elapsed and the inmate has brought the motion forward a second time. *Haney*, 454 F. Supp. 3d at 321-322; see also Letter from John W. Lungstrum & James C. Duff, Jud. Conf. of the U.S., to the Hon. Nita Lowey, et al., Chairwoman, H. Comm. on Appropriations (Apr. 28, 2020), https://www.uscourts.gov/sites/default/files/judiciary_covid-19_supplemental_request_to_house_and_senate_judiciary_and_approps_committees.4.28.2020_0.pdf (requesting Congress temporarily amend compassionate release statute).

Other district court judges have held that they do not have the power to waive the exhaustion requirement, finding that legislative intent and the BOP's attempts to curb outbreaks prevent defendants from seeking relief until they have exhausted their administrative remedies or waited thirty days without a response from the warden.⁶³ Because so few appellate courts have decided whether courts have the power to waive exhaustion, judges within the same district have decided differently regarding the issue.⁶⁴

When district court judges decide compassionate release motions on the merits, there are discrepancies in their decisions regarding what health conditions qualify as extraordinary and compelling.⁶⁵ Some judges closely adhere to the specific medical conditions listed in the sentencing commission's policy statement accompanying the compassionate release statute, which requires that an inmate's medical condition be serious and advanced with an end-of-life trajectory.⁶⁶ Other judges utilize the sentenc-

⁶³ See *United States v. Roberts*, No. 18-CR-528-5, 2020 U.S. Dist. LEXIS 62318, at *7 (S.D.N.Y. Apr. 8, 2020) (holding exhaustion not waivable). The court states that the legislative history indicates "that Congress recognized the importance of expediting applications for compassionate release and still chose to require a thirty-day waiting period." *Id.*; see also *Eberhart*, 448 F. Supp. 3d at 1088-89 (finding defendant failed to demonstrate futility of administrative remedies). The court specifically pointed to the jail's implementation of an outbreak control plan and the lack of COVID-19 cases at the institution. *Eberhart*, 448 F. Supp. 3d at 1089; *United States v. Feiling*, 453 F. Supp. 3d 832, 837 (E.D. Va. 2020) (holding even if exhaustion could be waived for futility, defendant failed to demonstrate futility). The court found that the presence of COVID-19 in a facility combined with an inmate's particular susceptibility to it is not enough to prove futility. *Feiling*, 453 F. Supp. 3d at 838-39. Further, the court pointed to the BOP's efforts to create a "safe and healthy prison environment" as evidence that the BOP would prioritize the defendant's request for home confinement. *Feiling*, 453 F. Supp. 3d at 839; *United States v. Isidaehomen*, No. 3:16-CR-0240-B-4, 2020 U.S. Dist. LEXIS 179408, at *3-4 (N.D. Tex. Sept. 30, 2020) (holding defendant did not meet exhaustion requirement). The defendant's request to the warden was titled "Petition for Home Confinement Release" and mentioned compassionate release twice. *Id.* at *4. However, because she asked for home confinement, the court characterized the request as one for home confinement and, as a result, found that she had not exhausted her administrative appeals for compassionate release. *Isidaehomen*, 2020 U.S. Dist. LEXIS 179408, at *4-5; *United States v. Rodriguez*, No. 15-198, 2020 U.S. Dist. LEXIS 162923, at *3-4 (E.D. La. Sept. 5, 2020) (holding defendant failed to satisfy exhaustion requirement). The defendant filed his motion with the court six days after sending a request to the warden; although thirty days passed since the initial request, the court found that because the defendant filed the motion after only six days, he failed to meet the exhaustion requirement. *Rodriguez*, 2020 U.S. Dist. LEXIS 162923, at *3-4.

⁶⁴ See *Haney*, 454 F. Supp. 3d at 321 (holding court has power to waive exhaustion). *But see Roberts*, 2020 U.S. Dist. LEXIS 62318, at *7 (holding court does not have power to waive exhaustion).

⁶⁵ See Pavlo, *supra* note 52 (describing inconsistencies in decisions regarding compassionate release).

⁶⁶ See 18 U.S.C. app. § 1B1.13, Application Notes (defining extraordinary and compelling medical conditions); see also *United States v. Clark*, 451 F. Supp. 3d 651, 656 (M.D. La. 2020) (finding defendant failed to prove extraordinary and compelling circumstances). The defendant

ing commission's last listed category, a catch-all category that allows the BOP or a judge to find a defendant's medical condition sufficient to satisfy the extraordinary and compelling requirement if there is another alternative extraordinary and compelling reason either separate from the explicitly listed medical conditions or in combination with those conditions.⁶⁷

Judges who find extraordinary and compelling circumstances when an inmate has a non-life-threatening illness that may become life-threatening in conjunction with COVID-19 are then split on which underlying conditions qualify as risk factors.⁶⁸ For example, the Centers for Disease Control and Prevention ("CDC") lists hypertension as an underlying condition that might increase the risk of death should the individual contract COVID-19; however, district court judges are not in agreement about whether hypertension, in conjunction with the risk of COVID-19, rises to the level of extraordinary and compelling.⁶⁹ Courts, some within the same

was sixty-seven years old, with high blood pressure, high cholesterol, and sleep apnea. *Clark*, 451 F. Supp. at 652. The court found that the defendant did not meet any of the statutory criteria, because he was not terminally ill, nor suffering from a serious medical condition. *Clark*, 451 F. Supp. at 656; *United States v. Mondragon*, No. 4:18-CR-132, 2020 U.S. Dist. LEXIS 120273, at *10-13 (E.D. Tex. July 8, 2020) (finding no extraordinary and compelling reasons in defendant's case). Although the defendant had hypertension, gout, arthritis, diabetes, and hypothyroidism, the court found that "[n]one of these medical conditions is terminal or substantially diminishes his ability to provide self-care." *Mondragon*, 2020 U.S. Dist. LEXIS 120273, at *11-12.

⁶⁷ See 18 U.S.C. app. § 1B1.13, Application Notes (defining extraordinary and compelling medical conditions); *United States v. Rodriguez*, 451 F. Supp. 3d 392, 395 (E.D. Pa. 2020) (concluding court may assess whether extraordinary and compelling circumstances exist under § 1B1.13). The court found that the defendant's underlying health conditions constituted extraordinary and compelling circumstances in the context of the pandemic. *Rodriguez*, 451 F. Supp. 3d at 395; see also *United States v. McIntosh*, No. 11-20085-01-KHV, 2020 U.S. Dist. LEXIS 176446, at *16 (D. Kan. Sept. 25, 2020) (noting court has authority to "consider whether defendant's medical condition—combined with the risk of contracting COVID-19 . . . constitute 'other' extraordinary and compelling reasons for a reduced sentence.")

⁶⁸ See Pavlo, *supra* note 52 (describing inconsistencies regarding findings of extraordinary and compelling circumstances).

⁶⁹ See *Coronavirus Disease 2019 (COVID-19), People with Certain Medical Conditions*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (Oct. 14 2021) (listing hypertension as risk factor for COVID-19); see also *United States v. McLin*, No. 1:17-CR-110-LG-RHW, 2020 U.S. Dist. LEXIS 118319, at *7 (S.D. Miss. July 7, 2020) (noting lack of clarity in CDC guidance regarding hypertension); *McIntosh*, 2020 U.S. Dist. LEXIS 176446, at *17 (holding hypertension does not compel finding of extraordinary and compelling). Defendant was 39 years old and housed at USP Thompson, which was experiencing a COVID-19 outbreak. *McIntosh*, 2020 U.S. Dist. LEXIS 176446, at *2-3; *Mondragon*, 2020 U.S. Dist. LEXIS 120273, at *12-13 (noting defendant's circumstances do not rise to the level of extraordinary and compelling). The defendant's medical conditions included hypertension and type 2 diabetes. *Mondragon*, 2020 U.S. Dist. LEXIS 120273, at *11. *But see* *United States v. Cardena*, 461 F. Supp. 3d 798, 803 (N.D. Ill. 2020) (noting both of defendant's hypertension and diabetes are underlying risk factors per CDC); *United States v. Pena*, 459 F. Supp. 3d 544, 550 (S.D.N.Y. 2020) (stating

circuit, are similarly split over whether asthma qualifies as an underlying risk factor that could warrant a finding of extraordinary and compelling based on the risk of COVID-19.⁷⁰

Even when judges do find that an inmate has an underlying condition that places the inmate at an increased risk for serious illness, many courts will not grant compassionate release on this basis alone.⁷¹ District courts are further split on whether an inmate must prove that there is an outbreak at his or her prison to meet the standard of extraordinary and compelling.⁷² Some district courts follow the reasoning of the Third Circuit in *United States v. Raia* and require that a defendant show a particularized risk of contracting COVID-19 by proving that there is an outbreak in his prison facility.⁷³ Other district courts have noted that the lack of testing in

“[t]his Court has repeatedly recognized that COVID-19 presents a heightened risk for individuals with hypertension”)

⁷⁰ See *Coronavirus Disease 2019 (COVID-19), People with Certain Medical Conditions*, *supra* note 69 (listing asthma as risk factor for COVID-19); see also *United States v. Echevarria*, No. 3:17-cr-44 (MPS), 2020 U.S. Dist. LEXIS 77894, at *8-9 (D. Conn. May 4, 2020) (granting compassionate release based on defendant’s medical condition of bronchial asthma). *But see* *United States v. Rodriguez*, 454 F. Supp. 3d 224, 228 (S.D.N.Y. 2020) (finding defendant did not meet his burden of showing extraordinary and compelling circumstances). Although the defendant’s medical records confirmed a lifelong diagnosis of asthma, the court found that he failed to show “that he falls into the narrow band of inmates who are ‘suffering from a serious physical or medical condition,’ ‘that substantially diminishes the ability of the Defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.’” *Rodriguez*, 454 F. Supp. 3d at 228 (quoting U.S.C. §1B1.13, Application Note 1(A)). The court further found that the defendant did not indicate to the court how his asthma has “proved a problem lately.” *Rodriguez*, 454 F. Supp. 3d at 228.

⁷¹ See *McLin*, 2020 U.S. Dist. LEXIS 118319, at *7 (finding preexisting conditions alone not enough to establish extraordinary and compelling). Despite holding that “preexisting conditions are not in themselves sufficient to establish extraordinary and compelling reasons justifying a reduction in sentence,” the court found that the defendant’s medical vulnerability in conjunction with the outbreak at his federal prison weighed in favor of his release. *Id.* at *8.

⁷² See *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020) (finding “the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release”) The court pointed to the BOP’s extensive efforts to contain the virus when explaining its decision not to grant compassionate release. *Id.* *But see* *United States v. Feucht*, 462 F. Supp. 3d 1339, 1342-43 (S.D. Fla. 2020) (finding absence of COVID-19 cases not dispositive). The court expressed its belief that zero confirmed cases in a prison does not mean that there are no COVID-19 cases, and noted the lack of universal testing in federal prisons. *Feucht*, 462 F. Supp. 3d at 1342. Further, the court recognized that, based on the virus’s ability to spread rapidly, a lack of confirmed cases does not mean inmates are safe from the virus. *Feucht*, 462 F. Supp. 3d at 1342.

⁷³ See *Raia*, 954 F.3d at 597 (finding existence of COVID-19 in society not enough to prove extraordinary and compelling); see also *United States v. Mondragon*, No. 4:18-CR-132(5), 2020 U.S. Dist. LEXIS 120273, at *14 (E.D. Tex. July 8, 2020) (finding defendant failed to prove existence of extraordinary and compelling circumstances). Although the defendant was suffering from hypertension and Type 2 diabetes, the court noted that no inmates or staff had tested positive at his facility. *Mondragon*, 2020 U.S. Dist. LEXIS 120273 at *11, *14; *United States v. Feiling*, 453 F. Supp. 3d 832, 841 (E.D. Va. 2020) (finding defendant failed to establish “a particular-

federal prisons, combined with the rapid spread of the virus, make it unjust to require proof of positive cases in a facility to prove extraordinary and compelling circumstances.⁷⁴ Finally, some district court judges have held that it is not enough to prove the existence of a COVID-19 outbreak in the defendant's prison facility; rather, if there is an outbreak in his facility, a defendant must then prove that the BOP is not equipped to manage the outbreak.⁷⁵

Because of these discrepancies, judges in two different circuits looked at the same prison, FCI Loretto, and came to opposite conclusions regarding whether each defendant proved the conditions of the prison demonstrated a particularized risk of contracting COVID-19.⁷⁶ Similarly,

ized risk of contracting the disease.”) The court found that the defendant established a particularized susceptibility to COVID-19 based on his comorbidities, including respiratory and heart conditions. *Feiling*, 453 F. Supp. 3d at 841. However, because the BOP had not confirmed a case of COVID-19 at his facility, the court found defendant's request was premised on the “mere possibility that COVID-19 will spread to his facility.” *Feiling*, 453 F. Supp. 3d at 841.

⁷⁴ See *Feucht*, 462 F. Supp. 3d at 1342 (finding the absence of COVID-19 cases not dispositive); *United States v. Amarrah*, 458 F. Supp. 3d 611, 618 (E.D. Mich. 2020) (noting “[z]ero confirmed COVID-19 cases is not the same thing as zero COVID-19 cases.”) The court further stated,

[f]or these reasons, unless and until FCI Loretto implements a universal testing regimen, the Court gives no weight to the zero ‘confirmed’ COVID-19 cases statistic – particularly because BOP is housing detainees together, because the United States could not give the Court any information regarding current testing practices, and because basic disinfecting tools such as soap and hand sanitizer are not universally provided to the population.

Amarrah, 458 F. Supp. 3d at 618; see also Sadie Gurman, *More Than 70% of Inmates Tested in Federal Prisons Have Coronavirus*, THE WALL STREET JOURNAL (Apr. 30, 2020, 9:07 AM), <https://www.wsj.com/articles/more-than-70-of-inmates-tested-in-federal-prisons-have-coronavirus-11588252023> (noting “[m]ore than two thirds of the small number of federal prisoners who have been tested for the new coronavirus had positive results”)

⁷⁵ See *United States v. Isidaehomen*, No. 3:16-CR-0240-B-4, 2020 U.S. Dist. LEXIS 179408, at *6 (N.D. Tex. Sept. 30, 2020) (finding COVID-19's “generalized effect” on defendant's facility does not establish specific extraordinary and compelling circumstances). Although defendant's facility at the time of her motion had nine active COVID-19 cases with 529 recovered cases, and six deaths, the court did not find these statistics compelling in making a finding of extraordinary and compelling. *Id.* at *1-2, *6; see also *United States v. McIntosh*, No. 11-20085-01-KHV, 2020 U.S. Dist. LEXIS 176446, at *17 (D. Kan. Sept. 25, 2020) (noting that despite an outbreak, only four inmates tested positive and had not recovered). Although, at the time of defendant's motion, fifty-eight inmates and fifty-five staff had tested positive, defendant failed to show that he faced a heightened risk of exposure to COVID-19 at USP Thompson compared to home confinement or community placement. *McIntosh*, 2020 U.S. Dist. LEXIS 176446, at *3, *17.

⁷⁶ See *Amarrah*, 458 F. Supp. 3d at 617 (finding absence of COVID-19 cases not dispositive in determining extraordinary and compelling circumstances). The court gave no weight to the argument that there were no confirmed cases at FCI Loretto because the BOP was housing inmates together and not providing universal testing or access to hygienic products. *Id.* at 618. *But see Feiling*, 453 F. Supp. 3d at 841 (finding defendant failed to “demonstrate a particularized risk of contracting the disease.”) The defendant based his request on the possibility that COVID-19

judges have reached different conclusions regarding whether the conditions at FCI Fort Dix constitute an outbreak that would create a need for an equitable exception to the exhaustion requirement.⁷⁷

When deciding compassionate release motions, judges often look at a defendant's plan for release and re-entry to ensure that granting the motion will not put the public at risk for future harm.⁷⁸ However, in the setting of COVID-19, judges must consider not only the potential that an inmate will recidivate but also the potential that the inmate will spread the virus to the greater community.⁷⁹ This has created another split among judges as to whether a defendant's release option that involves residing with family members is a safe option.⁸⁰ Judges tend to look favorably on inmate requests that demonstrate that the inmate has the means and support to create a lower risk environment outside of prison.⁸¹

Finally, in deciding a motion for compassionate release, judges must consider the factors laid out in 18 U.S.C. § 3553(a), which outlines

would enter his facility in the future as the BOP had not yet confirmed a case of COVID-19 at FCI Loretto. *Feiling*, 453 F. Supp. 3d at 841. The court found this insufficient to justify compassionate release because it did not demonstrate that the defendant had a particularized risk of contracting COVID-19. *Feiling*, 453 F. Supp. 3d at 841.

⁷⁷ See *United States v. Garcia*, 460 F. Supp. 3d 403, 409 (S.D.N.Y. 2020) (noting lack of outbreak at FCI Fort Dix). The court found that "Fort Dix is not a facility that has seen a massive outbreak of COVID-19. With 2,936 inmates, it has only 40 documented cases as of May 4." *Id.* But see *United States v. Pena*, 459 F. Supp. 3d 544, 549 (S.D.N.Y. 2020) (finding exhaustion requirement futile based on outbreak at FCI Fort Dix). The judge noted that FCI Fort Dix "is the most heavily populated BOP facility and has had 43 confirmed cases of COVID-19." *Id.* The judge found that requiring the defendant to wait an additional three weeks to meet the exhaustion requirement "could be the difference between life and death." *Id.*

⁷⁸ See *United States v. Cardena*, 461 F. Supp. 3d 798, 803 (N.D. Ill. 2020) (explaining that "[t]he court begins with the need to protect the public.") When considering the ramifications of Cardena's release, the court pointed to his lack of a criminal record and the minor role he played in the offense giving rise to his conviction. *Id.* The court also noted that his mother agreed to let him quarantine in a separate portion of her home, and that he had a promise of employment. *Id.* These factors led the court to conclude that Cardena's re-entry plan militated in favor of release. *Id.*

⁷⁹ See *Garcia*, 460 F. Supp. 3d at 410 (finding defendant's post-release behavior likely would not mitigate risks of COVID-19). The court noted that releasing the defendant to his home in Newark, New Jersey, where "compliance with social distancing and mask requirements would be strictly voluntary," would not necessarily reduce his risk of contracting COVID-19 or spreading it to others. *Id.*

⁸⁰ See *Feiling*, 453 F. Supp. 3d at 841 (finding defendant's release would create safety risk for his family). The court noted that the defendant's wife was also in a high-risk demographic due to her age and comorbidities, and releasing him would compound her health risks. *Id.*; cf. *United States v. Scott*, No. 19-cr-10144-ADB-1, 2020 U.S. Dist. LEXIS 143316, at *9 (D. Mass. Aug. 11, 2020) (finding release to mother's home appropriate).

⁸¹ See *United States v. Edwards*, No. 3:13-cr-00012, 2020 U.S. Dist. LEXIS 127869, at *33-34 (M.D. Tenn. June 2, 2020) (outlining reasons defendant will fare better with regard to COVID-19 outside BOP custody); *Cardena*, 461 F. Supp. 3d at 804 (finding defendant had good reentry plan).

specific criteria for judges imposing sentences.⁸² The three most relevant factors under § 3553 are: (1) the need to provide the defendant with services, including medical care; (2) the need for a sentence that serves as a deterrent; and (3) the need to ensure public safety.⁸³ In the setting of COVID-19, judges look to the final provision of § 3553(a)(2), which directs courts to consider “the need for the sentence imposed to provide the defendant with necessary educational or vocational training, medical care, or other correctional treatment in the most effective manner.”⁸⁴ Judges consider the care a facility is able to provide for an inmate and require an inmate to demonstrate that he will receive better medical care outside of the facility.⁸⁵

Another important factor is the deterrent factor that sentences confer on individuals as well as the general community.⁸⁶ However, judges are not in agreement regarding the percentage of a sentence that an inmate must serve to provide the requisite deterrent factor, leading to confusion, further compounded by BOP policies.⁸⁷ Some judges appear more willing to reduce sentences in the context of COVID-19, noting that the risk of death from COVID-19 creates a different type of incarceration than the one

⁸² See 18 U.S.C. § 3582(c)(1)(A) (outlining court’s options for modifying a sentence); see also 18 U.S.C. § 3553(a) (providing factors for judges to consider when imposing sentences).

⁸³ See 18 U.S.C. § 3553(a)(2) (outlining sentencing factors).

⁸⁴ 18 U.S.C. § 3553(a)(2)(D) (outlining need for sentences).

⁸⁵ See *United States v. Garcia*, 460 F. Supp. 3d 403, 410 (S.D.N.Y. 2020) (finding defendant failed to prove he would be safer at home). The court found that the defendant’s history indicated that he would not take care of himself if released, pointing to his repeated failures to adhere to medical advice while at liberty. *Id.* The court also stated that it was not convinced the defendant would be safer outside of FCI Fort Dix as he was “arguably receiving the most attentive and comprehensive health care that he ha[d] received in a long time . . .” *Id.* But see *Edwards*, 2020 U.S. Dist. LEXIS 127869, at *33-35 (finding defendant demonstrated he would fare better at home than in prison). The court pointed to the defendant’s access to personal protective equipment, health insurance, and proximity to hospitals. *Edwards*, 2020 U.S. Dist. LEXIS 127869, at *34-35. The court explained that the defendant’s access to resources

distinguishes [him] from many other inmates seeking release, who appear to lack plans and resources to enable them to cope with an infection as well (or better) upon release as they would in the custody of BOP, which does have resources (strained and limited though they may be) to confer upon infected inmates.

Edwards, 2020 U.S. Dist. LEXIS 127869, at *35.

⁸⁶ See 18 U.S.C. § 3553(a)(2)(B) (outlining need for sentences to deter criminal conduct).

⁸⁷ See *Neff & Blakinger*, *supra* note 8 (discussing confusion over sentence reduction). The authors reference one individual who drove to pick up her husband from prison only to discover that he would not be released because he had not yet served fifty percent of his sentence. *Id.* A judge ordered the prison to release him, but prison officials refused, claiming that the judge’s order was unclear. *Id.*

the judge initially handed down to the defendant.⁸⁸ Others, however, have held that the § 3553(a) factors are more important than the prison conditions and the inmate's medical condition.⁸⁹ District court judges have different standards for what constitutes an appropriate reduction in sentence when extraordinary and compelling circumstances apply.⁹⁰ When considering whether sentence reduction is appropriate, courts also consider the public safety implications that arise from releasing inmates, mostly focusing on an inmate's likelihood to reoffend.⁹¹

IV. ANALYSIS

A. *Congress should amend 18 U.S.C. § 3624(c) to require accountability from the BOP in considering home confinement requests*

The BOP is unable to carry its statutory burden under the FSA and, more recently, the CARES Act to release at-risk prisoners to home con-

⁸⁸ See *United States v. Amarrh*, 458 F. Supp. 3d 611, 618 (E.D. Mich. 2020) (finding extraordinary and compelling circumstances). Although the defendant had only served thirty-five percent of his sentence, the court stated, “the Court sentenced Defendant to 60 months in prison; it did not sentence him to death or to incarceration that carries a significant risk of death.” *Id.*

⁸⁹ See *United States v. Younger*, No. 16-40012-02-DDC, 2020 U.S. Dist. LEXIS 109555, at *19 (D. Kan. June 23, 2020) (finding reduced sentence would not provide adequate deterrence). Although the defendant had served two-thirds of his sentence at FCI Elkton, where nine inmates had died from COVID-19 at the time of his motion, the court found that reducing his sentence by one-third would not provide the necessary deterrent factor. *Id.* at *2, *19.

⁹⁰ See *United States v. McLin*, No. 1:17-CR-110-LG-RHW, 2020 U.S. Dist. LEXIS 118319, at *10 (S.D. Miss. July 7, 2020) (citing *United States v. Schwab*, No. 13-CR-237, 2020 U.S. Dist. LEXIS 110504, at *1 (E.D. La. June 24, 2020)) (finding sentence reduction not appropriate considering gravity of offense). The court found that because the defendant had only served a little over a quarter of his sentence, a reduction in sentence would not meet the objectives of deterrence. *Id.* at *9-10; see also *United States v. Osborne*, No. 4:05-CR-00109-BSM-12, 2020 U.S. Dist. LEXIS 104943, at *4 (E.D. Ark. June 16, 2020) (noting defendant's case does not merit release). The defendant had served over ninety-two percent of his sentence and “his home confinement eligibility, halfway house placement, and release dates [were] all months away.” *But see Edwards*, 2020 U.S. Dist. LEXIS 127869, at *26-27 (reducing defendant's sentence from seventy-two months to twenty-two months). The court clarified that the sentence reduction, effectively cutting the defendant's sentence by two thirds, was “not huge.” *Edwards*, 2020 U.S. Dist. LEXIS 127869, at *27.

⁹¹ See *Edwards*, 2020 U.S. Dist. LEXIS 127869, at *23-24 (explaining why public safety is not at risk with defendant's release). The court notes “[i]t is almost as if Defendant left no stone unturned in his crimes . . . violence was not one of them – a fact that decreases the risk attributable to his potential release.” *Id.*; see also *United States v. Cardena*, 461 F. Supp. 3d 798, 804 (N.D. Ill. 2020) (finding BOP's transfer of defendant to pre-release facility suggests appropriateness of release). *But see McLin*, 2020 U.S. Dist. LEXIS 118319, at *9 (focusing on defendant's lengthy criminal history of non-violent and violent offenses).

finement in an efficient way.⁹² The legislative history of § 3624(c)(2) indicates Congressional frustration with the BOP's failure to utilize the home confinement authority.⁹³ Despite these statutory directives, however, the BOP's approach to home confinement did not change in a substantial way.⁹⁴ When it became clear that the pandemic had infiltrated the federal prison system, Attorney General Barr appeared to understand the gravity and issued two memoranda encouraging the BOP to move vulnerable inmates out of prison.⁹⁵ Unfortunately, Attorney General Barr could only encourage the BOP to increase home confinement, because under 18 U.S.C. § 3624(c)(2), the BOP wields sole control over the ability to move prisoners to home confinement.⁹⁶

The new guidance from Congress under the CARES Act failed to deliver the relief many prisoners and their family members demanded.⁹⁷ Despite the explicit directives imbedded in the CARES Act and subsequent urgent instruction from Attorney General Barr, the BOP did not move individuals to home confinement at a speed that matched the urgency of the situation.⁹⁸ In noting the BOP's failure to move prisoners to home confinement, the chief federal public defender in New York City stated, “[t]hey don’t want to let people out. It’s not in their DNA.”⁹⁹

Beyond making it difficult for prisoners to reach the requisite PATTERN score to achieve home confinement, the BOP sowed confusion

⁹² See Neff & Blakinger, *supra* note 8 (discussing marginal reduction in prison population following CARES Act).

⁹³ See First Step Act of 2018, Pub. L. No. 115-391, § 602, 132 Stat. 5194 (2018) (instructing BOP to increase use of home confinement); see also Coronavirus Aid, Relief, and Economic Security Act, title II, sec. 12003(b)(2), Pub. L. No. 116-136, 134 Stat. 281 (2020) (outlining increased home confinement power).

⁹⁴ See Grawert, *supra* note 28 (discussing issues implementing First Step Act). Due to the DOJ's use of the PATTERN system to determine eligibility for home confinement, it is difficult for inmates to achieve the requisite minimum score. *Id.*; see also Neff & Blakinger, *supra* note 8 (describing BOP's failure to move inmates to home confinement under CARES Act).

⁹⁵ See Memorandum from the Att’y Gen. to the Dir. of Bureau of Prisons, *supra* note 38 (instructing BOP to prioritize granting home confinement due to COVID-19); see also Memorandum from the Att’y Gen. to the Dir. of Bureau of Prisons, *supra* note 40 (instructing increased use of home confinement at FCIs Oakdale, Danbury, and Elkton).

⁹⁶ See 18 U.S.C. § 3624(c)(2) (granting home confinement power to BOP).

⁹⁷ See Neff & Blakinger, *supra* note 8 (noting marginal reductions in federal prison populations after Congressional instruction).

⁹⁸ See *id.* (describing BOP's failure to efficiently move inmates to home confinement); see also Satija, *supra* note 7 (discussing BOP's slow response to home confinement requests). Judge Michael P. Shea responded to FCI Danbury's rate of home confinement review by stating that the slow trickle of releases (159 inmates had been reviewed as of May 5 and only twenty-one were granted home confinement) did not match the urgent tone that Attorney General Barr demonstrated in his memo. *Id.*

⁹⁹ See Neff & Blakinger, *supra* note 8 (discussing BOP's failures in carrying out policies).

regarding its release eligibility policy as it relates to percentages of sentences served.¹⁰⁰ This confusion created real consequences, as its policy changes resulted in the revocation of release for inmates already in prerelease quarantine.¹⁰¹ While federal policies should be streamlined to ensure fair results across the federal system, the ever-changing policies that emerged from the Barr administration left even federal prosecutors unable to articulate the United States' position.¹⁰²

By failing to move inmates to home confinement during the pandemic, the BOP pushed the responsibility of protecting vulnerable inmates into the hands of the judicial system.¹⁰³ Statutorily, the courts only have the power to grant compassionate release and have no power to grant home confinement.¹⁰⁴ Because courts lack the ability to move inmates to home confinement, they have less ability to balance the competing interests of protecting inmates while also protecting the general public and upholding justice.¹⁰⁵ While the BOP's changing metrics created a breakdown in moving inmates to home confinement, judges released individuals who do not meet BOP criteria under the PATTERN system or have not served the requisite percentage of their sentences.¹⁰⁶

The BOP had an opportunity to move at-risk inmates away from centralized COVID-19 outbreaks while also ensuring they served their sentences without putting the public at risk.¹⁰⁷ Instead, judges faced the impossible decision of granting compassionate release, effectively cutting an inmate's sentence to time served, or ordering an inmate to stay in prison, which could be equated to a death sentence in some instances.¹⁰⁸ Since the

¹⁰⁰ See Gerstein, *supra* note 45 (describing confusion with Barr's changing policies regarding home confinement).

¹⁰¹ See *id.* (observing effects of policy confusion on inmates).

¹⁰² See *id.* (describing incident where federal prosecutor could not explain government's policy to federal judge). A federal prosecutor in Manhattan was unable to respond effectively to an order from the court requiring her to detail the federal government's standards for compassionate release because of uncertainties regarding the policies in effect. *Id.*

¹⁰³ See Satija, *supra* note 7 (discussing rise of compassionate release cases in federal court).

¹⁰⁴ See 18 U.S.C. § 3624(c)(2) (granting home confinement power to BOP). See 18 U.S.C. § 3582(c) (granting court compassionate release power).

¹⁰⁵ See Gerstein, *supra* note 36 (noting judicial concerns regarding releasing prisoners en masse).

¹⁰⁶ See *United States v. Edwards*, No. 3:13-cr-00012, 2020 U.S. Dist. LEXIS 127869, at *26-27 (M.D. Tenn. June 2, 2020) (reducing inmate's sentence from seventy-two to twenty-one months); see also *United States v. Amarrah*, 458 F. Supp. 3d 611, 618 (E.D. Mich. 2020) (releasing inmate with sixty-five percent of his sentence left).

¹⁰⁷ See Memorandum from the Att'y Gen. to the Dir. of Bureau of Prisons, *supra* note 38 (instructing BOP to prioritize granting home confinement due to COVID-19).

¹⁰⁸ See Satija, *supra* note 7 (discussing rise in federal judges deciding compassionate release cases); see also Gerstein *supra* note 36 (describing Judge Gwin's order to release inmates at FCI

pandemic began, many district court judges have demonstrated that they are more comfortable shortening sentences than requiring individuals to risk their lives remaining in prison.¹⁰⁹

Congress should amend the home confinement statute to place greater accountability requirements on the BOP, ensuring the BOP processes home confinement petitions in a timely manner.¹¹⁰ If the BOP responded to home confinement requests and moved individuals to home confinement efficiently, courts would not have to make the difficult decision to negate an individual's sentence.¹¹¹ One way to foster greater accountability is to create a statutory time frame for responding to petitions, which Congress could model after state statutes governing medical parole.¹¹² The federal home confinement statute merely authorizes the BOP to move individuals to home confinement for a specific period of time.¹¹³ In contrast, medical parole statutes in states like Massachusetts and California authorize state agencies to move individuals to the medical parole program while also conferring upon those agencies an affirmative duty to respond to home confinement requests within specified time periods.¹¹⁴

In Massachusetts, the medical parole statute requires the superintendent of the correctional facility to respond to a medical parole request within twenty-one days.¹¹⁵ It further requires the superintendent to make a recommendation to the commissioner that includes a medical parole plan, a physician's diagnosis, and a risk assessment.¹¹⁶ Creating requirements in the language of the statute allows the court and the legislature to hold prison officials accountable for not responding efficiently to requests.¹¹⁷ Con-

Elkton). Judge Gwin could not order home confinement himself, so he ordered the BOP to determine which inmates were eligible for release from FCI Elkton. Gerstein *supra* note 36.

¹⁰⁹ See *Edwards*, 2020 U.S. Dist. LEXIS 127869, at *26-27 (M.D. Tenn. June 2, 2020) (reducing inmate's sentence by two thirds); see also *Amarrah*, 458 F. Supp. 3d at 618 (releasing inmate with sixty-five percent of his sentence left).

¹¹⁰ See 18 U.S.C. § 3624(c)(2) (authorizing BOP to place prisoners in home confinement). The current statute imposes no affirmative duty on the BOP to respond to requests efficiently. *Id.*

¹¹¹ See Satija, *supra* note 7 (discussing rise in federal judges deciding compassionate release cases).

¹¹² See MASS. GEN. LAWS ANN. ch. 127, § 119A (2018) (outlining medical parole procedure); see also CAL. PENAL CODE § 3550 (outlining medical parole procedure).

¹¹³ See 18 U.S.C. § 3624(c)(2) (authorizing BOP to place prisoners in home confinement).

¹¹⁴ See MASS. GEN. LAWS ANN. ch. 127, § 119A(c) (2018) (requiring response from superintendent of prison within twenty-one days); CAL. PENAL CODE § 3550(d) (requiring response from head physician of institution within thirty days).

¹¹⁵ See MASS. GEN. LAWS ANN. ch. 127, § 119A(c) (2018) (requiring response from superintendent of prison within twenty-one days).

¹¹⁶ See *id.* (outlining superintendent's statutory duties).

¹¹⁷ See *Buckman v. Comm'r of Correction*, 138 N.E.3d 996, 1011 (Mass. 2020) (holding superintendent of prison bears burden of responding to prisoner's request). The court held that the superintendent is responsible for "preparing or procuring '(i) a medical parole plan; (ii) a written

gress did not impute any similar duties to the BOP in granting the agency sole power over the home confinement system, leaving the federal courts powerless to demand more from the agency.¹¹⁸

B. Congress should amend 18 U.S.C. § 3582(c) to permanently remove the thirty-day waiting period

Although the First Step Act gave inmates more power to bring their cases forward, the exhaustion requirement remains as a barrier for inmates seeking release.¹¹⁹ Because of the BOP's failure to make even an initial response to a majority of compassionate release requests, the thirty-day waiting period is often wasted time during which the court cannot act to help vulnerable inmates.¹²⁰ The administrative exhaustion process is only feasible if the wardens at federal prisons participate in the process.¹²¹ During the pandemic, numerous inmates reported wardens verbally refusing their requests or refusing even to accept their requests, both of which prevent the exhaustion process from beginning.¹²² For example, the warden of one facility in California issued an official memo informing inmates that he

diagnosis by a physician . . . ; and (iii) an assessment of the risk for violence that the prisoner poses to society.” *Id.*

¹¹⁸ See 18 U.S.C. § 3624(c)(2) (authorizing BOP to place prisoners in home confinement). The current statute imposes no affirmative duty on the BOP to respond to requests efficiently. *Id.*; see also *United States v. Rodriguez*, 451 F. Supp. 3d 392, 395 (E.D. Pa. 2020) (noting BOP's failure to move inmates to home confinement).

¹¹⁹ See First Step Act of 2018, Pub. L. No. 115-391, § 603(b)(1), 132 Stat. 5194 (2018) (outlining compassionate release process).

¹²⁰ See Satija, *supra* note 7 (discussing judicial concern regarding thirty-day waiting period). As of May 2020, 241 inmates at FCI Danbury had applied for compassionate release since the beginning of the pandemic and none had been approved. *Id.* Judge Michael Shea said of the waiting period with this number in mind, “the numbers you’re reporting suggest . . . there’s no point in waiting the 30 days. The warden might as well tell people, look, we’re not going to be granting it.” *Id.* In his opinion he wrote, “[t]he 30-day period under the statute is simply dead time during which there is no prospect the BOP will come to the defendant’s aid.” *Id.*

¹²¹ See 18 U.S.C. § 3582(c) (granting court compassionate release power after BOP's initial decision).

¹²² See *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 428-29 (D. Conn. May 12, 2020) (noting BOP rarely filed compassionate release motions). Over a more than six-week period, the warden at FCI Danbury failed to make even an initial response to 44% of compassionate release requests. *Id.* at 437; see also *United States v. Rodriguez*, 451 F. Supp. 3d 392, 395 (E.D. Pa. Apr. 1, 2020) (noting BOP's failure to move court for compassionate release). The BOP has a long history of failing to utilize its power to approve compassionate release requests, resulting in terminally ill inmates dying in prison waiting for the BOP to respond to their requests. *Rodriguez*, 451 F. Supp. 3d at 395; see also Neff & Blakinger, *supra* note 8 (describing BOP's struggle implementing new policy directives from Attorney General Barr).

would not be addressing any further requests.¹²³ When the BOP consistently fails to allow the administrative process to begin and end, it is unjust to require inmates to exhaust administrative remedies.¹²⁴

Courts often point to the BOP's remedial actions as proof of effective administration, which courts believe places the BOP in the best position to make determinations about home confinement and compassionate release.¹²⁵ In one of the few appellate decisions on the issue, the Sixth Circuit concluded that thirty days is not an unreasonable or indefinite period of time for an inmate to wait before bringing a motion before the court.¹²⁶ However, the BOP has not handled the virus in an effective way, with massive outbreaks occurring in federal prisons across the country and inmate requests for relief left unanswered.¹²⁷ Further, while the thirty-day period may not be an unreasonable timeframe under normal circumstances, in the setting of a pandemic, each day a prisoner spends incarcerated adds to the cumulative risk the individual faces.¹²⁸ With an understanding of the BOP's poor handling of compassionate release requests, specifically during the COVID-19 pandemic, the court's role in granting compassionate release when the BOP wrongly denies, or is incapable of responding to, a request should be acknowledged.¹²⁹

¹²³ See Letter from John W. Lungstrum & James C. Duff *supra* note 62 (describing BOP's lack of cooperation in reviewing compassionate release requests).

¹²⁴ See *id.* (describing BOP obstruction in resolving compassionate release requests).

¹²⁵ See *United States v. Feiling*, 453 F. Supp. 3d 832, 839 (E.D. Va. 2020) (praising BOP's efforts in containing COVID and evaluating prisoner release requests).

¹²⁶ See *United States v. Alam*, 960 F.3d 831, 834 (6th Cir. 2020) (explaining government's reasoning in maintaining exhaustion requirement). The court determined that the government had a good reason for objecting to the defendant's failure to exhaust: "[i]t wants to implement an orderly system for reviewing compassionate-release applications, not one that incentivizes line jumping." *Id.*

¹²⁷ See Gerstein, *supra* note 36 (discussing outbreak at FCI Elkton); see also Tollefson *supra* note 36 (noting 70% of prisoners at FCI Waseka contracted COVID-19); Letter from John W. Lungstrum & James C. Duff, *supra* note 62 (describing instances of blatant BOP obstruction); *United States v. Amarrah*, 458 F. Supp. 3d 611, 617 (E.D. Mich. 2020) (excoriating government's argument regarding line-cutting). The government argued that allowing judges to waive the exhaustion requirement would incentivize inmates to attempt to jump ahead of fellow inmates in requesting compassionate release from the court instead of the BOP. *Amarrah*, 458 F. Supp. 3d at 617. The court states bluntly that this argument offends the court, noting that a defendant does not cut in line or interfere with the administrative process by exercising his statutory right to relief. *Amarrah*, 458 F. Supp. 3d at 617.

¹²⁸ See *United States v. Cardena*, 461 F. Supp. 3d 798, 802 (N.D. Ill. 2020) (waiving exhaustion requirement). The court points to the reality that due to the pandemic, each day a prisoner spends in prison, his risk increases. *Id.*

¹²⁹ See *Amarrah*, 458 F. Supp. 3d at 617 (noting importance of court's ability in waiving exhaustion). The court notes that Congress designed the compassionate release statute in anticipation of courts taking responsibility in situations where the BOP is unable to manage high levels of requests for release. *Id.*; see also Letter from John W. Lungstrum & James C. Duff, *supra* note

If Congress gave judges the power to waive the exhaustion requirement, inmates would have an equitable remedy in situations where BOP employees deliberately slow down the process.¹³⁰ There are multiple reports of federal prison wardens either refusing to accept requests for compassionate release or verbally denying all requests and telling inmates not to file any applications for relief.¹³¹ When there is such a blatant obstruction of the compassionate release process, it is important for judges to have the option to waive the exhaustion requirement in the interest of justice.¹³²

It is crucial that Congress amend the compassionate release statute to give judges the power to waive the thirty-day exhaustion requirement to ensure efficient management of their dockets in states of emergency.¹³³ Judge Lungstrum, in his official capacity as the Chair of the Committee on the Budget of the Judicial Conference of the United States, raised this issue in a letter to Congress, requesting that Congress waive the exhaustion requirement.¹³⁴ The letter raised concerns over the ability of district courts to review requests from vulnerable inmates, as the judges believed there had

62 (requesting statutory amendment granting courts greater power in compassionate release decisions).

¹³⁰ See Letter from John W. Lungstrum & James C. Duff *supra* note 62 (describing instances of blatant BOP obstruction).

¹³¹ See *United States v. Hansen*, 4:13-CR-40053-01-KES, 2020 U.S. Dist. LEXIS 173093, at *4-5 (S.D.S.D. September 22, 2020) (claiming exhaustion of administrative remedies). The defendant claimed that the warden at his facility “verbally told all inmates that he was denying all requests for compassionate release.” *Id.*; see also Letter from John W. Lungstrum & James C. Duff *supra* note 62 (describing instances of blatant BOP obstruction). The Warden at Taft Correctional Institution distributed a memo informing inmates that the office would not be reviewing any more administrative requests. Letter from John W. Lungstrum & James C. Duff *supra* note 62.

¹³² See Letter from John W. Lungstrum & James C. Duff *supra* note 62 (describing instances of blatant BOP obstruction). As Judge Lungstrum argues, it is crucial in a pandemic for judges to have the power to waive the exhaustion requirement. *Id.*

¹³³ See Satija, *supra* note 7 (quoting letter from federal judges requesting Congress change compassionate release statute). Federal judges noted that the thirty-day waiting period has resulted in an inability for district courts to review petitions in a timely manner to protect vulnerable inmates from future harm. *Id.*

¹³⁴ See Letter from John W. Lungstrum & James C. Duff, *supra* note 62 (requesting amendment to compassionate release statute). Judge Lungstrum requested Congress insert the following language into the compassionate release statute:

[O]r, effective during the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to COVID-19 and end 30 days after the national emergency terminates, upon motion by the defendant submitted to the court upon a showing that administrative exhaustion would be futile or that the 30-day lapse would cause serious harm to the defendant’s health

Id.

been significant delays in the BOP's response to these requests.¹³⁵ The compassionate release system simply does not work during a pandemic when the circumstance that inmates claim as a reason for release is a virus that moves rapidly through dense populations and thirty days could be the difference between life and death.¹³⁶

Further, the pandemic has demonstrated that it is essential that courts have the power to waive the exhaustion requirement in the interest of judicial efficiency.¹³⁷ Inmates flooded the BOP with requests for home confinement and compassionate release, and the agency was unable to respond to all of the requests.¹³⁸ The courts' inability to waive the thirty-day waiting period hampers judicial efficiency because the court must deny the motion only to re-hear the same motion when the thirty days has elapsed.¹³⁹ This issue is clearly demonstrated in cases where by the time the judge hears the motion, thirty days or more have elapsed since the inmate filed the motion, with no response from the BOP.¹⁴⁰ When courts dismiss these cases, they do so out of a strict adherence to the language of the statute.¹⁴¹ However, when interests of justice require the courts to move swiftly, dismissing these cases harms judicial efficiency, as the cases will be relitigated immediately in their same form.¹⁴² In these instances, equitable excep-

¹³⁵ See *id.* (justifying request for statutory amendment).

¹³⁶ See Satija, *supra* note 7 (quoting federal prosecutor's statement). In one hearing, a federal prosecutor argued that a judge was bound to honor the thirty-day waiting period but acknowledged that the system itself was not designed for the current circumstances. *Id.*

¹³⁷ See *United States v. Ramirez*, 459 F. Supp. 3d 333, 344 (D. Mass. 2020) (noting futility of exhaustion requirement in pandemic setting); see also *United States v. Haney*, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020) (discussing judicial efficiency issues regarding compassionate release statute). If courts cannot waive the thirty-day period they must dismiss the case and rehear it after the requisite amount of time, instead of deciding the merits of the case when it is in front of them the first time. *Haney*, 454 F. Supp. 3d at 321-22.

¹³⁸ See *Haney*, 454 F. Supp. 3d at 321 (discussing increase in compassionate release cases due to BOP's inaction); see also Satija, *supra* note 7 (noting rise of compassionate release cases).

¹³⁹ See *Haney*, 454 F. Supp. 3d at 321-22 (discussing interest of judicial efficiency in waiving exhaustion requirement).

¹⁴⁰ See *United States v. Rodriguez*, No. 15-198, 2020 U.S. Dist. LEXIS 162923, at *3-4 (E.D. La. September 5, 2020) (refusing to waive exhaustion requirement). Although thirty days had elapsed by the time the court heard the motion, the judge still dismissed the case because the defendant had not waited thirty days before filing. *Id.*

¹⁴¹ See *id.* (explaining reasoning for not waiving exhaustion requirement).

¹⁴² See *United States v. Pena*, 459 F. Supp. 3d 544, 549 (S.D.N.Y. 2020) (holding "the statute's exhaustion requirement is amenable to equitable exceptions.") Similar to the defendant in *Rodriguez*, the defendant in *Pena* did not wait thirty days before filing his motion with the court. *Id.* at 548. However, Judge Nathan found that without equitable exceptions to the exhaustion requirement, the pandemic may make it impossible for inmates to obtain judicial review in time. *Id.* at 549.

tions to the warrant requirement are vital to ensure vulnerable prisoners receive judicial review before the virus catches up with them.¹⁴³

Although the pandemic has brought the issue to the forefront of judicial dialogue, and the letter the federal judges wrote to Congress only requests a temporary amendment, the underlying problems will remain after the pandemic is over.¹⁴⁴ The amendment the judiciary proposed to the compassionate release statute should be a permanent addition because the BOP has proven itself incapable of participating in the administrative process.¹⁴⁵ COVID-19 may be highlighting the BOP's ineptitude, but the pandemic is not responsible for the problem created by the First Step Act.¹⁴⁶

Finally, the lack of clarity from Congress regarding the statutory interpretation of the exhaustion requirement creates sentence modification disparities, the exact situation the Federal Sentencing Guidelines sought to eliminate.¹⁴⁷ Moreover, because sentence modification is at the discretion of the sentencing court, there are few appellate decisions guiding district courts on whether they can waive the exhaustion requirement.¹⁴⁸ This manifests in the splits that have arisen not only between federal circuits but also *within* federal districts.¹⁴⁹ For example, within the Southern District of New York, prisoners find themselves in different situations based on which judge hears their petition.¹⁵⁰

In two cases decided within five days of each other, judges in the Southern District of New York made contradicting statements on the en-

¹⁴³ See *id.* (explaining importance of equitable exceptions for exhaustion requirement).

¹⁴⁴ See Neff & Blakinger, *supra* note 8 (describing limited compassionate release grants since First Step Act). Despite passing the First Step Act in 2018, at the start of the COVID-19 pandemic the BOP had only released 144 people to date. *Id.*

¹⁴⁵ See Letter from John W. Lungstrum & James C. Duff, *supra* note 62 (requesting temporary amendment to compassionate release statute).

¹⁴⁶ See Neff & Blakinger, *supra* note 8 (indicating lack of compassionate release grants since First Step Act).

¹⁴⁷ See *Federal Sentencing Guidelines*, *supra* note 2 (presenting brief overview of Federal Sentencing Guidelines). The Federal Sentencing Guidelines, while non-binding, provide a uniform sentencing policy based on various factors relating to guilt and harm. *Id.*; see also Pavlo, *supra* note 52 (discussing tensions between judges and BOP in decisions regarding compassionate release).

¹⁴⁸ See Pavlo, *supra* note 52 (highlighting problems faced by district courts regarding compassionate release). While there is dispute regarding whether district court judges should defer to BOP findings, it is clear that district court judges can make that decision independently. *Id.*

¹⁴⁹ See *United States v. Haney*, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020) (finding exhaustion requirement waivable). *But see* *United States v. Roberts*, 18-CR-528-5, 2020 U.S. Dist. LEXIS 62318, at *7 (S.D.N.Y. Apr. 8, 2020) (holding exhaustion requirement not waivable).

¹⁵⁰ See *Haney*, 454 F. Supp. 3d at 321 (holding court has power to waive exhaustion); *cf.* *Roberts*, 2020 U.S. Dist. LEXIS 62318, at *7 (holding exhaustion requirement not waivable).

forceability of the waiting period.¹⁵¹ In *United States v. Haney*, Judge Rakoff determined that “Congress cannot have intended the 30-day waiting period . . . to rigidly apply in the highly unusual situation in which the nation finds itself today.”¹⁵² In contrast, in *United States v. Roberts*, Judge Furman refused to waive the exhaustion period, instead concluding that the correct interpretation of the statute’s legislative history is that Congress recognized the importance of expediting applications and *still* chose to require a waiting period.¹⁵³ This type of split undermines the mission that the drafters of the Federal Sentencing Guidelines set out to achieve: parity in sentencing.¹⁵⁴ Although the Federal Sentencing Guidelines focus on the sentences individuals receive, the same logic should apply with regard to the sentence-modification stage of the process.¹⁵⁵

Another way to ameliorate the disparity in sentence modification would be to look again at state medical parole statutes and the reporting requirements they impose upon prison authorities.¹⁵⁶ The Massachusetts medical parole statute requires the commissioner of correction and the secretary of the executive office of public safety and security to file yearly reports with the state legislature detailing the number of individuals who applied for medical parole, as well as the number of individuals granted parole.¹⁵⁷ The statute also requires a report of how many prisoners the prison authorities denied medical parole, as well as the reasons for those denials.¹⁵⁸ Requiring these reports by statute would incentivize the BOP to consider compassionate release requests and either deny the inmate’s request or motion the court in a more timely manner.¹⁵⁹

¹⁵¹ See *Haney*, 454 F. Supp. 3d at 321 (holding court has power to waive exhaustion); cf. *Roberts*, 2020 U.S. Dist. LEXIS 62318 at *7 (holding exhaustion requirement not waivable).

¹⁵² *Haney*, 454 F. Supp. 3d at 321.

¹⁵³ *Roberts*, 2020 U.S. Dist. LEXIS 62318 at *7 (holding exhaustion requirement not waivable).

¹⁵⁴ See *Federal Sentencing Guidelines*, *supra* note 2 (discussing impact of Federal Sentencing Guidelines on defendants). The Federal Sentencing Guidelines, while non-binding, provide a uniform sentencing policy based on various factors relating to guilt and harm. *Id.*

¹⁵⁵ See UNITED STATES SENT’G, COMM’N, *supra* note 16 (listing objectives of U.S. Sentencing Commission).

¹⁵⁶ See MASS. GEN. LAWS ANN. ch. 127, § 119A(i) (2018) (outlining reporting requirement). The statute requires annual reports to the legislature accounting for inmates who requested medical parole and delineating how many of those inmates actually received parole. *Id.* The statute further requires the prison officials’ reason for denying medical parole. *Id.*

¹⁵⁷ See *id.* (outlining reporting requirement).

¹⁵⁸ See *id.* (outlining reporting requirement).

¹⁵⁹ See *Buckman v. Comm’r of Corr.*, 138 N.E.3d 996, 1008 (Mass. 2020) (explaining community participation in medical parole decisions). The court focused its opinion on the prisoner’s ability to request assistance from parole staff and noted that it was more efficient for the superintendent to prepare the parole plan than help the prisoner do so. *Id.*

C. *Courts need clarity and guidance from Congress on specific statutory interpretation to ensure equitable results across the federal system.*

The multitude of federal district court cases concerning compassionate release during 2020 revealed the inconsistencies of district court judges' interpretations of extraordinary and compelling circumstances warranting release.¹⁶⁰ The Application Note for the statute may provide appropriate guidance under normal circumstances, but it falls short during a public health crisis.¹⁶¹ The Application Note explaining the definition of "extraordinary and compelling" within the compassionate release statute is not malleable to the current situation, wherein a seemingly controllable illness could prove deadly if an inmate contracts COVID-19.¹⁶² A clarified Application Note would help bring the results of compassionate release motions within the objectives of the Federal Sentencing Commission.¹⁶³

1. The Federal Sentencing Commission should clarify the standard for extraordinary and compelling circumstances in a global pandemic.

When judges rely on the Application Note to the compassionate release statute in determining whether an inmate's circumstances are extraordinary and compelling, they typically look to the inmate's illness and ask whether that illness diminishes their ability to provide self-care in prison.¹⁶⁴ The pandemic complicated this analysis, as a latent condition that may be well controlled could contribute to very severe illness or death when com-

¹⁶⁰ See Pavlo, *supra* note 52 (describing inconsistencies in decisions regarding compassionate release).

¹⁶¹ See 18 U.S.C. app. § 1B1.13 (defining extraordinary and compelling medical conditions); *United States v. Mondragon*, No. 18-CR-132(5), 2020 U.S. Dist. LEXIS 120273, at *10-11 (E.D. Tex. July 8, 2020) (finding no extraordinary and compelling reasons in defendant's case despite medical conditions); *cf.* *United States v. Rodriguez*, 451 F. Supp. 3d 392, 395 (E.D. Pa. 2020) (holding defendant's medical condition and pandemic constitute extraordinary and compelling reasons).

¹⁶² See 18 U.S.C. app. § 1B1.13 (defining extraordinary and compelling medical conditions). The Application Note defines extraordinary and compelling medical conditions as: terminal illnesses, serious medical conditions or cognitive impairments, and deterioration from the aging process affecting the inmate's ability to care for himself in prison. *Id.*

¹⁶³ See *Federal Sentencing Guidelines*, *supra* note 2 (noting purpose of Federal Sentencing Guidelines).

¹⁶⁴ See *United States v. Rodriguez*, 454 F. Supp. 3d 224, 228-29 (S.D.N.Y. 2020) (finding defendant did not meet burden of proving extraordinary and compelling circumstances). The court found that the defendant did not show that his asthma condition "substantially diminish[ed]" his ability to provide self-care in prison. *Id.*

bined with COVID-19.¹⁶⁵ The Federal Sentencing Commission should clarify that, in the setting of a pandemic, an underlying condition that does not diminish an inmate's ability to provide self-care, but may contribute to a significantly higher risk of death should the inmate be exposed to the virus, constitutes an extraordinary and compelling circumstance.¹⁶⁶

Courts agree that, in the context of the pandemic, an inmate's health condition is a key factor in determining whether that inmate's circumstances are extraordinary and compelling as to justify compassionate release.¹⁶⁷ However, when courts require an active outbreak in a prison before they will consider compassionate release, they overlook the manner in which the virus spreads in dense populations, as well as the BOP's failures in testing inmates.¹⁶⁸ As Judge Levy stated in *United States v. Amarrah*, "Zero confirmed COVID-19 cases is not the same thing as zero COVID-19 cases."¹⁶⁹ At FCI Elkton, one of the facilities severely impacted by COVID-19, only 100 out of the 2,400 inmates had been tested for the virus at the height of the outbreak.¹⁷⁰ Because of the lack of testing in federal prisons, it would be wise for Congress to clarify that courts should consider the pandemic as a threat regardless of whether there is an active outbreak within the prison.¹⁷¹

¹⁶⁵ See *United States v. Pena*, 459 F. Supp. 3d 544, 550 (S.D.N.Y. 2020) (noting shifting standards for compassionate release during pandemic and stating, "[t]he court's analysis is different in current circumstances"); see also *United States v. Echevarria*, No. 17-cr-44, 2020 U.S. Dist. LEXIS 77894, at *5 (D. Conn. May 4, 2020) (discussing defendant's health conditions). The court in *Echevarria* notes that other Second Circuit courts have held that preexisting respiratory conditions, combined with the outbreaks of COVID-19 in prison, represent extraordinary and compelling reasons for release. *Echevarria*, 2020 U.S. Dist. LEXIS 77894, at *5.

¹⁶⁶ See *Pena*, 459 F. Supp. 3d at 550 (noting shifting standards for compassionate release during pandemic).

¹⁶⁷ See *id.* (explaining intricacies of compassionate release during pandemic); *United States v. McIntosh*, No. 11-20085-01-KHV, 2020 U.S. Dist. LEXIS 176446, at *16 (D. Kan. Sept. 25, 2020) (noting court's authority to consider COVID-19 in conjunction with medical conditions).

¹⁶⁸ See *United States v. Amarrah*, 458 F. Supp. 3d 611, 618 (E.D. Mich. 2020) (noting complexities of analyzing COVID-19 positivity rates); see also *Pandemic Response Report 20-086, Remote Inspection of Federal Correctional Complex Lompoc*, *supra* note 43 (describing problems with COVID-19 policy at FCC Lompoc). One of the largest issues the facility experienced in its efforts to mitigate transmission was a preexisting shortage of medical staff, which impacted the facility's ability to test and screen inmates for the virus. *Pandemic Response Report 20-086, Remote Inspection of Federal Correctional Complex Lompoc*, *supra* note 43.

¹⁶⁹ *Amarrah*, 458 F. Supp. 3d at 618.

¹⁷⁰ See Gerstein, *supra* note 36 (noting lack of testing at federal prisons).

¹⁷¹ See *Amarrah*, 458 F. Supp. 3d at 618 (noting issues with testing at federal prisons). Judge Levy stated that she would not be giving any weight to COVID-19 infection statistics until FCI Loretto implements a universal testing regimen. *Id.*; see also *Pandemic Response Report 20-086, Remote Inspection of Federal Correctional Complex Lompoc*, *supra* note 43 (describing testing issues at FCC Lompoc); Gurman, *supra* note 74 (noting great potential for secret virus spread given lack of testing).

This clarification would help ensure fairness in decisions where courts require an inmate to prove that there is an outbreak at his facility and that the BOP cannot manage the outbreak.¹⁷² The clarification would also work toward ensuring parity across jurisdictions with regard to requests arising from the same FCI facility.¹⁷³ For example, a judge in the Eastern District of Virginia and a judge in the Eastern District of Michigan came to the opposite conclusions regarding the conditions at FCI Loretto.¹⁷⁴ In *United States v. Feiling*, the court found that the defendant had multiple medical conditions that establish a particularized susceptibility to COVID-19 complications, but ultimately denied his motion because he failed to show a particularized risk of contracting the disease as there were no confirmed cases at FCI Loretto.¹⁷⁵ Subsequently, in *United States v. Amarrah*, the court noted that although there were no confirmed cases at FCI Loretto, there was no evidence that the facility was conducting widespread COVID-19 testing, so the existence of COVID-19 infections could not be ruled out.¹⁷⁶ Ensuring that courts view the pandemic as a particularized threat for inmates irrespective of the specific numbers coming out of each facility would remove from judges the responsibility of determining what number of infections qualifies as an outbreak.¹⁷⁷

¹⁷² See *United States v. Mondragon*, No. 18-CR-132(5), 2020 U.S. Dist. LEXIS 120273, at *13 (E.D. Tex. July 8, 2020) (finding no extraordinary and compelling reasons in defendant's case). The court specifically found that the defendant failed to prove that if there was an outbreak at his facility, the BOP would be unable to manage that outbreak. *Id.*

¹⁷³ See *Amarrah*, 458 F. Supp. 3d at 618 (noting inability to know how many positive cases facility may have). *But see* *United States v. Feiling*, 453 F. Supp. 3d 832, 841 (E.D. Va. 2020) (finding defendant failed in showing particularized risk of contracting COVID-19 at FCI Loretto). The court found that because there were no confirmed cases at FCI Loretto, defendant's motion relied solely on the possibility that the disease may spread to his facility. *Feiling*, 453 F. Supp. 3d at 841.

¹⁷⁴ See *Amarrah*, 458 F. Supp. 3d at 618 (finding defendant proved particularized risk of contracting COVID-19 at FCI Loretto). *But see* *Feiling*, 453 F. Supp. 3d at 841 (finding defendant failed in showing particularized risk of contracting COVID-19 at FCI Loretto).

¹⁷⁵ See *Feiling*, 453 F. Supp. 3d at 841 (finding defendant failed to show particularized risk of contracting COVID-19 at FCI Loretto).

¹⁷⁶ See *Amarrah*, 458 F. Supp. 3d at 618 (pointing out deficiencies in BOP testing procedures).

¹⁷⁷ See *United States v. Garcia*, 460 F. Supp. 3d 403, 409 (S.D.N.Y. 2020) (noting lack of outbreak at FCI Fort Dix). The court found that "Fort Dix is not a facility that has seen a massive outbreak of COVID-19. With 2,936 inmates, it has only 40 documented cases as of May 4." *Id.*; *cf.* *United States v. Pena*, 459 F. Supp. 3d 544, 549 (S.D.N.Y. 2020) (finding exhaustion requirement futile based on outbreak at Fort Dix).

V. CONCLUSION

The pandemic laid bare the BOP's inability to manage its role as judge and jury for both home confinement and compassionate release decisions. Despite numerous statutory changes, the BOP has failed to carry its burden of moving appropriate inmates to home confinement. Congress must amend the home confinement statute to place affirmative duties on the BOP, including time frames for responding to inmate requests. When the BOP fails to respond to home confinement or compassionate release requests, inmates flood the court systems with disorganized pleadings, leaving judges unsure of whether they can hear the motions. For the sake of judicial efficiency and to compensate for the BOP's inability to respond in a timely manner, Congress must remove the thirty-day waiting period from the compassionate release statute. Finally, to ensure parity in sentence modification, Congress must clarify that the extraordinary and compelling circumstances standard is malleable in light of current affairs.

Katherine Chenail

WELL, AT LEAST THEY TRIED: DELIBERATE INDIFFERENCE AS PRISON OFFICIALS’ LIABILITY SCAPEGOAT FOR OBJECTIVELY INHUMANE PRISON CONDITIONS DURING COVID-19¹

“The Constitution requires that prison officials and governments protect incarcerated people from the inevitable continued spread of Covid-19 behind bars Some of the 95 percent of people in prisons who have been left behind have taken to the courts. While their options are generally to request release or seek improvements to conditions, they face a gauntlet of legal obstacles to enforce their constitutional rights in federal court.”²

I. INTRODUCTION

On March 15, 2020, Anthony Cheek—an incarcerated man having served eighteen years of his twenty-year sentence—suddenly passed out while in the gym.³ Cheek called his mother only five days prior complaining of flu-like symptoms, but the forty-nine-year-old assured his mother he was on the mend.⁴ That was the last time Cheek’s mother ever heard from her son, as Cheek soon became the first incarcerated person⁵ to die during

¹ Given the ever-changing nature of the COVID-19 virus, this Note focuses exclusively on the height of the virus, specifically between March 2020 and January 2021. The rate of infection and death in prisons decreased dramatically following many states’ issuance of the COVID-19 vaccine in prisons. As such, this Note will not address the conditions of confinement following the vaccination. For currently up to date statistics on COVID-19 in prisons, please see <https://covidprisonproject.com/>.

² Taryn A. Merkl & Brooks Weinberger, *What’s Keeping Thousands in Prison During Covid-19*, BRENNAN CTR. FOR JUST. (July 22, 2020), <https://www.brennancenter.org/our-work/research-reports/whats-keeping-thousands-prison-during-covid-19> (describing cases brought to federal court resulting from inadequate medical conditions in prison).

³ See Joshua Sharpe & Christian Boone, *Ga. inmate dies from COVID-19 as virus hits more prisons*, THE ATL. J.-CONST. (Mar. 27, 2020), <https://www.ajc.com/news/local/breaking-inmate-dies-from-covid-outbreak-worsens-prison/TzQZL4uXfK4GzH9ebSFNQN/> (reporting first incarcerated death during COVID-19).

⁴ See *id.* (highlighting conversation between Cheek and mother before Cheek’s death).

⁵ In conjunction with The Marshall Project’s “The Language Project,” this Note uses the term “incarcerated persons,” or similar phrases, to refer to individuals currently in confinement. The Language Project is committed to using language intentionally to prevent the dehumanizing usage of terms such as “inmate,” “felon,” and “offender,” which define human beings by their crimes and punishments. See Lawrence Bartley et al., *The Language Project*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2021/04/12/the-language-project> (last visited Aug. 8, 2021). The Language Project asserts that, “[w]ords like ‘inmate,’ ‘prisoner,’ ‘convict,’ ‘felon’

the COVID-19 pandemic (“COVID-19”).⁶ At the time of Cheek’s death, incarcerated persons at Lee State Prison in Georgia were regularly denied medical treatment for COVID-like symptoms, confined in cells with six other individuals, given “tiny” cups of anti-bacterial soap sporadically, and were only required to wear masks discretionarily.⁷

These types of conditions were not abnormal for detention facilities during COVID-19; thus, given the rapid deterioration of prison conditions the pandemic, the 2.12 million⁸ incarcerated persons in the United States were routinely subjected to inadequate protection from illness and death during the height of the virus.⁹ One incarcerated person writes,

[t]o say that I am concerned about my health is an understatement. I feel trapped and helpless in this prison. No matter what I do to protect myself. I am at the mercy of others and can only hope they wear their masks and socially distance. Some [incarcerated persons] follow the rules.

and ‘offender’ are like brands. They reduce human beings to their crimes and cages.” See Lawrence Bartley, *I am Not Your ‘Inmate’*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2021/04/12/i-am-not-your-inmate> (last visited Aug. 8, 2021). Of note, the author has also altered all quotations in the piece to reflect this language adjustment.

⁶ See Sharpe & Boone, *supra* note 3 (noting Cheek’s death as first COVID-19 death).

⁷ See *id.* (summarizing incarcerated persons complaints at Lee State Prison). Unsurprisingly, prison officials actively rejected the “inadequate conditions” narrative incarcerated persons at Lee State Prison attempted to paint; notably, the Georgia Department of Corrections spokeswoman pointed to the agency’s website in denying this narrative, indicating that the website said the prison had increased soap supply, halted visitation, and eliminated the typical \$5 medical co-pay for inmates. See *id.* (providing agency response to incarcerated persons’ complaints).

⁸ See *Countries with the largest number of prisoners per 100,000 of the national population, as of May 2021*, STATISTA, <https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/> (last visited Nov. 15, 2021) (stating number of incarcerated persons in United States).

⁹ See *The most significant criminal justice policy changes from the COVID-19 pandemic*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html> (last updated Nov. 1, 2021) (reviewing jail and prison release conditions in wake of COVID-19 pandemic). Although many factors contribute to the increasingly worsening state of prisons and jails during COVID-19, the rapid deterioration and influx of cases in these facilities is often largely attributed to the concept of “jail churn.” See *Local Jails: The real scandal is the churn*, PRISON POL’Y INITIATIVE, https://www.prisonpolicy.org/graphs/pie2019_jail_churn.html (last visited Oct. 10, 2021). “Jail Churn” refers to the rapid movement of individuals in and out of jails, largely related to the United States increased rates of mass incarceration. *Id.* This consistent introduction and removal of individuals in jails exposes incarcerated persons to additional modes of contraction, thereby promoting the rapid spread of COVID-19. *Id.*

Some do not. Some don't care because they are never going home. *But I am.*¹⁰

Other incarcerated persons have commented on the poor living conditions during COVID-19—which further exacerbated the spread of the virus regionally—with one person writing to his wife, “I can tell you right now, with nearly 100% certainty, that I am going to get this virus.”¹¹ He added that incarcerated persons’ temperatures had not been checked in over two days, and that even once checked and determined feverish, the sick remained in dorms with dozens of other incarcerated persons, including those who were immunocompromised.¹² Unfortunately, lack of temperature checks and minimal accommodations for immunocompromised individuals were not the full extent of incarcerated persons’ exposure while confined.¹³ Of incarcerated persons’ complaints, they noted that sick and healthy individuals were often haphazardly mixed, they were periodically shipped to different facilities without proper testing, they were refused consistent testing practices, healthy individuals were kept in close confinement with infected persons, and individuals were further exposed to dirty and

¹⁰ See Benny Hernandez, *Will I Die of Coronavirus Before My Release in 100 Days?*, PRISON WRITERS (emphasis added), <https://prisonwriters.com/will-i-die-of-coronavirus/> (last visited Mar. 6, 2020). In his letter he adds:

I hope not to die in the next 145 days. Unfortunately, the possibility of death remains real. In the event of my demise, I ask that my story be told as an example of everything we have gotten wrong with mass incarceration policies. And that my death not be in vain, but serve as a rally cry for those seeking to repair a broken system that routinely discounts the lives of black and brown people. If I happen to make it to December, I look forward to joining the fray or voices as we remake and rebuild the criminal justice system that has too often failed us and our communities.

Id. Hernandez is not alone in his persistent fear of contracting COVID-19—and potential death due to inadequate protection by prison administrators—calling to attention the need for reform. *See id.* (indicating significant agreement among incarcerated persons regarding reform).

¹¹ See Jake Harper, *When Prisons Are ‘Petri Dishes,’ Inmates Can’t Guard Against COVID-19, They Say*, KHN (May 6, 2020), <https://khn.org/news/when-prisons-are-petri-dishes-inmates-cant-guard-against-covid-19-they-say/> (introducing story of incarcerated person who has been adversely affected by COVID-19 with little remedy). This incarcerated person is currently suffering from chronic obstructive pulmonary disease (COPD)—the third leading cause of death in the United States—amplifying his constant fear of infection. *See id.*; *see generally* Linda Hepler, *COPD Life Expectancy and Outlook*, HEALTHLINE (Nov. 7, 2018), <https://www.healthline.com/health/copd/life-expectancy#conclusion> (discussing side effects and complications of COPD).

¹² See Harper, *supra* note 11 (articulating fears of contracting virus based on his current conditions).

¹³ *See id.* (introducing problematic prison conditions during COVID-19).

unhygienic living conditions while confined.¹⁴ Despite concerning conditions, however, prisons across the country refused to modify their confinement practices, and further prevented the release of individuals to slow the spread.¹⁵

¹⁴ See *id.* (describing current conditions of confinement as a result of COVID-19). Generally, within prisons, incarcerated persons often complain of dirty and inhumane living conditions. See *Prisons in the United States of America*, HUM. RTS. WATCH PRISON PROJECT, <https://www.hrw.org/legacy/advocacy/prisons/u-s.htm> (last visited Mar. 6, 2021). While this Note only briefly touches upon the inhumane conditions of confinement, chief complaints among incarcerated persons consist of overcrowding, violence, and sexual misconduct by incarcerated persons and prison staff, isolation, mental illness going untreated, and unhygienic conditions. *Id.* For instance, incarcerated persons have complained of “bugs swarming their food and showers, broken and overflowing toilets. . .being forced to sleep on the floor because of overcrowding. . .mold in the showers and cold food on trays that smelled of mildew.” John Seewer, *Inmates sue over what they call inhumane conditions at jail*, AP NEWS (Apr. 24, 2019), <https://apnews.com/article/6995620a208245a9a629dbff5ffdd2eb> (discussing major complaints among incarcerated persons). Furthermore, incarcerated persons allege that they are “denied medication, personal hygiene items, accommodations for disabilities and medical visits.” *Id.* “One [incarcerated person] diagnosed with several mental health disorders said he was denied all of his medication during the first month he was in jail and later received only one of them.” *Id.* Additionally, even after being offered medical treatment while incarcerated, incarcerated persons are also challenged to pay for these services. See *The most significant criminal justice policy changes from the COVID-19 pandemic*, *supra* note 9 (criticizing medical co-pay practice in prisons in various states).

In most states, incarcerated people are expected to pay \$2-\$5 co-pays for physician visits, medications, and testing in prisons. Because incarcerated people typically earn 14 to 63 cents per hour, these charges are the equivalent of charging a free-world worker \$200 or \$500 for a medical visit. The result is to discourage medical treatment and to put public health at risk. In 2019, some states recognized the harm and eliminated these co-pays in prisons.

Id. As a result of the unsanitary conditions coupled with relaxed guidelines, incarcerated persons are not only subjected to higher rates of disease—including COVID-19—but they can also be outwardly refused medical treatment based on an inability to pay. See *id.* (noting increased rates of disease given lack of access to medical care).

¹⁵ See Harper, *supra* note 11 (outlining various state practices regarding release of incarcerated persons during pandemic). Prison Policy Initiative further notes that prisons “[are] releasing almost no one.” *The most significant criminal justice policy changes from the COVID-19 pandemic*, *supra* note 9. Other commentators on the worsening state of prison conditions remark,

Despite advocates’ early calls for a fast reduction of prison and jail populations, a recent study from the ACLU and Prison Policy Initiative found that the measures taken by governors, prisons officials, prosecutors, and law enforcement have resulted in only a small overall reduction in the prison population, but there have been larger reductions in jail populations. Among 49 states, the total prison population has been reduced by only around 5 percent. The jail population, however, showed a 20 percent median decrease nationwide. But even with people being released, safe social distancing in jail or prison is virtually impossible. And all states have failed to adequately implement policies necessary to prevent the transmission of Covid-19 among their incarcerated populations and staff.

As a result of the inhumane prison conditions maintained by prison administrators during the height of the virus, the rate of both infection and death for incarcerated persons and prison staff significantly increased between March 2020 and January 2021.¹⁶ From March 2020 through January 2021, 366,121 incarcerated persons and prison staff tested positive for COVID-19, with 2,314 of these cases resulting in death.¹⁷ In December of 2020, over four times as many incarcerated persons in the U.S. had COVID-19 as compared to the general population; this resulted in 1 in 5 incarcerated persons infected, while only 1 in 20 members of the general population infected.¹⁸ The rate of infection showed few signs of decreasing during the height of the virus, with the positive test rates increasing by roughly 3% each week.¹⁹ The same extended to the death rate of incarcerated persons, with the death rate increasing by 4% over one week.²⁰ Federal prisons experienced the highest number of deaths, reporting over 200

Merkel & Weinberger, *supra* note 2; see also Claudia Deane et al., *A Year of U.S. Public Opinion on the Coronavirus Pandemic*, PEW RES. CTR. (Mar. 5, 2021), <https://www.pewresearch.org/2021/03/05/a-year-of-u-s-public-opinion-on-the-coronavirus-pandemic/> (indicating public concern for conditions of confinement during COVID-19); Laura Crimaldi, *Advocates ask court to release inmates as COVID-19 sweeps through state prisons*, BOSTON GLOBE (Dec. 24, 2020 1:17 PM), <https://www.bostonglobe.com/2020/12/24/metro/advocates-ask-court-release-inmates-covid-19-sweeps-through-state-prisons/> (suggesting worsening conditions require change in prison practices).

¹⁶ See Keri Blakinger & Keegan Hamilton, *"I Begged Them To Let Me Die": How Federal Prisons Became Coronavirus Death Traps*, THE MARSHALL PROJECT (June 18, 2020, 7:00 AM), <https://www.themarshallproject.org/2020/06/18/i-begged-them-to-let-me-die-how-federal-prisons-became-coronavirus-death-traps> (describing increased rate of infection in prisons due to poor response); see also Kim Bellware, *Prisoners and guards agree about federal coronavirus response: "We do not feel safe"*, WASH. POST (Aug. 24, 2020), <https://www.washingtonpost.com/nation/2020/08/24/prisoners-guard-agree-about-federal-coronavirus-response-we-do-not-feel-safe/> (discussing prison staff effects of COVID-19).

¹⁷ See Katie Parker & Tom Meagher, *A State-by-State Look at 15 Months of Coronavirus in Prisons*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (last updated July 1, 2021) (recording and updating data on COVID-19 infection rates in federal and state correctional facilities). To illustrate the rapid nature of infection, between October 2020 and January 2021, the total number of infected incarcerated persons increased from 161,349 to 366,121. *Id.*

¹⁸ See Beth Schwartzapfel et al., *1 in 5 Prisoners in the U.S. has had COVID-19*, THE MARSHALL PROJECT (Dec. 18, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19> (discussing inequities in prisons leading to increased rate of infection); see also Giles Clark, *1 in 5 prisoners in the U.S. has had COVID and 1,700 have died*, CNBC (Dec. 18, 2020, 6:31 AM), <https://www.cnbc.com/2020/12/18/1-in-5-prisoners-in-the-us-has-had-covid-and-1700-have-died.html> (commenting on disproportionate COVID rate of infection for incarcerated persons).

¹⁹ See Schwartzapfel, *supra* note 18 (providing statistical data relating to rate of infection and deaths of incarcerated persons).

²⁰ See *id.* (confirming death rate among incarcerated persons during COVID-19).

deaths between March 2020 and January 2021.²¹ Similarly, every state—with the exception of Vermont—reported incarcerated deaths from COVID-19 during the height of the virus.²² Of these states, Nevada and New Mexico had the highest rate of death, with both states averaging 43 deaths per 10,000 incarcerated persons in January 2021.²³

These numbers resulted in higher likelihoods of infection, with incarcerated persons being 5.5 times more likely to contract COVID-19 and 3.3 times more likely to die from the virus, as compared to those who were not incarcerated.²⁴ In addition to causing higher COVID-19 infection rates in correctional facilities, the willful ignorance with regard to incarcerated persons' health and safety also increased the rate of infection in surrounding neighborhoods.²⁵ Despite these alarming rates of infection among incarcerated persons and prison staff, the only recourse for incarcerated persons seeking adequate medical care required meeting the Eighth

²¹ See *id.* (illustrating state-by-state review of COVID-19 in detention facilities). Interestingly, amidst COVID-19, the Federal Bureau of Prisons changed their policies relating to reporting incarcerated deaths in jails and prisons. Beath Healy, *As Feds Change Rules For Reporting Jail Deaths, Sheriffs Face Less Accountability*, WBUR (Jan. 21, 2021), <https://www.wbur.org/news/2021/01/21/jails-deaths-in-custody-reporting-change> (remarking on change in BOP policy and adverse effects on incarcerated persons). Under the new policy, the Bureau of Justice Assistance rather than the Bureau of Justice Statistics will track incarcerated deaths, sheriffs and prison officials will report deaths to the medical examiner's office rather than directly to the Department of Justice, and sheriffs will no longer have to file reports on incarcerated persons who die at the hospital. *Id.* These new policies have minimized sheriff accountability, as well as provided deference to prison officials on when to report to medical examiners. *Id.* In one Massachusetts case, an incarcerated person died due to COVID complications in April; however, the medical examiner was not notified until June 5th—a month after the incarcerated person was buried. *Id.*

²² See Schwartzapfel, *supra* note 18 (mentioning equally alarming infection and death rates in state prison facilities).

²³ See Parker & Meagher, *supra* note 17 (providing infographics charting infection rate by state).

²⁴ See Alexandra Sternlicht, *Prisoners 550% More Likely to Get Covid-19, 300% More Likely to Die, New Study Shows*, FORBES (July 8, 2020, 5:35 PM), <https://www.forbes.com/sites/alexandrasternlicht/2020/07/08/prisoners-550-more-likely-to-get-covid-19-300-more-likely-to-die-new-study-shows/?sh=7367f3593a72> (discussing recent data revealed by UCLA prison study). “Close confinement, limited PPE and increased risk of cardiac and respiratory conditions makes prison populations especially vulnerable to coronavirus, says the report.” *Id.*

²⁵ See Michael Ollove, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, PEW (July 1, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities> (presenting increased infection rates among populations in nearby areas of prisons with high COVID-19 rates).

Amendment’s stringent deliberate indifference standard—a near impossible feat—thereby resulting in a lack of any sufficient remedy.²⁶

In order to address alleged inhumane medical conditions while confined, incarcerated persons must raise an Eighth Amendment cruel and unusual punishment claim, arguing that prison officials were “deliberately indifferent” to their serious medical needs.²⁷ To make this determination, courts will apply a two-pronged deliberate indifference test, requiring an objective and subjective assessment of the prison officials’ conduct.²⁸ This two-pronged test, however, has created an inconsistent and arbitrary deliberate indifference standard, effectuating a near impossible burden for incarcerated persons to overcome.²⁹ As a result of the inconsistent application of this standard throughout federal courts, incarcerated persons are yet again presented with an additional barrier.³⁰ Through review of historical and modern Eighth Amendment jurisprudence, this Note seeks to assess the federal courts’ approach to the deliberate indifference standard when evaluating prison conditions—particularly during unprecedented public health emergencies.³¹ After a review of current practices, this Note will propose a new standard for the deliberate indifference test, one that abolishes its subjective element and instead requires an exclusively objective analysis.³²

²⁶ See *The most significant criminal justice policy changes from the COVID-19 pandemic*, *supra* note 9 (analyzing lack of response and its implications). The Eighth Amendment requires both an objective and subjective showing of deliberate indifference, meaning that incarcerated persons must offer evidence of a prison official’s “actual knowledge” of the serious medical condition; this often results in a “he said, she said” scenario between incarcerated persons and prison officials. See sources cited *infra* notes 63-69 and accompanying text (discussing subjective and objective elements of Eighth Amendment test). As discussed in the foregoing pages, this creates an impossible burden for incarcerated persons, requiring evidence of a subjective disregard for human life, despite objectively inhumane conditions and treatment. See sources cited *infra* notes 150-163 and accompanying text (considering practicality of deliberate indifference test). This is particularly difficult given the recency of COVID-19 and the lack of consensus as to appropriate responses. See sources cited *infra* note 164-166 and accompanying text (mentioning difficulties of subjective standard during a novel disease).

²⁷ See 1 CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT – ITS DIVISIONS, AGENCIES AND OFFICERS § 7:69. INADEQUATE MEDICAL CARE – DELIBERATE INDIFFERENCE STANDARD (2021) (describing requirements of Eighth Amendment conditions of confinement requirements).

²⁸ See *id.* (elaborating further on courts’ analyses of deliberate indifference standard).

²⁹ See Merkl & Weinberger, *supra* note 2 (noting difficulties in proving deliberate indifference under subjective standard based on Supreme Court precedent).

³⁰ See INADEQUATE MEDICAL CARE – DELIBERATE INDIFFERENCE STANDARD, *supra* note 27 (outlining inconsistent practices in applying standard among circuit courts).

³¹ See sources cited *infra* notes 33-43 and accompanying text (providing historical overview of Eighth Amendment).

³² See INADEQUATE MEDICAL CARE – DELIBERATE INDIFFERENCE STANDARD, *supra* note 27 (adding that removal of a subjective analysis will provide for more equitable results).

II. HISTORY

The Eighth Amendment to the United States Constitution provides, “[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.”³³ Generally, the Eighth Amendment seeks to prevent government officials from issuing punishments that are “barbaric” or severely disproportionate to the crime committed.³⁴ Despite this general assessment of the Amendment, the Supreme Court has often referenced the difficulty in properly defining its scope, with Justice Burger noting, “of all our fundamental guarantees, the ban on ‘cruel and unusual punishments’ is one of the most difficult to translate into judicially manageable terms.”³⁵ As such, the historical origins and development are particularly acute in defining the Amendment’s scope today.³⁶

A. *British Protections and Formative American History*

The concept of protection against cruel and unusual punishment dates long before the founding of the U.S. Constitution, with roots in early British governmental structure.³⁷ Following the tyrannical leadership of King James II in England, the English Parliament ratified a declaration of rights that provided “nor cruell and unusuall Punishments inflicted.”³⁸ Many scholars argue that the inclusion of this language largely stemmed from the trial of Titus Oates, in which the government sought to limit post-conviction sentences.³⁹ However, other scholars suggest that historical ev-

³³ See U.S. CONST. amend. VIII (emphasis added) (providing protections against cruel and unusual punishment).

³⁴ See Micah Schwartzbach, *The Meaning of “Cruel and Unusual Punishment,”* NOLO, <https://www.nolo.com/legal-encyclopedia/the-meaning-cruel-unusual-punishment.html> (last visited Mar. 6, 2021) (discussing overarching purpose of Eighth Amendment).

³⁵ See *Furman v. Georgia*, 408 U.S. 238, 376 (1972) (Burger, C.J., dissenting) (noting difficulties in applying Eighth Amendment standards); see also Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 665 (2004) (discussing Supreme Court’s inability to properly define Eighth Amendment protections).

³⁶ See Schwartzbach, *supra* note 34 (suggesting Eighth Amendment’s historical roots require more in-depth interpretation).

³⁷ See Rumann, *supra* note 35, at 670 (discussing British origins of Eighth Amendment in U.S. Constitution).

³⁸ See *id.* (providing context for introduction of Eighth Amendment and prohibition on cruel and unusual punishment).

³⁹ See *id.* at 670-71 (indicating trial of Titus Oates as formative event in Eighth Amendment adoption). Titus Oates was convicted in 1685 for perjury that led to numerous executions of people Oates wrongfully accused. See *id.* at 668-71; see also *Harmelin v. Michigan*, 501 U.S. 957, 969 (1991) (presenting historical origins of Eighth Amendment principles); John D. Bessler, *A Century In The Making: The Glorious Revolution, The American Revolution, And The Origins of the Constitution’s Eight Amendment*, 27 WM. & MARY BILL OF RTS. J. 989, 1018-19 (2019) (de-

idence points towards inclusion of this language as an effort to prevent torturous methods used to extract confessions.⁴⁰

Predominantly inspired by the English Bill of Rights, Virginia adopted a similar punishment provision in the Virginia Declaration of Rights in 1776.⁴¹ As much of the U.S. Constitution was influenced by the colonies' independent constitutions, Virginia's inclusion of a cruel and unusual punishment clause resulted in the addition of the Eighth Amendment to the federal Bill of Rights during the Constitutional Convention.⁴² Since the Bill of Rights' adoption, the Supreme Court has wrestled with determining whether prison conditions, specifically confinement, are considered "punishment" under the Eighth Amendment.⁴³

scribing trial of Titus Oates and its Eighth Amendment influences). As a result of Oates' perjury, over twelve Catholic men were executed, and Oates was coined, "the Blackest of Villains that ever lived upon the face of the Earth." See Bessler, *supra*, at 1018. However, the judge in Oates' case feared the implications of an execution, considering that a death imposition may deter even honest witnesses from testifying in later cases. See *Harmelin*, 501 U.S. at 970. As a result, Oates was sentenced to imprisonment and an annual public whipping while tied to a moving cart, along with numerous other barbaric punishments. See Bessler, *supra*, at 1021-22. Despite the severity of Oates' conduct, his punishments are still cited for their barbarity in contemporary Eighth Amendment jurisprudence. See, e.g., *Weems v. United States*, 217 U.S. 349, 390 (1910) (discussing scope and power of Eighth Amendment originating from Titus Oates); *Ingraham v. Wright*, 430 U.S. 651, 665 (1977) (noting "exclusive concern of English version was conduct of judges enforcing criminal law"); *Furman v. Georgia*, 408 U.S. 238, 274 n.17 (1972) (Brennan, J., concurring) (explaining English provision was intended to restrain the judicial and executive power).

⁴⁰ See Rumann, *supra* note 35, at 668-70 (considering historical intent of language proposed in Eighth Amendment).

⁴¹ See *id.* at 670 (introducing Virginia's influence on construction and implementation of Eighth Amendment).

⁴² See *id.* (outlining timeline for adoption of Eighth Amendment in Bill of Rights). Historically, the inclusion of the Eighth Amendment was also proposed by Virginia during the Virginia Convention, which ratified the U.S. Constitution in 1788. See BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 170 (Rowman & Littlefield 1992). Two notable Virginians, George Mason and Patrick Henry, were loud advocates for the inclusion of a cruel and unusual punishment limitation on Congress. See JOHN PATTERSON, *THE BILL OF RIGHTS: POLITICS, RELIGION, AND THE QUEST FOR JUSTICE* 84 (2004). Henry added, "[w]hat has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany. . . ." See *Debate in Virginia Ratifying Convention*, THE FOUNDER'S CONST., <https://press-pubs.uchicago.edu/founders/documents/amendVIII13.html> (last visited Oct. 21, 2021).

⁴³ See Jeffrey D. Bukowski, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishment to Prison Deprivation Cases is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 419 (1994) (rejecting Justice Thomas' assertion that conditions of confinement are outside bounds of Eighth Amendment protection).

B. *Current Eighth Amendment Interpretations: Evolving Standards of Decency*

As noted by Justice Burger above, defining the scope of what constitutes a “cruel” and “unusual” punishment under the Eighth Amendment has been particularly difficult for federal courts.⁴⁴ In 1910, the Supreme Court recognized that “[w]hat constitutes a cruel and unusual punishment has not been exactly decided.”⁴⁵ The Supreme Court has grappled with the term “unusual,” having difficulty applying the logic that even if a punishment is inhumane, it may be permissible if it is deemed a “normal” punishment.⁴⁶ The Court has since excluded the interpretation of “unusual” in its caselaw, suggesting that the term may have been unintentionally added to the Amendment by the Framers.⁴⁷

Today, the Court is left to determine what constitutes “cruel” under the Eighth Amendment, especially in light of historical punishments that are now seen as inhumane to contemporary society.⁴⁸ While many Justices differ, in 1958, the Court adopted an “evolving standards of decency” test, with Justice Burger holding that the cruel and unusual punishment clause “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁴⁹ In applying the “evolving standards of decency” test, the court assesses the proposed punishment by reviewing both objective and subjective indicia.⁵⁰ The “objective indicia” prong re-

⁴⁴ See Schwartzbach, *supra* note 34 (mentioning historical difficulties in interpreting terms “cruel” and “unusual” together).

⁴⁵ See *Weems v. United States*, 217 U.S. 349, 368 (1910) (acknowledging holes in Eighth Amendment jurisprudence); see also Schwartzbach, *supra* note 34 (reviewing early discussions of Eighth Amendment).

⁴⁶ See Schwartzbach, *supra* note 34 (outlining Court’s difficulties in defining term “unusual”).

⁴⁷ See *Furman v. Georgia*, 408 U.S. 238, 331 (1972) (Marshall, J., concurring) (reiterating term “unusual” was inadvertently included in English Bill of Rights); see also Schwartzbach, *supra* note 34 (commenting on early theories of Eighth Amendment interpretation).

⁴⁸ See Schwartzbach, *supra* note 34 (reviewing historical backdrop of Eighth Amendment tests).

⁴⁹ See *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (introducing restructuring of Eighth Amendment analysis); see also Schwartzbach, *supra* note 34 (discussing new Eighth Amendment test).

⁵⁰ See William W. Berry III, *Evolved Standards, Evolving Justices? The Case for a Broader Application of the Eighth Amendment*, 96 WASH. U. L. REV. 105, 117 (2018) (explaining scope of evolving standards of decency test). In adopting this test, the Court placed significant emphasis on judicial deference to states and allowing state legislatures to determine appropriate punishments. See *id.* at 116 (outlining history of deference to state legislatures for Eighth Amendment jurisprudence). One scholar argues that this deference was likely afforded to states following the *Furman* decision, where the Supreme Court faced severe backlash for outlawing the death penalty rather than affording states the opportunity to make that determination themselves. See *id.* at 117.

quires the court review societal consensus, namely the number of state and federal governments that permit the punishment.⁵¹ The “subjective indicia” prong utilizes the Court’s “own judgment,” whereby Justices assess whether the use of punishment at issue may be justified by any theory of punishment (retribution, deterrence, incapacitation, or rehabilitation).⁵² Justices place an emphasis on proportionality in their assessments, determining whether they believe that “the punishment is excessive in light of the characteristics of the offender and nature of the crime.”⁵³

Conversely, originalists on the Court have attempted to interpret the Eighth Amendment as limited to punishments that were historically unacceptable because of their “inherent brutality.”⁵⁴ Despite this proposed historical approach, the Court has remained consistent with its adherence to

This background has prompted the Court to adopt the evolving standards of decency test, as it allows for an acknowledgment of state practices. *See id.*

⁵¹ *See id.* at 116 (citing *Atkins v. Virginia*, 536 U.S. 304, 311-17 (2002)) (describing what Court will review to determine objective indicia). The author notes that this has seemingly resulted in the practice of simply counting the number of state jurisdictions that authorize the punishment, and if less than half authorize the punishment, then it is often considered not in accordance with societal standards. *Id.* The Court has also incorporated international norms in their considerations, but this is frequently met with backlash by originalist Justices. *See id.* at n.58; *see also Roper v. Simmons*, 543 U.S. 551, 625-28 (Scalia, J., dissenting) (discussing improper use of international norms in Eighth Amendment analysis).

⁵² *See Berry*, *supra* note 50, at 117 (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)) (providing “subjective indicia” analysis utilized by the Court).

⁵³ *See id.* at 118 (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008)) (indicating theories of punishment most utilized by the Court, particularly proportionality). Under this test, the Court has deemed unconstitutional the death penalty for “rapes, for some felony murder crimes, or where the offender is intellectually disabled or a juvenile.” *See id.* (listing unconstitutional punishments under evolving standards of decency test).

⁵⁴ *See Schwartzbach*, *supra* note 34 (introducing originalist approach to Eighth Amendment analysis); *see also* John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 N.W. U. L. REV. 1739, 1742 (2008) (remarking on Scalia’s approach to Eighth Amendment assessments as prohibiting “only certain inherently cruel forms of punishment”). Many scholars, in following an originalist interpretation to the Constitution, argue that the “evolving standards of decency” test promotes far too much inconsistency in the Eighth Amendment jurisprudence. *See Stinneford*, *supra*, at 1741.

The Court’s decisions with respect to the death penalty have been no more consistent than its non-death penalty proportionality jurisprudence. In *Stanford v. Kentucky*, for example, the Court ruled that execution of sixteen-or seventeen-year-old murderers was not cruel and unusual punishment per se. Sixteen years later, in *Roper v. Simmons*, the Court ruled that it was. Similarly, in *Penry v. Lynaugh*, the Court held that execution of the mentally retarded was not necessarily cruel and unusual. Thirteen years later, in *Atkins v. Virginia*, the Court held that it was. As these results indicate, in recent decades, the *Supreme Court’s prior decisions as to the scope and application of the Cruel and Unusual Punishments Clause have been poor indicators of what the Court will do in the future.*

Id. (emphasis added) (critiquing inconsistent application of evolving standards of decency test).

the evolving standards of decency test, oftentimes applying modern public opinion to its Eighth Amendment interpretations.⁵⁵ Thus, in applying Eighth Amendment protections today, the Court has placed a particular emphasis on ensuring that basic dignity, considering the time period, is respected.⁵⁶

C. *The Eighth Amendment in Prisons: The Court's Construction of the "Deliberate Indifference" Test*

The Supreme Court's Eighth Amendment jurisprudence has frequently evolved over time, periodically widening its latitude to restrict inhumane practices by government officials.⁵⁷ The Supreme Court has been expansive in their definition of punishment, determining that the scope of the Eighth Amendment may extend beyond the mere infliction of punishment, and instead holding that the Eighth Amendment may also be implicated based on the conditions of confinement.⁵⁸ Unsurprisingly, the Supreme Court has qualified this expansion, noting that "harsh conditions of confinement may constitute cruel and unusual punishment, *unless such conditions are a part of the penalty that criminal offenders pay for their offenses against society.*"⁵⁹

⁵⁵ See, e.g., *Coker*, 433 U.S. at 597 (holding death penalty as punishment for rape unconstitutional because only one state authorized that sentence); *Atkins*, 536 U.S. at 311-12 (holding death penalty for intellectually disabled unconstitutional based on modern trend); *Roper*, 543 U.S. at 578 (holding death penalty for minors unconstitutional based on trend towards death penalty abolition).

⁵⁶ See Schwartzbach, *supra* note 34 (assessing importance of context and time period in Eighth Amendment analyses).

⁵⁷ See *id.* at 424-29 (establishing jurisprudential history of Eighth Amendment claims).

⁵⁸ See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (expanding scope of Eighth Amendment to consider conditions of punishment); *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978) (incorporating conditions of confinement into deliberate indifference assessment); *Brown v. Plata*, 563 U.S. 493, 511 (2011) (finding extreme prison overcrowding warrants judicial remedy under Eighth Amendment); see also Bukowski, *supra* note 43, at 424-25 (introducing Eighth Amendment's expanded scope under *Estelle*); Joel H. Thompson, *Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs*, 45 HARV. CIV. LIB. L. REV. 635, 637 (2010) (laying out *Estelle* and *Farmer* progression under Eighth Amendment jurisprudence). The Supreme Court further emphasized the Eighth Amendment's protection of incarcerated persons, holding that conditions of incarceration are distinct from punishments in a school setting. See *Ingraham v. Wright*, 430 U.S. 651, 669-70 (1977) (affirming principles established in *Estelle*); see also Bukowski, *supra* note 43, at 425 (discussing jurisprudential progression of incarcerated person's conditions of confinement).

⁵⁹ See *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (emphasis added) (cleaned up) (providing exception to conditions of confinement protections). The Court continues to emphasize that Eighth Amendment protections are relaxed in the prison context, stating that "[a]fter incarceration, only the 'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual pun-

In defining what would constitute an Eighth Amendment violation based on conditions of confinement, the Court determined that prison officials' conduct must demonstrate "deliberate indifference" to the serious medical needs of incarcerated persons, holding that mere negligence alone is not enough.⁶⁰ Despite its commitment to protection against inadequate prison conditions, the Supreme Court ruled that prison officials must inflict "unnecessary or wanton" pain to constitute cruel and unusual punishment.⁶¹ The Court continued to refine this interpretation, holding that prison officials will only violate the Eighth Amendment when their conduct is malicious with the purpose of causing harm, and that lack of due care for an incarcerated person's interests or safety is not enough to warrant remedy.⁶²

The Supreme Court subsequently worked to define the requisite standards under the newly proposed "deliberate indifference" test, including determining whether an objective or subjective assessment of a prison official's conduct would be appropriate.⁶³ In the seminal *Farmer v. Brennan*,⁶⁴ the Supreme Court set forth the two-pronged test to be applied to Eighth Amendment deliberate indifference claims, including the use of both an objective and subjective analysis.⁶⁵ Under this test, a prison official will be held liable under either § 1983 or *Bivens* for violations of the Eighth Amendment when the plaintiff establishes: (1) there was an objectively serious medical need; and (2) prison officials were deliberately indif-

ishment" See *Ingraham*, 430 U.S. at 670 (emphasis added) (describing scope of Eighth Amendment protections in prison).

⁶⁰ See *Whitley*, 475 U.S. at 319 (noting Eighth Amendment requires "more than ordinary lack of due care for the [incarcerated person's] interests or safety.")

⁶¹ See *Ingraham*, 430 U.S. 651 at 669-70 (establishing unnecessary and wanton infliction of pain threshold); *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (holding double celling does not constitute cruel and unusual punishment without unnecessary or wanton pain).

⁶² See *Whitley*, 475 U.S. at 324 (holding that prison official's intentional shooting of incarcerated person during riot was not cruel and unusual). Affording prison administrators significant deference when security risks are implicated, the Court in *Whitley* concluded that even though prison officials could have handled the response better, there was no "wantonness" necessary to offend the Eighth Amendment. *Id.* "The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense." *Id.* at 319.

⁶³ See Bukowski, *supra* note 43, at 427 (discussing Court's shift to include objective and subjective analysis).

⁶⁴ *Farmer v. Brennan*, 511 U.S. 825, 826 (1994) (stating court's disposition).

⁶⁵ See *id.* at 836 (outlining use of two-prong deliberate indifference test). *Farmer* dealt with a preoperative transsexual with feminine characteristics incarcerated in a male prison who alleged, among other things, that the prison official's failure to segregate her resulted in her subsequent rape and beatings, thereby making prison officials liable for deliberate indifference. *Id.* at 829. The plaintiff in *Farmer* asserted that the prison officials were deliberately indifferent because they were aware of the facility's violent tendencies and that the plaintiff would be susceptible to attack based on her particular characteristics. *Id.*

ferent to that need.⁶⁶ As to the second prong, the Supreme Court thereafter held that deliberate indifference must be assessed subjectively; the court determined that objectively inhumane prisons conditions are not enough to establish liability, but rather, the Court must review the prison official's state of mind.⁶⁷ Consequently, the Supreme Court noted that even obvious risks will not implicate a prison official, so long as the prison official was not subjectively aware of the risk.⁶⁸ Therefore, as a result of this ruling, prison officials whom the Supreme Court Justices deem to have acted "reasonably" in response to a risk may still avoid liability under the Eighth Amendment.⁶⁹

D. Relevant Prerequisite Hurdles to an Eighth Amendment Claim: § 1983, Bivens, and the PLRA

While the Eighth Amendment is explicit in its protections against inhumane treatment, incarcerated persons must first surpass a series of hurdles before properly asserting a meritorious Eighth Amendment analysis in federal court.⁷⁰

⁶⁶ See *id.* at 837 (laying out Eighth Amendment test). Depending on whether an incarcerated person is in state or federal prison, in order to reach this Eighth Amendment test, an incarcerated person must first allege a § 1983 (state or local prison) or *Bivens* (federal) claim alleging that a state or federal official violated their Eighth Amendment rights while acting "under the color of law." See sources cited *infra* notes 71, 75 and accompanying text (describing initial bases for raising Eighth Amendment violations).

⁶⁷ See *Farmer*, 511 U.S. at 838 (discussing necessity of subjective test for deliberate indifference).

⁶⁸ See *id.* (adding detail to use of subjective test). The Court in *Farmer* elaborated further by adding that a prison official cannot be required to "anticipate" victims, and that even plaintiffs who are especially susceptible to injury will not alter the Court's requirement that a prison official must be *aware* of the risk. *Id.* at 844. Moreover, the *Farmer* Court provided additional scapegoats for prison officials, as they articulated that prison officials who were aware of the risk to incarcerated persons may still escape liability if they can show that they "respond[ed] reasonably to a risk, even if the harm was not ultimately avoided." See *id.* (elaborating on prison official's liability in this context).

⁶⁹ See *id.* (adding prison official's duty is to ensure "reasonable safety"). The Court rejected the plaintiff's argument that a subjective test would "unjustly" require physical injury prior to suit, holding that incarcerated persons may still seek injunctions under the subjective test, and that this test does not require an injury to occur prior to suit. *Id.* at 845; see also Brief for the Petitioner, *Farmer*, 511 U.S. 825, No. 92-7247 (Nov. 16, 1993) (introducing physical injury requirement to court). Some commentators have critiqued the use of a subjective analysis within this context, arguing that "[t]he conditions of a[n] [incarcerated person]'s confinement are part of his punishment regardless of a prison official's state of mind." See Jason D. Sanabria, Note and Comment, *Farmer v. Brennan: Do Prisoners Have Any Rights Left Under the Eighth Amendment?*, 16 WHITTIER L. REV. 1113, 1142-43 (1995).

⁷⁰ See sources cited *infra* notes 75-83 and accompanying text (providing several instances of procedural hurdles for incarcerated litigants).

To pursue an Eighth Amendment violation by state or local actors in federal court, incarcerated persons must first raise a § 1983 civil rights claim, which holds state and local government officials working “under the color of law” tortiously liable for violations of “immunities secured by the Constitution.”⁷¹ Practically, though, § 1983 serves as a procedural device, giving claimants jurisdiction to bring civil rights suits against state and local actors in federal court.⁷² Since it is a procedural device, however, allegations are ancillary in nature, that is, claimants must allege a violation of another federal law in order to obtain relief.⁷³ Further, § 1983 claims apply exclusively to state and local actors, and do not typically reach federal officials unless they act alongside state or local officials.⁷⁴

However, if a federal prison official was acting independently, incarcerated persons instead must raise a *Bivens* claim.⁷⁵ Similar to § 1983 claims, a *Bivens* claim is a civil rights lawsuit, holding federal officials “acting under the color of authority” personally liable for violations of constitutional rights, such as the Eighth Amendment.⁷⁶ However, in obtaining

⁷¹ See 42 U.S.C. § 1983 (laying out liability for federal officials who violate protected rights). In addition, the term “color of law” has often raised significant discourse among federal courts. See *Gonzaga University v. Doe*, 536 U.S. 273, 277 n.1 (2002) (declining to review whether petitioners acted “under color of state law”). Ultimately, “under color of law” has most often been interpreted to hold government actors liable when they act with the power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” See *West v. Atkins*, 487 U.S. 42, 49 (1988) (defining “under the color of law” for deliberate indifference). Thus, police officers and prison officials will be acting “under the color of law” when acting within the scope of their employment. *Id.*

⁷² See Martin A. Schwartz & Kathryn R. Urbonya, *Section 1983 Litigation*, FED. JUD. CTR., 7-8 (2008), <https://www.fjc.gov/sites/default/files/2012/Sec19832.pdf>. Historically, § 1983 was adopted under the Civil Rights Act of 1871, seeking to provide freed slaves the opportunity to bring suit against southern law enforcement officials in federal court, avoiding biases likely present in state courts. *Id.* at 1-2. Thus, the federal government adopted § 1983 exclusively as a procedural remedy, hoping to provide freed slaves the opportunity to address civil rights claims in a more impartial court. *Id.* at 2-3; see also Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 485 (1982) (detailing historical adoption of § 1983).

⁷³ See Schwartz & Urbonya, *supra* note 72, at 7-8 (explaining functional and procedural use of § 1983 claims).

⁷⁴ See *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) (holding § 1983 claims do not apply to federal officials); *Tongol v. Usery*, 601 F.2d 1091, 1099 (9th Cir. 1979) (holding federal officials liable under § 1983 when working alongside state actor).

⁷⁵ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (holding federal officials may be liable for monetary damages resulting from violation of constitutional tort).

⁷⁶ See *id.* at 389 (describing appropriateness of monetary damages against federal officials where cause of action is proven). *Bivens* claims were adopted to provide relief for litigants where negligent acts by government officials were not covered by the Federal Torts Claims Act (FTCA). See *id.* at 392 (offering *Bivens* as additional source of remedy where FTCA will not apply); see also Federal Torts Claim Act, 28 U.S.C. § 1346 (providing relief only where the ac-

its basis through common law, *Bivens* claims are implied causes of actions, meaning incarcerated persons must demonstrate that there is no other statutory remedy available for their claim.⁷⁷ In addition, since it is an implied cause of action, courts have upheld the discretionary authority to refuse to imply a cause of action if there are other concerns, such as national security considerations.⁷⁸

In another series of hurdles, even after alleging inadequate confinement under the Eighth Amendment's cruel and unusual punishment, based on either § 1983 or *Bivens*, incarcerated persons must further meet the stringent requirements of the Prison Litigation Reform Act ("PLRA").⁷⁹ Notably, Congress adopted the PLRA in response to the surplus of § 1983 claims, with its overall purpose to avoid "meritless" incarcerated person lawsuits.⁸⁰ Much like several other litigation prerequisites, the PLRA requires incarcerated persons to first exhaust all administrative remedies prior to bringing a claim in federal court.⁸¹ Having surpassed the base-level PLRA requirements, incarcerated persons may allege civil complaints in

tion is brought against the United States). *Bivens* actions are not prohibited by the federal government's "sovereign immunity" doctrine because the officials are acting in their personal capacities and are therefore not considered "the United States." See 28 U.S.C. § 1346(a)(1) ("Any civil action against the United States" (emphasis added)).

⁷⁷ See *Bush v. Lucas*, 462 U.S. 367, 374-75 (1983) (holding Civil Service Reform Act permitted statutory remedy for wrongful termination by federal agencies).

⁷⁸ See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (holding *Bivens* did not extend to Plaintiffs' Fifth Amendment claims). The Court has also refused to acknowledge a *Bivens* claim when injuries were suffered during military service. See *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (holding enlisted military service members cannot bring *Bivens* actions against their superior officers).

⁷⁹ See 18 U.S.C. § 3626 (articulating process for incarcerated persons to adjudicate claims in federal court). Typically, in § 1983 and *Bivens* claims, there are no exhaustion requirements. See *id.* However, because incarcerated persons have been subjected to the PLRA, they have to overcome an additional hurdle before their civil rights claims may be redressed in court. See *id.*

⁸⁰ See Ethan Rubin, Comment, *Unknowable Remedies: Albino v. Baca, The PLRA Exhaustion Requirement, and the Problem of Notice*, 56 B.C. L. REV. E-SUPPLEMENT 151, 151 (2015) (introducing context of PLRA adoption). This comment further discusses the inequities surrounding the PLRA's exhaustion requirement, noting that the administrative exhaustion requirement applies to all incarcerated persons regardless of whether they have been notified of this requirement. *Id.*

⁸¹ See 42 U.S.C. 1997(e) (describing requirement for exhaustion of administrative remedies); 18 U.S.C. § 3626(a)(3)(A)(i)-(ii) (refusing prison release orders unless administrative remedies exhaustion); see also *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016) (holding available remedies prevent incarcerated persons from bringing claim in court). This requirement has also been applied arbitrarily during the COVID-19 pandemic, with some courts claiming that the exhaustion requirement is disregarded because of the severe circumstances of the pandemic, whereas others contend that an exhaustion of administrative remedies remains necessary. See *McPherson v. Lamont*, 457 F. Supp. 3d 67, 81 (D. Conn. 2020) (holding COVID-19 risks are so dire that exhaustion requirement is not necessary); see also *Blake*, 136 S. Ct. at 1857 (holding "special circumstances" do not preclude incarcerated persons from meeting exhaustion requirement).

federal courts.⁸² Thus, before incarcerated persons may even address the requisite analysis under the Eighth Amendment, they must first convince a federal court that they have met the exhaustive requirements in the PLRA, among others, and that they have sufficient basis under either § 1983 or *Bivens*.⁸³

E. Deference to Prison Administrators and Its Added Burden on Incarcerated Litigants

While litigating, incarcerated persons are next challenged to overcome the long-held deference afforded to prison administrators by the Court.⁸⁴ The Supreme Court has maintained that “[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”⁸⁵ Not only does this deference exist, but subsequent Supreme Court cases have instructed that this deference be “substantial,” providing prison administrators with the ability to “defin[e] legitimate goals of corrections systems and determin[e] most appropriate means to accomplish them.”⁸⁶

This general standard has been extended to deliberate indifference cases, with the Supreme Court specifically recognizing the competing interests of Eighth Amendment protections for incarcerated persons and security risks in prisons.⁸⁷ The Court, in fact, emphasizes just how important

⁸² See 18 U.S.C. § 3626 (providing implications of failure to meet requirements of PLRA).

⁸³ See sources cited *supra* note 81 and accompanying text (discussing exhaustion requirements under PLRA).

⁸⁴ See sources cited *infra* notes 85-90 and accompanying text (commenting on substantial deference afforded to prison administrators).

⁸⁵ See *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979) (introducing concept of deference to prison administrators).

⁸⁶ See *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (holding “legitimate penological interests” were alleged by restricting visitation of children to prison). The Court in *Overton* discusses the four key factors in evaluating prison regulations and whether they would pass constitutional scrutiny, namely: (1) “whether the regulation has a ‘valid, rational connection’ to a legitimate governmental interest;” (2) “whether alternative means are open to [incarcerated persons] to exercise the asserted right;” (3) “what impact an accommodation of the right would have on guards and [incarcerated persons] and prison resources;” and (4) “whether there are ‘ready alternatives’ to the regulation.” *Id.* at 132; see also *Turner v. Safley*, 482 U.S. 78, 89-91 (1987) (establishing four-factor test utilized in assessing prison regulations and appropriate deference).

⁸⁷ See *Whitley*, 475 U.S. at 320-21 (discussing balancing interests between incarcerated persons and prison officials in Eighth Amendment context). The Court adopted a new test under *Whitley* regarding disturbances and deliberate indifference, stating that

[w]here a prison security measure is undertaken to resolve a disturbance . . . we think the question whether the measure taken inflicted unnecessary and wanton pain and suf-

deference to prison administrators is, stating, “a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.”⁸⁸

In facing these series of hurdles, incarcerated persons will be required to surpass the Supreme Court’s explicit trust in prison administrators’ decisions regarding safety.⁸⁹ Incarcerated persons will thus face a final presumption against them when arguing the merits of their claim, in addition to an already challenging subjective element to establish under the deliberate indifference test.⁹⁰

F. *Final PLRA Limitations on Relief*

Finally, even if incarcerated persons somehow manage to surpass the above hurdles, incarcerated persons again must return to the PLRA, as it provides applicable limitations on available relief for individuals.⁹¹ The PLRA provides that any federal court prospective relief order that results from an incarcerated person’s successful deliberate indifference claim must be “narrowly drawn” and be the “least intrusive means necessary” to correct prison officials’ apparent violation.⁹² The rule also adds that “[t]he

fering ultimately turns on ‘whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id.

⁸⁸ See *id.* at 320 (reviewing appropriate deference in a deliberate indifference setting).

⁸⁹ See Alicia Bianco, Article, *Prisoners’ Fundamental Right to Read: Courts Should Ensure that Rational Basis is Truly Rational*, 21 ROGER WILLIAMS U. L. REV. 1, 19 (2016) (arguing “the level of deference afforded to prison administrators causes the purported balancing test in *Turner* to be heavily slanted against [incarcerated persons].”) Notably, this deference also extends to medical opinions received by prison administrators in evaluating the subjective understandings for deliberate indifference. See *Westlake v. Lewis*, 537 F.2d 857, 860 n.5 (applying medical deference in deliberate indifference assessment).

⁹⁰ See Bianco, *supra* note 89, at 20 (“[T]he courts are inclined to defer to the prison administrator’s judgment regardless of whether a[n] [incarcerated person] claims that a policy is in violation of the [incarcerated person’s] rights, or that the regulated material is appropriate.”)

⁹¹ See 18 U.S.C. § 3626 (establishing requisite elements incarcerated persons must establish to warrant judicial relief).

⁹² See *id.* § 3626(a)(1)(A) (providing requirements for prospective relief for incarcerated persons). “The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.” *Id.* Additionally, the PLRA requires that a release order be issued by a three-panel bench, further illustrating the stringent and arbitrary requirements of this rule. *Id.* § 3626(a)(3)(B) (“In

court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief,” granting federal courts and prison officials additional discretion to avoid resolving Eighth Amendment violations in the name of public safety.⁹³ Thus, incarcerated persons face a steep uphill battle in obtaining relief for the potential violations of their constitutional rights.⁹⁴

III. FACTS

A. *Circuit Splits*

As a result of the adherence to a subjective analysis, federal courts’ application of the deliberate indifference test often varies in its results.⁹⁵ Several circuit courts are split as to both parts of the test, namely what constitutes a serious medical need, and whether a prison official was subjectively indifferent to this medical need.⁹⁶ For example, circuit courts have been unable to come to a consensus regarding whether refusal to provide surgery for transgender incarcerated persons’ gender dysphoria—distress caused by discrepancy between person’s sex and gender—constitutes deliberate indifference under the Eighth Amendment.⁹⁷ In addition to contradictions among circuits regarding the standard for “serious medical need,” federal courts across the country have been inconsistently applying the subjective test, ranging in decisions as to what constitutes deliberate indifference based on a prison official’s conduct.⁹⁸

any civil action in Federal court with respect to prison conditions, a[n incarcerated person] release order shall be entered only by a three-judge court”)

⁹³ See 18 U.S.C. § 3626(a)(1)(A) (describing discretion afforded to courts to assess public safety).

⁹⁴ See *id.* (establishing hurdles for incarcerated persons in litigation); *Farmer v. Brennan*, 511 U.S. 825, 835-36 (1994) (outlining deliberate indifference test); see also *Merkel and Weinberger*, *supra* note 2 (discussing inability for incarcerated persons to meet these high burdens).

⁹⁵ See INADEQUATE MEDICAL CARE – DELIBERATE INDIFFERENCE STANDARD, *supra* note 27 (emphasizing inconsistent application among circuit courts).

⁹⁶ See *id.* (discussing inconsistent approaches among both circuit and district courts).

⁹⁷ See *Gibson v. Collier*, 920 F.3d 212, 221 (5th Cir. 2019) (holding lack of medical consensus regarding gender dysphoria prevented denial of procedure from being a deliberate indifference subjective violation). The Ninth Circuit, by comparison, held that the lack of treatment was deliberately indifferent because the surgery was medically necessary. See *Edmo v. Corizon, Inc.*, 935 F.3d 757, 793 (9th Cir. 2019) (holding medical necessity rendered the prison official’s denial of the procedure deliberately indifferent).

⁹⁸ See, e.g., *Lowrance v. Coughlin*, 862 F. Supp. 1090, 1119 (S.D.N.Y. 1994) (holding refusal to give physician-prescribed operation constitutes deliberate indifference); *Meadows v. Hut-tonsville Corr. Ctr.*, 793 F. Supp. 684, 688 (N.D.W. Va. 1992), *order aff’d* 991 F.2d 790 (4th Cir. 1993) (holding forced operation despite lack of permission does not constitute deliberate indifference); *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993) (finding forcing incarcerated person

B. *Deliberate Indifference During Public Health Emergencies*

1. H1N1

Nevertheless, federal courts have previously been prompted to assess deliberate indifference claims during public health emergencies, particularly during the H1N1⁹⁹ pandemic in 2009.¹⁰⁰ Federal courts primarily avoided resolving inadequate medical condition claims during the H1N1 epidemic by holding that unless prison officials blatantly ignored the H1N1 virus in its entirety, prison facilities' sanitation practices will not amount to a subjective deliberate indifference to a serious medical condition, regardless of their actual adherence to medical guidelines.¹⁰¹

Of their notable holdings, federal courts have determined that failing to provide incarcerated persons with necessary vaccinations to prevent diseases does not constitute deliberate indifference under the Eighth Amendment, instructing that this practice does not amount to a "subjective" disregard of known medical risks.¹⁰² Furthermore, federal courts have at times indicated that the mere exposure to the deadly disease does not constitute "a deprivation of basic human needs that was objectively sufficiently

son to work with fractured spine not deliberately indifferent); *Aaron v. Finkbinder*, 793 F. Supp. 734, 737-38 (E.D. Mich. 1992), *order aff'd* 4 F.3d 993 (6th Cir. 1993) (concluding failure to record incarcerated person needed insulin on medical chart not deliberately indifferent); *Koehl v. Dalsheim*, 85 F.3d 86, 88 (2d Cir. 1996) (holding failure to provide prescription glasses to incarcerated person was sufficiently deliberately indifferent); *Ruarek v. Drury*, 21 F.3d 213, 217-18 (8th Cir. 1994) (holding delay in calling ambulance for incarcerated person experiencing discomfort not deliberately indifferent); *McElligott v. Foley*, 182 F.3d 1248, 1260 (11th Cir. 1999) (delaying medical treatment for severe pain can constitute deliberate indifference).

⁹⁹ See *H1N1 flu (swine flu)*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/swine-flu/symptoms-causes/syc-20378103> (last visited Oct. 10, 2021) (explaining symptoms of H1N1 or swine flu). H1N1—often referred to as "swine flu"—is a combination of the H1N1 and H3N2 strains of influenza. *2009 H1N1 Pandemic*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html> (last visited Nov. 19, 2021). In 2009, the H1N1 infected 60.8 million people around the world, thereby resulting in the World Health Organization ("WHO") declaring H1N1 a pandemic. *Id.*

¹⁰⁰ See, e.g., *Ayala v. NYC Dep't of Corr.*, No. 10 Civ. 6295, 2011 WL 2015499, at *1 (S.D.N.Y. May. 9, 2011) (evaluating deliberate indifference during swine flu); *Jackson v. Rikers Island Facility*, No. 11 Civ. 285, 2011 WL 3370205, at *1 (S.D.N.Y. Aug. 2, 2011) (analyzing whether swine flu constitutes serious medical risk); *Freeman v. Quinn*, No. 09-cv-1055, 2010 WL 2402917, at *2-3 (S.D. Ill. June 15, 2010) (declining to acknowledge prison official's response to swine flu as deliberate indifference).

¹⁰¹ See *Ayala*, 2011 WL 2015499, at *2 ("Absent any indication that the defendants ignored willfully the swine flu outbreak in their facilities, the plaintiff's infection, though unfortunate, is insufficient to support an Eighth Amendment claim.")

¹⁰² See *Freeman*, 2010 WL 2402917, at *3 ("Freeman makes no allegation that any of the named defendants . . . acted with deliberate indifference in denying him access to the vaccine.")

serious.”¹⁰³ However, public health officials have frequently cited major distinctions between the COVID-19 virus and the H1N1 virus, leaving open the question of how courts should resolve deliberate indifference claims in the context of COVID-19.¹⁰⁴

2. COVID-19

Moreover, given the obtrusive nature of COVID-19,¹⁰⁵ federal courts have been tasked with resolving a significant number of deliberate indifference claims brought by incarcerated persons.¹⁰⁶ As a result of this litigation influx, the Supreme Court has since been petitioned with the question of whether prison conditions during COVID-19 violate constitutional protections against cruel and unusual punishment.¹⁰⁷

Of the hundreds of COVID-19 related cases brought in both state and federal court, most are class actions filed by civil rights and advocacy groups on behalf of incarcerated persons.¹⁰⁸ These plaintiffs typically re-

¹⁰³ See *Jackson*, 2011 WL 3370205, at *2-3 (holding “[e]xposure to swine flu, in and of itself, does not involve an ‘unreasonable risk of serious damage to future health.’”)

¹⁰⁴ See *Similarities and Differences between Flu and COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm> (last updated June 7, 2021) (discussing differences in severities between common influenza and COVID-19 virus). “COVID-19 seems to spread more easily than the flu Compared to flu, COVID-19 can cause more serious illnesses in some people” *Id.*; see also Kimberly Hickok, *How does the COVID-19 pandemic compare to the last pandemic?*, LIVE SCI. (Mar. 18, 2020), <https://www.livescience.com/covid-19-pandemic-vs-swine-flu.html> (outlining key distinctions between swine flu and COVID-19). Officials cite COVID-19’s higher rates of infection and mortality, as well as its significantly more deadly impact on older and immunocompromised individuals as other notable distinctions between the COVID-19 virus and the H1N1 virus. See Hickok, *supra* (noting mortality difference of .02% for swine flu and 2% for COVID-19 virus).

¹⁰⁵ See *COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/dotw/covid-19/index.html> (last visited Nov. 19, 2021) (noting COVID-19’s infectiousness); *Coronavirus and COVID-19: What You Should Know*, WEBMD, <https://www.webmd.com/lung/coronavirus#:~:text=There%20is%20more%20than%20one,all%20came%20from%20bats> (last visited Jan. 30, 2021) (explaining symptoms of COVID-19). “COVID-19 is a disease caused by SARS-CoV-2 that can trigger what doctors call a respiratory tract infection . . . SARS-CoV-2 is one of seven types of coronavirus” *Coronavirus and COVID-19: What You Should Know, supra*.

¹⁰⁶ See Carolyn Casey, *Dozens of Prisons Now Face COVID-19-Related Civil Rights Lawsuits*, EXPERT INST., <https://www.expertinstitute.com/resources/insights/dozens-of-prisons-now-face-covid-19-related-civil-rights-lawsuits/> (last updated Aug. 9, 2021) (discussing prevalence of COVID-19 lawsuits).

¹⁰⁷ See Ariane de Vogue, *Supreme Court denies Texas inmates’ appeal in case over Covid-19 protections*, CNN POLITICS (May 14, 2020, 8:02 PM), <https://www.cnn.com/2020/05/14/politics/supreme-court-texas-inmates-coronavirus-protections/index.html> (introducing various cases regarding prison conditions).

¹⁰⁸ See Burton Bentley II, *The Growing Litigation Battle Over COVID-19 in the Nation’s Prisons and Jails*, LEXIS+, <https://plus.lexis.com/search?pdsearchterms=LNSDUID-ALM->

quest improved conditions that mirror the Centers for Disease Control and Prevention's (CDC) requisite protocols.¹⁰⁹ In addition, these advocacy groups frequently request compassionate release for sick or vulnerable incarcerated persons.¹¹⁰ Despite viable arguments advocating for improved conditions, prison authorities have been able to successfully dismiss many of these claims, arguing that their responses are severely limited when balanced against the fast-paced nature of the virus, public safety concerns, and budget limitations.¹¹¹

C. *The Supreme Court and Recent Developments in Deliberate Indifference*

In Texas, two incarcerated persons filed a class action lawsuit on behalf of high-risk incarcerated persons, alleging that prison officials' deliberate indifference to their medical needs resulted in the death of a fellow

AMLAWR-20200825THEGROWINGLITIGATIONBATTLEOVERCOVID19INTHENATIONSPRISONS ANDJAILS&pdbyasscitatordocs=False&pdsourcingroupingtype=&pdisurlapi=true&pdmfid=1530671&crd=c4151adc-2301-486a-88bb-dddc74606a76 (last visited Oct. 10, 2021) (summarizing influx of incarcerated persons' COVID-19 class actions).

¹⁰⁹ See Burton Bentley II, *supra* note 108 (outlining causes of actions raised by incarcerated persons in class action suits regarding COVID-19).

¹¹⁰ See Meghan Downey, *Compassionate Release During COVID-19*, THE REG. REV. (Feb. 22, 2021), <https://www.theregreview.org/2021/02/22/downey-compassionate-release-during-covid-19/> (outlining process for applying compassionate release standard to requests made by individuals due to COVID-19 pandemic). Downey further discusses the procedure of compassionate release, noting the difficulty in obtaining these requests. *Id.* Downey notes that the request initially goes to a warden, who, statistically, deny most requests for release. *Id.* When raising compassionate release requests during an appeal process or during sentencing, individuals must still exhaust all administrative remedies. *Id.*

With the onset of the COVID-19 pandemic and its prevalence in prison facilities, many federal courts have held that the conditions of confinement during the pandemic contribute to the extraordinary and compelling reasons justifying compassionate release. For example, courts have observed that prisons are "powder kegs for infection" due to "greater risks of infectious disease spread within detention facilities." Data kept by the Bureau of Prisons confirm these concerns, as more than 46,000 federally incarcerated people—approximately one third of people in federal custody—have tested positive for COVID-19.

Id. Despite some courts providing compassionate release for incarcerated persons, many motions are still denied, thus elevating incarcerated persons' exposure to the virus. See *id.* (discussing how compassionate release denial is directly linked to increase in COVID-19 cases).

¹¹¹ See Bentley II, *supra* note 108 (noting frequency of dismissals of incarcerated persons' actions); see also sources cited *supra* notes 84-90 and accompanying text (discussing deference afforded to prison officials to maintain order and discipline).

incarcerated person.¹¹² The Fifth Circuit overruled the district court’s finding of deliberate indifference, holding that the requirements went further than applicable CDC guidelines, and as such, prison officials were not subjectively aware of the apparent risk.¹¹³ The plaintiffs subsequently petitioned the Supreme Court, but their writ was denied.¹¹⁴ While ultimately agreeing with the Court’s decision to deny the appeal, Justice Sotomayor, joined by the late Justice Ginsburg, concurred separately to discuss the prevalence of this issue and the necessary adjustments that must be made to adequately respond to the mistreatment of incarcerated persons.¹¹⁵ Justice Sotomayor writes,

It has long been said that a society’s worth can be judged by taking stock of its prisons. That is all the truer in this pandemic, where [incarcerated persons] everywhere have been rendered vulnerable and often powerless to protect themselves from harm. May we hope that our country’s facilities serve as models rather than cautionary tales.¹¹⁶

Justice Sotomayor also explicitly “encouraged lower courts to ensure that prisons are not deliberately indifferent in the face of danger and death.”¹¹⁷ Harsh prison conditions during COVID-19, alongside increased

¹¹² See *Valentine v. Collier*, 140 S. Ct. 1598, 1598 (2020) (describing factual background of case and incarcerated persons’ allegations); see also de Vogue, *supra* note 107 (detailing facts of suit and reason for filing). The district court held that prison officials were deliberately indifferent based on inadequate conditions of confinement, requiring prison officials to “provid[e] unrestricted access to hand soap and hand sanitizer that contains 60% alcohol in public areas . . . educate and inform [incarcerated persons] about the pandemic . . . provide a detailed plan to test all [incarcerated persons]” and were ordered to do “extensive cleaning and disinfecting protocols.” See *Valentine v. Collier*, 956 F.3d 747, 802 (5th Cir. 2020), *aff’d Valentine*, 140 S. Ct. at 1598 (outlining district court’s order for relief).

¹¹³ See *Valentine*, 956 F.3d at 802 (describing justification for disposition); see also de Vogue, *supra* note 107 (discussing decision on appeal).

¹¹⁴ See *Valentine v. Collier*, 140 S. Ct. 1598, 1598 (2020) (Sotomayor, J., concurring) (statement respecting denial of application to vacate stay); see also de Vogue, *supra* note 107 (noting results of appeal).

¹¹⁵ See *Valentine*, 140 S. Ct. at 1598-1601 (Sotomayor, J., concurring) (writing separately to stress health concerns for incarcerated persons); see also de Vogue, *supra* note 107 (elaborating on Justice Sotomayor’s and Ginsburg’s concurrence).

¹¹⁶ See *Valentine*, 140 S. Ct. at 1601 (Sotomayor, J., concurring) (drawing attention to incarcerated persons’ vulnerabilities); see also de Vogue, *supra* note 107 (illustrating Justice Sotomayor’s concern in protecting incarcerated persons under Eighth Amendment jurisprudence).

¹¹⁷ See *Valentine*, 140 S. Ct. at 1599 (Sotomayor, J., concurring) (stressing prison officials’ obligations); see also Bentley II, *supra* note 108 (referencing Justice Sotomayor’s contention regarding prison’s management of COVID-19 under deliberate indifference standard).

litigation alleging deliberate indifference, warrants a review of whether the subjective test should still stand.¹¹⁸

The Court recently readdressed deliberate indifference in prisons during COVID-19 in *Barnes v. Ahlman*.¹¹⁹ In *Barnes*, a group of incarcerated persons brought suit against jail officials, alleging that the officials failed to meet CDC guidelines by not following social distancing standards and mixing healthy and sick incarcerated persons.¹²⁰ Among other allegations, the incarcerated plaintiffs alleged that they “were required to clean the bedding of detainees who tested positive for COVID-19.”¹²¹ A California district court judge issued a preliminary injunction in response to the petition, requiring the jail to, at minimum, meet relevant CDC guidelines.¹²² Jail officials appealed and requested a stay on the injunction; however, the Ninth Circuit swiftly denied this request.¹²³ Relying on prison administrative deference, the jail again appealed to the Supreme Court, alleging that they had “largely implemented” CDC guidelines “to the extent possible.”¹²⁴ In a 5-4 decision in favor of the jail officials, the Supreme Court granted a stay on the injunction; however, the Court failed to provide an explanation of their reasoning.¹²⁵ Justice Sotomayor, joined by Justice

¹¹⁸ See *Wilson v. Williams*, 961 F.3d 829, 844 (6th Cir. 2020) (finding failure to establish subjectively unreasonable response fails deliberate indifference test); *Swain v. Junior*, 961 F.3d 1276, 1289 (11th Cir. 2020) (determining subjective response by prison official warrants denial of injunctive relief); see also Merkl and Weinberger, *supra* note 2 (alluding to necessity of review of the subjective element by critiquing deliberate indifference standard).

¹¹⁹ See *Barnes v. Ahlman*, 140 S. Ct. 2620, 2620 (2020) (granting stay for preliminary injunction).

¹²⁰ See Petition for Writ of Habeas Corpus and Complaint for Injunctive and Declaratory Relief at 1-6, *Ahlman v. Barnes*, 445 F. Supp. 3d 671, No. 8:20-cv-835 (C.D. Cal. Apr. 30, 2020) (seeking injunction for inhumane conditions of confinement); see also James Romoser, *Siding with jail officials, court lifts injunction that imposed coronavirus safety measures*, SCOTUSBLOG (Aug. 5, 2020, 11:57 PM), <https://www.scotusblog.com/2020/08/siding-with-jail-officials-court-lifts-injunction-that-imposed-coronavirus-safety-measures/> (introducing basis for action in *Barnes*).

¹²¹ See Romoser, *supra* note 120 (quoting Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief at 1-6, *Ahlman v. Barnes*, 445 F. Supp. 3d 671, No. 8:20-cv-835 (C.D. Cal. Apr. 30, 2020)) (discussing allegations raised in incarcerated persons’ complaint).

¹²² See *id.* (summarizing *Barnes*’ lower court determinations and describing initial order to remedy COVID-19 mismanagement).

¹²³ See *id.* (outlining *Barnes*’ procedural history).

¹²⁴ See *id.* (quoting Emergency Application for Stay of Injunctive Relief Pending Appeal of Denial of Stay Application in the United States Court of Appeals for the Ninth Circuit at 2, *Barnes v. Ahlman*, 140 S. Ct. 2620, No. 20A19 (July 21, 2020)) (summarizing arguments in *writ of certiorari* filed by prison officials). The jail officials also argued that injunction required measures not mandated by the CDC and that it was a “micromanagement of local jail procedure.” *Id.*

¹²⁵ See *id.* at 2620 (granting stay of preliminary injunction); see also Romoser, *supra* note 120 (referencing holding of *Barnes* case).

Ginsburg, vehemently dissented, writing that the decision to grant the stay was an “extraordinary intervention” of the Court.¹²⁶ Thus, while touching on the issue of deliberate indifference and its increasingly concerning impacts on incarcerated persons, the Supreme Court has yet to substantively address the merits of these claims.¹²⁷

IV. ANALYSIS

As discussed above, alarming rates of infection and death within prisons between March 2020 and January 2021 gave legitimacy to many lawsuits brought by incarcerated persons.¹²⁸ In March of 2020, the World Health Organization (WHO) released a statement on COVID-19’s impact on incarcerated persons and surrounding communities, adding that “prisons, jails, and similar settings. . . may act as a source of infection, amplification, and spread of infectious diseases,” and that “[p]rison health is, therefore, critical to public health,” and requires a “whole-of-government and whole-of-society approach.”¹²⁹ Thus, to explicitly disregard the conditions of incarcerated persons not only violates basic civil rights, but it also endangers surrounding communities and innocent prison officials.¹³⁰

In addition, the Eighth Amendment has repeatedly been interpreted to consider conditions of confinement as a part of the cruel and unusual punishment analysis.¹³¹ The Supreme Court noted that “[c]onfinement in a prison . . . is a form of punishment subject to [judicial] scrutiny under

¹²⁶ See *Barnes*, 140 S. Ct. at 2621 (Sotomayor, J., dissenting) (arguing Court improperly intervened on behalf of jail officials). Overall, Justice Sotomayor perceived the majority’s decision to be ignorant to the District Court’s valid findings that the staff fell “well short” of implementing the CDC guidelines. *Id.*; see also Romoser, *supra* note 120 (discussing Justice Sotomayor’s issues with grant of stay).

¹²⁷ See sources cited *supra* notes 112-127 and accompanying text (commenting on Supreme Court’s inaction in relation to recent remarks on deliberate indifference in prisons).

¹²⁸ See Harper, *supra* note 11 (analyzing lack of response and its implications).

¹²⁹ See Burton Bentley II, *supra* note 108 (describing importance of societal change regarding protection of incarcerated persons during COVID-19).

¹³⁰ See Ollove, *supra* note 25 (discussing high infection rates in prisons and dangers to surrounding communities).

¹³¹ See *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978) (holding inhumane conditions of confinement supported finding of deliberate indifference). The Court noted: “It is equally plain, however, that the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards. A filthy, overcrowded cell and a diet of “grue” might be tolerable for a few days and intolerably cruel for weeks or months.” *Id.*; see also *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (finding “[Eighth Amendment] principles apply when the conditions of confinement compose the punishment at issue. Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment.”)

Eighth Amendment standards.”¹³² The Supreme Court elaborated on this determination in *Hutto*, holding that prison conditions may result in violations of basic human rights and must comport with “contemporary standards of decency.”¹³³

By refusing to reflect the minimum standards of decency within prisons, the judicial system has permitted an explicit disregard for incarcerated persons health and safety.¹³⁴ First, incarcerated persons face a litany of procedural battles before being able to argue the merits of their claim in court.¹³⁵ Moreover, incarcerated persons are next challenged to face a court that affords significant discretion to prison administrators, and further assess a prison administrators subjective understandings before finding a constitutional violation.¹³⁶ As a result of this focus on subjectivity, incarcerated persons are continually denied relief for objectively inhumane treatment while incarcerated.¹³⁷ Therefore, instead of the two-part deliberate indifference test requiring a subjective assessment of prison officials’ understandings, the Court must adopt a test that exclusively uses an objective approach in order to adequately reflect the Court’s adherence to minimum standards of decency in confinement.¹³⁸

A. *Practical Issues with Deliberate Indifference*

As a result of the *Farmer* decision, incarcerated persons are now required to prove that prison officials had “actual knowledge” of “subjective recklessness” before effectively establishing an Eighth Amendment violation.¹³⁹ Thus, despite being presented with objectively inhumane prison conditions, prison officials may curb liability based on a lack of “actual

¹³² See *Rhodes*, 452 U.S. at 345 (quoting *Hutto*, 437 U.S. at 685) (stating confinement is form of punishment governed by Eighth Amendment).

¹³³ See *Hutto*, 437 U.S. at 685 (citing *Estelle*, 429 U.S. at 102) (maintaining Eighth Amendment interpretations must evolve with time). The Court in *Hutto* determined that prolonged stays in isolation confinement cells may constitute cruel and unusual punishment. *Id.* at 680.

¹³⁴ See sources cited *supra* notes 16-23 and accompanying text (charting disproportionate impact on incarcerated persons during COVID-19).

¹³⁵ See sources cited *supra* notes 70-83, 91-94 and accompanying text (outlining various procedural and administrative prerequisites to Eighth Amendment claims).

¹³⁶ See sources cited *supra* notes 85-90 and accompanying text (describing “substantial deference” afforded to prison officials and subjective element under deliberate indifference test).

¹³⁷ See sources cited *infra* note 160 and accompanying text (displaying how objectively meritorious claims fail for inability to overcome subjectively determined “reasonable responses”).

¹³⁸ See sources cited *infra* notes 167-178 and accompanying text (discussing adoption of exclusively objective test for deliberate indifference).

¹³⁹ See *Farmer v. Brennan*, 511 U.S. 825, 843 (quoting Brief for Petitioner at 27, *Farmer v. Brennan* 511 U.S. 825, 843 (1993) (No. 92-7247)) (internal quotation marks omitted) (holding two-part test is necessary for deliberate indifference).

knowledge.”¹⁴⁰ The Court in *Farmer* rejected the notion that a subjective approach would permit prison officials “to take refuge in the zone between ignorance of obvious risks and actual knowledge of risks,” holding that a fact finder could instead determine the official had “actual knowledge” because it was obvious.¹⁴¹ Accordingly, incarcerated persons must prove that prison officials actually knew of a risk, rather than that prison officials *should* have known of a risk.¹⁴² Not only is this test plainly illogical considering the Court’s commitment to human decency, but it also perpetuates an ambiguous test with varying results for litigants.¹⁴³

1. State of Mind and Congressional Intent

When adopting § 1983, both Congress and the Court recognized the incumbent need for a judicial remedy to inhumane and problematic conduct by government officials.¹⁴⁴ However, little Congressional evidence suggests that an “actual knowledge” consideration was intended when evaluating prison official conduct.¹⁴⁵ Upon examining Congress’ legislative history in adopting § 1983, the record is void of concern regarding government officials’ *actual* knowledge of wrongful conduct; rather, the legislative history suggests that Congress’ intention in adopting § 1983 was to limit discretionary abuse by government officials that either deliberately or inadvertently infringed upon an individual’s constitutional rights.¹⁴⁶

¹⁴⁰ See Sanabria, *supra* note 69, at 1135 (noting jurisprudential evolution for Eighth Amendment deliberate indifference claims).

¹⁴¹ See *Farmer*, 511 U.S. at 843 (quoting Brief for Petitioner at 22, 27, *Farmer v. Brennan*, 511 U.S. 825, 843 (1993) (No. 92-7247)) (internal quotation marks omitted) (justifying use of subjective prong in deliberate indifference test).

¹⁴² See *id.* (emphasis added) (mandating “actual knowledge” test as opposed to objective understandings).

¹⁴³ See sources cited *infra* notes 167-178 and accompanying text (discussing adoption of exclusively objective test for deliberate indifference); see Hill, *supra* note 96 (discussing circuit court splits under current deliberate indifference test).

¹⁴⁴ See 42 U.S.C. § 1983 (outlining grounds to bring civil cause of action for deprivation of rights by the State); see also Sanabria, *supra* note 69, at 1135 (mentioning adoption of § 1983 to respond to mistreatment by government officials).

¹⁴⁵ See Eisenberg, *supra* note 72, at 485 (providing historical overview of § 1983 adoption). Eisenberg suggests that while government sought to limit § 1983, their primary focus was curbing misconduct, writing, “. . . although the 1871 Act dealt with a limited problem, its history suggests a firm congressional resolve that the problem feel the full effect of federal power, without regard to traditional limitations.” *Id.* (outlining main takeaways from article).

¹⁴⁶ See *id.* at 485-86 (assessing historical backdrop of § 1983). To the contrary, a historical analysis suggests that § 1983 was drafted to aggressively resolve government mistreatment, as it was adopted under the Civil Rights Act of 1871. *Id.* at 484-85. Of mention on the floor of Congress,

Despite Congressional intention indicating government mistreatment must be curbed, the Supreme Court insisted upon a more limited standard when raising claims against government officials.¹⁴⁷ Furthermore, the Supreme Court's recognition of prison conditions as part of the cruel and unusual punishment analysis was undermined by the Court's decision to also consider prison officials' state of mind in their Eighth Amendment determinations.¹⁴⁸ By assessing a prison official's state of mind to determine whether conditions are inhumane, the Court explicitly ignores the objectively wrongful conditions of confinement.¹⁴⁹

2. Burdens on Incarcerated Persons

Accompanying the prerequisite burdens incarcerated persons are forced to overcome—such as the PLRA, § 1983, or *Bivens*' sufficiency arguments—incarcerated litigants must also compile some presentation of evidence that demonstrates prison officials near-intentionally subjected them to degrading and substandard conditions.¹⁵⁰ Before any judicial remedy is available, an incarcerated person must take several steps to avoid dismissal of the suit by the PLRA; per the exhaustion requirements of the PLRA, an incarcerated person must raise inadequate conditions or medical

Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished.

Id. (quoting CONG. GLOBE, 42d Cong., 1st Sess., pt. 2, app. at 78 (1871)).

¹⁴⁷ See 42 U.S.C. § 1983 (failing to delineate clear standard of “actual knowledge” to establish relief); see also Sanabria, *supra* note 69, at 1116-15 (emphasizing idea that *Farmer* test fails to provide any remedy for incarcerated persons' relief); Eisenberg, *supra* note 72, at 486 (suggesting congressional intent for § 1983 as covering government mistreatment).

¹⁴⁸ Compare Eisenberg, *supra* note 72, at 485 with Sanabria, *supra* note 69, at 1123 (juxtaposing scope of Congressional intent and practical execution of § 1983).

¹⁴⁹ See Sanabria, *supra* note 69, at 1135 (determining primary purpose of Eighth Amendment as disregarded under *Farmer* test).

¹⁵⁰ See 18 U.S.C. § 3626(a)(3) (defining procedural remedies for relief with respect to incarcerated persons' prison conditions). The statute specifically states, “[a] party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.” *Id.* at § 3626(a)(3)(C) (placing burden on incarcerated persons to produce evidence of violation).

issues with the prison's internal grievance systems prior to bringing suit.¹⁵¹ Naturally, these claims often fail to provide any relief because the individual reviewing them is either “. . . an employee of the medical contractor, such as a colleague of the individual providers whose actions are being reviewed, or a prison administrator whose interests, particularly in controlling costs, are closely aligned with the contractor's interests.”¹⁵² Therefore, the determinations of the medical provider typically stand, thereby persisting the existence of medical issues for incarcerated persons.¹⁵³ In addition, this process is also long and draining for incarcerated persons, as they are repeatedly forced to undergo additional tests, file additional paperwork, seek additional referrals, and endure other cyclical administrative procedures.¹⁵⁴ Thus, incarcerated persons pursuing the grievance process typically spend months seeking treatment, in what some scholars refer to as “a giant feedback loop.”¹⁵⁵ Finally, the PLRA specifically demands the dismissal of “frivolous claims,” presenting incarcerated persons with an immediate barrier to proving their case.¹⁵⁶

If the grievance process fails, then incarcerated persons must make their best attempt at obtaining judicial relief.¹⁵⁷ Based on the subjective

¹⁵¹ See *id.* § 3626(a)(3)(A)(i)-(ii) (instructing incarcerated persons to surpass administrative requirements before alleging merits of claim). The statute places the requirements in the negative, instructing that “no court shall enter a prisoner release order *unless*—” *Id.* § 3626(a)(3)(A). This illustrates the emphasis the statute places on refusing release for incarcerated persons—much in line with the court's growing precedent. See *id.*

¹⁵² See Thompson, *supra* note 58, at 649 (providing context to grievance process for incarcerated persons at administrative level). The author further elaborated on the inadequacies in terms of prison medical care, adding that “the reviewing officials often are not medical professionals. Thus, they are not qualified to question the individual provider's actions and usually defer to the provider's medical judgement.” *Id.*

¹⁵³ See *id.* 650 (remarking on medical providers opinions as final).

¹⁵⁴ See *id.* at 649 (introducing other relevant considerations during grievance process).

¹⁵⁵ See *id.* at 649-50 (defining prison administrative process as “feedback loop” for its lack of resolution).

¹⁵⁶ See *id.* at 650-51 n.41 (describing *Estelle*'s determination that prison officials were not deliberately indifferent based on evidence alone); see also *Estelle v. Gamble*, 429 U.S. 97, 108 n.16 (1976) (dismissing complaint outright despite “detailed factual accounting” in complaint because “[b]y his exhaustive description he renders speculation unnecessary. It is apparent from his complaint that . . . the doctors were not indifferent to his needs.”)

¹⁵⁷ See Thompson, *supra* note 58, at 650 (commenting on judicial remedy for inadequate medical care for incarcerated persons).

However, they face an uphill battle. If the provider has taken any action at all, a court may not be willing to find deliberate indifference. Even if a court undertakes an examination of the adequacy of care, the examination is typically one-sided, pitting a[n] [incarcerated person] without legal counsel or any expert witnesses against a medical provider armed with its own records and expert opinions.

approach instituted by *Farmer*, it is difficult for incarcerated persons to prove violations if prison officials took any steps towards protection.¹⁵⁸ For example, prisons that provide some CDC guidelines are often believed to have “responded reasonably” to the risk of danger posed by COVID-19.¹⁵⁹

Eighth Amendment claims are further difficult to satisfy given the requisite showing of “inadequate” medical care, compelling a review of all medical documents, records, affidavits, and more.¹⁶⁰ Furthermore, courts have expressed a “general reluctan[ce] to second guess medical judgments,” as well as an explicit determination that choice of treatment for incarcerated persons will not constitute deliberate indifference.¹⁶¹ Despite its exclusion from the *Farmer* test, courts frequently cite this language to dis-

Id. (describing incarcerated persons’ difficulties raising Eighth Amendment deliberate indifference claims).

¹⁵⁸ See *id.* (analyzing subjective approach to deliberate indifference claims). Thompson goes on to discuss the difficulties in establishing a subjective violation, arguing that it provides an outlet for providers to deny mistreatment without any remedy to the incarcerated person.

Providers can use their own records and affidavits to argue that they did not deny all care to the [incarcerated person] patient and that they did not interfere with any prescribed treatment. However, neither directly addresses the [incarcerated person’s] claim, which is that the medical care was so inadequate that it constituted deliberate indifference.

Id. at 650 (discussing subjective setbacks); see also Sanabria, *supra* note 69, at 1129 (arguing incarcerated persons limited rights following subjective analysis).

¹⁵⁹ See *Wilson v. Williams*, 961 F.3d 829, 844 (6th Cir. 2020) (holding incarcerated persons unlikely to establish prison administrators responded unreasonably); *Swain v. Junior*, 961 F.3d 1276, 1289 (11th Cir. 2020) (failing to establish preliminary injunctive relief because prison officials responded reasonably).

There is no question that the BOP was aware of and understood the potential risk of serious harm to [incarcerated persons] at Elkton through exposure to the COVID-19 virus. As of April 22, fifty-nine [incarcerated persons] and forty-six staff members tested positive for COVID-19, and six [incarcerated persons] had died. ‘We may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious.’ The BOP acknowledged the risk from COVID-19 and implemented a six-phase plan to mitigate the risk of COVID-19 spreading at Elkton . . . Here, while the harm imposed by COVID-19 on [incarcerated persons] at Elkton “ultimately [is] not averted,” the BOP has ‘responded reasonably to the risk’ and therefore has not been deliberately indifferent to the [incarcerated persons’] Eighth Amendment rights.

Wilson, 961 F.3d at 840-41 (explaining reasoning for finding no deliberate indifference).

¹⁶⁰ See Thompson, *supra* note 58, at 652 (mentioning incarcerated litigants’ struggle to obtain medical documents and files while preparing cases).

¹⁶¹ See *Westlake v. Lewis*, 537 F.2d 857, 860 n.5 (acknowledging deference to medical opinions).

miss prison claims at their early stages.¹⁶² In addition, since many of the claims brought by incarcerated persons are filed *pro se*, they will likely lack the funding to obtain sufficient counsel or experts to testify to the inadequate care.¹⁶³

These hardships are further exacerbated by the impact of COVID-19 on prison conditions.¹⁶⁴ Due to the unprecedented nature of the virus, prison officials often attempt to avoid liability by arguing that they are not well versed in adequate responses to the virus, and that even their minimal efforts meet the subjective standard proffered under *Farmer*.¹⁶⁵ Given the sheer number of obstacles regularly faced by incarcerated persons seeking relief, individuals forced into confinement remained disproportionately subjected to death during the height of the virus.¹⁶⁶

¹⁶² See, e.g., *Bell*, 441 U.S. at 520 (affording deference to prison officials); *Overton*, 539 U.S. at 132 (reviewing penological purposes and giving greater weight to prison administrators); *Turner*, 482 U.S. at 78 (establishing four-factor test utilized in assessing prison regulations and appropriate deference); *Whitley*, 475 U.S. at 320-21 (concluding substantial deference to prison officials is appropriate).

¹⁶³ See Thompson, *supra* note 58, at 651-52 (describing difficulties incarcerated pro se litigants typically face when alleging Eighth Amendment claim in federal court).

[Incarcerated persons] generally lack the wherewithal to locate a willing expert and the funds to retain her as an expert witness. A plaintiff's sworn statement about how she was treated, without more, stands little chance against the records, affidavits, and expert opinions that the prison medical providers can generate.

Id.

¹⁶⁴ See *id.* (offering additional struggles amidst prison administration deference); see also Bellware, *supra* note 16 (emphasizing inhumane confinement conditions effects on incarcerated persons). Furthermore, incarcerated persons are not alone in their court claims, with even prison staff alleging inadequate response. See Bellware, *supra* note 16.

"All of us are trying to survive," Troitino said. "Your health affects me, and vice versa. [Incarcerated persons] and staff, we do not feel safe." Troitino is among the federal workers suing the government for hazard pay over what they say are risky conditions they're forced to work under during the pandemic — but he's hardly a disgruntled worker. When the BOP announced Aug. 5 it had moved into Phase 9 of its covid-19 action plan, [incarcerated persons] and their advocates panned the news as the bureau's attempt to create the impression that the virus is under control in facilities while papering over a deepening health and safety crisis.

Id. (introducing prison staff's disapproval of prison facilities).

¹⁶⁵ See Thompson, *supra* note 58, at 649 (listing procedural problems for incarcerated persons prior to court).

¹⁶⁶ See Bellware, *supra* note 16 ("Covid-19 cases are proportionally higher and have spread faster in prisons than in the outside population.")

B. *Adopting an Objective Test for Deliberate Indifference so as to Embrace “Evolving Standards of Decency”*

The Supreme Court’s interpretation of the Eighth Amendment is that the treatment of prisoners must meet “evolving standards of decency,” and that “[a] prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”¹⁶⁷ Nevertheless, the Court’s permitted use of objective analyses for the deliberate indifference test fully ignores the obvious disproportionate impact of COVID-19 on incarcerated persons and the few available legal mechanisms for relief.¹⁶⁸

The Supreme Court explicitly recognized that in interpreting conditions of confinement, “‘Eighth Amendment judgments should neither be nor appear to be merely the subjective views’ of judges.”¹⁶⁹ As a result, the Court emphasized that “judgment[s] should be informed by objective factors to the maximum extent possible.”¹⁷⁰ As such, the Supreme Court should restructure their deliberate indifference test to more closely resemble this intention.¹⁷¹

Under an entirely objective deliberate indifference test, the court would assess: (1) whether there was an objectively serious medical need;

¹⁶⁷ See *Brown v. Plata*, 563 U.S. 493, 511 (2011) (noting deprivation of basic sustenance incompatible with civilized society); see also *Estelle v. Gamble*, 429 U.S. 97, 103-04 (contextualizing conditions of confinement protections).

These elementary principles establish the government’s obligation to provide medical care for those whom it is punishing by incarceration. An [incarcerated person] must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical ‘torture or a lingering death,’ the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that ‘(i)t is but just that the public be required to care for the [incarcerated person], who cannot by reason of the deprivation of his liberty, care for himself.’

Id. (discussing importance of protecting incarcerated persons from inadequate medical care).

¹⁶⁸ See *Estelle*, 429 U.S. at 102 (“The Amendment embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .’ against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with ‘the evolving standards of decency that mark the progress of a maturing society.’”)

¹⁶⁹ See *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275 (1980)) (implementing objective tests for assessing Eighth Amendment claims).

¹⁷⁰ See *id.* (citing *Rummel*, 445 U.S. at 275) (evaluating beneficial uses of objective analysis).

¹⁷¹ See *id.* (insisting subjectivity will not adequately resolve cruel and unusual punishment claims).

and (2) whether an objectively reasonable prison official was deliberately indifferent to the risk the medical need poses.¹⁷² An objective analysis of the second prong of the test requires that prison officials be held liable for risks that are deemed obvious, and also for more nuanced risks that minimal investigative efforts would reveal to such an objectively reasonable prison official.¹⁷³ While maintaining the “reasonable response” rather than an “any response at all” assessment under the deliberate indifference test, the Court can therefore find minimal efforts by prison officials deliberately different, even in the face of unprecedented health emergencies.¹⁷⁴

As it stands, the subjective element of the approach fails to satisfy the evolving standards of decency test.¹⁷⁵ Applying objective indicia, public opinion is seeking more aggressive responses to COVID-19 by the government and international organizations are calling for a deeper protection of incarcerated persons.¹⁷⁶ Applying subjective indicia, it is clear that a number of the COVID-19 measures lack proportionality, as *all* incarcerated persons are subjected to these inhumane and inadequate medical conditions.¹⁷⁷ Where the Court employs a test that is inconsistently applied, therefore perpetuating inhumane prison conditions, the Court fails to provide any “evolving standard of decency” that they purportedly adhere to.¹⁷⁸

¹⁷² See *Farmer v. Brennan*, 511 U.S. 825, 842-44 (assessing and ultimately rejecting purely objective analysis). Again, the Court in *Farmer* relied on standards of criminal recklessness in making this determination, finding that deliberate indifference requires a “subjective component,” even when confronted with objectively inhumane conditions of confinement. *Id.* at 839.

¹⁷³ See sources cited *supra* note 68 and accompanying text (commenting on how even obvious risks may not implicate liability if prison official was unaware).

¹⁷⁴ See sources cited *supra* notes 68-69 and accompanying text (noting reasonable response may be adequate to pass subjective deliberate indifference test).

¹⁷⁵ See sources cited *supra* note 66 and accompanying text (introducing elements of test).

¹⁷⁶ See Deane et al., *supra* note 15 (describing data on public opinion regarding COVID-19).

It may seem hard to believe today, but in late March 2020, there was strong bipartisan support for a variety of government-imposed shutdown measures. At the time, broad majorities in both parties supported restricting international travel to the U.S., canceling sports and entertainment events, closing K-12 schools, asking people to avoid gatherings of more than 10 people and halting indoor dining at restaurants.

Id.; see also Crimaldi, *supra* note 15 (outlining worsening health conditions for incarcerated persons during COVID-19 and subsequent calls for action).

¹⁷⁷ See sources cited *supra* note 52 and accompanying text (discussing specifically subjective indicia under evolving standards of decency test).

¹⁷⁸ See sources cited *supra* notes 49-51 and accompanying text (describing elements of evolving standards of decency test).

V. CONCLUSION

In sum, COVID-19 has presented the Court with a unique opportunity to address the inhumane medical conditions and blatant mistreatment of incarcerated persons during public health emergencies—a recognizable violation of the Eighth Amendment. Broadly, the Supreme Court’s failure to respond to the disproportionate effects of COVID-19 on incarcerated persons ignores the Supreme Court’s Eighth Amendment commitment to evolving standards of decency test. Further, the inundation of COVID-19 prison condition litigation within federal courts is indicative of the woefully inadequate confinement conditions. Finally, the series of circuit splits regarding the test for deliberate indifference also serves as evidence that the standard itself is unclear, and the test is likely applied both inconsistently and arbitrarily among courts. Abolishing the subjective approach and adhering to an exclusively objective analysis for deliberate indifference would allow the Supreme Court not only to resolve an unclear and inadequate test, but it would also usher in a new era of human rights protection under the Eighth Amendment.

Mary Levine

**RIGHT TO A SPEEDY TRIAL FOR ALL, UNLESS
YOU'RE INCARCERATED: HOW SIXTH
AMENDMENT JURISPRUDENCE ALLOWS FOR
PROLONGED ISOLATION—*UNITED STATES V.
BAILEY-SNYDER*, 923 F.3D 289, 291 (3RD CIR. 2019)**

*“The authorities believed that isolation was the cure for our defiance and rebelliousness . . . I found solitary confinement the most forbidding aspect of prison life. There was no end and no beginning; there is only one’s own mind, which can begin to play tricks. Was that a dream or did it really happen? One begins to question everything.”*¹

I. INTRODUCTION

The Sixth Amendment to the United States Constitution guarantees certain rights to the criminally accused when facing prosecution.² Included among these rights is the right to a speedy trial, which is “as fundamental as any of the rights secured by the Sixth Amendment.”³ Courts have adopted a narrow interpretation of the term “speedy trial” and have only applied the right if the accused has been “arrested.”⁴ Often, the criminal justice system deprives the accused of their right to a speedy trial, and their case faces the possibility of being neglected by the criminal courts.⁵

¹ NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* 274 (Back Bay Books 1995).

² See U.S. CONST. amend. VI. (listing rights of criminally accused).

³ See *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (detailing origins of right to speedy trial).

⁴ See *United States v. Marion*, 404 U.S. 307, 320 (1971) (declining to extend reach of right to speedy trial to period prior to arrest). “[I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.” *Id.*

⁵ See Andrew Cohen, *The Foundational Speedy Trial Case of Our Time Has Come*, BRENNAN CENTER FOR JUSTICE (Aug. 31, 2015), <https://www.brennancenter.org/our-work/research-reports/foundational-speedy-trial-case-our-time-has-come> (explaining reasons for deprivation of right to speedy trial). “All over the country criminal defendants are deprived of their speedy trial rights, often for years, and then still are tried and convicted and sentenced, the results from those tainted trials then sanctioned by appellate judges who rely upon tortured constructions of law and fact to justify the result.” *Id.*

The United States has approximately 2.3 million people incarcerated in its jails and prisons as of March 2020.⁶ Solitary confinement holds approximately 80,000 of those 2.3 million people at any given time.⁷ A common form of solitary confinement is administrative segregation, wherein corrections officers remove prisoners who pose a significant threat to safety or security from the general prison population and place them in complete isolation away from other inmates.⁸ Frequently, corrections officers place an inmate in administrative segregation when the inmate is undergoing investigation for new criminal charges obtained while incarcerated.⁹

Courts have consistently denied the application of the right to speedy trial to inmates who are placed in administrative segregation for a new criminal charge.¹⁰ The United States Court of Appeals for the Third Circuit in *United States v. Bailey-Snyder*¹¹ joined this trend.¹² Although the federal courts of appeals are in unanimous agreement on this principle, unanimity does not signify accuracy, and therefore the *Bailey-Snyder* hold-

⁶ See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> (categorizing incarcerated population).

⁷ See *Solitary Confinement Facts*, AMERICAN FRIENDS SERVICE COMMITTEE, <https://www.afsc.org/resource/solitary-confinement-facts> (last visited Nov. 5, 2020) (explaining rough estimate of those in solitary confinement).

⁸ See Natasha A. Frost & Carlos E. Monteiro, *Administrative Segregation in U.S. Prisons*, NATIONAL INSTITUTE OF JUSTICE, 3 (Mar. 2016), <https://www.ncjrs.gov/pdffiles1/nij/249749.pdf> (explaining historical use of administrative segregation); see also Suzanne Agha, Angela Brown & Alissa Cambier, *Prisons Within Prisons: The Use of Segregation in the United States*, VERA INSTITUTE OF JUSTICE, 24 (Oct. 2011), [https://www.vera.org/downloads/Publications/prisons-within-prisons-segregation.pdf](https://www.vera.org/downloads/Publications/prisons-within-prisons-the-use-of-segregation-in-the-united-states/legacy_downloads/prisons-within-prisons-segregation.pdf) (summarizing emergence of solitary confinement in U.S. prisons); *Apodaca v. Raemisch*, 139 S. Ct. 5, 6 (mem. 2018) (clarifying interchanging use of administrative segregation and solitary confinement). “[T]hey were held in what is often referred to as ‘administrative segregation,’ but what is also fairly known by its less euphemistic name: solitary confinement.” *Apodaca*, 139 S. Ct. at 6.

⁹ See Petition for Writ of Certiorari at 22, *United States v. Bailey-Snyder*, 923 F.3d 289 (3d Cir. 2019) (No. 19-742) (listing reasons why prison officials choose to segregate inmates).

¹⁰ See *United States v. Wearing*, 837 F.3d 905, 910 (8th Cir. 2016) (concluding speedy trial rights had not yet attached); *United States v. Daniels*, 698 F.2d 221, 223 (4th Cir. 1983) (finding segregated confinement of prison inmate is not equivalent to an arrest); *United States v. Mills*, 641 F.2d 785, 787 (9th Cir. 1981) (holding there was no arrest or accusation until grand jury indictment); *United States v. Blevins*, 593 F.2d 646, 647 (5th Cir. 1979) (holding “administrative segregation is not an ‘arrest’ or ‘accusal’ for sixth amendment purposes”); *United States v. Bambulas*, 571 F.2d 525, 527 (10th Cir. 1978) (finding segregation not considered “arrest” for purposes of initiating time period measuring pre-indictment delay); *United States v. Duke*, 527 F.2d 386, 390 (5th Cir. 1976) (“[W]e do not hold administrative segregation to constitute an arrest . . .”)

¹¹ 923 F.3d 289 (3rd Cir. 2019)

¹² See *id.* at 294 (holding administrative segregation is not considered “arrest” within meaning of Sixth Amendment).

ing—denying speedy trial rights to an inmate placed in administrative segregation pending a criminal investigation—deserves a close examination.¹³ Judge Kelly of the Eighth Circuit agreed with this notion in her concurring opinion in *United States v. Wearing*, written three years prior to the *Bailey-Snyder* case, when she expressed that she only concurred with the majority opinion’s result, but “would leave for another day . . . the question of whether being placed in administrative segregation may under any circumstances qualify for an arrest for purposes of an accused’s right to a speedy trial pursuant to the Sixth Amendment.”¹⁴

This Note aims to offer support to, and expand upon, Judge Kelly’s concurring opinion by comparing an arrest to administrative segregation for a new criminal charge while incarcerated and arguing that the Supreme Court of the United States should consider administrative segregation, in this context, as an arrest within the meaning of the Sixth Amendment right to a speedy trial.¹⁵ Further, this Note will argue that if the Court does not make such a determination, there is potential for future issues regarding a defendant’s competency to stand trial, as well as their ability to adequately prepare a strong defense.¹⁶ Lastly, this Note will argue that, generally, the courts should take a more hands-on approach to this area of carceral punishment.¹⁷

¹³ See *id.* at 294 (holding periods of administrative segregation are not “arrests” for purposes of Sixth Amendment); see also Petition for Writ of Certiorari at 17, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (reiterating necessity for court to consider this issue).

¹⁴ See *United States v. Wearing*, 837 F.3d 905, 911 (8th Cir. 2016) (Kelly, J., concurring) (stating reservations of court’s holding without hearing parties fully brief issue).

¹⁵ See *id.* (expressing court should reconsider issue); see also Petition for Writ of Certiorari at 27, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (urging Court to resolve question left unanswered by previous courts).

¹⁶ See *Medina v. California*, 505 U.S. 437, 446 (1992) (emphasizing common-law rule that incompetent defendants are not required to stand trial); see also *Dusky v. United States*, 362 U.S. 402, 402 (1960) (defining test for competency standard); Petition for Writ of Certiorari at 24, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (noting isolation’s effect on defendant’s ability to build strong defense). “This is not a hypothetical concern. In this case, Mr. Bailey-Snyder explained that he was unable to locate and interview witnesses to the search or to request that the videos at the prison be preserved in the area where he was initially confronted by the guards.” Petition for Writ of Certiorari at 24, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742).

¹⁷ See Petition for Writ of Certiorari at 13, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (urging Supreme Court to rule on question presented).

II. HISTORY

A. *History of the Right to a Speedy Trial*

The Sixth Amendment right to a speedy trial has “roots at the very foundation of the [United States’] English law heritage.”¹⁸ The Assize of Clarendon, issued in 1166, established judicial procedures regarding crime and recognized the right to “speedy justice.”¹⁹ In 1215, barons of England wrote the Magna Carta in rebellion against a tyrannical king, which enshrined the right to speedy trial, and it remains one of the most fundamental bases of English liberty.²⁰ The barons sought to protect their rights by formulating one of the first articulations of the right to a speedy trial, writing, “[t]o no one will we sell, to no one deny or delay right or justice.”²¹

Motivated by the belief that they were entitled to the rights guaranteed by the Magna Carta, the American Founders ensured the presence of those rights in the U.S. Constitution with the Bill of Rights.²² In 1776, founding father George Mason wrote in the Virginia Declaration of Rights that “in all capital or criminal prosecutions a man has a right to . . . a speedy trial”²³ This right was adopted by several of the states’ consti-

¹⁸ See *Klopper v. North Carolina*, 386 U.S. 213, 223 (1967) (detailing history of right to speedy trial).

¹⁹ See *id.* (explaining where early evidence of recognition of right to speedy justice is found); see also *Assize of Clarendon*, EARLY ENGLISH LAWS, <https://earlyenglishlaws.ac.uk/laws/texts/ass-clar/> (last visited Nov. 5, 2020) (providing purpose of Assize of Clarendon).

²⁰ See *Petition for Writ of Certiorari at 12, Bailey-Snyder*, 923 F.3d 289 (No. 19-472) (outlining history of solitary confinement’s development in U.S.); see also *Magna Carta*, NATIONAL ARCHIVES (Apr. 26, 2019), <https://www.archives.gov/exhibits/featured-documents/magna-carta> (summarizing emergence of Magna Carta); Ben Johnson, *The History of the Magna Carta*, HISTORIC UK, <https://www.historic-uk.com/HistoryUK/HistoryofEngland/The-Origins-of-the-Magna-Carta> (last visited Nov. 5, 2020) (explaining English baron’s disapproval of King John I). “[T]he barons focused their attack on John’s oppressive rule, arguing that he was not adhering to the Charter of Liberties.” Johnson, *supra*.

²¹ See *Magna Carta*, NATIONAL CONSTITUTION CENTER, <https://constitutioncenter.org/learn/educational-resources/historical-documents/magna-carta> (last visited Nov. 5, 2020) (listing rights in Magna Carta).

²² See Robert Schehr, *Essay From the Innocence Project: Shedding the Burden of Sisyphus: International Law and Wrongful Conviction in the United States*, 28 B.C. THIRD WORLD L.J. 129, 149 (2008) (explaining Magna Carta’s influence on U.S. Bill of Rights). “The rights of the accused flowing from the Magna Carta . . . were adopted by the colonists and then reinterpreted and expanded to complement the other freedoms articulated in the U.S. Bill of Rights.” *Id.*

²³ See *The Virginia Declaration of Rights* § 8, NATIONAL ARCHIVES, <https://www.archives.gov/founding-docs/virginia-declaration-of-rights> (last visited Sep. 10, 2021) (declaring rights of Virginians).

tutions and is now guaranteed in each of the fifty states.²⁴ “The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution.”²⁵

In 1972, the Supreme Court in *Barker v. Wingo*²⁶ promulgated a balancing test, which courts still utilize today, to determine whether a defendant has been deprived of their right to a speedy trial.²⁷ The factors analyzed in making such a determination include the “[l]ength of the delay, the reason[s] for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”²⁸ “Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect.”²⁹ “This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to minimize the possibility that the defense will be impaired.”³⁰ The most serious interest is the possibility that the defense will be impaired because “the inability of a defendant adequately to prepare his case skews the fairness of the entire system.”³¹ Those accused have an interest in a speedy trial because it provides them with a “fair, accurate, and timely resolution” of their case.³² The accused’s interest in having a speedy trial is specifically affirmed in the Constitution, and therefore the *Barker* balancing test should reflect the importance of these interests.³³

²⁴ See *Klopper v. North Carolina*, 386 U.S. 213, 225-26 (1967) (stating “right [to a speedy trial] was considered fundamental at [an] early period in our history[,] [which] is evidenced by its guarantee in the constitutions of several of the States of the new nation, as well as by its prominent position in the Sixth Amendment.”); see also BURKE O’HARA FORT ET AL., A SELECTED BIBLIOGRAPHY AND COMPARATIVE ANALYSIS OF STATE SPEEDY TRIAL PROVISIONS 181 (National Institute of Law Enforcement and Criminal Justice, 1978) (comparing speedy trial laws in various U.S. states).

²⁵ See *Klopper*, 386 U.S. at 226.

²⁶ 407 U.S. 514(1972)

²⁷ See *id.* at 530 (explaining use of balancing test to determine “whether a particular defendant has been deprived of his right [to a speedy trial]”).

²⁸ See *id.* (listing court balancing factors used to determine whether defendant was afforded their speedy trial right).

²⁹ See *id.* at 532 (determining how to assess prejudice toward defendants).

³⁰ See *id.* (listing interests of defendant in having speedy trial).

³¹ See *id.* (stating most important interest of defendant is ensuring case preparation is not impaired). “If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past.” *Id.*

³² See *Speedy Trial*, AMERICAN BAR ASSOCIATION: CRIMINAL JUSTICE STANDARDS, https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_speedytrial_blk (last visited Mar. 2, 2021) (explaining benefits of a speedy trial).

³³ See *Barker*, 407 U.S. at 533 (explaining how fundamental right to speedy trial is); see also U.S. CONST. amend. VI. (listing rights of criminally accused).

Around the same time as the *Barker* decision, courts began to notice an alarming rise in the backlogs of federal and state court calendars, and oftentimes the result of frequent delays in bringing criminal cases to trial increasingly contributed to these backlogs.³⁴ Although courts used the *Barker* test to determine the timeline of a defendant's speedy trial rights, this practice only exacerbated the delays due to the ad hoc nature of the assessment.³⁵ These loose guidelines led to the conclusion that in order to protect the public's interests and to reduce court congestion, there needed to be a system imposed with specific guidelines for "prompt disposition of criminal cases."³⁶ The Speedy Trial Act of 1974 followed, and many states adopted similar speedy-trial legislation before the late 1970s.³⁷ The Act's purpose was to protect the public's interest in bringing the criminally accused to justice promptly and "[t]o assist in reducing crime and the danger of recidivism[.]"³⁸ The Act requires filing the information or indictment within thirty days from the date of arrest or service of the summons, and

³⁴ See Linda M. Ariola et al., *The Speedy Trial Act: An Empirical Study*, 47 *FORDHAM L. REV.* 713, 717 (1979) (pointing out spikes in backlogs of state and federal cases in late 1960s).

³⁵ See *id.* (explaining test used and how it failed to resolve backlogs of state and federal cases); see also *Barker v. Wingo*, 407 U.S. 514, 523 (1972) (refusing to quantify Sixth Amendment guarantee). Quantifying the right to speedy trial guarantee would require the Court "to engage in legislative or rulemaking activity, rather than in the adjudicative process . . ." *Barker*, 407 U.S. at 523.

³⁶ See Ariola et al., *supra* note 34, at 717 (1979) (stating turning point in speedy trial legislation).

³⁷ See ANTHONY PARTRIDGE, *LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974* 11 (Federal Judicial Center, 1980) (detailing "society's interest in bringing criminals to justice promptly.") The state legislation regarding defendant's rights was concerned more with clarifying the actual rights of defendants rather than specifically focusing on their speedy trial rights. *Id.* As the 1960s counterculture and civil rights movement led to renewed calls for strong law and order, this "speedy trial legislation acquired a second purpose: it was seen as a vehicle for protecting society's interest in bringing criminals to justice promptly." *Id.*

³⁸ See *id.* at 15 (quoting S. REP. NO. 93-1021, at 2076 (1974)) (explaining Speedy Trial Act's purpose). "What appears to have been new in the late sixties was the idea that this interest could be protected by combining statutory time limits with a provision for dismissal if the time limits were violated." *Id.*; see also Ariola, *supra* note 34, at 716-17 (explaining public's interest in having speedy trials).

The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the government to prove its case. Moreover, while awaiting trial, an accused who is at large may become a fugitive from justice or commit other criminal acts. And the greater the lapse of time between the commission of an offense and the conviction of the offender, the less the deterrent value of his conviction.

the trial must commence within seventy days from the date of filing the information or indictment.³⁹

B. History of Solitary Confinement in the United States

The practice of isolating prisoners in the United States began during America's colonization when prison administrators separated prisoners for a myriad of organizational reasons such as gender and type (e.g., convicted criminal or unfree citizen).⁴⁰ It was not until the 1790s that the United States began specifically utilizing solitary confinement to separate prisoners.⁴¹ Much like how it is used today, solitary confinement served as a threatening message to prisoners to follow the prison's rules or they could face an indeterminate period in an environment designed to wreak psychological pain.⁴²

Beginning in the early nineteenth century, penal institutions began experimenting with many forms of solitary confinement to "achieve their goals better."⁴³ Overcrowding and lack of space in prisons contributed to the inmates' poor physical and mental health, and many prison reformers believed the practice of solitary confinement was cruel, inhumane, and extremely costly.⁴⁴ Solitary confinement continued only as a "minor prac-

³⁹ See 18 U.S.C. § 3161(b) (1974) (outlining timing requirements of right to speedy trial regarding summons); 18 U.S.C. § 3161(c)(1) (1974) (outlining timing requirements of right to speedy trial regarding when trial must commence).

⁴⁰ See Keramet Reiter & Ashley T. Rubin, Article, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 L. & SOC. INQUIRY 1604, 1612 (2018) (explaining administrative control was used to maintain basic control over daily institutional operation). "[P]risoners of different genders and types (recidivist or novice, convicted criminal or unfree citizen) were separated from each other to prevent the spread of disease as well as the mutual moral contamination previously wrought by congregating prisoners in jails." *Id.* at 1613.

⁴¹ See *id.* at 1612-13 (detailing purposes of separating prisoners for nonpunitive purposes). "Distinct from colonial jails, however, these early prisons kept their convicted criminals separate from the untried, witnesses awaiting trial, debtors, vagrants, and others who also remained congregated together." *Id.* at 1613.

⁴² See *id.* at 1613 (explaining advantages of early uses of solitary confinement to prison administrators). "In this regime, reformers considered solitary confinement an indispensable tool for prisoner reformation, but not one intended for all prisoners—only for the worst offenders." *Id.*

⁴³ See *id.* (referring to past failures for reasons to begin use of solitary confinement). "These early episodes with total solitary confinement at Western State Penitentiary, Auburn State Prison, and Maine State Prison became the first set of 'historical echoes' that would continue to haunt penal experimentation and innovation." *Id.* at 615.

⁴⁴ See *id.* at 1614-1615 (explaining penal reformers' and prison administrators' intense opposition to solitary confinement). "[R]eformers and other commentators believed solitary confinement was too expensive: prisoner labor was increasingly understood to be a central ingredient for prisoner reformation and to offset the cost of prison maintenance, but labor seemed impossible in solitary." *Id.* at 1615.

tice” throughout the United States, and in 1890 the Supreme Court, albeit in non-binding dicta, “dismissed solitary confinement as a barbaric and destructive practice no longer used in most of the United States.”⁴⁵

As the twentieth century wore on, prisons lost their experimental sheen and became an integral part of U.S. democracy. Solitary confinement, on the other hand, continued to inspire criticism, and critics from the Supreme Court to the *Saturday Evening Post* continued to presume that the practice of solitary confinement, unlike incarceration, was far from integral to American democracy.⁴⁶

Solitary confinement became more commonly used in American prisons during the initial period of mass incarceration.⁴⁷ In the 1970s and 1980s, litigation challenging the practice increased, arguing that “even short-term uses of solitary confinement . . . ‘serve[] no rehabilitative purpose.’”⁴⁸ Super-maximum (“supermax”) prisons emerged in the 1980s and 1990s and are described as “the model of incarcerating large numbers of prisoners in near total isolation.”⁴⁹ The supermax model’s origin can be traced to the slave plantation and convict labor systems, which both fed off the complete control of African-Americans.⁵⁰ The increased use of solitary

⁴⁵ See Reiter, *supra* note 40, at 1619-20 (noting critique of solitary confinement was not legally binding).

⁴⁶ *Id.* at 1620-21.

⁴⁷ *Id.* at 1622 (describing new technologies of systematic isolation). “[P]rison systems across the United States began testing out new technologies of longer-term, more systematic isolation . . . [a]s with earlier forms of solitary confinement use, prison officials faced critique, but they defended themselves against these critiques, often with reference to historical echoes of earlier regimes.” *Id.*

⁴⁸ See *id.* at 1621-22 (citing *Hutto v. Finney*, 437 U.S. 678, 686 n.8 (1978)) (“The *Hutto* Court, like many lower courts considering similar challenges to solitary confinement in state prisons across the United States, upheld caps of fifteen to thirty days on durations of solitary confinement, seeking to avoid lengthier stays.”) “By the early 1970s, more than thirty state prison systems faced challenges to conditions of confinement in at least one facility, and sometimes the entire state system.” *Id.* at 1621.

⁴⁹ See *id.* at 1623 (detailing how supermax prisons became so prevalent); Jules Lobel, Essay, *Mass Solitary and Mass Incarceration: Explaining the Dramatic Rise in Prolonged Solitary in America’s Prisons*, 115 NW. U. L. REV. 159, 162 (2020) (noting rise in practice of “incarcerating large numbers of prisoners in near total isolation from each other”). “[I]nstead of designing alternatives to solitary confinement, prison administrators worked with architects to design the first ‘supermax’ prisons—technologically advanced facilities that institutionalized lockdown practices.” See Reiter, *supra* note 40, at 1623. “Supermaxes. . . can be better understood as a product of [] contested origin stories: a reinvention and reinterpretation of solitary confinement, with multiple eras of critique integrated into the institution, as encrusted layers of both justification and practice.” *Id.* at 1625.

⁵⁰ See Lobel, *supra* note 49, at 182 (describing historical origination of supermax facilities). “[T]he supermax represents a form of control different from, yet connected to, the racist practices

confinement was also racially discriminatory; the same racial disparities that characterize the general prison population are replicated in the population of those held in solitary confinement.⁵¹

The rise of mass solitary confinement . . . [sprang] from the same root cause that critical theorists identify as inspiring mass incarceration: the need to develop new mechanisms of social control to replace an old order thrown into turmoil by mass protests, litigation, and changing societal attitudes. In both cases of mass isolation and removal from society, the political technique involved the imagery of a violent, predatory monster who was no longer perceived to be human.⁵²

C. *Historical Analysis of Psychological Issues Caused by Solitary Confinement*

In 1829, the Eastern State Penitentiary in Philadelphia began a new solitary confinement experiment.⁵³ The so-called “‘Philadelphia System’ involved almost an exclusive reliance upon solitary confinement as a means of incarceration[,]” and the mental impact on inmates was catastrophic.⁵⁴ The Philadelphia System caused side effects in prisoners with no prior history of mental illness, and exacerbated the condition of those with existing mental illness.⁵⁵ The Supreme Court noted, in 1980, regarding the psychological issues endured by those placed in solitary confinement:

A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition . . . and

used to brutalize, control, and subordinate African Americans in the plantation system and convict labor system of previous eras.” *Id.*

⁵¹ *See id.* at 185-86 (noting presence of racial discrimination in both mass incarceration and mass solitary confinement).

⁵² *Id.* at 181-82.

⁵³ *See* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL’Y 325, 328 (2006) (summarizing beginning of experiment).

⁵⁴ *See id.* at 328-29 (describing psychological harm resulting from solitary confinement). The mental side effects included an “agitated confusional state which, in more severe cases, had the characteristics of a florid delirium, characterized by severe confusional, paranoid, and hallucinatory features, and also by intense agitation and random, impulsive, often self-directed violence.” *Id.* at 328.

⁵⁵ *See id.* at 328-29 (“[S]uch confinement almost inevitably imposed significant psychological pain during the period of isolated confinement and often significantly impaired the inmate’s capacity to adapt successfully to the broader prison environment.”)

others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.⁵⁶

Throughout the twentieth century, prisons specifically utilized to isolate inmates began to emerge across the United States.⁵⁷ By the 1990s, states increased the amount of supermax or control-unit prisons, and solitary confinement became a standard practice at these carceral facilities.⁵⁸ As the use of solitary confinement expanded, so, too, did popular opposition to the practice, as knowledge of the resulting irreversible damage became widespread.⁵⁹ By this time, the American public knew that “other symptoms manifesting from isolation included ‘psychiatric syndrome, characterized by hallucinations; panic attacks; overt paranoia; diminished impulse control; hypersensitivity to external stimuli; and difficulties with thinking, and concentration and memory.’”⁶⁰ Forensic psychiatrist Terry Kupers found that the conditions of supermax cells caused great harm to those who were relatively psychiatrically healthy, and even greater harm to those with pre-existing mental illness.⁶¹ Those placed in solitary confinement are 78% more likely to die by suicide within the first year after their release, and 127% more likely to die of an opioid overdose within the first two weeks after their release.⁶² Currently, public disapproval of solitary confinement lingers and is reflected by a large civil rights movement to abolish the practice altogether due to the same negative psychological ef-

⁵⁶ *In re Medley*, 134 U.S. 160, 168 (1890) (describing psychological impact of prolonged isolation).

⁵⁷ See Laura Sullivan, *Timeline: Solitary Confinement in U.S. Prisons*, NAT’L PUB. RADIO, (Jul. 26, 2006) <https://www.npr.org/templates/story/story.php?storyId=5579901> (summarizing historical timeline of solitary confinement prisons).

⁵⁸ See *id.* (“Oregon, Mississippi, Indiana, Virginia, Ohio, Wisconsin and a dozen other states all built new, free-standing, isolation units.”) The 1990s were considered a “building boom” era of supermax or control-unit prisons throughout the century. *Id.*

⁵⁹ See Reiter, *supra* note 40 at 1604-05 (highlighting criticism denouncing solitary confinement as immoral and inhumane punishment).

⁶⁰ See Ruth Chan, Comment, *Buried Alive: The Need to Establish Clear Durational Standards for Solitary Confinement*, 53 J. MARSHALL L. REV. 235, 252 (2020) (discussing symptoms experienced due to solitary confinement).

⁶¹ See *id.* at 252-53 (“[P]risoners who spent long periods of time in solitary confinement exhibited anxious, paranoid, and angry behavior and had difficulty with concentration, cognition, and memory.”)

⁶² See Aaron Stagoff-Belfort, *Study Links Solitary Confinement to Increased Risk of Death After Release*, VERA INSTITUTE OF JUSTICE (Dec. 4, 2019) <https://www.vera.org/blog/study-links-solitary-confinement-to-increased-risk-of-death-after-release> (stating statistics about placement in solitary confinement).

fects that have always been apparent.⁶³ In a country already suffering from a crippling mental health crisis, solitary confinement is an additional affront to the wellbeing of incarcerated Americans that inflicts long-term psychological trauma.⁶⁴

A recent well-known, and tragic, case of solitary confinement is the story of Kalief Browder.⁶⁵ In 2010, Kalief was a sixteen-year-old boy living in the Bronx, New York, when someone accused him of stealing their backpack.⁶⁶ After his family could not afford bail, the Bronx County Criminal Court sent Kalief to Rikers Island.⁶⁷ Due to his involvement in physical altercations while at Rikers, Kalief spent the last two years of his imprisonment in solitary confinement, never having been convicted of a crime when, finally, prosecutors dropped the charges against him for lack of evidence and released him.⁶⁸

In the years following Kalief's imprisonment on Rikers Island, he experienced psychological side effects due to his prolonged time in isolation, such as constant paranoia that people were after him.⁶⁹ He heard voices in his head, and often talked to himself.⁷⁰ Family members recall that Kalief did not seem like himself because he was always paranoid.⁷¹ Tragically, Kalief died by suicide at his parents' Bronx home just two years after his release from Rikers.⁷²

⁶³ See *We Can Stop Solitary*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/prisoners-rights/solitary-confinement/we-can-stop-solitary> (last visited Mar. 6, 2021) ("Officials in some states that formerly relied heavily on solitary confinement are now realizing that they should use public resources on proven policies that promote safe communities and fair treatment, and are successfully reducing the use of solitary")

⁶⁴ See Jamie Fellner & Jeffrey L. Metzner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCH. & the L. 104, 104-5 (2010) (listing psychological side-effects of prolonged isolation); see also *The State of Mental Health in America*, MENTAL HEALTH AMERICA, <https://mhanational.org/issues/state-mental-health-america> (last visited, Nov. 28, 2021) (listing key findings of status of mental health in America); Alexandra Douglas, *Caging the Incompetent: Why Jail-Based Competency Restoration Programs Violate the Americans with Disabilities Act under Olmstead v. L.C.*, GEO. J. LEGAL ETHICS, 525, 527 (2019) (noting population suffering from mental health issues within the prison system).

⁶⁵ See *Time: The Kalief Browder Story: Part 2 – The Island* (Netflix Mar. 8, 2017) (documenting Kalief Browder's experience at Rikers Island).

⁶⁶ See *id.* (highlighting lack of evidence involved in case against Kalief).

⁶⁷ See *id.* (detailing impact of not posting bail).

⁶⁸ See *id.* (depicting prosecutor's shortcomings in establishing case).

⁶⁹ See *id.* (showing interview with Kalief explaining paranoid thoughts).

⁷⁰ See *Time: The Kalief Browder Story: Part 5 – Injustice for All* (Netflix Mar. 29, 2017) (explaining specific paranoia symptoms).

⁷¹ See *id.* (showing concerns from Kalief's family).

⁷² See *id.* (explaining Kalief's tragic passing).

D. *The Court's Role in Carceral Punishment*

Historically, American courts have utilized the “hands-off doctrine[.]” which precludes judges from determining what rights survive incarceration.⁷³ In an effort to self-regulate and avoid the ire of the legislative or executive branches, courts proactively adopted this doctrine with a vow to simply not intervene in the operations of state penal institutions.⁷⁴ Given that “the management and control of these institutions are generally viewed as executive and legislative functions[.]” the hands-off doctrine ensured the courts were not using their federal power to dictate how states run their penal institutions.⁷⁵ Although the doctrine was eventually discredited in the mid to late 1990s, courts continued to utilize the hands-off doctrine on administrative segregation and supermax confinement.⁷⁶

E. *Case Law Preceding Bailey-Snyder*

The more frequent usage of administrative segregation caused an attendant rise in litigation principally about such usage, particularly in the form of inmates asserting that prolonged isolation constituted a violation of their Sixth Amendment right to a speedy trial.⁷⁷ The first instance of this type of litigation came in the 1970s, when circuit courts held that being placed in administrative segregation for a new criminal charge pending

⁷³ See *Legal Rights of Prisoners: The Hands-off Period*, L. LIBR. – AM. L. AND LEGAL INFO., <https://law.jrank.org/pages/1761/Prisoners-Legal-Rights-hands-off-period.html> (last visited Feb. 1, 2021) (stating prisoners had no legal right to humane conditions in confinement). “Judges refused to intervene on the ground that their function was only to free those inmates illegally confined, not to superintend the treatment and discipline of prisoners in penitentiaries.” *Id.*; see also *The Hands-Off Period*, LEGAL RIGHTS OF PRISONERS, <https://law.jrank.org/pages/1761/Prisoners-Legal-Rights-hands-off-period.html> (last visited Mar. 6, 2021) (detailing judge’s utilization of hands-off doctrine).

⁷⁴ See *Legal Rights of Prisoners: The Hands-off Period*, *supra* note 73 (reasoning courts felt they did not have proper solution to these kinds of issues). “The courts believed that they lacked the expertise to become involved in prison management and the corrections officials perceived judicial review as a threat to internal discipline and authority.” *Id.*

⁷⁵ See *id.* (explaining why courts used hand-off approach).

⁷⁶ See *id.* (stating that hands-off doctrine was eventually phased out). “Courts and commentators began to recognize that the separation of powers does not foreclose judicial scrutiny when the legislature or executive acts unconstitutionally.” *Id.*; see also Lobel, *supra* note 49, at 184 (“[B]y the mid-to late 1990s, the courts had developed a largely hands-off policy on administrative segregation and supermax confinement.”)

⁷⁷ See, e.g., *Rivera v. Toft*, 477 F.2d 534, 535-36 (10th Cir. 1973) (holding that administrative segregation is not synonymous with “arrest”); *United States v. Duke*, 527 F.2d 386, 390 (5th Cir. 1976) (“[W]e do not hold administrative segregation to constitute an arrest because of what we consider to be the essential nature of that act.”); *United States v. Blevins*, 593 F.2d 646, 647 (5th Cir. 1979) (“Blevins’ confinement in administrative segregation is not an ‘arrest’ or an ‘accusal’ for sixth amendment purposes.”)

criminal investigation is not the same as an arrest, and therefore refused to extend the right to a speedy trial in these instances.⁷⁸ Defendants frequently raised Sixth Amendment arguments well into the 1980s, but courts continued to refuse to extend the fundamental right to speedy trial to administrative segregation for a new criminal charge.⁷⁹ Finally, in *United States v. Bailey-Snyder*, the Third Circuit addressed the question posed by Judge Kelly's Eighth Circuit concurring opinion—whether administrative segregation for a new charge should be considered an arrest within the meaning of the Sixth Amendment right to speedy trial—but ultimately sided with their sister courts in holding that it should not.⁸⁰

III. FACTS

A. *Underlying Case*

In 2015, appellant James Bailey-Snyder was incarcerated at Schuylkill, the Federal Correctional Institution in Minersville, Pennsylvania, when he was allegedly found with “a seven-inch homemade plastic weapon (shank) on his person.”⁸¹ Correctional officers then moved him to administrative segregation, where he remained in solitary confinement for twenty-three hours each weekday in the Special Handling Unit (“SHU”) pending further investigation by the Federal Bureau of Investigation (“FBI”).⁸² In June, 2016, Bailey-Snyder was eventually indicted on one count of possession of a prohibited object in prison after having spent eleven months in the SHU.⁸³ Bailey-Snyder moved to dismiss the indictment

⁷⁸ See *Rivera*, 477 F.2d at 536 (“Actions of prison officials in disciplining inmates are not subject to judicial review in the absence of arbitrariness or caprice.”)

⁷⁹ See *United States v. Mills*, 641 F.2d 785, 787 (9th Cir. 1981) (“Administrative segregation by the prison board is not an ‘arrest’ or ‘accusal’ for speedy trial purposes.”); see also *United States v. Daniels*, 698 F.2d 221, 223 (4th Cir. 1983) (“In all the cases where this question has been directly addressed, the courts have found that segregative confinement of a prison inmate is not the equivalent of an arrest for purposes either of the Rule or of the constitutional provisions.”)

⁸⁰ See 923 F.3d 289, 291 (3d Cir. 2019) (holding administrative segregation while under investigation for new crime does not trigger sixth amendment).

⁸¹ See *id.* at 292 (explaining nature of accusations).

⁸² See *id.* (stating Bailey-Snyder remained in isolation pending further investigation); see also *Petition for Writ of Certiorari* at 2-3, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (stating Bailey-Snyder’s confinement was for 23 hours each weekday). “His isolation was typical of the modern solitary confinement regime. For 23 hours each weekday, he was confined to a single-person cell. There, he endured social and environmental isolation. Still, the government did not move quickly.” *Id.*

⁸³ See *Bailey-Snyder*, 923 F.3d at 292 (describing cause for indictment); see also *Petition for Writ of Certiorari* at 3, *Bailey-Snyder*, 923 F.3d 289, (No. 19-742) (specifying indictment was for possession of shank).

on the grounds that his prolonged confinement in the SHU violated both his constitutional and statutory rights to a speedy trial.⁸⁴ The District Court denied the motion without holding an evidentiary hearing, and the case went to trial a month later.⁸⁵ During trial, the defense attempted to undermine the officers' credibility by pointing to possible Bureau of Prisons ("BOP") incentive programs for recovering contraband.⁸⁶ The Government rebutted this claim, but did not offer much evidence in support of their rebuttal.⁸⁷ After being convicted and sentenced to 30 months additional imprisonment, running consecutively to his underlying conviction, Bailey-Snyder appealed.⁸⁸

B. *United States v. Bailey-Snyder*

On appeal, Bailey-Snyder argued that his constitutional and statutory rights had been violated.⁸⁹ As an issue of first impression for the Third Circuit, the court considered the question of "whether speedy trial rights attach when a prisoner is placed in administrative segregation[.]"⁹⁰ Nonetheless, the Third Circuit aligned with its sister courts in deciding that administrative segregation was not an arrest within the meaning of the Sixth Amendment, and therefore declined to extend the constitutional speedy trial right "to the period prior to arrest."⁹¹

⁸⁴ See *Bailey-Snyder*, 923 F.3d at 292 ("Focusing on his placement in administrative segregation as the start of the speedy trial clock, Bailey-Snyder moved to dismiss his indictment, alleging violations of his constitutional and statutory rights to a speedy trial.")

⁸⁵ See *id.* ("Reasoning that placement in the SHU does not constitute an arrest or accusation that would trigger speedy trial rights.")

⁸⁶ See *id.* (explaining defense counsel cross-examined officers regarding incentive programs for recovering contraband).

⁸⁷ See *id.* ("The Government's only other witness was the FBI agent who investigated the case.")

⁸⁸ See *id.* at 293 (stating Bailey-Snyder filed a timely appeal).

⁸⁹ See *Bailey-Snyder*, 923 F.3d 289 at 294 (outlining Bailey-Snyder's arguments). Constitutionally, he argued "that SHU placement (like an arrest) . . . restrains the inmate's liberty, worries friends and family, prevents the inmate from gathering evidence, and focuses the prison population's obloquy on the segregated inmate." *Id.* Statutorily, he argued that the delay prior to his indictment violated the Speedy Trial Act, which requires the Government "to file an indictment or information against a defendant 'within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.'" *Id.* (quoting *United States v. Oliver*, 238 F.3d at 473).

⁹⁰ See *id.* at 291 (stating court had never addressed this particular issue before). "This appeal presents a question of first impression in this Court: does an inmate's placement in administrative segregation while he is under investigation for a new crime trigger his right to a speedy trial under the Sixth Amendment or the Speedy Trial Act?" *Id.*

⁹¹ See *Bailey-Snyder*, 923 F.3d at 293-94 (quoting *United States v. Marion*, 404 U.S. 307, 313 (1971)) (agreeing with all five circuit courts that have considered this issue on appeal). The Third Circuit held that their sister courts persuasively rebutted claims like Bailey-Snyder's for

The court's conclusion rested on four bases. First, solitary confinement imposed for this purpose occurs in "the peculiar context of a penal institution where the curtailment of liberty is the general rule, not the exception." Second, prison officials may transfer prisoners to solitary confinement for non-prosecutorial reasons Third, other circuits had previously held that solitary confinement could not amount to an arrest. [Fourth], the Third Circuit also placed significant weight on an (erroneous) belief that Mr. Bailey-Snyder could administratively challenge his solitary confinement during the pendency of the FBI referral.⁹²

The court held that the District Court correctly denied Bailey-Snyder's motion to dismiss the indictment for a speedy trial violation because being placed in administrative segregation does not constitute an "arrest" within the meaning of the Sixth Amendment.⁹³ The court further reasoned that "inmates like Bailey-Snyder have an opportunity to administratively challenge their segregation's length prior to arrest or accusation[.]"⁹⁴ In light of this decision, in January 2020, Bailey-Snyder petitioned to the Supreme Court for further review, arguing that precedent followed by the circuit courts regarding administrative segregation and the right to speedy trial "disregards both the foundational nature of the speedy trial right, and our present understanding of the threat of the modern solitary confinement regime."⁹⁵ The Court denied the petition for writ of certiorari.⁹⁶

speedy trial rights to attach when placed in administrative segregation pending criminal investigation. *Id.* at 294.

⁹² See Petition for Writ of Certiorari at 26-27, *Bailey-Snyder*, 932 F.3d 289 (No. 19-742).

⁹³ See *id.* at 293-96 (blaming denial of right to speedy trial on opportunity to administratively challenge segregation length).

⁹⁴ See *Bailey-Snyder*, 923 F.3d at 294 (explaining administrative remedies for inmates like Bailey-Snyder).

⁹⁵ See Petition for Writ of Certiorari at 26-27, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (citation omitted) (petitioning to Supreme Court). "The time has come for this court to resolve the question it left unanswered decades before the true cost of solitary confinement became known." *Id.*

⁹⁶ See *Bailey-Snyder v. United States*, 140 S. Ct. 847 (2020) (denying petition for writ of certiorari).

C. Arrest vs. Administrative Segregation

Arrests require probable cause to believe the accused committed a crime.⁹⁷ Once police establish probable cause, they have the authority to take the accused into custody for the purpose of charging the person with that crime.⁹⁸ Courts classify an “arrest” as “a public act that may seriously interfere with the defendant’s liberty . . . and [] may disrupt [their] employment, drain [their] financial resources, curtail [their] associations, subject [them] to public obloquy, and create anxiety in [themselves], [their] family, and [their] friends.”⁹⁹

Administrative segregation is not clearly defined, but courts deem it as the equivalent of solitary confinement.¹⁰⁰ Typically, administrative segregation separates an inmate from the general population who corrections officers deem a threat to themselves, other inmates, or prison officials from the general prison population.¹⁰¹ For more serious offenses, inmates must build a defense against the charges that landed them in administrative segregation.¹⁰² Administrative segregation is commonly used as a consequence of a new “charge” against an inmate while incarcerated, resulting in

⁹⁷ See U.S. CONST. amend. IV. (requiring probable cause for searches and seizures); see also *United States v. Marion*, 404 U.S. 307, 320 (1971) (detailing requirements of a lawful arrest).

⁹⁸ See Wayne R. LaFave, et al., *Principles of Criminal Procedure: Post-Investigation* 333-34 (Thomson Reuters, 2nd ed. 2009) (noting elements of arrest).

⁹⁹ See *Marion*, 404 U.S. at 320 (describing “restraints imposed by arrest”).

¹⁰⁰ See *Apodaca v. Raemisch*, 139 S. Ct. 5, 6 (mem. 2018) (clarifying interchanging use of administrative segregation and solitary confinement). “[T]hey were held in what is often referred to as ‘administrative segregation,’ but what is also fairly known by its less euphemistic name: solitary confinement.” *Id.*; see also *Estelle v. Gamble*, 429 U.S. 97, 100 n.5 (1976) (explaining interchanging use of terms “solitary confinement” and “administrative segregation”). “There are a number of terms in the complaint whose meaning is unclear, and with no answer from the State, must remain so. For example, ‘administrative segregation’ is never defined. The Court of Appeals deemed it the equivalent of solitary confinement.” *Id.*

¹⁰¹ See Elli Marcus, Comment, *Toward a Standard of Meaningful Review: Examining the Actual Protections Afforded to Prisoners in Long-Term Solitary Confinement*, 163 U. PA. L. REV. 1159, 1162 (2015) (explaining purpose of administrative segregation); see also *Petition for Writ of Certiorari* at 22, *United States v. Bailey-Snyder*, 923 F.3d 289 (3d Cir. 2019) (No. 19-742) (listing reasons prison officials segregate inmates). “Prison officials . . . segregate inmates for myriad reasons, including: investigation, discipline, protection, prevention, and transition.” *Petition for Writ of Certiorari* at 22, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (citations omitted).

¹⁰² See *Woff v. McDonnell*, 418 U.S. 539, 563-64 (1974) (detailing necessity of preparation time for inmates to prepare defense against new charges); James E. Robertson, Commentary, “Catchall” *Prison Rules and the Courts: A Study of Judicial Review of Prison Justice*, 14 ST. LOUIS U. PUB. L. REV. 153, 156-57 (1994) (describing how inmates are expected to build their defense). See generally *Jailbirds* (Netflix May 10, 2019) (showing inmates pleading to charges brought against them while incarcerated).

a criminal investigation by prosecutors.¹⁰³ Inmates placed in administrative segregation are typically placed in single inmate pods, and isolated for approximately twenty-two to twenty-four hours a day.¹⁰⁴ Most jurisdictions in the United States do not require a maximum hour limit—the point after which prisoners must be released back into the general prison population—while a global standard exists that solitary confinement should not last more than fifteen days.¹⁰⁵

D. Procedure: Arrests v. Administrative Segregation

Following arrest, an accused is brought to the court to be arraigned and to respond to the charges being brought against him or her.¹⁰⁶ Depending on the accused's plea, trial preparation commences, hopefully, in accordance with the accused's right to a speedy trial.¹⁰⁷ The accused must assert this right, but he can also choose to waive it.¹⁰⁸ When determining whether the accused's speedy trial right has been violated, the Supreme Court in *Barker v. Wingo* balanced the following factors: (1) the length of delay, (2) the reason for delay, (3) the time and manner in which the defendant has asserted his right, and (4) the degree of prejudice to the defendant the delay has caused.¹⁰⁹ The Speedy Trial Act serves “to assist in reducing crime and the danger of recidivism by requiring speedy trials[.]”¹¹⁰

¹⁰³ See *Bailey-Snyder*, 923 F.3d at 292 (stating Bailey-Snyder was indicted on charges of new crime while incarcerated); *Hewitt v. Helms*, 459 U.S. 460, 464 (1983) (examining inmate charged with crime while incarcerated). See generally *Jailbirds* (Netflix May 10, 2019) (demonstrating inmates charged for crimes resulting in administrative segregation).

¹⁰⁴ See Frost, *supra* note 8, at 6 (listing distinct features of solitary confinement); see also Valerie Kiebala & Sal Rodriguez, *FAQ, Solitary Confinement in the United States*, SOLITARY WATCH, <https://solitarywatch.org/facts/faq/> (Dec. 2018) (acknowledging that inmates often endure solitary confinement for twenty-three to twenty-four hours per day).

¹⁰⁵ See Kiebala & Rodriguez, *supra* note 104 (stating forty-two jurisdictions report no maximum limit); see also Amy Fettig, et al., *Seeing into Solitary: A Review of the Laws and Policies of Certain Nations Regarding Solitary Confinement of Detainees*, WEIL, GOTSHAL & MANGES LLP at 11 (Aug. 2016), https://www.weil.com/~media/files/pdfs/2016/un_special_report_solitary_confinement.pdf (explaining United Nations' call for global ban on solitary confinement exceeding fifteen days).

¹⁰⁶ See LaFave, et al., *supra* note 98, at 13 (describing arraignment process).

¹⁰⁷ See *id.* at 14 (outlining timeline of a criminal trial).

¹⁰⁸ See *id.* at 333-34 (detailing procedure of the right to speedy trial).

¹⁰⁹ See *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (listing balancing test factors courts use to determine violation of speedy trial rights).

¹¹⁰ See Speedy Trial Act of 1974, Pub. Law. No. 93-619 (1975) (stating purpose of Speedy Trial Act).

It is meant to regulate the time in which a trial begins after arrest, and theoretically ensure no undue delay in criminal prosecutions.¹¹¹

When correctional authorities place inmates in administrative segregation on accusations of a major offense against *internal* rules, those authorities organize and conduct their own internal disciplinary hearing.¹¹² An inmate facing such a hearing is informally “charged[,]” and is subjected to a completely internal review process.¹¹³ Inmates have the “opportunity to administratively challenge their segregation’s length prior to arrest or accusation[.]”¹¹⁴ Conversely, if an inmate is placed in solitary confinement while police and prosecutors build a criminal case against them, like Bailey-Snyder, the inmate cannot avail themselves of the administrative remedies previously discussed.¹¹⁵ In these situations, “it is effectively the speedy trial right or nothing that stands in the way of government overreach.”¹¹⁶

¹¹¹ See Kerry J. Eudy & Ira K. Packer, *Speedy Trial Act of 1974*, J. OF THE A. ACAD. OF PSYCH & THE L. (Sept. 2007), <http://jaapl.org/content/35/3/393> (detailing purpose of Speedy Trial Act).

¹¹² See Robertson, *supra* note 102, at 156 (explaining start of formal disciplinary process).

¹¹³ See *id.* at 156-57 (describing each step of disciplinary process). Fellow inmates or members of the prison staff act as counsel substitutes for inmates, and their task is to “carry out the most basic, reasonable, and non-disruptive requests of the inmate.” *Id.* (quoting *Pino v. Dalshelm*, 605 F. Supp. 1305, 1318 (S.D.N.Y. 1984)). The inmate can gather witnesses and advance their defense until it is time for the impartial adjudication, which is carried out by corrections officers. *Id.*

Even though tribunals staffed by the prison’s own officers face “obvious pressure to resolve a disciplinary dispute in favor of the institution . . .,” their use is not unconstitutional as long as the charging officer, witnesses, and other persons substantially involved in the circumstances underlying the charge are recused.

Id. at 157-58 (footnotes omitted).

¹¹⁴ See *United States v. Bailey-Snyder*, 923 F.3d 289, 294 (3rd Cir. 2019) (pointing to alternative remedy for inmates who are administratively segregated).

¹¹⁵ See *Petition for Writ of Certiorari* at 23, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (highlighting administrative remedies are for other uses of solitary confinement not resulting in criminal investigation).

Likewise, if prison officials were to throw a prisoner in solitary confinement for some purpose other than to detain him pursuant to a criminal investigation, speedy trial rights would not attach. Instead, the prisoner could avail himself of the administrative remedies denied Mr. Bailey-Snyder. The habeas and civil rights statutes are no substitute for speedy trial rights—litigating such claims takes years, and prisoners rarely prevail.

Id. at 23.

¹¹⁶ See *id.* (explaining lack of relief options “[f]or prisoners detained in solitary confinement to permit police and prosecutors to build a criminal case”).

E. Building a Case After Prolonged Isolation

Prolonged isolation can lead to issues for a defendant when attempting to build a strong defense in preparation for trial.¹¹⁷ The Court in *Barker* explained that “if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.”¹¹⁸ If the defendant is isolated from the general population where the incident occurred, they are unable to communicate with the witnesses and examine the evidence relevant to their case while the prosecution has the luxury of building a case against the defendant.¹¹⁹ These issues are considered in the *Barker* balancing test—when determining the prejudice factor—because they go to the accused’s interest in maintaining a speedy trial.¹²⁰

Additionally, prolonged isolation often causes mental health issues, which possibly leads to determinations that a defendant is incompetent to stand trial.¹²¹ The Court “recognize[s] that a defendant has a constitutional right ‘not to be tried while legally incompetent,’ and that a State’s ‘failure to observe procedures adequate to protect a defendant’s right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.’”¹²² Although defendants have a constitutional right to competency at trial, the Court finds constitutionally the burden is on defendants to prove incompetency.¹²³ The Court has said that in order to be deemed competent to stand at trial, a defendant must be able to con-

¹¹⁷ See *id.* at 24 (“[U]nder the prevailing rule, the government could hold a prisoner in dangerous isolation definitely, enabling it to gradually build a case while the prisoner’s ability to do the same diminishes with each passing day.”)

¹¹⁸ See *id.*; *Barker v. Wingo*, 407 U.S. 514, 533 (1972) (explaining why it could be difficult for defendants to prepare strong defenses while incarcerated).

¹¹⁹ See Petition for Writ of Certiorari at 24, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (describing difficulty in maintaining favorable witnesses over time).

¹²⁰ See *Barker*, 407 U.S. at 530 (accepting balancing test approach).

¹²¹ See *Medina v. California*, 505 U.S. 437, 440 (1992) (setting standard for mentally incompetent defendant). “A defendant is mentally incompetent ‘if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.’” *Id.*; see also Kirsten Weir, *Alone, in ‘the hole,’* 43 AM. PSYCH. ASSN., 54, 54 (2012) (listing extreme mental health problems inmates suffer from prolonged isolation). “[M]any segregated prisoners reportedly suffer from mental health problems including anxiety, panic, insomnia, paranoia, aggression and depression” Weir *supra*, at 54. “The rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage.” *Medina*, 505 U.S. at 446.

¹²² See *Medina*, 505 U.S. at 449 (describing Court’s recognition of legally incompetent defendants’ constitutional rights not to be tried).

¹²³ See *id.* at 452 (placing burden on defendant to prove incompetency).

sult with their lawyer with a reasonable degree of rational understanding and be able to comprehend the facts of the proceedings against them.¹²⁴

Procedural safeguards for defendants deemed mentally incompetent for the purposes of standing at trial exist; a defendant may file a motion for a hearing to determine the mental competency of the defendant.¹²⁵ “Where the evidence raises a ‘bona fide doubt’ as to a defendant’s competence to stand trial, the trial judge on his own motion must . . . conduct a hearing to determine competency to stand trial.”¹²⁶ If the court finds, by a preponderance of the evidence, that the defendant is suffering from a mental disease, the defendant should be sent to a “suitable facility” for treatment until their mental condition improves for trial.¹²⁷

IV. ANALYSIS

The U.S. should no longer practice solitary confinement because of its barbaric nature and the resultant harm it wreaks on the incarcerated.¹²⁸ Because the Supreme Court remains reluctant to abolish solitary confinement, it should consider affording inmates placed in solitary confinement pending criminal investigation their fundamental right to a speedy trial.¹²⁹ This analysis will offer compelling reasons as to why the Court should reexamine the question posed by Judge Kelley’s concurring opinion: whether placing an inmate in solitary confinement pending investigation for a new criminal charge should be considered an “arrest” within the meaning of the Sixth Amendment’s right to speedy trial.¹³⁰ The following

¹²⁴ See *Dusky v. United States*, 295 F.2d 743, 746 (1960) (setting legal standard for determining defendant’s competency to stand at trial).

¹²⁵ See 18 U.S.C.S. § 4241(a) (stating procedural safeguards for defendants deemed mentally incompetent); see also Douglas, *supra* note 64, at 527 (referring to population of criminal defendants with mental health care needs who are deemed incompetent).

¹²⁶ See *Torres v. Prunty*, 223 F.3d 1103, 1106-07 (9th Cir. 2000) (quoting *Kaplany v. Enomoto*, 540 F.2d 975, 979 (9th Cir. 1976)) (describing procedure to determine competency).

¹²⁷ See 18 U.S.C.S. § 4241(d) (detailing procedural remedy for defendants deemed mentally incompetent to stand trial).

¹²⁸ See Reiter, *supra* note 40 at 1619-20 (describing Court’s rejection of solitary confinement); see also *In re Medley*, 134 U.S. 160, 170 (1890) (describing severity of solitary confinement as additional punishment). “[Solitary confinement] was considered as an additional punishment of such a severe kind that it is spoken of . . . as ‘a further terror and peculiar mark of infamy’” *Id.*

¹²⁹ See *Petition for Writ of Certiorari at 13, United States v. Bailey-Snyder*, 923 F.3d 289 (3d Cir. 2019) (No. 19-742) (pushing for speedy trial rights to attach to solitary confinement pending criminal investigation); see also *Klopfert v. North Carolina*, 386 U.S. 213, 223 (1967) (explaining fundamental nature of right to a speedy trial).

¹³⁰ See *United States v. Wearing*, 837 F.3d 905, 911 (8th Cir. 2016) (Kelly, J., concurring) (stating exception to overall concurrence without hearing parties fully brief issue); see also *Peti-*

sections will compare “arrests” to solitary confinement pending investigation for a new criminal charge, arguing that the latter should trigger speedy trial rights, and will discuss the failures of procedural safeguards in penal institutions.¹³¹

A. Solitary Confinement Pending External Investigation Should Trigger Speedy Trial Rights

Placing an inmate in solitary confinement—or administrative segregation—pending investigation for a new criminal charge should trigger Sixth Amendment speedy trial rights because similar to an arrest, it seriously interferes with the defendant’s liberty.¹³² For example, it is common for inmates to have jobs while incarcerated to pay for various commodities in the prison system.¹³³ When put in administrative segregation for long periods of time, this “may disrupt [their] employment, and drain [their] financial resources,” as they would no longer be able to work due to the forced isolation.¹³⁴ Although the general public would not know about the admin-

tion for Writ of Certiorari at 24-25, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (encouraging Supreme Court to reconsider issue).

¹³¹ See Petition for Writ of Certiorari at 23, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (“[T]he *Barker* test determines whether the nearly eleven-month delay between placement in solitary confinement and indictment constitutes a violation of those rights.”) In these situations, where inmates are placed in solitary confinement pending investigation for a new criminal charge, “it is effectively the speedy trial right or nothing that stands in the way of government overreach.” *Id.*

¹³² See *United States v. Marion*, 404 U.S. 307, 320 (1971) (listing ways arrests interfere with defendant’s liberties); see also Petition for Writ of Certiorari at 7, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (applying *Bailey-Snyder* case facts into *Barker* test).

Judged against the four-prong metric set forth in *Barker*, the delay between arrest and indictment violated his speedy trial rights, Mr. Bailey-Snyder argued. First, his pre-indictment solitary confinement was lengthy. Second, the government could not justify that delay because it developed no new evidence during its protracted investigation. Third, Mr. Bailey-Snyder asserted his speedy trial rights as soon as practical. Fourth, the delay was prejudicial because it was oppressive, anxiety-inducing, and impaired his defense.

Id. (citations omitted). “Mr. Bailey-Snyder’s pretrial solitary confinement was prejudicial in each of these ways. The oppressive nature and anxiety inherent in solitary confinement, detailed above, are quite clearly prejudicial.” *Id.* at 23-24.

¹³³ See *Jailbirds: Dressed Into Oranges, Ima Be That Phatt B. . . , We’re All Criminals, Swimmin’ in S. . . , Bruh!* (Netflix May 10, 2019) (showing inmates relying on jobs for certain commodities while incarcerated).

¹³⁴ See *Marion*, 404 U.S. at 320 (detailing impact of being incarcerated); see also *Jailbirds: Dressed Into Oranges, Ima Be That Phatt B. . . , We’re All Criminals, Swimmin’ in S. . . , Bruh!* (Netflix May 10, 2019) (depicting frustration of inmates who could not afford various commodities).

istrative segregation in the same way they would know about an “arrest” on the streets, the same type of “public obloquy” can occur in prisons.¹³⁵ Prisons function in similar ways to society on the outside; relationships and cliques form, therefore the traveling of information is inevitable.¹³⁶ When an inmate goes into administrative segregation for a new charge, they often face analogous scrutiny from fellow inmates that one arrested on the streets would from the general public.¹³⁷ This can cause great anxiety for an inmate placed in isolation.¹³⁸ Lastly, depending on the specific situation, inmates are allowed calls and visits from family and friends.¹³⁹ When inmates are placed in administrative segregation, this complete isolation prevents any type of communication.¹⁴⁰ Lack of communication with an incarcerated loved one creates feelings of anxiety in the inmate’s family and friends that are similar to those that would arise if that individual had been arrested.¹⁴¹ These elements demonstrate the ways in which the Court’s classification of an “arrest” is especially similar to its classification of an administrative segregation, so both should be treated the same for Sixth Amendment speedy trial purposes.¹⁴² Disregarding this determination will likely lead to many subsequent issues, such as the isolated inmate’s inability to build a strong defense and competently stand for trial.¹⁴³

An accused’s interests in a speedy trial—specifically the possibility that their defense will be impaired—mirror those of administratively segre-

¹³⁵ See *Jailbirds: Dressed Into Oranges, Ima Be That Phatt B. . . , We’re All Criminals, Swimmin’ in S. . . , Bruh!* (Netflix May 10, 2019) (showing general population’s knowledge of newly isolated inmate).

¹³⁶ See *id.* (displaying society formed in prison).

¹³⁷ See *id.* (observing inmates speaking negatively of newly isolated inmates).

¹³⁸ See *id.* (showing anxiety caused by such scrutiny).

¹³⁹ See *id.* (showing inmates interacting with family members).

¹⁴⁰ See *Jailbirds: Dressed Into Oranges, Ima Be That Phatt B. . . , We’re All Criminals, Swimmin’ in S. . . , Bruh!* (Netflix May 10, 2019) (showing inmates being denied opportunity to speak to loved ones); see also Frost, *supra* note 8, at 6 (explaining distinct features of solitary confinement). A defining feature of solitary confinement in correctional systems is minimal contact with others. See Frost, *supra* note 8, at 6. “Other distinct features of solitary confinement practices include . . . restrictions on visited from friends and family.” *Id.*

¹⁴¹ See *Time: The Kalief Browder Story: Part 3 - The Bing* (Netflix Mar. 15, 2017) (showing stress Kalief’s family endured during his time in solitary confinement).

¹⁴² See *Petition for Writ of Certiorari* at 9, *United States v. Bailey-Snyder*, 923 F.3d 289 (3d Cir. 2019) (No. 19-742) (applying *Marion* analysis to deem administrative segregation and arrests synonymous for sixth amendment purposes). “If speedy trial rights attached at the time of Mr. Bailey-Snyder’s placement in solitary, which they must under this Court’s *Marion* analysis, then the *Barker* test determines whether the nearly eleven-month delay between placement in solitary confinement and indictment constitutes a violation of those rights.” *Id.* at 23.

¹⁴³ See *id.* at 7 (detailing detrimental impact of solitary confinement on inmate’s ability to build a strong defense); see also *Medina v. California*, 505 U.S. 437, 439 (1992) (recognizing defendant’s right to competently stand trial).

gated individuals facing a new charge.¹⁴⁴ Prejudice to the defendant is a factor within the *Barker* balancing test which the Court uses in assessing whether the defendant has been deprived of their right to a speedy trial.¹⁴⁵ The prejudice factor addresses the interests of the defendant in: (i) preventing oppressive pretrial incarceration; (ii) minimizing anxiety and concern of the accused; and (iii) limiting the possibility that the defense will be impaired.¹⁴⁶ With respect to preventing oppressive pretrial incarceration, inmates placed in solitary confinement while awaiting trial are certainly prejudiced given the oppressive nature of detainment.¹⁴⁷ It is difficult—if not impossible—to think of a more oppressive way to incarcerate someone than to lock them in a small room for twenty-three hours a day with absolutely no human interaction.¹⁴⁸ As for minimizing anxiety and concern of the accused, inmates in solitary confinement struggle with extreme mental health issues; if the interest in minimizing the anxiety and concerns of the accused is sincere, making them await their trial in solitary confinement is not a practice that upholds such an interest due to its destructive nature.¹⁴⁹ Lastly, addressing the possibility that the defense will be impaired, it is a difficult task to build a strong case while in complete isolation.¹⁵⁰

Equally clear is the detrimental impact of solitary on [an inmate's] ability to present a defense. The *Barker* Court explained that “if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.” Of course, this is also true when the alleged crime took place in general population and the defendant is locked up in solitary confinement—away from the witnesses and evidence relevant to his case.

¹⁴⁴ See Petition for Writ of Certiorari at 16, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (emphasizing difficulties involved with building a strong defense in isolation).

¹⁴⁵ See *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (articulating balancing test courts use to determine violation of speedy trial rights).

¹⁴⁶ *Id.* at 532 (outlining elements of factor test to determine whether defendant has been deprived of speedy trial).

¹⁴⁷ See Petition for Writ of Certiorari at 15, *Bailey-Snyder*, 923 F.3d 289 (3d Cir. 2019) (describing how isolation is oppressive).

¹⁴⁸ See *id.* at 21 (“[S]hort of execution, our penal system knows no more extreme, oppressive, and anxiety-inducing liberty restriction than solitary confinement.”)

¹⁴⁹ See *id.* at 17 (“The oppressive nature and anxiety inherent in solitary confinement . . . are quite clearly prejudicial.”); see also Weir, *supra* note 121, at 54 (listing extreme mental health problems inmates suffer from prolonged isolation). “[M]any segregated prisoners reportedly suffer from mental health problems including anxiety, panic, insomnia, paranoia, aggression and depression” See Weir, *supra* note 121, at 54.

¹⁵⁰ See *Barker*, 407 U.S. at 533 (“[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.”)

This is not a hypothetical concern But under the prevailing rule, the government could hold a prisoner in dangerous isolation indefinitely, enabling it to gradually build a case while the prisoner's ability to do the same diminishes with each passing day.¹⁵¹

For the reasons mentioned above, placing an inmate in solitary confinement—or administrative segregation—pending investigation for a new criminal charge should trigger protection from the Speedy Trial Act.¹⁵² It should be required that the information or indictment be filed within thirty days from the date of placing the inmate in solitary confinement pending a criminal investigation.¹⁵³ Further, the trial must commence within seventy days from the date of filing the information or indictment.¹⁵⁴ In addition to these procedural requirements, the prison should perform an informal incarceration hearing in order to minimize the amount of time inmates wait for their trial in isolation.¹⁵⁵ Otherwise, with no time limit on how long a defendant waits for their trial in isolation, there is a greater risk that they will suffer extreme psychological trauma.¹⁵⁶

The psychological issues stemming from a prolonged period of time in administrative segregation heavily impact a defendant's ability to competently stand trial.¹⁵⁷ If prisons continue placing inmates in solitary confinement for extremely long periods of time, it is inevitable that they will become mentally impaired and legally incompetent to stand trial.¹⁵⁸ Further, if defense counsel questions the competency of its client, the

¹⁵¹ See Petition for Writ of Certiorari at 17-18, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (citations omitted).

¹⁵² See 18 U.S.C.S. § 3161(b) (1974) (stating time limits for procedure of speedy trial). “Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.” *Id.*

¹⁵³ See *id.* (outlining timing requirements of right to speedy trial).

¹⁵⁴ See 18 U.S.C.S. § 3161(c)(1) (1974) (outlining timing requirements of right to speedy trial).

¹⁵⁵ See Petition for Writ of Certiorari at 15-16, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (emphasizing need for better procedural safeguards for incarcerated inmates); see also Fetting, *supra* note 103, at 11 (explaining United Nations global ban on solitary confinement lasting more than fifteen days).

¹⁵⁶ See Chan, *supra* note 60, at 252 (explaining psychological trauma caused by prolonged isolation).

¹⁵⁷ See Douglas, *supra* note 64, at 527 (2019) (referring to population of criminal defendants with mental health care needs who are deemed incompetent).

¹⁵⁸ See Petition for Writ of Certiorari at 13-14, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (“[T]here is not a single study of solitary confinement wherein non-voluntary confinement that lasted for longer than 10 days failed to result in negative psychological effects.”)

courts employ a procedure to evaluate their client's mental health.¹⁵⁹ This procedure prolongs the trial process because of the time consuming nature of tending to a defendant's deteriorating mental health, which can lead to backlog that Congress sought to do away with by enacting the Speedy Trial Act.¹⁶⁰ Instead, courts should afford inmates the speedy trial rights prior to them reaching the state of mental deterioration deeming them legally incompetent.¹⁶¹

B. Shift Towards a More Hands-On Approach to Carceral Punishment

The issue posed by Judge Kelly's concurring opinion is one courts should be mindful of, given the fundamental nature of the right to a speedy trial.¹⁶² While courts historically took the "hands-off approach" in order to allow correctional authorities more autonomy in managing their facilities, it is crucial for the courts to be involved in the adjudication of the matter when a criminal investigation is underway.¹⁶³ The hands-off doctrine has proved to be dangerous for the fate of prisoners' rights.¹⁶⁴ Since courts are afraid to overstep their bounds into the executive or legislative branch, they try not to postulate solutions that may be best left to a different branch.¹⁶⁵ Instead, courts allow for internal investigations and procedures intended as safeguards for inmates, and claim they are the best solutions.¹⁶⁶ The cur-

¹⁵⁹ See 18 U.S.C.S. § 4241 (describing procedure for court's determination of mental competency).

¹⁶⁰ See *id.* (explaining timeline for mentally incompetent before standing for trial); see also Partridge, *supra* note 37 (explaining interest in bringing defendants to trial promptly); Chan, *supra* note 60 (explaining psychological trauma caused by prolonged isolation).

¹⁶¹ See Petition for Writ of Certiorari at 14, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) ("[E]ven a short time in solitary confinement is associated with drastic cognitive changes.")

¹⁶² See *id.* at 12 (declaring "[u]nanimity does not guarantee accuracy"). "That is particularly so in light of the fact that the dangerous impact of solitary confinement was not a pressing concern when the bulk of this precedent issued. Pleading ignorance is no longer tenable, yet the Third Circuit grounded its holding in stale decisions that predate the scientific consensus." *Id.*; see also *Klopper v. North Carolina*, 386 U.S. 213, 223 (1967) (detailing historical roots of right to speedy trial).

¹⁶³ See *United States v. Marion*, 404 U.S. 307, 313 (1971) (explaining when speedy trial rights begin and when they require court involvement).

¹⁶⁴ See *The Hands-Off Period*, *supra* note 73 (explaining "[i]n one case, a federal court refused to hear from inmates whose lives were endangered by these conditions, [and] because of the hands-off doctrine, the judge declined to intervene.")

¹⁶⁵ See *id.* ("Underlying the hands-off doctrine were concerns about the appropriate reach of federal judicial power.") "The argument that courts lack expertise in prison management was also criticized. The argument is based on a misconception of the judiciary's role." *Id.*

¹⁶⁶ See *id.* ("The courts believed that they lacked the expertise to become involved in prison management and the corrections officials perceived judicial review as a threat to internal discipline and authority.")

rent safeguards to administrative segregation pending a criminal investigation do not work as intended.¹⁶⁷ This lack of functionality requires that the Sixth Amendment right to speedy trial attach to administrative segregation based on the framers' intent to protect the criminally accused.¹⁶⁸ By allowing penal institutions to place inmates in limitless administrative segregation pending investigation for a new crime, the Court allows the penal institution to strip inmates of their constitutional assurance to a speedy trial.¹⁶⁹

The right to a speedy trial is one of the most fundamental rights found in the Constitution—and the Court should afford inmates that same constitutional right as those criminally accused in the general public.¹⁷⁰ Inmates and the criminally accused have the same interests as any accused and need the protections speedy trial right.¹⁷¹ The Court's hands-off approach to dealing with penal institutions has led to less interest in protecting inmate's constitutional rights, and more of an interest in making corrections officers' jobs easier.¹⁷² For these reasons, this Note urges defense attorneys to raise these Sixth Amendment speedy trial issues when repre-

¹⁶⁷ See Marcus, *supra* note 101, at 1180 (“Indeed, ‘the decision is predetermined, the review is a sham, and there is nothing the prisoner can do to get out of solitary confinement.’”); see also Petition for Writ of Certiorari at 14, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (explaining risk of government overreach in prison administrative remedies).

Likewise, if prison officials were to throw a prisoner in solitary confinement for some purpose other than to detain him pursuant to a criminal investigation, speedy trial rights would not attach. Instead, the prisoner could avail himself of the administrative remedies denied Mr. Bailey-Snyder. The habeas and civil rights statutes are not substitute for speedy trial rights—litigating such claims takes years, and prisoners rarely prevail.

Id.

¹⁶⁸ See Petition for Writ of Certiorari at 19, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (criticizing rule that disregards “both the foundational nature of the speedy trial right, and our present understanding of the threat of the modern solitary confinement regime.”)

¹⁶⁹ See *id.* (explaining speedy trial right is sole protection inmates have from government overreach).

Under the prevailing doctrine, the government can hold an incarcerated person in isolation indefinitely—or at least until the statute of limitations runs—while it builds a criminal case against him and his ability to marshal a defense dwindles. This is permissible, the cases hold, because a radical additional deprivation of liberty is of no significance when a person is already locked away, and solitary confinement may be imposed for reasons unrelated to investigation and prosecution.

Id.

¹⁷⁰ See *Klopper v. North Carolina*, 386 U.S. 213, 223 (1967) (explaining how fundamental right to speedy trial is).

¹⁷¹ See *Barker v. Wingo*, 407 U.S. 514, 533 (1972) (stating rationales to solitary detention do not outweigh right to speedy trial in U.S. Constitution).

¹⁷² See *The Hands-Off Period*, *supra* note 73 (“The attitude of the courts and the prison officials work[] hand-in-hand to deny prisoners’ rights.”)

senting inmates who are awaiting a new criminal trial while isolated in solitary confinement.¹⁷³

V. CONCLUSION

One of the most fundamental rights belonging to the accused in a criminal prosecution is their right to a speedy trial. When incarcerated inmates are accused of crimes and subsequently put in prolonged isolation, they should be afforded the same rights as those accused outside of the prison walls. As time in isolation persists, inmates are left with a higher risk of an impaired defense because of their lack of access to witnesses and others substantially involved in the matter. More importantly, there also exists a strong possibility that the defendant will not be legally competent enough to inevitably stand trial due to the traumatic mental effects of prolonged isolation. If the Court remains reluctant to abolish solitary confinement altogether—as many have strongly suggested—it should at least consider administrative segregation pending investigation for a new crime while incarcerated an “arrest” within the meaning of the Sixth Amendment’s right to speedy trial and the Speedy Trial Act.

Taking the hands-off approach to carceral punishment, especially the right to speedy trial after administrative segregation, enables the criminal justice system to place inmates in complete isolation and leave them there indefinitely. Rather than maintaining the system currently in place, affording inmates the right to a speedy trial would reduce: (1) the risk that the defense will be impaired and (2) the extreme mental health issues of prolonged solitary confinement. Since the Court remains reluctant to answer the important constitutional question posed by Judge Kelly in her concurring opinion in *Wearing*, defense attorneys should be committed to relentlessly raising these speedy trial claims. As a country, it is time we stop disregarding the rights of individuals we lock in cages—they are suffering and should be afforded the same speedy trial rights for a new criminal charge as the criminally accused outside of the prison system. The more visibility these issues gain, the greater the chance society can do away with this grotesque practice altogether.

Madison Carvello

¹⁷³ See Petition for Writ of Certiorari at 24, *Bailey-Snyder*, 923 F.3d 289 (No. 19-742) (explaining detrimental impact solitary confinement has on defendant’s ability to build defense).

THE CASE FOR RACE: AN EXPLORATION OF WHETHER THE UNITED STATES OLYMPIC AND PARALYMPIC COMMITTEE CAN REQUIRE ATHLETES TO SIGN AWAY THEIR RIGHT TO PROTEST

“It wasn’t done for a malignant reason. It was only done to bring attention to the atrocities of which we were experiencing in a country that was supposed to represent us.” – Tommie Smith, U.S. Olympic Gold Medalist.¹

I. INTRODUCTION

The Olympic Games have always been an inherently political affair—established to bring the world together through sport.² As such, and perhaps inadvertently, the games have been a venue for political protest for almost as long as they have existed in their modern form.³ Just ten years after the modern Olympic Games began in 1896, Peter O’Connor,

¹ See Walter Ford, *It’s progress*, THE UNION (Jun. 12, 2020), <https://www.theunion.com/sports/walter-ford-its-progress/>.

² See INT’L OLYMPIC COMM., OLYMPIC CHARTER 8, ¶ 2 (2021), https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf?_ga=2.234634012.303326392.1633619797-1409196676.1632857194 (establishing Fundamental Principles of Olympism). The Charter states that “the goal of Olympism is to place sport at the service of the harmonious development of humankind, with a view to promoting a peaceful society concerned with the preservation of human dignity.” *Id.* The most recent Olympic games in Tokyo showcased the intersection between sports, peace, and politics when a Russian and a Ukrainian athlete, rivals from two warring countries, hugged each other as they medaled in the high jump, while their government exploited the event. Vladimir Mozgovoï, *How Russia and Ukraine Became Smear Campaign Champions*, THE MOSCOW TIMES (Aug. 11, 2021), <https://www.themoscowtimes.com/2021/08/11/how-russia-and-ukraine-became-smear-campaign-champions-a74755>.

³ See Jessica Phelan, *7 of the most memorable Olympic protests in history (and one that could be)*, SALON (Feb. 13, 2014, 5:50 PM), https://www.salon.com/2014/02/13/7_of_the_most_memorable_olympic_protests_in_history_and_one_that_could_be/ (summarizing protest history at Olympic Games); David Davis, *Olympic Athletes Who Took a Stand*, SMITHSONIAN MAGAZINE (Aug. 2008), <https://www.smithsonianmag.com/articles/olympic-athletes-who-took-a-stand-593920/> (providing overview of 1968 Olympic protest); M. . lissa Godin, *Athletes Will Be Banned From Protesting at the 2020 Tokyo Olympics. But the Games Have a Long History of Political Demonstration*, TIMES MAGAZINE (Jan. 14, 2020, 12:19 PM), <https://time.com/5764614/political-protests-olympics-ioc-ban/> (discussing protests at Olympics and use of Olympics as venue or tool of protest).

an Irish track and field athlete, was forced to compete for Great Britain during the Irish fight for independence.⁴ In response to his new status as a British athlete, O'Connor scaled a flagpole during his medal ceremony and waved a green flag reading "Ireland Forever" in Gaelic.⁵ The 1968 Olympic Games in Mexico City were the venue of similar protests by Věra Čáslavská, a Czechoslovakian gymnast who went into hiding when the Soviet Union invaded her country.⁶ After winning four gold and two silver medals, Čáslavská turned her head from the Soviet flag in protest of the Soviet Union's invasion.⁷ While the International Olympic Committee (IOC) did nothing in response to this specific act, Čáslavská was unable to coach or take any part in the world of gymnastics until the fall of the Soviet Union in 1991.⁸

John Carlos and Tommie Smith, two American track and field athletes, protested at the medal ceremony for the two hundred meter sprint by raising their fists in a black power salute during the Star-Spangled Banner.⁹ Their protest was in response to the Civil Rights Movement, the continuing war in Vietnam, and the assassinations of Martin Luther King, Jr. and Robert Kennedy.¹⁰ The IOC took immediate action, suspending Carlos and Smith from the American team and sending the pair back to the states.¹¹ While the lives and careers of these athletes were upended

⁴ See Phelan, *supra* note 3 (describing O'Connor's protest); Godin, *supra* note 3 (describing O'Connor's protest and background surrounding his status as British athlete).

⁵ See Godin, *supra* note 3 ("In protest, O'Connor scaled a 20-foot flagpole in the stadium, waving a green flag with the words 'Erin Go Bragh' (Ireland forever) while his co-athlete Con Leahy distracted Greek authorities.") Though the International Olympic Committee ("IOC") frowned upon O'Connor's actions, it did not expel him or place him on probation, and he went on to win gold in three more competitions, waving a green flag each time. *Id.*

⁶ See Phelan, *supra* note 3 (describing Čáslavská's protest); Godin, *supra* note 3 (describing the background and consequences of Čáslavská's protest).

⁷ See Phelan, *supra* note 3 (recounting Čáslavská's protest). Čáslavská was present in her native Czechoslovakia when the Soviet Union invaded and was forced to go into hiding, training from home rather than at the state sponsored gymnasium. *Id.* "She kept in competition form by practicing her floor routine in fields and swinging on tree branches instead of the parallel bars." *Id.* The Soviet flag went up during Čáslavská's medal ceremony because she tied with a Soviet gymnast for the gold. *Id.*

⁸ See Godin, *supra* note 3 (detailing Čáslavská's life after 1968 Olympics).

⁹ See Davis, *supra* note 3 (describing Carlos and Smith's protest); Phelan, *supra* note 3 (providing background on Carlos and Smith's protest); Godin, *supra* note 3 (explaining protest's impetus).

¹⁰ See Davis, *supra* note 3 (describing protest's impetus and historical background); Godin, *supra* note 3 (explaining protest's impetus and historical background). Both American runners took off their shoes to symbolize Black poverty and wore one black glove to represent African American strength and unity. Phelan, *supra* note 3. Additionally, Smith wore a black scarf for Black pride while Carlos wore a string of beads to show respect for the victims of lynching. Phelan, *supra* note 3.

¹¹ See Phelan, *supra* note 3 (describing consequences for Carlos and Smith after protest).

because they took a stand for their beliefs, there has never been consequences for a nation that chooses to boycott the Olympic Games.¹² This discrepancy reveals the IOC's unbalanced approach in preventing the Olympics from being used for political purposes—the politically motivated actions of athletes are punished, while the politically motivated actions of nations are effectively ignored.¹³

Protests by athletes are not specific to the Olympics, as professional athletes in the United States have protested at games in their own respective leagues.¹⁴ In 2016, San Francisco 49ers quarterback Colin Kaepernick knelt during the national anthem to protest police brutality and racial inequality in the United States, sparking a movement that spread through all United States professional sports.¹⁵ Kaepernick's protest caught the ire of the Republican Party and then-Republican presidential nominee Donald Trump, who called the act disrespectful, un-American, and an attack on veterans and service members.¹⁶ Informal pressure from conservative consumers and commentators, as well as then-President

¹² See Davis, *supra* note 3 (noting difficulties Carlos faced after protest). Carlos struggled to find a stable job and even attributed the suicide of his then-wife, in part, to the backlash from his protest. *Id.*; see also Phelan, *supra* note 3 (noting instances of nation boycotts). Sixty nations, led by the United States, boycotted the 1980 Olympic Games in Moscow in response to the 1979 Soviet invasion of Afghanistan, which then resulted in a sixteen-nation boycott of the 1984 Olympic Games in Los Angeles. Phelan, *supra* note 3; DeFrantz v. U.S. Olympic Comm., 492 F. Supp. 1181, 1188 (D.D.C. 1980), *aff'd* without opinion, 701 F.2d 221 (D.C. Cir. 1980) (holding USOC entitled to refuse to allow American athletes to compete, even for reasons unrelated to sport); Oren Weisfeld, *Olympics bans political protest by athletes*, NOW MAGAZINE (Jan. 22, 2020), <https://nowtoronto.com/news/olympics-2020-tokyo-protests/> (noting IOC's reaffirmation of commitment to ban athlete protest).

¹³ See Weisfeld, *supra* note 12 (noting IOC commitment to ban athlete protests); DeFrantz, 492 F. Supp. at 1188 (endorsing USOC refusal to participate in Olympic Games).

¹⁴ See Adam Kilgore & Ben Golliver, *Most sports leagues pause with second day of protests, some more unified than others*, THE WASHINGTON POST (Aug. 27, 2020, 7:17 PM), <https://www.washingtonpost.com/sports/2020/08/27/sports-protests/> (noting teams across the NBA, NHL, and NFL all canceling games due to protests). The cancelled games were a response to the shooting of Jacob Blake in Kenosha, Wisconsin, and, more generally, police brutality following the murder of George Floyd by a Minneapolis police officer in 2020. *Id.*

¹⁵ See Tadd Haislop, *Colin Kaepernick kneeling timeline: How protests during the national anthem started a movement in the NFL*, SPORTING NEWS (Sept. 13, 2020), <https://www.sportingnews.com/us/nfl/news/colin-kaepernick-kneeling-protest-timeline/xktu6ka4diva1s5jxaylrcsse> (providing comprehensive timeline of Colin Kaepernick's activism). Initially, Kaepernick protested by sitting on the bench instead of standing during the national anthem during a preseason game. *Id.* Kaepernick got the idea to kneel, rather than sit, from former Seahawks player and Green Beret Nate Boyer. *Id.* When Kaepernick knelt for the first time on September 1, 2016, he was joined by teammate Eric Reid, who continued to kneel with him for the entire season. *Id.*; see also Trump Calls NFL kneeling 'disgraceful,' disrespectful to veterans, FOX NEWS (Sept. 26, 2017), <https://www.foxnews.com/politics/trump-calls-nfl-kneeling-disgraceful-disrespectful-to-veterans> (quoting President Trump's views on athlete activism).

¹⁶ See FOX NEWS, *supra* note 15 (quoting President Trump).

Trump, resulted in the National Football League (“NFL”) announcing a rule penalizing players who kneel during the national anthem.¹⁷ Despite the new rule, President Trump continued to criticize the NFL, sparking more protests from players and greater outcry from fans.¹⁸ Americans remain divided in their views on athlete protests, and the act of kneeling during the national anthem has remained at the center of the controversy.¹⁹

This note analyzes the United States Olympic and Paralympic Committee’s (“USOPC”) previous policy of barring athlete protest during sanctioned events and seeks to prove that this action was unconstitutional.²⁰ While the USOPC does not currently enforce this policy, the risk of reversal warrants careful consideration of this issue.²¹ Athletes who choose

¹⁷ See Haislop, *supra* note 15 (explaining NFL’s locker room rule).

¹⁸ See *id.* (examining developments in dialogue surrounding Kaepernick’s protest). Nike used Kaepernick as the face for a new ad campaign supporting his activism, which was met with applause as well as the widespread burning of Nike products. *Id.*

¹⁹ See Michael Tesler, *Americans Are Far More Likely To Support Athlete Protests Than They Once Were*, FIVETHIRTYEIGHT (Sept. 3, 2020, 6:00 AM), <https://fivethirtyeight.com/features/americans-are-far-more-likely-to-support-athlete-protests-than-they-once-were/> (showing statistical change over time in favorability of protest by athletes); see also Amy Tenny, *NFL: Political divide on athlete activism widens in the U.S. – Reuters/Ipsos Poll*, REUTERS, <https://www.reuters.com/article/us-football-nfl-activism/nfl-political-divide-on-athlete-activism-widens-in-the-u-s-reuters-ipsos-poll-idUSKBN2602MX> (Sep. 9, 2020, 12:22 PM) (reviewing statistics underscoring partisan divide over athlete protest). Kneeling during the national anthem is still hotly debated and support for the act is incredibly partisan. *Id.*; Oren Weisfeld, *Race Imboden: ‘I knelt because America doesn’t reflect me anymore’*, THE GUARDIAN (Sep. 1, 2020, 5:00 PM), <https://www.theguardian.com/sport/2020/sep/01/race-imboden-fencing-anthem-protest-interview> (interviewing Race Imboden regarding his decision to kneel on Olympic podium during national anthem).

²⁰ See Eddie Pells, *Pan Am Games protestors each get 12 months of probation*, ASSOCIATED PRESS (Aug. 20, 2019), <https://apnews.com/article/80b2fb3ee1da43c8909cb7b6a1a47454> (discussing sanctions, contract signed, and initial public statement).

²¹ See Associated Press, *USOPC won’t punish athletes for protesting at the Olympics*, ESPN (Dec. 10, 2020), https://www.espn.com/olympics/story/_/id/30489589/usopc-punish-athletes-protesting-olympics (announcing USOPC’s refusal to sanction athletes for kneeling or raising fists at future games). A reversal of this policy is possible, given that Rule 50 remains under the IOC Olympic Charter, and the IOC has consistently defended its enforcement. *Id.*; Dave Zirin & Jules Boykoff, *The USOPC Defends Olympic Athletes’ Right to Protest*, THE NATION (Dec. 23, 2020), <https://www.thenation.com/article/society/olympics-protest/>. It should be noted that the USOPC’s new policy states that they will not punish athletes that protest “peacefully and respectfully . . . in support of racial and social justice for all human beings.” Zirin & Boykoff, *supra* note 21. This suggests that the USOPC retains the right to sanction athletes who do not protest within those categories. *Id.*; see also Ariane de Vogue & Devan Cole, *Supreme Court—over John Roberts’ sole dissent—rules in favor of student in First Amendment case*, CNN, <https://www.cnn.com/2021/03/08/politics/supreme-court-free-speech-college-religion-case-chike-uzuegbunam/index.html> (Mar. 8, 2021, 11:20 AM) (detailing decision allowing First Amendment suit where university could reestablish anti-speech policy). The potential for a policy reversal is enough to warrant intervention by the courts—especially where constitutional freedoms are abridged. Vogue & Cole, *supra* note 21. This uncertainty was apparent during the Tokyo Games

to protest at future Olympic Games or international competitions should be allowed to do so freely, without retribution from the USOPC, or the IOC acting through it.²²

II. FACTS

The IOC was established in 1894 as an independent, international organization, with the role of overseeing the Olympic Games and international sport competitions, reviewing bidding processes, facilitating the growth of sport and sportive collaboration around the world, and promoting the political neutrality of the Olympic Movement.²³ This dedication to political neutrality is stated in Rule 50 of the Olympic Charter, the “codification of the fundamental principles of Olympism, and the rules and bye-laws adopted by the International Olympic Committee.”²⁴ Rule 50 itself bars any “kind of demonstration or political, religious, or racial propaganda . . . in any Olympic sites, venues or other areas.”²⁵ To ensure adherence to Rule 50, the IOC relies on the National Olympic Committees to evaluate infractions and dole out consequences to their own athletes instead of imposing the sanctions itself.²⁶

as fencer Race Imboden and shot-putter Raven Saunders protested from their respective podiums. Matthew Futterman, et al., *Shot-Putter’s Gesture Renews Controversy Over Podium Protests*, NEW YORK TIMES, <https://www.nytimes.com/2021/08/01/sports/olympics/olympics-protests-podium.html> (Aug. 5, 2021). This led to confusion over the enforcement of Rule 50, with the IOC and USOPC both stating that the other would handle any potential disciplinary action. *Id.*

²² See Pells, *supra* note 20 (discussing USOPC and Imboden fall out).

²³ See *Overview*, INT’L OLYMPIC COMM. (July 10, 2021), <https://olympics.com/ioc/overview> (providing IOC historical overview); *History, Principles & Financing*, INT’L OLYMPIC COMM. (July 14, 2021), <https://olympics.com/ioc/mission> (stating IOC mission); OLYMPIC CHARTER, *supra* note 2, at 8 (stating IOC’s role is “to maintain and promote its political neutrality and to preserve the autonomy of sport.”)

²⁴ See *Olympic Charter*, INT’L OLYMPIC COMM. (July 14, 2021), <https://olympics.com/ioc/olympic-charter> (republishing IOC Charter).

²⁵ See OLYMPIC CHARTER, *supra* note 2, at 94 (barring athlete activism); see also IOC ATHLETES’ COMM., RULE 50 GUIDELINES 1-3, <https://stillmedab.olympic.org/media/Document%20Library/OlympicOrg/News/2020/01/Rule-50-Guidelines-Tokyo-2020.pdf> (last visited Nov. 2, 2020, 9:26 AM) (explaining purpose of Rule 50 and how infractions are evaluated). Notably, Rule 50 bars any protest on the field of play, in the Olympic Village, during medal ceremonies, and during the opening, closing, or other official ceremonies. IOC ATHLETES’ COMM., *supra* note 25, at 2. However, it permits protests during press conferences, at team meetings, and through digital and traditional media platforms. *Id.* Ostensibly, Rule 50 bars protest where it would have the largest effect—where it reaches the largest audience. Gwen Berry, *I Used the Podium to Protest. The Olympic Committee Punished Me.*, THE NEW YORK TIMES (Sep. 7, 2020), <https://www.nytimes.com/2020/09/07/opinion/gwen-berry-olympics-protest.html?action=click&module=Opinion&pgtype=Homepage>.

²⁶ See IOC ATHLETES’ COMM., *supra* note 25, at 1-3 (explaining Rule 50 purpose and infractions).

The USOPC, the IOC's American counterpart, was initially established as the United States Olympic Committee ("USOC"), and is a federally incorporated and chartered, independent organization.²⁷ Founded in 1978, the USOC served as the coordinating and governing body for all amateur athletic activity directly related to international competition.²⁸ As such, it deals directly with, and follows the rules of, the IOC—including the IOC's infamous Rule 50.²⁹ The USOPC has the power to enforce IOC rules through its incorporating statute, and its constitution and by-laws give it full authority over the eligibility and sanctioning of athletes.³⁰

In the lead up to the 2019 Pan-American Games, the USOPC required all its competing athletes to sign a contract promising not to violate Rule 50 by taking part in political demonstrations during the games.³¹ In spite of this contract, American Olympic foil fencer Race Imboden took a knee on the medal podium after the U.S. Men's Foil Team won gold.³² In addition to breaching his contract, his protest ran afoul of Rule 50 of the Olympic Charter.³³ In response to his protests, the USOPC

²⁷ See Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220502(a) (incorporating USOC).

²⁸ See 36 U.S.C. § 220502(a) (incorporating USOC); 36 U.S.C. § 220502(c) (renaming USOC as USOPC); 36 U.S.C. § 220503(2) (establishing USOPC's purposes).

²⁹ See 36 U.S.C. § 220503 (stating USOPC purposes); OLYMPIC CHARTER, *supra* note 2, at 94 (barring athlete activism); see also Zirin & Boykoff, *supra* note 21 (detailing USOPC change in Rule 50 adherence).

³⁰ See 36 U.S.C.S. § 220505 (creating the USOPC as an independent, federally chartered organization); 36 U.S.C. § 220503(3), (8) (stating USOPC authority over eligibility and disputes involving American athletes); see also 36 U.S.C. § 220502 (incorporating the USOPC); 36 U.S.C. §§ 220501-220529 (showing entire act); 36 U.S.C.S. § 220505(a) (establishing that "the corporation shall adopt a constitution and bylaws," that it "may amend").

³¹ See OLYMPIC CHARTER, *supra* note 2, at 94 (barring any "kind of demonstration or political, religious or racial propaganda . . . in any Olympic sites, venues or other areas."); OlympicTalk, *Race Imboden kneels, Gwen Berry raises fist on Pan Am Games podium*, NBC SPORTS (Aug. 11, 2019, 11:59 PM), <https://olympics.nbcsports.com/2019/08/10/race-imboden-fencer-national-anthem-protest-knee/> (stating that "before competing, Pan Am Games athletes commit to terms including refraining from political demonstrations.")

³² See Los Angeles Times Staff and Wire Reports, *U.S. Fencer Race Imboden kneels on podium to protest injustice and Trump*, THE LOS ANGELES TIMES (Aug. 10, 2019, 9:44 AM), <https://www.latimes.com/sports/story/2019-08-11/american-fencer-kneels-over-social-injustice-blasts-trump> (explaining reasons behind Imboden's Pan-American protest); Derrick Bryson Taylor, *U.S. Fencer and Hammer Thrower Lead Silent Protest at Pan-American Games*, THE NEW YORK TIMES (Aug. 11, 2019), <https://www.nytimes.com/2019/08/11/sports/race-imboden-fencer-kneels.html> (detailing Imboden's specific protest motivations). Imboden tweeted that he was motivated to kneel by the "shortcomings" of his country, most notably "racism, gun control, mistreatment of immigrants, and a president who spreads hate." Taylor, *supra* note 32. He further stated that he wanted to use his moment at the top of the podium to "call attention to issues" he believed needed to be addressed. *Id.*

³³ See OLYMPIC CHARTER, *supra* note 2, at 94 (barring demonstrations or protests); OlympicTalk, *supra* note 31 (noting Race violated promise not to protest).

issued a statement of disapproval.³⁴ The USOPC then sent Imboden a letter informing him that he was being put on a twelve-month probation whereby another infraction would result in his ineligibility to compete in the 2021 Tokyo Olympic Games.³⁵ In early 2020, the IOC reaffirmed its full-throated adherence to Rule 50.³⁶ This affirmation came under the guise of promoting harmony and preventing “divisive disruption” during the games.³⁷ The guidelines released by the IOC clarified that “kneeling,” specifically added as an example, would not be allowed as a form of protest on medal podiums.³⁸

Following summer 2020’s Black Lives Matter movement, and the election of President Joe Biden, the USOPC suddenly reversed its decision,

³⁴ See Los Angeles Times Staff and Wire Reports, *supra* note 32 (quoting USOPC’s Vice President of Communications Mark Jones’s statement). “In this case, Race didn’t adhere to the commitment [not to protest] he made to the organizing committee and the USOPC . . . [w]e respect his rights to express his viewpoints, but we are disappointed that he chose not to honor his commitment. Our leadership is reviewing what consequences may result.” *Id.*

³⁵ See Associated Press, *Race Imboden and Gwen Berry get probation for Pan Am Games podium protests*, NBC SPORTS (Aug. 20, 2019, 6:56 PM), <https://olympics.nbcsports.com/2019/08/20/race-imboden-gwen-berry-podium-protests-pan-am-games/> (noting USOPC’s initial response to the protests); Des Bieler, *U.S. Fencer Race Imboden given 12-month probation for Pan Am Games protest*, THE WASHINGTON POST (Aug. 21, 2019, 12:05 AM), <https://www.washingtonpost.com/sports/2019/08/21/us-fencer-race-imboden-given-month-probation-pan-am-games-protest/> (further detailing USOPC sanctions); Pells, *supra* note 20 (quoting from USOPC probation notices for Imboden and Berry). Sarah Hirshland, CEO of the USOPC, stated in her letter to Imboden:

“It is also important for me to point out that, going forward, *issuing a reprimand to other athletes in a similar instance is insufficient* . . . We recognize that we must more clearly define for Team USA athletes what a breach of these rules will mean in the future . . . Working with the (athletes and national governing body councils), we are committed to more explicitly defining what the *consequences* will be for members of Team USA who protest at future Games.”

Id. (emphasis added). Hirshland further stated that she respected the perspectives of the athletes and would work with the IOC “to engage on a global discussion on these matters,” but noted that she could not “ignore the rules or the reasons they exist.” *Id.* While Hirshland’s letter acknowledged that a more clearly defined punishment is required, it did not indicate that the USOPC was willing to break with its own tradition and allow its athletes to protest in any capacity. *Id.*

³⁶ See IOC ATHLETES’ COMM., *supra* note 25 (identifying “hand gesture or kneeling” as explicit examples of barred protest).

³⁷ See *id.* (clarifying IOC guidelines on Rule 50).

³⁸ See Tom Schad, *IOC: No kneeling or any form of political protest allowed at Tokyo Olympics*, USA TODAY (Jan. 9, 2020, 11:11 AM), <https://www.usatoday.com/story/sports/olympics/2020/01/09/tokyo-olympics-ioc-details-athlete-rules-political-protests/4419120002/> (discussing reposting of guidelines); see also Andrew Keh, *Olympics Allows Protests, but Not During Events or on Medal Stands*, <https://www.nytimes.com/2021/07/02/sports/olympics/olympics-protests-tokyo.html> (Aug. 6, 2021) (noting prohibition against protesting on podium remains intact under new guidelines).

renouncing its policy against athlete activism so long as protests were “peaceful” and “respectful.”³⁹ However, the USOPC retains the ability to unilaterally reverse its position again.⁴⁰ Were this to occur, any athlete exercising their constitutional right to free speech from the podium would be stripped of their eligibility to compete.⁴¹

III. HISTORY

To establish that the Constitution bars the USOPC from conditioning the benefit of participation on waiving the right to protest, an athlete must prove that: (1) the USOPC functions as a state actor or has taken a state action; (2) the athlete exercised their constitutionally protected right to free speech; and (3) the USOPC, as a state actor, conditioned the benefit of competing on the athlete’s waiver of the right to exercise their constitutionally protected right to protest.⁴²

A. Federally Chartered Corporations as State Actors and State Action

The question of whether the USOPC is a state actor was first addressed in *DeFrantz v. U.S. Olympic Committee*.⁴³ In 1980, under considerable pressure from the United States government, the USOPC (then the USOC) boycotted the Moscow Games in response to the Soviet

³⁹ See Associated Press, *supra* note 21 (noting previous policy reversal); Zirin & Boykoff *supra* note 21 (establishing USOPC will not punish athletes who protest “peacefully and respectfully . . . in support of racial and social justice for all human beings.”) Without further guidance, the USOPC effectively establishes itself as the sole arbiter of what constitutes peaceful or disrespectful protest. Zirin & Boykoff, *supra* note 21. Further, there is no indication that the USOPC cannot reverse its policy, nor any explanation of the distinctions it has placed on how athletes can protest and for what causes. *Id.*

⁴⁰ See Pells, *supra* note 20 (describing USOPC’s original policy on athlete protest); Associated Press, *supra* note 21 (noting USOPC’s policy reversal); see also de Vogue & Cole, *supra* note 21 (discussing Supreme Court allowing First Amendment case due to concern university could reestablish anti-speech policy).

⁴¹ See Pells, *supra* note 20 (describing USOPC’s original policy on athlete protest); see also de Vogue & Cole, *supra* note 21 (discussing Supreme Court allowing First Amendment case due to concern university could reestablish anti-speech policy).

⁴² See *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1192-94 (D.D.C. 1980), *aff’d*, 701 F.2d 221 (D.C. Cir. 1980) (discussing the USO[P]C and corporations as state actors); see also Thomas R. McCoy, *Unconstitutional Conditions Doctrine, The First Amendment Encyclopedia*, THE FREE SPEECH CENTER: FIRST AMENDMENT NEWS AND INSIGHTS FROM MTSU, <https://www.mtsu.edu/first-amendment/article/1026/unconstitutional-conditions-doctrine> (last visited Nov. 2, 2020, 10:07 AM) (outlining unconstitutional conditions doctrine).

⁴³ *DeFrantz*, 492 F. Supp. at 1192 (analyzing whether USO[P]C is a state actor or committed state action in boycotting Moscow Olympics).

Union's 1979 invasion and occupation of Afghanistan.⁴⁴ Twenty-five athletes and one USO[P]C Executive Board Member sued the USO[P]C to challenge the decision not to send American athletes to the 1980 Moscow Olympics.⁴⁵ The plaintiffs claimed that the USO[P]C's action to boycott the games constituted a "governmental state action" that abridged their rights of "liberty, self-expression, personal autonomy and privacy" as guaranteed by the First, Fifth, and Fourteenth Amendments to the U.S. Constitution.⁴⁶

In evaluating the plaintiff's argument, the court addressed two issues: (1) whether the USO[P]C's decision was a state action; and (2) whether the USO[P]C's decision "abridged any constitutionally protected rights."⁴⁷ The court looked to two cases when determining whether the USO[P]C committed a state action: *Burton v. Wilmington Parking Auth.*⁴⁸ and *Jackson v. Metropolitan Edison Co.*⁴⁹ Under *Burton*, the Court asked whether the state had "so far insinuated itself into a position of interdependence with [the private entity] that [the entity] must be recognized as a joint participant in the challenged activity."⁵⁰ While the

⁴⁴ See *id.* at 1183-84 (discussing factual background). The United States levied sanctions against the Soviet Union and requested a boycott of the games in Moscow, which the USO[P]C initially resisted. *Id.* In response to the USO[P]C's resistance, President Carter announced in his State of the Union address that he did not support sending a "United States team to compete in the Olympic Games as long as the Soviet military forces remained in Afghanistan." *Id.* at 1184. The House of Representatives and the Senate followed suit by issuing resolutions opposing participation. *Id.* Pressure mounted on the USO[P]C as White House counsel met with USO[P]C executives and officers. *Id.* White House counsel threatened to terminate federal funding and revoke the USO[P]C's tax-exempt status unless the USO[P]C complied and voted to boycott the games. *Id.* President Carter went so far as to tell the Athlete's Advisory Council that the United States would not send a team and sent a message to USO[P]C threatening legal action to enforce his decision to boycott the games. *Id.*; see also Dionne L. Koller, *How the United States Government Sacrifices Athletes' Constitutional Rights in the Pursuit of National Prestige*, 2008 BYU L. REV. 1465, 1481-82 (2008) (summarizing facts under *DeFrantz*).

⁴⁵ See *DeFrantz*, 492 F. Supp. at 1182 (describing plaintiffs' claim that "that in preventing American athletes from competing in the Summer Olympics, defendant has exceeded its statutory powers and has abridged plaintiffs' constitutional rights.")

⁴⁶ See *id.* at 1182, 1185 (identifying plaintiffs and listing plaintiffs' claims). Additionally, plaintiffs asserted claims that: (1) the USO[P]C violated its own governing statute by acting in a political manner; and (2) the USO[P]C breached its own Constitution, Bylaws and governing statute by violating the rights of a plaintiff-member of the Executive Board. *Id.* at 1185.

⁴⁷ *Id.* at 1192 (stating two-pronged test for constitutional claim against private entity). The USO[P]C was a federally chartered, but private, organization. *Id.* As such, the plaintiffs had to show that the USO[P]C vote to boycott was a governmental act, or state action, as understood through the Fifth and Fourteenth Amendments. *Id.*

⁴⁸ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

⁴⁹ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *DeFrantz*, 492 F. Supp. at 1193-94 (explaining precedent and analyzing claim).

⁵⁰ See *DeFrantz*, 492 F. Supp. at 1193 (quoting *Burton*, 365 U.S. at 725) (stating *Burton* inquiry). In *Burton*, the Supreme Court had found that a restaurant that discriminated on the basis

Supreme Court found that the private entity in *Burton* committed a state action, the D.C. Circuit declined to do so for the USO[P]C.⁵¹ In its opinion, the court noted that there was no evidence of a “symbiotic relationship” between the government and the USO[P]C, outside of the funds Congress used to establish the USO[P]C and the fact that its incorporating statute requires the USO[P]C to submit an annual report to the President and Congress.⁵² The court then held that there was no “obvious” or “deep enmeshment of the defendant and the state” because the “USO[P]C receive[s] no federal funding and exists and operates independently of the federal government.”⁵³

Under *Jackson*, there is a governmental action only when there is a “sufficiently close nexus” between the state and the challenged action.⁵⁴ In *Jackson*, the Supreme Court held that the defendant-utility committed no state action, even though it was closely regulated by the state and the action about which the plaintiff complained was approved by the state’s utility commission.⁵⁵ In *DeFrantz*, the plaintiffs’ argued that the Carter Administration’s persuasion campaign had crossed the line from “governmental recommendation” to “affirmative pressure, [putting] the government’s prestige behind the challenged action.”⁵⁶ The D.C. Circuit disagreed, holding that the USO[P]C’s decision failed the *Jackson* test because the federal government was not required to approve any USO[P]C action.⁵⁷ The court also quoted *Spark v. Cath. Univ. of Am.*,⁵⁸ reasoning that, at least where race is not involved, “it is necessary to show that the Government exercises some form of control over the actions of the private

of race had committed a state action. *Burton*, 365 U.S. at 717. The restaurant was physically and financially an integral part of a public building that was built and maintained by public funds, was devoted to a public parking service, and was owned by the state of Delaware. *Id.* at 717-18. The Court reasoned that this interdependence between the private and state entities was sufficient to classify the private entity as a state actor. *Id.*

⁵¹ See *Burton*, 365 U.S. at 726 (finding restaurant committed state action); see also *DeFrantz*, 492 F. Supp. at 1193 (declining to recognize USO[P]C as state actor).

⁵² See *DeFrantz*, 492 F. Supp. at 1193 (stating reasoning behind USO[P]C’s rejection as state actor).

⁵³ See *id.* (rejecting *Burton* framework for USO[P]C).

⁵⁴ See *Jackson*, 419 U.S. at 351 (stating “the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”); *DeFrantz*, 492 F. Supp. at 1193 (quoting *Jackson*, 419 U.S. at 351) (noting *Jackson* standard).

⁵⁵ See *Jackson*, 419 U.S. at 346, 358-59 (stating defendant-utility regulated by state but holding state not sufficiently connected to defendant’s conduct). The action that led to the litigation was the defendant’s procedure for terminating electrical services. *Id.* at 347; *DeFrantz* 492 F. Supp. at 1193 (noting *Jackson* holding).

⁵⁶ See *DeFrantz*, 492 F. Supp. at 1193 (reciting plaintiff’s argument).

⁵⁷ See *id.* (holding USO[P]C not a state actor under *Jackson*).

⁵⁸ *Spark v. Cath. Univ. of Am.*, 510 F.2d 1277 (D.C.Cir. 1975).

party.”⁵⁹ Since there was no issue of racial discrimination, and the USO[P]C was not required to obtain approval from the federal government, the decision not to send an American team to the Moscow Olympics was not a state action.⁶⁰

DeFrantz is not the only case that called into question the USO[P]C’s status as a state actor.⁶¹ In a 5-4 decision, the Supreme Court in *S.F. Arts & Athletics, Inc.* held that the USO[P]C was not a state actor, but not without garnering a notable dissent from Justice Brennan.⁶² Justice Brennan’s dissent rested on the belief that “‘when private individuals . . . are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and are subject to its constitutional limitations.’”⁶³ This argument is particularly relevant in situations where the function of the individual is traditionally within the government’s “‘exclusive prerogative.’”⁶⁴ Brennan concluded that the USO[P]C may be classified a government actor because it represents the

⁵⁹ *DeFrantz*, 492 F. Supp. at 1194 (quoting *Spark*, 510 F.2d at 1281-82) (stating *Spark* alters *Jackson* framework when race is involved).

⁶⁰ *See id.* at 1194 (holding USO[P]C’s actions nongovernmental). The court found that the USO[P]C is an independent organization without *per se* or *de facto* government control. *Id.* The court further reasoned that nothing in the governing statute gives the federal government control and noted that the decision to boycott was decided by the USO[P]C’s House of Delegates via secret ballot. *Id.* The court also stated that while the federal government may bar athletes from competing in the Olympics, it did not exercise its power in pressuring the delegates to vote a certain way. *Id.* The court explained that to find otherwise would “open the door” into a non-justiciable realm where courts would have to decide what “level, intensity, or type of ‘Presidential’ or ‘Administrative’ or ‘political’ pressure” on a private entity is enough to trigger federal jurisdiction. *Id.*

⁶¹ *See S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 525 (1987) (discussing San Francisco corporation attempting to use “Olympic” for private event under Fifth Amendment). The incorporating statute of the USO[P]C gave it sole commercial and promotional use of the word “Olympic” and Olympic symbols, as well as the ability to grant their use. *Id.* at 526. *S.F. Arts & Athletics, Inc.* argued that this policy violated their First Amendment right to free speech. *Id.* The Court disagreed, finding that the USO[P]C was not a state agent and therefore the plaintiff’s claim must fail. *Id.* at 546-48.

⁶² *See id.* at 548-73 (Brennan, J., dissenting) (outlining Justice Brennan’s dissent). Brennan’s dissent was joined by Justices Marshall, O’Connor and Blackmun. *Id.* at 548; *see also id.* (O’Connor, J., concurring) (“. . . for the reasons explained by Justice Brennan . . . I believe the [USOC] and the United States are joint participants in the challenged activity and as such are subject to the equal protection provisions of the Fifth Amendment.”)

⁶³ *See id.* at 549 (Brennan, J., dissenting) (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)) (emphasizing government’s role in endowing entities with powers and related consequences).

⁶⁴ *See id.* at 549-50 (Brennan, J., dissenting) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)) (stating USOC’s powers flow from Congressional action).

United States during the Olympics, which is a nationalistic event that the government often utilizes as a tool of foreign policy.⁶⁵

While *DeFrantz* and *S.F. Arts & Athletics, Inc.* addressed the scope of the USO[P]C's general powers, Olympians have yet to litigate the USO[P]C's powers when it comes to restrictions on their First Amendment freedoms.⁶⁶ The court affirmed the USO[P]C's general powers regarding athlete participation in *Barnes v. Int'l Amateur Athletic Fed'n.*⁶⁷ where it noted that Congress intended for disputes regarding eligibility to be decided outside the judicial system.⁶⁸ While the infringement on the First Amendment rights of athletes has not yet been addressed, precedent set out under *Bantam Books, Inc. v. Sullivan*⁶⁹ indicates that organizations working on behalf of the government may face constitutional litigation.⁷⁰

⁶⁵ See *id.* at 549-50 (Brennan, J., dissenting) (stating Congress granted USO[P]C powers to develop amateur athletes and represent America).

The USOC is . . . our country's exclusive representative to the International Olympic Committee (IOC), a highly visible and influential international body. The Court overlooks the extraordinary representational responsibility that Congress has placed on the USOC. As the Olympic Games have grown in international visibility and importance, the USOC's role as our national representative has taken on increasing significance.

Although the Olympic ideals are avowedly nonpolitical, Olympic participation is inescapably nationalist. Membership in the IOC is structured not according to athletes or sports, but nations. The athletes the USOC selects are viewed, not as a group of individuals who coincidentally are from the United States, but as the team of athletes that represents our Nation . . . Every aspect of the Olympic pageant, from the procession of athletes costumed in national uniform, to the raising of national flags and the playing of national anthems at the medal ceremony, to the official tally of medals won by each national team, reinforces the national significance of Olympic participation.

Id. at 550-551; see also Koller, *supra* note 44, at 1469-86 (explaining history of sportive nationalism and athletics as foreign policy).

⁶⁶ See *S.F. Arts & Athletics, Inc.*, 483 U.S. at 525-27 (discussing "Olympic" copyright); *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1182-86 (D.D.C. 1980) (discussing Olympian participation rights).

⁶⁷ *Barnes v. Int'l Amateur Athletic Fed'n*, 862 F. Supp. 1537 (S.D. W. Va. 1993).

⁶⁸ See *id.* at 1544 (citing *Michels v. U.S.O.C.*, 741 F.2d 155 (7th Cir. 1984)) (outlining legislative history of Ted Stevens Act). The plaintiffs in *DeFrantz* sued for their right to compete under the Due Process Clause of the Fifth Amendment, as well as their right to self-expression under the First Amendment. *DeFrantz*, 492 F. Supp. at 1182-86. The plaintiff in *S.F. Arts & Athletics, Inc.* sued for the right to use the term "Olympic" under the Due Process Clause and First Amendment. *S.F. Arts & Athletics, Inc.*, 483 U.S. at 525-27 (reciting causes of action).

⁶⁹ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

⁷⁰ See *id.* at 71 (highlighting organizations acting on state's behalf are not exempt from constitutional claims).

B. Free Speech Considerations

For a state agent to be held liable for the deprivation of an individual's constitutional rights, the plaintiff must first show that they were prevented from exercising such a right.⁷¹ Historically, a citizen's right to protest has been protected under the First Amendment's Free Speech clause.⁷² The test used to determine whether conduct, like an act of protest, is considered speech was formulated under *Spence v. Washington*,⁷³ where the Supreme Court analyzed conduct through a two-pronged test: (1) whether there was an intent to convey a particularized message; and (2) whether, in the surrounding circumstances of the conduct, the likelihood was great that the message would have been understood by those who saw it.⁷⁴ This test works in tandem with the holding from *Tinker v. Des Moines*,⁷⁵ where the Supreme Court ruled that "symbolic speech," such as an act of protest, is protected under the First and Fourteenth Amendments, as if it were "pure speech."⁷⁶ The two-prong framework established by *Spence* would likely be applied to protests mounted by American athletes seeking to express themselves during the Olympic Games.⁷⁷

⁷¹ See *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) (explaining conduct must deprive plaintiff of "rights, privileges, or immunities secured by the Constitution or laws of the United States.")

⁷² See *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (delineating test for when conduct is communicative and therefore protected); see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (noting symbolic speech, akin to pure speech, protected under First and Fourteenth Amendments); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.")

⁷³ *Spence v. Washington*, 418 U.S. 405 (1974).

⁷⁴ See *Spence*, 418 U.S. at 410-11 (articulating test for classifying conduct as speech). In this case, the appellant had used removable tape to superimpose a peace symbol onto an American flag and hung it from his apartment window. *Id.* at 405-06. The flag was hung in protest of the invasion of Cambodia and the recent killings at Kent State University. *Id.* at 408; see also *Johnson*, 491 U.S. at 399 (holding flag burning, as conduct, entitled to First Amendment protections).

⁷⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁷⁶ See *Tinker*, 393 U.S. at 505-06 (holding wearing of armbands akin to pure speech and protected conduct). The Court notes that wearing black armbands to protest the War in Vietnam was "... entirely divorced from actually or potentially disruptive conduct," effectively undermining the school's argument that in restricting speech it was trying to maintain order. *Id.* at 505.

⁷⁷ See generally *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1741-45 (2018) (Thomas, J., concurring) (exhibiting recent conduct as speech example).

C. *Unconstitutional Conditions Doctrine*

The unconstitutional conditions doctrine bars the government, or any state actor, from conditioning a benefit on the exercise of a constitutional right.⁷⁸ In many cases involving the unconstitutional conditions doctrine, the government has conditioned a benefit, such as federal funding, or a privilege, like tax exemption, on a party's relinquishment of their freedom of speech.⁷⁹ For example, in *Regan v. Taxation with Representation of Washington*,⁸⁰ the Supreme Court held that denying tax deductions to a lobbying non-profit was not a violation of the First Amendment.⁸¹ Additional examples include *Rust v. Sullivan*,⁸² where the Supreme Court allowed the government to subsidize certain services over others in the promotion of particular forms of family planning, and

⁷⁸ See, e.g., *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) (striking down requirement for veterans to swear oath of loyalty for veteran's property-tax exemption); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)) (noting "government may not deny a benefit to a person because he exercises a constitutional right"); *Fed. Comm'n Comm'n. v. League of Women Voters of Cal.*, 468 U.S. 364, 402 (1984) (barring government from conditioning funds on station's relinquishing right to editorialize); *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 549 (2001) (holding government cannot create private speech and then try to restrict it); McCoy, *supra* note 42 (stating overview of unconstitutional conditions doctrine); see also *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 (1963) (holding commission's pressure on book sellers to stop selling "objectionable" books unconstitutional); cf. *Rust v. Sullivan*, 500 U.S. 173, 177 (1991) (allowing HHS to limit ability of Title X fund recipients to engage in abortion-related activities). "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust*, 500 U.S. at 193.

⁷⁹ See *Speiser*, 357 U.S. at 518-519 (stating "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech."); *League of Women Voters of Cal.*, 468 U.S. at 402 (barring government from conditioning funds on station's relinquishing right to editorialize); McCoy, *supra* note 42 ("The unconstitutional conditions doctrine is encountered most often . . . where an express or implied term in [a] contract restricts the contractor's freedom to speak . . . [and] . . . the contractor [seeks] to invalidate the contractual restriction . . . on the grounds that it is an unconstitutional condition on the availability of the valuable government contract."); cf. *Taxation with Representation of Wash.*, 408 U.S. at 551 (allowing Congress, by statute, to bar public grants to charitable organizations for lobbying purposes); *Rust*, 500 U.S. at 194-95 (holding Government can selectively fund a program to encourage certain activities in public interest). The Supreme Court held that there is no distinction between a benefit or a privilege, like in *Speiser*, where a California state law required veterans to swear an oath of loyalty to the government to continue receiving their property-tax exemption, equating privileges and benefits with respect to the doctrine. See *Speiser*, 357 U.S. at 518-19.

⁸⁰ *Taxation with Representation of Wash.*, 461 U.S. 540 (1983).

⁸¹ See *id.* at 545 (quoting *Perry*, 408 U.S. at 597) (stating "government may not deny a benefit to a person because he exercises a constitutional right.")

⁸² *Rust v. Sullivan*, 500 U.S. 173 (1991).

Legal Services Corp. v. Velazquez,⁸³ where the Supreme Court invalidated a restriction on a legal services organization's ability to challenge the constitutionality or validity of laws pertaining to indigent clients.⁸⁴ Notably, this doctrine does not apply if the "restriction is reasonably necessary for the effective performance of the contract," such when secrecy is required, or an employee is engaged in government-specified speech.⁸⁵ If the doctrine does apply, then a court would automatically apply the strict scrutiny standard of review to see if: (1) the state has a compelling interest in restricting the speech; and (2) the action is narrowly tailored enough to achieve that interest.⁸⁶ A compelling state interest is defined as something necessary or essential to the function or interests of the government, rather than a matter of choice, preference, or discretion.⁸⁷ In the event that the USOPC is deemed a state actor, and an athlete's podium protest, like Imboden's, is considered free speech, that athlete could likely find redress under the unconstitutional conditions doctrine.⁸⁸

⁸³ *Legal Services Corp. v. Velazquez*, 531 U.S. 549 (2001).

⁸⁴ See *Taxation with Representation of Wash.*, 461 U.S. at 540 (demonstrating unconstitutional conditions doctrine as applied to nonprofit's conditional tax deductions); *Rust*, 500 U.S. 173 (applying unconstitutional conditions doctrine to government subsidies); *Legal Services Corp.*, 531 U.S. 533 (showing unconstitutional conditions doctrine consequences when examining restrictions on LSC).

⁸⁵ See McCoy, *supra* note 42 (first citing *Snepp v. United States*, 444 U.S. 507, 507-10 (1980); then citing *Rust*, 500 U.S. at 193). In *Snepp*, the Supreme Court upheld a CIA employment contract that required a former CIA analyst to submit his manuscript regarding CIA activities in South Vietnam to the agency for prepublication review, as a way to screen for classified materials. *Snepp*, 444 U.S. at 507-10. Similarly, in *Rust*, the Court found that the Department of Health and Human Services could fund family-planning services under the condition that fund recipients did not engage in abortion-related activities, such as counseling, communicating, suggesting, or performing abortions. *Rust*, 500 U.S. at 193. The Court further noted that selectively funding a specific program, and not an alternative program, was not viewpoint discrimination, but rather the government's own prerogative. *Id.*

⁸⁶ See *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 172 (2015) (exemplifying seminal *Frist* Amendment case explaining strict scrutiny evaluation requirements). Under a First Amendment strict scrutiny analysis, "narrowly tailored" means that the restriction is neither under-inclusive—so riddled with exceptions that the restriction does not actually achieve the state's interest—nor over-inclusive—so broad that it leaves no other way for someone to express themselves. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 452-54 (2015) (defining narrowly tailored analysis contours); see also *Boos v. Barry*, 485 U.S. 312, 318 (1988) (holding barring protests is specifically understood as content-based restriction).

⁸⁷ See Ronald Steiner, *Compelling State Interest*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest> (last visited Jan. 22, 2021, 4:20 PM) (discussing what constitutes compelling governmental interests). Examples of compelling government interests include government regulations that are "vital to the protection of public health and safety," the "requirements of national security and military necessity," and "respect for fundamental rights." *Id.*

⁸⁸ See McCoy, *supra* note 42 (laying out requirements for claims under unconstitutional conditions doctrine).

IV. ANALYSIS

While it is unclear whether the USOPC will reverse its position, the threat of such a reversal and its previous enforcement is enough to allow a suit to go forward.⁸⁹ Such a reversal would be unconstitutional, and the discretion to do so should be taken out of the hands of the committee.⁹⁰ Race Imboden's protest, a prime example of athlete activism, will serve as the fact pattern for this analysis since his actions ran afoul the previous policy, and would inevitably violate a reversal.⁹¹ This analysis seeks to prove: (1) that the USOPC is a state actor; (2) that by kneeling, Race Imboden exercised his protected constitutional right of free speech; and (3) that as a state actor, the USOPC conditioned the benefit of competing on Race Imboden's signing away of his right to exercise a constitutionally protected right.⁹²

A. *The USOPC is a State Actor*

The USOPC should be constitutionally barred from conditioning Olympic participation on the relinquishment of an athlete's First Amendment rights because the USOPC is a state actor.⁹³ The court in *DeFrantz* offered two approaches for deciding whether a private actor's conduct constituted a state action: the nexus test from *Jackson* and the

⁸⁹ See *Associated Press*, *supra* note 21 (detailing USOPC decision not to sanction athletes who protest at Tokyo Games). The reversal of the previous policy was sudden and came after the USOPC had affirmed its conviction against changing the policy. *Zirin & Boykoff*, *supra* note 21. See *de Vogue & Cole*, *supra* note 21 (detailing decision allowing First Amendment suit where university could reestablish anti-speech policy); *Futterman, et al.*, *supra* note 21 (detailing protests by Saunders and Imboden, and IOC-USOPC fallout over enforcement).

⁹⁰ See sources cited *supra* note 31 and accompanying text (stating USOPC's actions regarding Rule 50).

⁹¹ See sources cited *supra* note 31 and accompanying text (describing Imboden's actions and resulting consequences).

⁹² See U.S. CONST. amend. I (establishing right to free speech); U.S. CONST. amend. XIV (prohibiting states from making or enforcing laws that curtail First Amendment rights without due process); *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1192-94 (D.D.C. 1980) (noting USOPC a private organization despite being federally chartered); *McCoy*, *supra* note 42 (providing brief unconstitutional conditions doctrine overview); *OlympicTalk*, *supra* note 31 (reviewing facts from Imboden's protest and USOPC precautionary and reactionary measures).

⁹³ See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 557-59 (1987) (Brennan, J., dissenting) (arguing for profound connection between USO[P]C and U.S. government); *DeFrantz*, 492 F. Supp. at 1193 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (explaining nexus requirement between government and private actors to create state action). The *DeFrantz* court ultimately found that the USO[P]C's decision not to send athletes to the Moscow Games was not a state action. *DeFrantz*, 492 F. Supp. at 1194.

symbiosis test from *Burton*.⁹⁴ It is unlikely that a plaintiff could prove that the USOPC is a state actor under the *Burton* test, as the committee operates independently from the federal government and takes no direct federal funding for its maintenance, governance, or function.⁹⁵ It is more likely that a plaintiff would prevail under the *Jackson* test, which asks whether the federal government is functionally interdependent with the alleged state actor.⁹⁶

The court in *DeFrantz* incorrectly ruled that there was not a sufficient nexus between the state and the USOPC.⁹⁷ While it is true that the federal government has no authority to approve or reject USOPC committee actions, this does not mean that the USOPC is insulated from the pressures of the government.⁹⁸ The federal government can exert control over an entity in a variety of different ways, and while the court noted that the state did not retain any veto power over the committee's actions, it is insufficient to merely ask whether the government had the direct ability to dictate the USO[P]C's decision to boycott the Moscow Olympics.⁹⁹ For example, President Carter announced in his State of the Union address that he would not support sending American athletes to the games, and the House of Representatives and the Senate passed resolutions opposing participation in the games.¹⁰⁰ These resolutions threatened the USO[P]C's tax exemption status and federal funding, undoubtedly

⁹⁴ See *DeFrantz*, 492 F. Supp. at 1192-94 (laying out precedents); see also *Jackson*, 419 U.S. at 351 (establishing nexus test); *Burton*, 365 U.S. at 725 (establishing symbiosis test).

⁹⁵ See *DeFrantz*, 492 F. Supp. at 1193 (applying *Burton* test). The court distinguished the USO[P]C from the restaurant in *Burton*, which was "physically and financially an integral part of a public building, built and maintained with public funds, devoted to a public parking service, and owned and operated by an agency of the State of Delaware for public purposes." *Id.* The USO[P]C, on the other hand, receives "no federal funding" and "exists and operates independently of the federal government." *Id.* While the USO[P]C is required to submit yearly reports on diversity and participation to Congress and the President, this was not enough to convert an "an independent relationship to a 'joint participation.'" *Id.*

⁹⁶ See *id.* at 1193 (quoting *Jackson*, 419 U.S. at 351) (outlining *Jackson* nexus test).

⁹⁷ See *id.* at 1193-94 (holding there must be some government control when race is not at issue). The court referenced *Spark v. Cath. Univ. of Am.*'s assertion that it is "necessary to show . . . [the] government [exercising] some form of control" where "race is not involved." *Spark v. Cath. Univ. of Am.*, 510 F.2d 1277, 1281-82 (D.C.Cir. 1975).

⁹⁸ See *DeFrantz*, 492 F. Supp. at 1193-94 (discussing plaintiffs' novel arguments and why they fail nexus test); see also Koller, *supra* note 44, at 1481-82 (discussing plaintiffs' argument surrounding insulation).

⁹⁹ See Koller, *supra* note 44, 1481-82 (listing actions taken by the United States government to force compliance, and USOPC resistance); see also *DeFrantz*, 492 F. Supp. at 1193 (summarizing plaintiffs' argument).

¹⁰⁰ See Koller, *supra* note 44, at 1481-82 (outlining USOPC's resistance to number of government actions); see also *DeFrantz*, 492 F. Supp. at 1193 (summarizing plaintiffs' argument).

influencing its decision.¹⁰¹ The White House also threatened legal action to enjoin the committee, told the Athlete's Advisory Council that the United States would not send a team, and directed the USO[P]C Executive Board and its officers to vote for a boycott.¹⁰²

The USOPC is not insulated from the pressures of the government, nor could it be, as it performs a traditionally governmental role.¹⁰³ Justice Brennan's dissent in *S.F. Arts & Athletics, Inc.* emphasized that the Court's majority failed to see the interdependence between Congress and the USO[P]C, noting that § 110 of the Amateur Sports Act's infringement on non-commercial speech violated both the spirit of the law and the Constitution as an overbroad restriction on free speech.¹⁰⁴ The dissent further argued that the USO[P]C should be considered a governmental actor for two reasons: (1) it performs an important governmental function; and (2) there exists a significantly close nexus between the government and the challenged action by the USO[P]C.¹⁰⁵ Regarding the first argument, Justice Brennan noted that the powers given to the USO[P]C are "endowed by the State" and "governmental in nature," making it an agency or instrumentality of the state and therefore subject to "constitutional limitations."¹⁰⁶ Those "distinctive, traditional government function[s]" included: exclusively representing the United States to the IOC and at the Olympics; training and developing amateur athletes; and serving as its own administrative and adjudicative body—something that is usually reserved

¹⁰¹ See Koller, *supra* note 44, at 1481-82 (demonstrating attack on tax exemption and federal funding).

¹⁰² See Koller, *supra* note 44, at 1481-82 (listing actions taken by United States government forcing compliance, and USO[P]C resistance); see also *DeFrantz*, 492 F. Supp. at 1184 (discussing influential government actions).

¹⁰³ See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 548-64 (1987) (O'Connor, J., and Brennan, J., dissenting separately) (recognizing USO[P]C and government as "joint participants" in regulating use of "Olympic," and discussing USO[P]C's public role). The USO[P]C sued an athletics club in San Francisco over its use of the word "Olympic" when it promoted the "Gay Olympic Games"—an athletic contest "rivaling" the real Olympic Games—which would be paid for with promotional merchandise displaying the name. *Id.* at 525.

¹⁰⁴ See *id.* at 548 (Brennan, J., dissenting) (outlining reasoning for finding government action); see also 36 U.S.C.S. § 220506 (granting USOPC exclusive rights to word "Olympic").

¹⁰⁵ See *S.F. Arts & Athletics, Inc.*, 483 U.S. at 548 (Brennan, J., dissenting) (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)) (listing reasons why USO[P]C should be considered state actor).

¹⁰⁶ See *id.* at 549 (Brennan, J., dissenting) (providing governmental powers argument). Justice Brennan is careful to note that a definition covering all regulated businesses would be too broad, and that actions by a private entity that "serves the public," are not necessarily governmental in nature. *Id.* (citing *Jackson*, 419 U.S. at 354). Brennan instead references *Evans v. Newton*, 382 U.S. 296, 299 (1966), *Terry v. Adams*, 345 U.S. 461 (1953), and *Marsh v. Alabama*, 326 U.S. 501 (1946), stating that a private entity endowed with powers or functions that are governmental in nature should be treated as state actors. *Id.*

for ministries of sport and culture in foreign nations.¹⁰⁷ Brennan further argued that the USO[P]C should be considered a state actor under the *Burton* framework because the government and the USO[P]C each garners a financial or prestigious benefit from the other.¹⁰⁸ Additionally, Brennan opined that, to the public, there is no distinction between the decisions of the government and the USO[P]C.¹⁰⁹ He reasoned that athletes literally wear, carry, and salute the national flag throughout the entirety of the games, as well as figuratively represent American values on the international stage.¹¹⁰

By examining the legislative history of the incorporating act, Justice Brennan's dissent highlights why the court's treatment of the USO[P]C as a non-state actor was misguided, while respecting the ultimate ruling in *DeFrantz*.¹¹¹ Looking at the USOPC's status as a state actor strictly from a free speech perspective would avoid the holdings in *Barnes* and *Spark*, all while affirming the committee's strict autonomy in the realm of athlete participation.¹¹² Imboden's protest can be distinguished from these rulings because it does not pertain to pure athlete eligibility, but rather to how and whether one may exercise their right to free speech.¹¹³ *Spark* should be distinguished from the case at hand because forcing a litigant to show that there is some actual level of government control misinterprets the logical conclusion of *DeFrantz* and *Barnes*—that athletes were barred from private action in court to decide eligibility in order avoid

¹⁰⁷ See *id.* at 550-55 (Brennan, J., dissenting) (explaining USO[P]C's governmental functions). The USO[P]C was created following a Commission on Olympic Sports, which was established to investigate the deteriorating rate of performance by Americans at the Olympics and to suggest possible solutions. *Id.* at 553-54. Much like an administrative agency, the USO[P]C's powers are accompanied by several public checks, such as: (1) the inability to amend its constitution or by-laws; (2) the inability to recognize a new national governing body without both a public hearing and notice to all interested parties; and (3) a requirement to submit annual reports to the President and Congress on expenditures, operations, activities, and accomplishments. *Id.* at 554-55 (Brennan, J., dissenting) (comparing USO[P]C to administrative agency).

¹⁰⁸ See *S.F. Arts & Athletics, Inc.*, 483 U.S. at 556-59 (Brennan, J., dissenting) (applying *Burton* precedent to USO[P]C).

¹⁰⁹ See *id.* (Brennan, J., dissenting) (advocating for application of *Burton* test).

¹¹⁰ See *S.F. Arts & Athletics, Inc.*, 483 U.S. at 556-59 (Brennan, J., dissenting) (arguing for application of *Burton* test); see also 36 U.S.C.S. § 220506 (proscribing exclusive rights to the USOPC).

¹¹¹ See *Barnes v. Int'l Amateur Athletic Fed'n.*, 862 F. Supp. 1537, 1544 (S.D. W. Va. 1993) (citing *Michels v. U.S.O.C.*, 741 F.2d 155 (7th Cir. 1984)) (noting Congress's removal of provision allowing athletes private action in federal court regarding competitive eligibility).

¹¹² See *id.* (demonstrating Congressional intent for athletes not to have right to private action for participation); see also *DeFrantz v. United States Olympic Committee*, 492 F. Supp. 1181, 1194 (D.D.C. 1980) (citing *Spark v. Cath. Univ. of Am.*, 510 F.2d 1277, 1281-82 (1975)) (stating that without race factor there must be some government control).

¹¹³ See *Spark*, 510 F.2d at 1281-82 (illustrating holding); *DeFrantz*, 492 F. Supp. at 1182, 1194 (summarizing facts and determining USOC's action not state action).

an explosion of litigation by spurned would-be Olympians as opposed to an actual Olympians litigating for constitutional rights.¹¹⁴ Adhering to the ruling in *DeFrantz* ignores the possibility that the court was equally affected by the sentiments of the federal government, namely, that allowing athletes to compete at the Moscow Games might have given the Soviets the impression that the Invasion of Afghanistan was “of no consequence.”¹¹⁵

When considering the holdings of *Spark*, *Barnes*, and *DeFrantz* within the proper context, a court could reasonably apply the *Jackson* test to the current facts while examining them through Justice Brennan’s dissent in *S.F. Arts & Athletics, Inc.*¹¹⁶ The USOPC’s former decision to sanction United States Olympic Athletes was informed by guidance from Rule 50 in the Olympic Charter.¹¹⁷ However, while the IOC can sanction athletes itself, its Charter does not give it the power to force governing bodies to sanction their own athletes, so those sanctions must come from the USOPC.¹¹⁸ The federal government has its prestige abroad, and the USOPC has the financial incentive to retain viewership, as American political figures and the American public put sustained pressure on the USOPC to either recognize or ban athlete activism.¹¹⁹ Pressure from the government and the public would have been high under the Trump administration, as going against the President of the United States and the

¹¹⁴ See *Barnes*, 862 F. Supp. at 1544 (citing legislative history); see also *Spark*, 510 F.2d at 1281-82 (illustrating holding); *DeFrantz*, 492 F. Supp. at 1182, 1194 (summarizing facts and determining USO[P]C did not commit state action).

¹¹⁵ See Koller, *supra* note 44, 1483-85 (arguing *DeFrantz* decision must be put into Cold War context). The Olympic Movement in the United States stood in stark contrast to the Soviet model—while the private sector groomed and nurtured amateur athletes in the West, the Kremlin and its State Committee for Sports and Physical Education of the USSR developed the athletes of the Soviet east. *Id.* Such a contrast was likely known by the judges and, given the context of the 1970s, it is reasonable to suspect that they supported the West’s approach. *Id.*

¹¹⁶ See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 559 (1987) (Brennan, J., dissenting) (highlighting USO[P]C’s state-oriented role); see also *Spark*, 510 F.2d at 1281-82 (indicating need for government control absent issues regarding race); *Barnes*, 862 F. Supp. at 1544 (citing legislative history); *DeFrantz*, 492 F. Supp. at 1182, 1194 (articulating case facts and holding that USOC’s action not state action).

¹¹⁷ See OLYMPIC CHARTER, *supra* note 2, at 94 (stating rule 50).

¹¹⁸ See Zirin & Boykoff, *supra* note 21 (noting uncertainty regarding who decides what is “peacefully and respectfully,” especially when IOC *still* opposes athlete protest); see also OLYMPIC CHARTER, *supra* note 2, at 94 (determining Olympic Charter does not confer power compelling governing bodies to sanction their respective athletes).

¹¹⁹ See *S.F. Arts & Athletics*, 483 U.S. at 559 (Brennan, J., dissenting) (demonstrating USO[P]C imbued with “prestige” of the United States); see also *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 (1963) (holding commission’s pressure on book sellers to stop selling “objectionable” books unconstitutional).

Republican Party could result in a financial catastrophe.¹²⁰ This kind of mollification of the government is analogous to the compliance of the USO[P]C in *DeFrantz* in their boycott of the Moscow Games.¹²¹ At the very least, this situation should be distinguished from the holding in *DeFrantz* because, here, a plaintiff would be suing under their First Amendment right to free speech as opposed to the right to compete.¹²² Such a distinction would account for the overall ruling in *DeFrantz* and the legislative intent of the incorporating act, but prevent the USOPC from barring athletes from competing by attaching eligibility to the relinquishment of a constitutionally protected right.¹²³ In this way, a court could update the holding in *DeFrantz* and apply the holding of *Bantam Books, Inc.*, where governmental pressure was declared unconstitutional under the First Amendment.¹²⁴ In combining *Bantam Books, Inc.*, with Justice Brennan's dissent in *S.F. Arts & Athletics, Inc.*, a court could find that the pressure exerted by President Trump, Congress, and the Republican Party, would leave the USOPC no choice but to cave to its own financial interest.¹²⁵ It can be inferred that the USOPC's initial actions were meant to pacify the government, by the fact that the reversal of their policy came after President Biden was confirmed to be the next president, sufficiently demonstrating the nexus between the state and the challenged

¹²⁰ See Haislop, *supra* note 15 (exemplifying President Donald Trump railing against athlete protest); Tesler, *supra* note 19 (showing statistical change over time favoring athlete protest); Tennery, *supra* note 19 (illustrating statistics underscoring partisan divide over athlete protest).

¹²¹ See *DeFrantz*, 492 F. Supp. at 1183-86 (illustrating case facts).

¹²² See *id.* at 1185 (listing plaintiffs' causes of action). The plaintiffs were suing for their right to compete under their rights to "free expression," "privacy," and personal autonomy under the First, Fifth, Ninth Amendments, respectively. *Id.* The court ultimately found that there was no constitutional right to compete in the Olympics, but did not address an athlete's constitutional right to protest. *Id.* at 1194-95; see also Bieler, *supra* note 35 (illuminating facts surrounding Imboden's protest and sanction).

¹²³ See Bylaws of the United States Olympic & Paralympic Committee §§ 9.2-9.10 (effective June 18, 2020) [hereinafter *USOPC 2020 Bylaws*] (granting USOPC exclusive control over eligibility and participation of athletes); *Barnes v. Int'l Amateur Athletic Fed'n.*, 862 F. Supp. 1537, 1544 (S.D. W. Va. 1993) (citing *Michels v. U.S.O.C.*, 741 F.2d 155 (7th Cir. 1984)) (providing legislative history of incorporating act); *DeFrantz*, 492 F. Supp. at 1194-95 (announcing case holding).

¹²⁴ See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 (1963) (holding pressure intended to restrict book shops' constitutional rights to sell books freely).

¹²⁵ See *S.F. Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522, 549-61 (1987) (Brennan, J., dissenting) (explaining Brennan's analysis and conclusion that USOPC is a state agent); *Bantam Books, Inc.*, 372 U.S. at 64 (exemplifying unconstitutional government pressure); see also Koller, *supra* note 44, at 1481-82 (demonstrating actions taken by federal government encouraging boycott); Tennery, *supra* note 19 (showing statistics underscoring partisan divide over athlete protest).

action.¹²⁶ If not for the Trump administration's position on athlete activism, which encouraged society's polarized view of activism, it is likely that the USOPC may not have taken action against Race Imboden, who specifically chose to *kneel* during the National Anthem—a recognizable form of protest in 2019.¹²⁷

B. Race Imboden's Protest was Speech

In *Texas v. Johnson*,¹²⁸ the Court wrote that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable,” and that same bedrock principle ought to apply to protests by athletes.¹²⁹ The test to determine whether Imboden's actions on the podium constitute speech is straight forward.¹³⁰ In applying the *Spence* precedent, a court must first determine whether Imboden had the intent to convey a particularized message.¹³¹ Imboden clearly stated that he wanted to convey the message that the current state of America did not represent him, despite actively representing his country on the international stage as a fencer.¹³² Imboden's kneeling was also a direct response to police brutality and the rampant gun violence spreading across the United States at the time.¹³³ Given that Imboden expressly said that he *wanted* to convey a message, it is likely that a court would find that there was an intent to convey a particularized message.¹³⁴

¹²⁶ See Associated Press, *supra* note 21 (reversing prior decision barring Olympic Games protest); Pells, *supra* note 20 (focusing on USOPC's original position and probational sanction against Imboden); Futterman, et al., *supra* note 21 (detailing Saunders and Imboden protests, and IOC-USOPC fallout).

¹²⁷ See Associated Press, *supra* note 35 (detailing USOPC's sanctions on Imboden).

¹²⁸ 491 U.S. 397 (1989).

¹²⁹ See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (describing flag-burning as offensive). While Imboden did not burn an American flag, it is likely that many Americans would have viewed kneeling during the national anthem as “disagreeable,” if not outright “offensive.” Tesler, *supra* note 19.

¹³⁰ See *Spence v. Wash.*, 418 U.S. 405, 410-11 (1974) (stating test for non-verbal conduct); *OlympicTalk*, *supra* note 31 (reviewing Imboden's actions).

¹³¹ See *Spence*, 418 U.S. at 410-11 (holding “intent to convey a particularized method” as first prong in analysis).

¹³² See *id.* at 408 (stating that Spence “felt there had been so much killing and that this was not what America stood for. [He] felt that the flag stood for America and [he] wanted people to know that [he] thought America stood for peace”); Weisfeld, *supra* note 19 (explaining why Imboden knelt on the podium).

¹³³ See Weisfeld, *supra* note 19 (explaining Imboden's actions through interview and tweets).

¹³⁴ See Weisfeld, *supra* note 19 (stating why he knelt on the podium); *Spence*, 418 U.S. at 408 (discussing Spence's desire to convey a message).

Next, a court must determine whether the circumstances surrounding the act make it likely that the message would have been understood by those who viewed it.¹³⁵ Because Imboden was an athlete *kneeling* during the national anthem at the Olympics, it is safe to assume that most Americans would understand that Imboden was protesting by linking him, at least tangentially, to Colin Kaepernick and the kneeling movement Kaepernick started.¹³⁶ Similar to the defendant in *Spence*, Imboden's form of protest would have been clearly recognized as a commentary on either the Black Lives Matter movement or in response to the two mass shootings in El Paso, Texas, and Dayton, Ohio, which occurred in the week leading up to Imboden's event.¹³⁷ If the USOPC understood it to be a form of protest, as demonstrated through the sanctions imposed after the act, then it is probable that any spectator would understand that Imboden was protesting.¹³⁸ It is likely that a court would find the *Spence* test satisfied and that Imboden was participating in speech.¹³⁹

C. *The Contract Violated Athletes' Constitutionally Protected Rights*

If the USOPC is a state actor, and Imboden's protest is classified as protected speech under the First Amendment, then the contract conditioning eligibility to compete on the relinquishment of a right to protest is a violation of the unconstitutional conditions doctrine.¹⁴⁰ The overarching maxim of the doctrine is that the "government may not deny a benefit to a person because he exercises a constitutional right[.]" which is

¹³⁵ See *Spence*, 418 U.S. at 411 (articulating second prong of analysis).

¹³⁶ See Haislop, *supra* note 15 (illustrating Kaepernick's protest timeline and the social movement he started); see also OlympicTalk, *supra* note 31 (discussing Imboden kneeling).

¹³⁷ See *Spence*, 418 U.S. at 406 (describing the peace symbol the defendant taped to the American flag). Anyone in the 1970s would have immediately understood Spence's action to be a direct commentary on the Vietnam War. *Id.* See Weisfeld, *supra* note 19 (noting Imboden's reasons for kneeling).

¹³⁸ See Los Angeles Times Staff and Wire Reports, *supra* note 32 (quoting USOPC's Vice President of Communications Mark Jones's statement); see also IOC ATHLETES' COMM., *supra* note 25, at 2 (identifying kneeling as a form of barred protest).

¹³⁹ See *Spence*, 418 U.S. at 410-11 (stating test). It should be noted that not all speech is protected, but none of the scenarios that protract the realm of free speech (danger; incitement of violence; hate speech) apply here and that while the actions of the USOPC could be found unconstitutional at this point through an analysis of a content based restriction this note instead chooses to focus on the actual contract athletes had to sign as the act to be overturned, rather than the bylaws of the USOPC. See OLYMPIC CHARTER, *supra* note 2, at 94 (stating rule 50); see also *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015) (developing seminal case showing that free speech restrictions demand strict scrutiny analysis); *Boos v. Barry*, 485 U.S. 312, 312-16 (1988) (detailing seminal case explaining content based restrictions).

¹⁴⁰ See McCoy, *supra* note 42 (providing overview unconstitutional conditions doctrine).

exactly what the USOPC attempted to do in Lima.¹⁴¹ The contracts that the USOPC forced its athletes to sign stated that they could not protest at the Pan American Games without risking their Olympic eligibility—a direct threat to deny the benefit of competing should they exercise their constitutional right to free speech.¹⁴² The USOPC could argue that the contract did not contain restrictions as to specific types of speech and actions, and that the committee allows for protest at other points during Olympics, just not during opening, closing, or medal ceremonies, or in specific areas.¹⁴³ However, the most meaningful kind of protest would occur on the medal podium, where an athlete has the ability to show the world what they believe with the greatest effect.¹⁴⁴ It is likely that a court would find that the USOPC specifically conditioned the privilege of participant eligibility on the relinquishment of one's First Amendment rights, thus violating the unconstitutional conditions doctrine and forcing to the court to apply a strict scrutiny analysis to Imboden's situation.¹⁴⁵

In defense of its position, the USOPC could reference cases such as *Rust v. Sullivan*, where the court ruled that a state actor may choose not to promote one view or opinion instead of another, or *Legal Services Corp. v. Velazquez*, where the court held that viewpoint-based funding decisions could be sustained where the government is a speaker, or where the government uses private speakers to transmit information pertaining to its

¹⁴¹ See *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 545 (1983) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)); Los Angeles Times Staff and Wire Reports, *supra* note 32 (acknowledging that there was an agreement entered into between athletes and the USOPC).

¹⁴² See *McCoy*, *supra* note 42 (providing overview of unconstitutional conditions doctrine); Los Angeles Times Staff and Wire Reports, *supra* note 32 (showing terms of contract). Through the unconstitutional conditions doctrine, the analysis can again be distinguished from *DeFrantz*, as here the constitutional right being abridged is that of speech, in the First Amendment, and not "expression" under the First Amendment—which, conceded, was meritless—or the right to compete under the Due Process Clause of the Fifth and Fourteenth amendments. See *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1183-84 (D.D.C. 1980) (describing what plaintiffs were seeking relief under). Note, also, that just because the benefit being denied is a privilege does not mean that the denial is not an infringement, nonetheless. See *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) (striking down California requirement for veteran loyalty oath to receive Veteran's property-tax exemption).

¹⁴³ See *Taxation with Representation of Washington*, 461 U.S. at 545 (holding that Congress had made specific conditions on funds not to be used to lobby state legislatures) (emphasis added).

¹⁴⁴ See *Berry*, *supra* note 25 (countering argument that protest is allowed elsewhere during the Olympics).

¹⁴⁵ See *Taxation with Representation of Washington*, 461 U.S. at 549 (affirming if unconstitutional conditions doctrine is violated, strict scrutiny must apply); see also *McCoy*, *supra* note 42 (providing unconstitutional conditions doctrine analysis overview).

own programs.¹⁴⁶ These exceptions would be misplaced, however, as the USOPC did not choose to promote one view over another, but rather sought to bar a certain type of speech.¹⁴⁷ Additionally, the USOPC did not speak through its athletes, nor request that they transmit information pertaining to their own program, and such an interpretation would broaden the exceptions of *Legal Services Corp.* beyond reason.¹⁴⁸ This argument fails to comport with the direct holding of *Legal Services Corp.*, as the USOPC could be argued to have created private expression through the development and participation of athletes, and subsequently tried to restrict that expression.¹⁴⁹ Without an exception, the USOPC's actions would be required to be examined under strict scrutiny.¹⁵⁰

To pass strict scrutiny, the USOPC needs a compelling state interest, as well as a narrowly tailored means to achieve that interest.¹⁵¹ It could be argued that the USOPC's interest is in the protection of athletes from sanctions by the IOC, as well as maintaining the neutrality of sport.¹⁵² This interest is not compelling, however, as the sanctions come from the IOC anyways, rendering the USOPC's actions moot.¹⁵³ Simultaneously, the USOPC could argue that it has an interest in presenting a common front to the world: a unified Team USA competing for the prestige and glory of the United States at the highest level of athletic ability.¹⁵⁴ This argument fails as well, as it would run afoul of *Texas v. Johnson* and the "bedrock principle underlying the First Amendment": that the government cannot

¹⁴⁶ See *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (allowing HHS to limit the ability of Title X funding recipients to engage in abortion-related activities); see also *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 537 (2001) (invalidating restriction on the use of LSC's services to challenge the constitutionality or validity of certain laws).

¹⁴⁷ See *Rust*, 500 U.S. at 193 (restricting abortion-related speech to favor other family-planning methods).

¹⁴⁸ See *Legal Serv. Corp.*, 531 U.S. at 543 (barring restriction on private, government created, speech); see also IOC ATHLETES' COMM., *supra* note 25, at 2 (explaining where protesting is barred and where it is allowed).

¹⁴⁹ See *Legal Serv. Corp.*, 531 U.S. at 538-40 (addressing challenges to restrictions in § 504(a)(16) and creating four categories of prohibited activities).

¹⁵⁰ See *Regan v. Taxation with Representation of Washington* 461 U.S. 540, 549 (1983) (holding where unconstitutional conditions doctrine is violated strict scrutiny must be applied); see also *McCoy*, *supra* note 42 (providing overview of unconstitutional conditions doctrine analysis).

¹⁵¹ See *Reed v. Town of Gilbert*, 576 U.S. 115, 163 (2015) (recent case showing that free speech restrictions demand a strict scrutiny analysis by a court); see also *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 452-54 (2015) (explaining "narrowly tailored"); Steiner, *supra* note 87 (showing examples of compelling interests).

¹⁵² See generally IOC ATHLETES' COMM., *supra* note 25, at 2 (explaining justification).

¹⁵³ See OLYMPIC CHARTER, *supra* note 2, at 94 (stating rule 50 and sanctions).

¹⁵⁴ See generally Koller, *supra* note 44, at 1469-86 (exploring the concept of "sportive nationalism:" the use of sport to promote a nationalist message).

prohibit the expression of an idea because it may conflict with the ideas and values of society.¹⁵⁵ Akin to the flag in *Johnson*, the USOPC restricts speech to maintain an image and prevent an uproar from a certain sect of society.¹⁵⁶ This is completely unrelated to public health, safety, or national security, and it is unlikely that a court would declare these compelling interests.¹⁵⁷ To hold otherwise would be to allow the state to mandate how citizens relate to icons or symbols, out of fear of each other.¹⁵⁸

If a court were to find that the USOPC's interest was not compelling, then the analysis could end here; but if it did find the interest sufficiently compelling, the court would then examine the narrow tailoring of the USOPC's actions.¹⁵⁹ For an act to be narrowly tailored, it must be neither over-inclusive—meaning not so broad as to restrict all manner of speech—nor under-inclusive—meaning not so riddled with exceptions that it cannot possibly achieve its desired end.¹⁶⁰ A litigant is more likely to successfully argue that a rule is overinclusive, as the exceptions are few and far between, and so this note will focus on this argument.¹⁶¹ The USOPC's bar on athlete is over-inclusive for two reasons: (1) it anoints specific places as appropriate for protest, diminishing the value of the speech to the point where it might not be heard at all; and (2) the IOC's list of barred conduct could encompass nearly any kind of speech or protest.¹⁶² Without a viable counter argument, it is likely that a court would find such a contract unconstitutional under the unconstitutional conditions doctrine because the action does not have a compelling interest, and even if there was one, it is not narrowly tailored to achieve that interest.

¹⁵⁵ See *Texas v. Johnson*, 419 U.S. 397, 414 (1989) (articulating bedrock principle underlying First Amendment)

¹⁵⁶ See *id.* (illustrating restriction's purpose in *Johnson*).

¹⁵⁷ See *Johnson*, 419 U.S. at 414 (discussing proper restriction purposes); see also Steiner, *supra* note 87 (providing examples of compelling interests).

¹⁵⁸ See *Johnson*, 419 U.S. at 414 (noting SCOTUS denouncing such mandating by Congress); see also Steiner, *supra* note 87 (providing examples of compelling interests).

¹⁵⁹ See *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 452-54 (2015) (explaining scope of "narrowly tailored"); Ruth Ann Strickland, *Narrowly Tailored Laws*, THE FIRST AMENDMENT ENCYCLOPEDIA (last visited Jan. 31, 2021, 2:47 AM) <https://mtsu.edu/first-amendment/article/1001/narrowly-tailored-laws> (explaining briefly "narrowly tailored").

¹⁶⁰ See *Williams-Yulee*, 575 U.S. at 452-54 (scope of "narrowly tailored").

¹⁶¹ See IOC ATHLETES' COMM., *supra* note 25, at 2 (explaining Rule 50 meaning and protests prohibited and locations allowed).

¹⁶² See *id.* (explaining Rule 50 and conduct requirements); cf. *Williams-Yulee*, 575 U.S. at 452-54 (deciding law barring judges from soliciting campaign donations was narrowly tailored). The law in question did not have so many exceptions to it as to render it unnecessary and did not restrict the free speech of judges to the extent that they could not act in a political capacity, rather it only restricted soliciting campaign donations in the interest of preserving the integrity of the Florida elected judiciary. *Williams-Yulee*, 575 U.S. at 452-54.

V. CONCLUSION

The USOPC's actions run afoul of the unconstitutional conditions doctrine by forcing American athletes to sign away their right to protest in exchange for participation in international and Olympic events. While the committee has changed its stance on athlete protest for now, it may reverse its position, or narrowly construe what it views as a peaceful and respectful protest. This affords far too much discretion to a private body, especially one so unregulated and closely tied to the government. While the USOPC recently chose to stand with its athletes against the IOC, there is nothing stopping the committee from reverting its stance and siding with its international counterpart once again. Without a ruling permanently barring the USOPC from returning to its old pattern of conduct, every future American athlete is at risk of losing their eligibility at the hands of the committee and the administration it follows. As such, the action taken against Race Imboden should be ruled as unconstitutional, and the USOPC must be stripped of its discretion regarding the enforcement of Rule 50. The United States has always said it stands for free speech: this should be especially true when its athletes stand on the Olympic podium.

Leon Rotenstein

**CONSTITUTIONAL LAW—DANGERS OF THE
SUBSTANTIVE DUE PROCESS STATE-CREATED
DANGER EXCEPTION—*IRISH V. FOWLER*, 979
F.3d 65 (1st Cir. 2020)**

When an individual is deprived of life, liberty, or property by the state without due process of law, he or she may bring a cause of action against the state agent (“State Actor”) that caused the deprivation under 42 U.S.C. § 1983.¹ While State Actors are generally not liable for failing to protect an individual from the deprivation of life, liberty, or property by a private actor, this rule is subject to a few exceptions.² In *Irish v. Fowler*,³ the United States Court of Appeals for the First Circuit considered, as an issue of first impression, whether State Actors can be held liable for failing to protect an individual from a third party when the State’s actions resulted in the deprivation of that individual’s due process rights.⁴ The court ulti-

¹ See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law”); 42 U.S.C. § 1983 (“Every person who, under color of any statute . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law”); Matthew D. Barrett, Note, *Failing To Provide Police Protection: Breeding A Viable and Consistent “State-Created Danger” Analysis for Establishing Constitutional Violations under Section 1983*, 37 VAL. U. L. REV. 177, 180 (2002) (noting § 1983 allows action against State for constitutional violations); see also Jeremy Daniel Kernodle, Note, *Policing the Police: Clarifying the Test for Holding the Government Liable Under 42 U.S.C. § 1983 and the State-Created Danger Theory*, 54 VAND. L. REV. 165, 170 (2001) (highlighting § 1983 overrides sovereign immunity).

² See *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989) (“[A] State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.”); Kernodle, *supra* note 1, at 180 (recognizing “government cannot be held liable for failing to protect an individual against private violence” under Due Process Clause); Barrett, *supra* note 1, at 187 (outlining two exceptions to general rule). “First, liability can be imposed on state actor when an actual custodial relationship exists between a plaintiff and a state actor, also known as a ‘special relationship.’ Second, liability can be imposed based on the state-created danger theory.” Barrett, *supra* note 1, at 187.

³ 979 F.3d 65 (1st Cir. 2020).

⁴ See *id.* at 67 (addressing whether State Actors can violate plaintiffs’ due process rights under state-created danger theory). After the court announced its adoption of the state-created danger theory, it considered whether (1) a jury could conclude that the defendants violated plaintiffs’ substantive due process rights; (2) the defendants’ conduct shocked the conscience; and (3) whether the defendants were protected by qualified immunity. *Id.* at 72, 75-76. Because the defendants moved for summary judgment, plaintiffs were required to “present ‘enough competent evidence’ to enable a factfinder to decide in its favor on the disputed claims.” *Carroll v. Xerox Corp.*, 294 F.3d 231, 237 (1st Cir. 2002) (quoting *Goldman v. First Nat’l Bank of Bos.*, 985 F.2d 1113, 1116 (1st Cir. 1993)). However, even if the court determined that plaintiffs met their evidentiary burden, the motion may still be granted in defendants’ favor on the basis of qualified

mately held that state officials were liable for constitutional violations under the state-created danger theory and that their conduct was not justified by qualified immunity.⁵

On July 15, 2015, plaintiff, Brittany Irish (“Irish”), reported to police that she was kidnapped and repeatedly raped the previous night by her ex-boyfriend, Anthony Lord (“Lord”).⁶ The case was assigned to defendants, Detective Perkins and Detective Fowler, who were told that Lord was a registered sex offender.⁷ After receiving Irish’s statement, which also reported Lord’s alleged threat to cut her from ear to ear, the detectives met with Irish, who explained she was “scared that Anthony Lord would become terribly violent if he knew [Irish] went to the police.”⁸ Later that evening, the detectives found evidence corroborating Irish’s allegations.⁹ The next day, the detectives called Lord to obtain his statement; when Lord did not answer, Detective Perkins left a voicemail.¹⁰

immunity. *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 91 (1st Cir. 1994); *see also Soto v. Flores*, 103 F.3d 1056, 1064 (1st Cir. 1997) (“Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.”) (quoting *Davis v. Scherer*, 468 U.S. 183, 194 (1984)).

⁵ *See Irish*, 979 F.3d at 67-68 (outlining holding of court). Since plaintiffs produced triable issues of fact as to whether they suffered a constitutional violation due to the defendants’ conduct, the court determined that the state-created danger theory was clearly established case law, and then reversed the district court’s grant of summary judgment on the basis of qualified immunity. *Id.* at 67-68, 80.

⁶ *See id.* at 68 (explaining event). When Irish contacted Bangor Police Department (BPD), they referred her to Maine State Police (MSP). *Id.* The court noted that its description of the facts of the case was supplemented with facts in *Irish v. Maine*, 849 F.3d 521 (1st Cir. 2017), and the district court’s statement of facts. *Id.*; *see also Irish v. Maine*, 849 F.3d 521, 523 (1st Cir. 2017) (detailing complaint, procedural history, and holding); *Irish v. Fowler*, 436 F. Supp. 3d 362, 364 (D. Me. 2020) (summarizing procedural history and holding).

⁷ *See Irish*, 979 F.3d at 68 (noting defendants were made aware of Lord’s sex offender status). At the time, it was custom practice to check the sex offender registry and run a criminal background check once police were made aware that the person they were investigating was a sex offender. *Id.*

⁸ *See id.* (detailing Irish meeting with detectives).

⁹ *See id.* (explaining corroborating evidence). When Irish first contacted the police on July 15, she reported specific information about where she was raped. *Id.* Later that evening, the detectives obtained corroborating evidence connecting Lord to the location of the alleged rape. *Id.*

¹⁰ *See id.* at 69 (“Detective Perkins called Lord while Detective Fowler listened.”) When Lord did not answer, Detective Perkins left a voicemail, identifying himself as a detective. *Id.* Prior to the voicemail, Irish submitted a second written statement to the detectives, which said: Lord had threatened to ‘cut [her] from ear to ear,’ to abduct Irish’s children, to abduct and ‘torture’ Hewitt to find out ‘the truth’ about what was happening between Irish and Hewitt, to kill Hewitt if Hewitt was romantically involved with Irish, and to weigh down and throw Irish into a lake. *Id.* at 68. Despite these threats and Lord’s status as a registered sex offender, the detectives did not “check the sex offender registry to find Lord’s address or run a criminal background check.” *Id.* at 69.

Approximately an hour and forty-five minutes after Detective Perkins left the voicemail, the detectives “received notice of a ‘possible suspicious’ fire in Benedicta, the town where the detectives” found evidence corroborating the allegations against Lord.¹¹ Irish notified the detectives that it was her parents’ barn that was on fire, and reported that earlier that evening “someone had heard Lord say . . . ‘I am going to kill a fucker.’”¹² The detectives then began their search for Lord, notifying other state officials to “use caution” if they were to find him.¹³ Soon after the detectives arrived to the barn fire, Irish received a call from her brother who informed her that Lord was “irate” after receiving the voicemail from Detective Perkins and said that “someone’s gonna die tonight.”¹⁴ Irish relayed this information to the detectives and asked for protection, but the detectives left the scene.¹⁵ About an hour later, the detectives requested a criminal background check on Lord and learned of his criminal record.¹⁶

After receiving no response from the detectives regarding her requests for protection, Irish called them a third time and was told no protection could be provided because law enforcement lacked “the manpower.”¹⁷ Between 3:00 A.M. and 4:00 A.M., when all police resources left the area, Lord stole a truck, drove to the Irish’s, and went on a shooting rampage.¹⁸

¹¹ See *id.* at 68 (noting Lord’s potential connection to fire).

¹² See *Irish*, 979 F.3d at 69 (detailing Irish’s conversation with detectives). Irish also “told the detectives that she was afraid for her children’s safety, planned to stay at her mother’s home in Benedicta, and would meet the detectives there.” *Id.*

¹³ See *id.* (highlighting “use caution” warning). Detective Perkins notified officers “that Lord could be dangerous and to take precautions.” *Id.*

¹⁴ See *id.* (outlining events that occurred when detectives arrived). Detective Perkins learned of the suspicious fire at 8:05 PM and began the search for Lord at 10:05 PM. *Id.* The detectives arrived at the barn fire around 10:36 PM. *Id.*

¹⁵ See *id.* at 69-70 (highlighting Irish’s conversation with detectives and request for protection). Even though Irish requested protection, the officers left the scene. *Id.*

¹⁶ See *id.* at 70 (noting detectives requested Lord’s background check at 11:38 PM). The criminal background check occurred hours after learning Lord was a sex offender, which was against standard practice. *Id.* at 69-70. If the detectives followed procedure and ran a background check as soon as they learned about Lord’s sex offender status, they would have discovered that Lord was on probation and had a lengthy record of sexual and domestic violence. *Id.* at 69.

¹⁷ See *Irish*, 979 F.3d at 70 (detailing Irish’s requests for protection). About an hour after Irish made her second request for protection, Detective Perkins relayed the information to his superior. *Id.* Detective Perkins did not inform Irish that her request for protection was denied until she called again around 2:00 A.M. *Id.* at 70-71. Around 3:00 A.M. or 4:00 A.M., Irish’s mother contacted the MSP’s hotline explaining her desire to drive to and sleep in the MSP parking lot with Irish and Hewitt for protection. *Id.* An MSP employee advised them not to come, so they stayed in Irish’s parents’ home. *Id.* at 71.

¹⁸ See *id.* (describing Lord’s conduct). A Maine resident called the police between 4:00 A.M. and 4:40 A.M., reporting that someone “attacked him with a hammer and stole his truck and guns.” *Id.* The resident reported that the incident occurred in Silver Ridge, Maine, which is

Nine hours later, the police apprehended Lord after he killed Irish's boyfriend, shot Irish's mom, and abducted Irish.¹⁹ Irish and her mother brought a § 1983 action against the detectives, claiming a Substantive Due Process violation.²⁰ The United States District Court for the District of Maine granted summary judgment on the basis of qualified immunity and the plaintiffs appealed.²¹ Upon review, the First Circuit "affirm[ed] the district court's holding that a jury could find that the officers violated the plaintiffs' substantive due process rights [and] reverse[d] the grant of defendants' summary judgment motion on qualified immunity grounds."²²

Congress enacted 42 U.S.C. § 1983 to allow individuals to bring suit against a State Actor when the State Actor deprives a person of life, liberty, or property without the due process of law.²³ In order to recover for a substantive due process violation under § 1983, the plaintiff must "first, show a deprivation of a property interest in life, liberty, or property" and subsequently "show that the deprivation of this protected right was caused by government conduct."²⁴ The Supreme Court of the United States, in *DeShaney v. Winnebago County Department of Social Services*,²⁵ held that a substantive due process violation does not arise when the State fails to protect individuals from violence by private actors because the State does not cause the deprivation.²⁶ The Court explained that the purpose of the Due Process Clause "was to protect the people from the State, not to ensure that the State protected [the people] from each other."²⁷ Since *DeShaney*,

twelve minutes from Irish's parents' home. *Id.* Lord drove the truck straight to the Irish family home and opened fire. *Id.*

¹⁹ *See id.* (noting result of Lord's conduct and length of time before Lord was apprehended).

²⁰ *See id.* at 67-68 (outlining complaint). "The plaintiffs seek relief based on the state-created danger doctrine. The plaintiffs argue that the detectives created and enhanced the danger and then failed to protect them in the face of Lord's escalating threats." *Id.* at 68.

²¹ *See id.* (explaining procedural history). On a prior appeal, the First Circuit "had earlier vacated the dismissal of these claims for failure to state a claim." *Id.* After the remand, the detectives moved for summary judgment, which the district court granted. *Id.*

²² *See Irish*, 979 F.3d at 68 (stating holding of case).

²³ *See* 42 U.S.C. § 1983 (establishing constitutional remedy for violations of Fourteenth Amendment); U.S. CONST. amend. XIV, § 1 (declaring right to due process for deprivations of "life, liberty, or property" caused by State); *see also* Kernodle, *supra* note 1, at 170 (explaining State Actor liable under § 1983 for depriving citizens of their rights).

²⁴ *See Rivera v. Rhode Island*, 402 F.3d 27, 33-34 (1st Cir. 2005) (outlining requirements to assert substantive due process claim).

²⁵ 489 U.S. 189 (1989).

²⁶ *See id.* at 197 ("As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.")

²⁷ *See id.* at 195 (explaining scope of Due Process Clause). The Court noted that the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security[.]" *Id.* at 195-96.

lower courts have recognized two departures from this general rule.²⁸ One of these recognized exceptions is the state-created danger theory, which provides for a cause of action if the State creates or enhances some danger to an individual and then fails to protect the individual from harm subsequently caused by a third party.²⁹

Although many circuits have adopted the state-created danger theory, there are still some that have not.³⁰ Because the Supreme Court has never explicitly endorsed or applied the state-created danger theory, its scope remains unclear, resulting in the creation of varied frameworks across circuit courts.³¹ Despite this ambiguity, circuits agree that when the

²⁸ See Kernodle, *supra* note 1, at 173-74 (outlining two theories when State Actor has duty to protect individual against private actor). Following the Supreme Court's decision in *DeShaney*, federal circuit courts recognized two exceptions to *DeShaney's* canonical rule that the Due Process Clause does not create an affirmative duty to protect individuals from private third parties. *Id.* at 173. First, liability can be imposed on a State Actor when an actual custodial relationship exists between a plaintiff and the State Actor, also known as a "special relationship." *Id.* Second, liability can be imposed based on the state-created danger theory. *Id.*; see also Barrett, *supra* note 1, at 187 (explaining two exceptions derived from *DeShaney*). The *DeShaney* Court said in dicta that the state "played no part in [the danger's] creation, nor did it do anything to render [the plaintiff] any more vulnerable to them." *DeShaney*, 489 U.S. at 201. Courts have used this language to find liability when the State fails to protect an individual from a third party after the State created or caused danger to that individual. Joseph M. Pellicciotti, Annotation, "State-created danger," or *Similar Theory, as Basis for Civil Rights Action under 42 U.S.C.A. § 1983*, 159 A.L.R. Fed. 37 (2000) (explaining courts inference of state-created danger theory from language in *DeShaney*).

²⁹ See 18A Eugene McQuillin, *The Law of Municipal Corporations* § 53:278 (3d. ed.) (recognizing and outlining state-created danger theory exception); see also *Rivera v. Rhode Island*, 402 F.3d 27, 34-35 (1st. Cir. 2005) ("The Supreme Court [in *DeShaney*] also suggested, but never expressly recognized, the possibility that when the state creates the danger to an individual, an affirmative duty to protect might arise . . .")

³⁰ See Kernodle, *supra* note 1, at 175-76 (distinguishing circuit stances on state-created danger theory). The Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. circuits have adopted the doctrine; see also, e.g., *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 427-28 (2d Cir. 2009); *Sanford v. Stiles*, 456 F.3d 298, 304-05 (3d Cir. 2006); *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015); *Jane Doe v. Jackson Loc. Sch. Dist. Bd. of Educ.*, 954 F.3d 925, 932 (6th Cir. 2020); *D.S. v. E. Porter Cnty. Sch. Corp.*, 799 F.3d 793, 798 (7th Cir. 2015); *Fields v. Abbott*, 652 F.3d 886, 890-91 (8th Cir. 2011); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1066 (9th Cir. 2006); *Est. of B.I.C. v. Gillen*, 710 F.3d 1168, 1173 (10th Cir. 2013); *Butera v. District of Columbia*, 235 F.3d 637, 652 (D.C. Cir. 2001). The Fifth and Eleventh Circuits have not recognized the state-created danger doctrine. *Cook v. Hopkins*, No. 19-10217, 2019 U.S. App. LEXIS 33713, at *13 (5th Cir. Nov. 8, 2019); *Vaughn v. City of Athens*, No. 05-12954, 2006 WL 1029167, at *1 n.1 (11th Cir. Apr. 20, 2006). *But see Est. of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 1003 (5th Cir. 2014) (noting case "does not sustain a state-created danger claim, even assuming that theory's validity"); *Waddell v. Hendry Cnty. Sheriff's Off.*, 329 F.3d 1300, 1305-06 (11th Cir. 2003) (recognizing recovery under § 1983 for government conduct that is "arbitrary or conscience shocking").

³¹ See Milena Shtelmakher, Note, *Police Misconduct and Liability: Applying the State-Created Danger Doctrine to Hold Police Officers Accountable for Responding Inadequately to Domestic-Violence Situations*, 43 LOY L.A. L. REV. 1533, 1540 (2010) (explaining lack of Su-

state violates an individual's constitutional rights under the doctrine, then § 1983 permits recovery; however, State Actors may be protected from civil liability if they are entitled to qualified immunity.³² The doctrine of qualified immunity shields government officials sued in their individual capacities from civil liability unless the State Actors (1) violated a federal or constitutional right; and (2) the unlawfulness of their conduct was "clearly established at the time."³³ Qualified immunity shields State Actors from liability in jurisdictions that have not recognized the state-created danger doctrine because failing to protect an individual from a third party is not considered a constitutional violation.³⁴ Qualified immunity also protects State Actors from liability in jurisdictions that have adopted the doctrine because the ambiguity surrounding the doctrine has caused courts to conclude that the unlawfulness of their conduct was not clearly established at the time.³⁵

While, prior to 2020, the First Circuit had not recognized the state-created danger doctrine, it considered its scope in precedent cases.³⁶ In *Rivera v. Rhode Island*³⁷, the court discussed the doctrine, but ultimately ruled that the exception was inapplicable as law enforcement's conduct of identifying the plaintiff as a witness and taking her witness statement in a murder investigation did not trigger a duty to protect under the state-created danger theory.³⁸ The *Rivera* court examined its prior case law on the state-

preme Court doctrinal guidance has caused inconsistent circuit applications); see also Kernodle, *supra* note 1, at 169 ("Because the Supreme Court has never explicitly or clearly addressed the theory, the federal circuits apply it unevenly and erratically.")

³² See 42 U.S.C. § 1983 ("Every person who, under color of any statute . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . ."); Martin A. Schwartz, *Section 1983 Litigation Claims & Defenses* § 3.09 (4th ed.) (highlighting uncertainty regarding state-created danger theory causes qualified immunity protection); 1 Sheldon H. Nahmod, *Civil Rights & Civil Liberties Litigation: The Law of Section 1983* § 3:61 (4th ed.) (explaining courts avoid finding liability under state-created danger theory by finding qualified immunity).

³³ See Stacey Haws Felkner, Proof of Qualified Immunity Defense in 42 U.S.C.A. § 1983 or Bivens Actions Against Law Enforcement Officers, 59 Am. Jur. Proof of Facts 3d 291, § 1 (2000) (outlining qualified immunity standard).

³⁴ See *Cook v. Hopkins*, No. 19-10217, 2019 U.S. App. LEXIS 33713, at *13 (5th Cir. Nov. 8, 2019) (failing to find liability under state-created danger theory); *Vaughn v. City of Athens*, No. 05-12954, 2006 WL 1029167, at *1 n.1 (11th Cir. Apr. 20, 2006) (rejecting liability under state-created danger theory).

³⁵ See Nahmod, *supra* note 32 ("[S]ome courts avoid the [state-created danger] issue by finding no clearly settled law for qualified immunity purposes.")

³⁶ See *Rivera v. Rhode Island*, 402 F.3d 27, 35 (1st Cir. 2005) (outlining cases within circuit that have discussed state-created danger theory).

³⁷ 402 F.3d 27 (1st Cir. 2005).

³⁸ See *id.* at 37-38 ("[R]endering a person more vulnerable to risk does not create a constitutional duty to protect.") The *Rivera* court referenced *DeShaney* in its opinion, explaining that "a state's affirmative constitutional duty to protect an individual from private violence arises where

created danger doctrine and reiterated that the State's action must create or enhance danger to the individual, as well as "shock the conscience."³⁹ Though the *Rivera* court's framework for the state-created danger doctrine differs from those applied by other circuits, central similarities have emerged among them.⁴⁰ The core elements required to prevail on a state-created danger claim are: (1) that a state official affirmatively acted to create or enhance harm to the plaintiff; (2) that the potential harm was specific to the plaintiff; (3) that the act caused harm to the plaintiff; and (4) that the act was highly culpable.⁴¹ Despite the common features among these circuits, courts remain split as to whether the doctrine is valid and whether it is "clearly established law."⁴²

there is some deprivation of liberty by State Actors." *Id.* at 38. Although the state's action "render[ed] the individual more vulnerable to harm," it did not cause a deprivation; thus, the state did not have a duty to protect. *Id.*

³⁹ See *id.* at 34-36 (discussing scope of state-created danger doctrine).

Even if there exists a special relationship between the state and the individual or the state plays a role in the creation or enhancement of the danger . . . there is a further and onerous requirement that the plaintiff must meet in order to prove a constitutional violation: the state actions must shock the conscience of the court.

Id. at 35 (citing *Hasenfus v. LaJeunesse*, 175 F.3d 68, 73 (1st Cir. 1999)). The court noted its past discussions of the theory and considered persuasive authority referenced under its prior case law. *Id.* at 35-36 (highlighting past discussions in First Circuit); see also *Soto v. Flores*, 103 F.3d 1056, 1063-64 (1st Cir. 1997) (citing other circuits' discussions on state-created danger theory); *Hasenfus*, 175 F.3d at 72, 74 n.3 (observing other circuits and noting potential due process violation under state-created danger theory).

⁴⁰ See Michael E. Withey & Karen Koehler, *Cause of Action for State-Created Danger Under 42 U.S.C.A. § 1983*, 21 CAUSES OF ACTION 2D 175, § 5 (2003) (explaining overlapping similarities between different circuits' tests); Veronica Zhang, Note, *Throwing the Defendant into the Snake Pit: Applying a State-Created Danger Analysis to Prosecutorial Fabrication of Evidence*, 91 B.U. L. REV. 2131, 2152-56 (2011) (noting overlap of elements between multiple tests); see also Lauren Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1168 (2005) (identifying state-created danger claim requires "high level of culpability").

⁴¹ See Ryan Avery, Note, *Fair Shake or an Offer They Can't Refuse? The Protection of Cooperating Alien Witnesses Under United States Law*, 33 SUFFOLK TRANSNAT'L L. REV. 347, 365-66 (2010) ("Although U.S. circuit courts have applied different tests to evaluate state-created danger claims, the four-element test set forth [by the Third Circuit] appears to incorporate all of the jurisdictional rules crafted to date."); *Sanford v. Stiles*, 456 F.3d 298, 304-05 (3d Cir. 2006) (modifying four elements of state-created danger test of Third Circuit). *But see* Daniel J. Moore, Comment, *Protecting Alien-Informants: The State-Created Danger Theory, Plenary Power Doctrine, and International Drug Cartels*, 80 TEMP. L. REV. 295, 300-01 (2007) ("[T]he state-created danger exception remains a viable theory in most jurisdictions. Nevertheless, it is difficult to synthesize a single interjurisdictional standard for applying the state-created danger exception, which leads to some variation among the circuits.")

⁴² See McQuillin, *supra* note 29 ("It has yet to be decided definitively whether a state-created danger theory is a viable mechanism for finding a constitutional injury"); Felkner, *supra* note 33 (outlining cases that grant qualified immunity when considering state-created danger theory).

In *Irish v. Fowler*, the First Circuit considered whether State Actors can be held liable for a substantive due process violation under the state-created danger doctrine, and if so, whether the State Actors can claim immunity based on an argument that the doctrine was not “clearly established at the time” of the violation.⁴³ As an issue of first impression, the court adopted the state-created danger doctrine, which recognizes that State Actors may be liable for failing to protect victims against private conduct when the State Actor’s action enhanced the danger to the victim and such conduct caused a deprivation of life, liberty, or property.⁴⁴ In its reasoning, the court looked to the history of the doctrine and noted that the Supreme Court in *DeShaney* “suggested that when the state creates the danger to an individual, an affirmative duty to protect might arise.”⁴⁵ The court then looked to the nine circuits that have recognized the doctrine and identified the common elements required to assert a viable state-created danger substantive due process claim.⁴⁶ Specifically, the court recognized that these circuits require that “the defendant affirmatively acted to create or exacerbate a danger to a specific individual or class of people . . . [And] the defendant’s acts be highly culpable and go beyond mere negligence.”⁴⁷ After considering the scope of the theory, the court acknowledged that it has “repeatedly outlined the core elements of the state-created danger doctrine,” but despite its past discussions, had not found it applicable to the facts of a specific case until now.⁴⁸

⁴³ See *Irish*, 979 F.3d 65, 72, 75 (1st Cir. 2020) (noting issues before court). The district court granted the defendants’ motion for summary judgment on the basis of qualified immunity, and the plaintiffs appealed. *Id.* at 72. Qualified immunity shields State Actors from liability unless “(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was ‘clearly established at the time.’” *Id.* at 76 (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018)). Because a qualified immunity analysis requires a constitutional violation, the court first addressed whether there was a substantive due process violation based on the state-created danger doctrine. *Id.* at 75-76.

⁴⁴ See *id.* at 67 (“Under the state-created danger substantive due process doctrine, officers may be held liable for failing to protect plaintiffs from danger created or enhanced by their affirmative acts. In doing so, we for the first time join nine other circuits in holding such a theory of substantive due process liability is viable.”)

⁴⁵ *Id.* at 73 (emphasis added) (recognizing Supreme Court “suggested” state-created danger doctrine).

⁴⁶ See *id.* (identifying circuits that adopted state-created danger doctrine).

⁴⁷ *Id.* at 73-74 (describing circuits uniformly required doctrinal elements). Additionally, the court indicated that “most circuits require that the defendant’s actions ‘shock the conscience.’” *Id.* at 74 n.4.

⁴⁸ See *Irish*, 979 F.3d at 75, 78 (distinguishing case from precedent). “This case presents different facts that require us to recognize the state-created danger doctrine . . .” *Id.* at 75. The court pieced together its state-created danger discussions from precedent and noted that the “core elements” outlined in its prior case law “have been articulated in other circuits.” *Id.* at 74. Relying on dicta, the court identified the following as core elements to the state-created danger doctrine: (1) there must be affirmative action that increases danger of third-party harm to an individ-

In recognizing the state-created danger doctrine, the First Circuit formally defined “the necessary components” for a viable claim and considered whether the detectives were protected by qualified immunity.⁴⁹ The court agreed with the district court’s conclusion that a jury could find that a substantive due process violation occurred, and thus focused on whether the state-created danger law was “clearly established” at the time of the violation.⁵⁰ To determine whether the law was “clearly established,” the court relied on “a robust ‘consensus of cases of persuasive authority’” and concluded that the State Actors were not shielded from liability because “[t]he widespread acceptance of the state-created danger theory . . . was sufficient to clearly establish that a state official may incur a duty to protect a plaintiff where the official creates or exacerbates a danger to the plaintiff.”⁵¹ The court noted that a majority of circuits had accepted the theory, providing “notice to every reasonable officer” that such conduct would be unlawful.⁵² The court also noted specific First Circuit case law that should have warned the officers that they could be held liable under the state-created danger doctrine.⁵³ The court therefore concluded that the de-

ual; (2) the State Actor must create the harm towards the plaintiff; (3) the plaintiff cannot “voluntarily” assume the risk of the danger; (4) the danger the State Actor creates must be specific to the plaintiff; (5) the State Actor’s conduct must cause injury to the plaintiff; and (6) the State Actor’s action must “shock the conscience.” *Id.*

⁴⁹ *See id.* at 75 (stating “necessary components” to assert viable state-created danger claim). After establishing the state-created danger test, the First Circuit applied it to determine whether Irish properly asserted a substantive due process claim under the state-created danger framework, and if so, whether the detectives are protected by qualified immunity. *Id.* at 75-76.

⁵⁰ *See id.* at 76 (noting qualified immunity defense dependent on “clearly established prong”). The court further explained:

The test to determine whether a right is clearly established asks whether the precedent is “clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply” and whether “[t]he rule’s contours [were] so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”

Id. (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018)).

⁵¹ *Id.* at 77 (explaining why state-created danger theory was “clearly established”). Defendants’ argued that the law was not “clearly established” because “this circuit to date has not recognized the state-created danger doctrine,” but the court rejected this. *Id.* The court explained that “clearly established law can be dictated by controlling authority or a robust consensus of persuasive authority.” *Id.* at 76. Furthermore, the court explained that a “robust consensus” among the circuits “does not require the express agreement of every circuit.” *Id.* at 76.

⁵² *Id.* at 76 (outlining how “clearly established” standard determines liability). The court explained that when an officer violates proper police procedure, as the detectives did here, it supports the argument that “a reasonable officer in [the officer’s] circumstance would have believed that his conduct violated the Constitution.” *Id.* at 77 (citing *Stamps v. Town of Framingham*, 813 F.3d 27, 32 n.4 (1st. Cir. 2016)).

⁵³ *See Irish*, 979 F.3d at 78 (explaining “Rivera was a critical warrant bell that officers could be held liable under the state-created danger doctrine.”)

tectives were not protected by qualified immunity, as reasonable officers would have been aware that affirmative actions that increase or enhance danger to an individual are unlawful.⁵⁴

The ambiguity surrounding the state-created danger doctrine led the First Circuit to adopt the theory as valid without accurately considering the scope of the doctrine.⁵⁵ Despite this uncertainty, the court properly pointed to suggestive language in *DeShaney* and the general acceptance by sister circuits as justification for its adoption.⁵⁶ However, when discussing the contours of the doctrine, the court did not properly consider the varied and erratic applications of its sister circuits.⁵⁷ Each of the nine circuits that have adopted the doctrine maintains a different test; therefore, what constitutes “state-created danger” in one circuit is different in another.⁵⁸ Never-

⁵⁴ See *id.* at 77-78 (outlining reasons why state-created danger doctrine was clearly established). The court distinguished this case from its precedent case, *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997), which “concluded that the state-created danger doctrine was not clearly established.” *Id.*; *Soto*, 103 F.3d at 1065. The court explained why the *Soto* court decided that the doctrine was not clearly established: (1) prior to *Soto*, the court never discussed the doctrine; and (2) the history of the doctrine, in terms of other circuits, was “uneven.” *Irish*, 979 F.3d at 77. The court distinguished *Soto* from the case at bar by explaining that, prior to the incident, the court had discussed the doctrine numerous times and that the doctrine was more developed at the time of the detectives’ conduct in 2015. *Irish*, 979 F.3d at 77-78.

⁵⁵ See Barrett, *supra* note 1, at 240 (explaining ambiguity of state-created danger doctrine); Withey & Koehler, *supra* note 40 (noting courts using *DeShaney* dicta to find liability under § 1983); Kernodle, *supra* note 1, at 175 (acknowledging majority of circuits have adopted state-created danger doctrine).

⁵⁶ See Kernodle, *supra* note 1, at 172-74 (highlighting how circuits used language in *DeShaney* to find liability); Barrett, *supra* note 1, at 215 (“The only consistency among the [nine] circuits is that each of them mechanically cite to *DeShaney*’s canonical dicta.”)

⁵⁷ See Shtelmakher, *supra* note 31, at 1540 (“[E]ven though most circuits acknowledge the state-created danger doctrine, its scope and limitations are still ill-defined and its application is considerably inconsistent.”) Although there are similarities among the elements of the state-created danger doctrine, “[t]here are substantive differences in the elements and burden of proof from one circuit to another.” Withey & Koehler, *supra* note 40. For example, the Tenth Circuit utilizes a six-part test, which requires a showing of:

- (1) the charged state entity and the charged individual actors created the danger or increased plaintiff’s vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendant[’s] conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.

Est. of B.I.C. v. Gillen, 710 F.3d 1168, 1173 (10th Cir. 2013). Whereas the Fourth Circuit requires a plaintiff to “show that the State Actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission.” *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015).

⁵⁸ See Kernodle, *supra* note 1, at 197 (noting lack of unified test causes various outcomes); Barrett, *supra* note 1, at 224-25 (“While all of these circuits cite the same language from *DeShaney*, the different key elements only amplify the confusion surrounding the proper param-

theless, the court properly focused on the commonalities between the circuits and identified, at a minimum, that they hold a State Actor liable if the officer's affirmative act creates or enhances danger to the plaintiff and the act is highly culpable.⁵⁹ Thus, the court was correct in holding that a constitutional violation occurred under the state-created danger doctrine, as the facts indicate that the detectives' conduct meets the minimum threshold requirement among the circuits.⁶⁰

While the First Circuit clearly outlined the requisite elements to assert a state-created danger claim, its application of the test contributed to the confusion surrounding the doctrine.⁶¹ The First Circuit accepted the district court's reasoning regarding the substantive due process violation; however, the district court evaluated the plaintiff's state-created danger claim under the Third Circuit's test.⁶² Despite this, the First Circuit still came to the correct conclusion because the core of the doctrine supports a finding of liability when the State Actors' actions cause or enhance danger to the plaintiff and such conduct is highly culpable.⁶³ While the court's dis-

ters of the state-created danger concept. From this, it is fairly inferable that different emphases from different tests can lead to inconsistent judicial results among the [nine] circuits.”)

⁵⁹ See Kernodle, *supra* note 1, at 178 (outlining core elements); see also Oren, *supra* note 40, at 1168 (“No matter how it is defined, ‘deliberate indifference’ is the minimum standard required.”) As of today, all circuits that adopted the state-created danger doctrine require an affirmative action by the state official. See, e.g., Okin v. Vill. Of Cornwall-on-Hudson Police Dep’t, 577 F.3d 415, 428 (2d. Cir. 2009); Sanford v. Stiles, 456 F.3d 298, 304-05 (3d. Cir. 2006); Doe v. Rosa, 795 F.3d 429, 439 (4th Cir. 2015); Jane Doe v. Jackson Loc. Sch. Dist. Bd. of Educ., 954 F.3d 925, 932 (6th Cir. 2020); D.S. v. E. Porter Cty. Sch. Corp., 799 F.3d 793, 798 (7th Cir. 2015); Field v. Abbott, 652 F.3d 886, 891 (8th Cir. 2011); Kennedy v. City of Ridgefield, 439 F.3d 1055, 1066 (9th Cir. 2006); Est. of B.I.C. v. Gillen, 710 F.3d 1168, 1173 (10th Cir. 2013); Buetera v. District of Columbia, 235 F. 3d 637, 652 (D.C. Cir. 2001). Furthermore, all circuits “require the State Actor to have some level of culpability regarding his act that led to the plaintiff’s harm in order for the government to be liable.” Kernodle, *supra* note 1, at 185 (noting different levels of culpability).

⁶⁰ See Irish v. Fowler, 979 F.3d 65, 75 (1st Cir. 2020) (“This case presents different facts that require us to recognize the state-created danger doctrine and conclude that a reasonable jury could find that a claim has been validly presented on this evidence.”); Rivera v. Rhode Island, 402 F.3d 27, 35 (1st Cir. 2005) (noting “affirmative act” and “high culpability” as requirements for state-created danger doctrine); sources cited *supra* note 59 (detailing minimum standard); Zhang *supra* note 40, at 2152-53 (highlighting commonalities of multiple tests). But see Kernodle, *supra* note 1, at 178 (“[Circuits] employ various tests with often inconsistent factors and results.”)

⁶¹ See Irish, 979 F.3d at 75 (outlining new test); see also Kernodle, *supra* note 1, at 178 (explaining circuits apply “various test with inconsistent factors and results”).

⁶² See Irish, 979 F.3d at 75 (noting acceptance of district court’s reasoning); Irish v. Fowler, 436 F. Supp. 3d 362, 413 n.148, 415 (D. Me. 2020) (describing and applying Third Circuit state-created danger test).

⁶³ See Shelmakher, *supra* note 31, at 1540 (explaining circuits find liability “if the state itself played a role in creating or increasing the danger to a child, then the state could be liable for a substantive due process violation.”); Kernodle, *supra* note 1, at 185 (noting high level of culpability required).

regard for the various circuit tests may be logical, its effect could lead to disparate results in determining whether the law was clearly established under a qualified immunity analysis.⁶⁴ Unlike many courts that have avoided state-created danger claims by granting qualified immunity on the basis that the doctrine was not “clearly established” at the time of the unlawful conduct, this court concluded that the state-created danger theory was “clearly established” among the circuits.⁶⁵ However, the court overlooked the variety among circuit tests when concluding that the doctrine was “clearly established,” contributing to the ambiguity surrounding the doctrine.⁶⁶

While it may appear that the court’s reasoning as to the establishment of the state-created danger doctrine is flawed due to the differing standards among circuits, the suggestive language in *DeShaney* and the minimum requirements among these circuits indicate that State Actors may be liable if their affirmative action is highly culpable and such act creates or enhances danger to an individual.⁶⁷ The First Circuit attempted to clarify the doctrine by explaining the court’s analysis of the doctrine.⁶⁸ However, the uncertainty surrounding the doctrine still remains, despite the court’s decision to join the nine other circuits.⁶⁹ Without a uniform approach, the different tests among the courts will likely lead to inconsistent results and allow State Actors to evade liability stemming from substantive due process violations on the grounds that the doctrine is not “clearly estab-

⁶⁴ See *Avery supra* note 41, at 365-66 (identifying Third Circuit as universal test). Since the Third Circuit test and the First Circuit test are similar, it is likely that the First Circuit’s reliance on the district court’s analysis did not alter the analysis. *Irish*, 979 F.3d at 75 (outlining First Circuit approach); see also *Sanford v. Stiles*, 456 F.3d 298 (3d Cir. 2006) (detailing Third Circuit approach). However, the different tests among the circuits likely will have a substantial impact on the qualified immunity analysis because the differences may play into whether a court considers the doctrine to be “clearly established.” Barrett, *supra* note 1, at 215 (explaining how different tests have affected “clearly established” prong in qualified immunity analysis).

⁶⁵ See *Irish*, 979 F.3d at 77 (concluding doctrine “clearly established”); see also Schwartz, *supra* note 32 (“[i]n several cases, uncertainties surrounding this doctrine and other aspects of *DeShaney* have led courts to conclude that even if the plaintiff’s due process rights were violated, the defendant official is protected by qualified immunity because the defendant did not violate clearly established federal law.”)

⁶⁶ See *Irish*, 979 F.3d at 77 (concluding persuasive authority sufficient to qualify doctrine as “clearly established”); see also Barrett, *supra* note 1, at 241 (explaining “many of the federal courts have amplified *DeShaney*’s ambiguities” by lack of uniformity); see also sources cited *supra* note 56 and accompanying text (highlighting effect of different tests).

⁶⁷ See Barrett, *supra* note 1, at 214 (“[N]o clear constitutional standard exists for analyzing state-created danger claims under § 1983 jurisprudence.”)

⁶⁸ See *Rivera v. Rhode Island*, 402 F.3d 27, 33-34 (1st Cir. 2005) (discussing state-created danger claim).

⁶⁹ See Kernodle, *supra* note 1, at 197-98 (“The miscellaneous tests currently employed by the circuits present an overwhelming array of standards dizzying to any potential § 1983 litigant or judge faced with state-created danger case.”)

lished.”⁷⁰ In order to uphold the protection guaranteed by the Due Process Clause, the Supreme Court should explicitly endorse the state-created danger doctrine; without the Supreme Court’s direction, individuals may be stripped of their right to recover when State Actors violate their constitutional rights.⁷¹

The right to be free from State deprivation of life, liberty, or property is guaranteed by the Fourteenth Amendment of the Constitution, and this right should not be diminished because of ambiguity surrounding the state-created danger doctrine. Allowing circuit courts to create their own tests for state-created danger violations has created confusion among courts and deprived individuals of their right to recover for State Actors’ unlawful conduct. Ultimately, the Supreme Court must intervene and provide additional guidance on the state-created danger doctrine. If the Court fails to address this issue, lower courts will continue to struggle with drawing a bright line on what constitutes state-created danger and whether it is justified by qualified immunity.

Bianca Tomassini

⁷⁰ See *supra* note 58 (describing effect of multiple tests); see also Kernodle, *supra* note 1, at 198 (explaining uniform test needed to “ensure greater governmental accountability while also confining recovery and protecting legislative decisions.”)

⁷¹ See Kernodle, *supra* note 1, at 197 (suggesting Supreme Court should step in and provide guidance); Barrett, *supra* note 1, at 241 (suggesting uniform test to uphold § 1983 jurisprudence).

**EMPLOYMENT LAW—INTERSECTING
IDENTITIES & IDEOLOGIES,
NONDISCRIMINATION, AND THE FIRST
AMENDMENT MINISTERIAL EXCEPTION
DEFENSE—*DEWEESE-BOYD V. GORDON
COLLEGE*, 163 N.E.3D 1000 (MASS. 2021)¹**

When fundamental legal principles such as religious freedom and discrimination intersect, a great tension emerges.² The ministerial exemption—an affirmative defense under the First Amendment—sits at this intersection, barring employment discrimination claims against religious institutions by their ministerial employees.³ In *DeWeese-Boyd v. Gordon College*,⁴ the Supreme Judicial Court of Massachusetts (“SJC”) applied recent Supreme Court precedent to clarify which employees are considered ministers under the exemption.⁵ The SJC ultimately found that the plaintiff, Professor Margie DeWeese-Boyd, was not a minister, and, therefore, her employment discrimination claims against defendant, Gordon College, were not barred by the exemption.⁶

Gordon College is a Christian liberal arts college located in Wenham, MA, a suburb about twenty-five miles north of Boston.⁷ In 2011, the

¹ This case comment was initially written for Suffolk University Law School’s Race, Women’s Rights, Gender Identity and the Law course, under the supervision of Justice Elspeth Cypher and Dean Robert Ward.

² *DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000, 1009 (Mass. 2021) (“The potential for conflict between these fundamental legal principles is therefore obvious and of great concern, not only to the individual plaintiffs, but also for our civil society and religious institutions.”)

³ See *DeWeese-Boyd*, 163 N.E.3d at 1003 (explaining ministerial exception and evaluating plaintiff’s responsibility to integrate religious faith into instruction); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n* (“E.E.O.C (*Hosanna-Tabor*)”), 565 U.S. 171, 188-89 (2012) (barring woman’s claims, holding she was commissioned minister teaching daily religion classes at religious school).

⁴ 163 N.E.3d 1000 (Mass. 2021).

⁵ See *id.* at 1002 (stating “this case requires us to assess, in light of the recent United States Supreme Court decision in *Our Lady of Guadalupe Sch. v. Morrissey-Berru* . . . whether the ministerial exception applies to an associate professor of social work at a private Christian liberal arts college.”); see also *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2062-66 (2020) (clarifying which employees fall under ministerial exemption).

⁶ See *DeWeese-Boyd v. Gordon*, 163 N.E.3d at 1018.

⁷ See *Id.* at 1004 (“Its mission is ‘to graduate men and women distinguished by intellectual maturity and Christian character, committed to lives of service and prepared for leadership worldwide.’”) *Gordon College*, distinct from *Gordon-Conwell Theological Seminary*, was founded in 1889 “for the purpose of carrying on the educational work begun . . . by the Reverend

late President R. Judson Carlberg resigned after serving nearly twenty years as Gordon's president and was succeeded by D. Michael Lindsay.⁸ With this leadership transition came many changes within the Gordon community, including the founding of OneGordon, a community of lesbian, gay, bisexual, transgender, queer (LGBTQ) and allied alumni, students, faculty, and staff, "committed to affirming and supporting people of all sexual orientations, gender identities, and gender expression."⁹ In 2014, following the Supreme Court's decision in *Burwell v. Hobby Lobby Stores*,¹⁰ President Obama signed an Executive Order forbidding any federal contractor from discriminating on the basis of sexual orientation or gender identity.¹¹ In response, Gordon's President Lindsay, along with many other evangelical leaders, submitted a letter to President Obama requesting an exemption so religious institutions receiving federal funding can remain selective in their hiring.¹²

As a result of the letter to President Obama, community partners, including the cities of Salem and Lynn, formally cut ties with Gordon.¹³ In

Adoniram Judson Gordon." *Id.*; see also GORDON COLLEGE, <https://www.gordon.edu/> (last visited Nov. 21, 2021).

⁸ See *DeWeese-Boyd*, 163 N.E.3d at 1006 ("Lindsay, who became president of Gordon after DeWeese-Boyd was hired . . ."); see also John R. Ellement, *R. Judson Carlberg, 74; former president of Gordon College*, THE BOSTON GLOBE (Nov. 25, 2014), <https://www.bostonglobe.com/metro/2014/11/25/judson-carlberg-former-president-gordon-college/FMpzw5LEZlvpvmolMrbjpL/story.html> (noting Carlberg's tenure as president of Gordon College).

⁹ See OneGordon, *About*, FACEBOOK, https://www.facebook.com/OneGordonLGBTQ/about/?ref=page_internal (last visited May 5, 2021) (stating OneGordon's mission); see also Philip Francis & Mark Longhurst, *How LGBT Students Are Changing Christian Colleges*, THE ATLANTIC (July 23, 2014), <https://www.theatlantic.com/education/archive/2014/07/gordon-college-the-new-frontier-of-gay-rights/374861/> (describing emergence of LGBTQ+ activism on Christian college campuses).

¹⁰ 573 U.S. 682 (2014).

¹¹ See *id.* (allowing religious exemption to contraceptive mandate for privately held corporations); Exec. Order No. 13672, 3 C.F.R. 2014 Comp., pt. 1 (2015) (prohibiting discrimination based on sexual orientation and gender identity). Executive orders prohibiting employment discrimination precede even the 1964 Civil Rights Amendment. PATRICIA BELL-SCOTT, *THE FIREBRAND AND THE FIRST LADY: PORTRAIT OF A FRIENDSHIP: PAULI MURRAY, ELEANOR ROOSEVELT, AND THE STRUGGLE FOR SOCIAL JUSTICE* 226-27 (Vintage Books 2017) (describing President Eisenhower's executive order protecting against discrimination).

¹² See Francis & Longhurst, *supra* note 9 (describing executive order and evangelical letter); Madeline Linnell, *The Four Years That Changed Gordon College*, THE TARTAN (March 29, 2017), <https://tartan.gordon.edu/the-four-years-that-changed-the-college/> (explaining letter to President Obama and subsequent impact).

¹³ See Liam Adams & Taylor Bradford, *Gordon in Lynn – An Enduring Relationship Severed*, THE TARTAN (March 29, 2017), <https://tartan.gordon.edu/gordon-in-lynn-an-enduring-relationship-severed/> (explaining history, legacy, and end of Gordon's programming in Lynn); Linnell, *supra* note 12 (describing community backlash to Lindsey's signature on letter to President Obama); Matt Rocheleau, *Salem ends Gordon College's use of town hall*, BOSTON GLOBE

response, Gordon's lawyers sent a memo to the Lynn Public School Committee defending President Lindsay's First Amendment rights, worsening tensions between the school and the surrounding communities.¹⁴ The following academic year, tenured Philosophy Professor Lauren Barthold penned a letter to the editor of *The Salem News* criticizing Gordon's approach to homosexuality; as a result, Barthold was threatened with termination and subject to discipline by the administration.¹⁵ Barthold filed and ultimately settled a civil rights lawsuit claiming employment discrimination.¹⁶ Shortly after Barthold's suit was filed, the word "minister" was added to the Gordon faculty handbook—an addition that garnered serious opposition from faculty.¹⁷

Prior to joining Gordon College as a professor, DeWeese-Boyd received a master's degree in General Theological Studies from Covenant Theological Seminary in St. Louis and performed mission work in the Phil-

(July 10, 2014, 12:00 AM), <https://www.bostonglobe.com/metro/2014/07/09/salem-cut-ties-with-gordon-college-over-school-request-for-religious-exemption-antigay-discrimination-rules/goy5ep3SGqAD0yqHWp77oO/story.html> (describing Salem's response to Lindsay's signature on letter to President Obama).

¹⁴ See Linnell, *supra* note 12 (describing Lindsay's "presumptuous" legal action and Lynn School Committee's response); Adams & Bradford, *supra* note 13 (describing Memo to Lynn School Committee); see also Letter from Kevin P. Martin, att'y for Gordon Coll., to John C. Mihos, att'y for Lynn Pub. Sch. Dist. (August 28, 2014) (on file with Tartan Newspaper) (threatening lawsuit for free speech retaliation).

¹⁵ See Linnell, *supra* note 12 (explaining circumstances leading up to Professor Barthold's civil rights suit); see also Lauren Barthold, *Letter: Hiring practices cause pain in Gordon community*, THE SALEM NEWS, https://www.salemnews.com/opinion/letter-hiring-practices-cause-pain-in-gordon-community/article_a890ec4f-d8d6-5c68-a001-5a8cd89ad042.html (Apr. 28, 2016) (opposing Gordon's hiring practices and criticizing Gordon's approach to homosexuality). Gordon's discipline of Barthold included removing her from faculty leadership positions, denying her the scheduled right to apply for a promotion, and removing her from serving as director of the Gender Studies Minor. Complaint and Jury Demand at 7, *Barthold v. Gordon Coll.*, No. 16-639 B, 2016 WL 4159201 (Essex Super. Ct. Apr. 28, 2016).

¹⁶ See Complaint and Jury Demand at 7, *Barthold v. Gordon Coll.*, No. 16-639 B, 2016 WL 4159201 (Essex Super. Ct. Apr. 28, 2016) (alleging employment discrimination based on her sex and association with LGBTQ community). Barthold's complaint highlights the non-ministerial nature of her role at Gordon. *Id.* at 2-3; see also Linnell, *supra* note 12 (explaining circumstances surrounding Professor Barthold's lawsuit).

¹⁷ See *DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000, 1006 (Mass. 2021) (explaining addition of minister to Gordon's faculty handbook). Since Barthold and DeWeese-Boyd's initial filings, Gordon hired a professional facilitator to mediate conversations on campus between the administration and members of the LGBTQ+ community, and President Lindsay has formally submitted his resignation. Shalom Maleachi, *Colegrove Hired to Facilitate Talk on Sexuality*, THE TARTAN (Feb. 2, 2017), <https://tartan.gordon.edu/colegrove-hired-to-facilitate-talk-on-sexuality/> (describing professional facilitator's role on campus); Paul Leighton, *Lindsay to step down as Gordon College president*, THE SALEM NEWS (Oct. 22, 2020), https://www.salemnews.com/lindsay-to-step-down-as-gordon-college-president/article_86d1add3-5488-502a-9437-98f838b086a5.html (explaining President Lindsay's resignation).

ippines.¹⁸ DeWeese-Boyd first contacted Gordon about a tenure track faculty position in the Social Work department in February 1998, submitting an application for employment in March.¹⁹ In her application, DeWeese-Boyd acknowledged her personal agreement with Gordon's Statement of Faith, agreed to comply with the Statement of Life and Conduct, and affirmed her understanding of the basic responsibilities of a faculty member.²⁰ In June 1998, Gordon offered DeWeese-Boyd a "tenure track faculty position," hiring her as an Assistant Professor of Social Work.²¹ While at Gordon, DeWeese-Boyd participated in religious services, convocations, and religious gatherings on campus with students and attended a local church alongside Gordon students.²²

DeWeese-Boyd was promoted to Associate Professor in 2004 and approved for tenure in September 2009.²³ In 2016, DeWeese-Boyd applied for promotion to Full Professor and the Faculty Senate unanimously rec-

¹⁸ See *DeWeese-Boyd*, 163 N.E.3d at 1006-07 (explaining DeWeese-Boyd's educational background); *DeWeese-Boyd v. Gordon Coll.*, No. 1777CV01367, 2020 WL 1672714, at *6 (Essex Super. Ct. Apr. 2, 2020) (discussing DeWeese-Boyd's previous missionary work in the Philippines).

¹⁹ See *DeWeese-Boyd*, 163 N.E.3d at 1006 (describing initial hiring process); *DeWeese-Boyd*, 2020 WL 1672714, at *5 (discussing DeWeese-Boyd's personal motivations for applying to work at Gordon College). "[DeWeese-Boyd] sent a cover letter to Gordon's then-Provost in which she stated, '[a]s a product of a Christian liberal arts college . . . I very much want to participate in, and contribute to, Christian liberal arts education.'" *DeWeese-Boyd*, 2020 WL 1672714, at *5. In her cover letter, DeWeese-Boyd "further stated that her seminary training and mission work in the Philippines 'could be of particular benefit to Gordon College Students.'" *DeWeese-Boyd*, 2020 WL 1672714, at *5.

²⁰ See *DeWeese-Boyd*, 2020 WL 1672714, at *6 (describing DeWeese-Boyd's personal understanding of Gordon's Statement of Faith and Life and Conduct Statement). DeWeese-Boyd described her understanding of her role as a faculty member as "to provide a critical, and distinctly Christian, perspective[,] . . . to guide and mentor each student in such a way as to help her discern how Christianity impacts upon her particular discipline[,] . . . [and] to teach her students how to do 'Christian scholarship.'" *Id.* Gordon's Statement of Faith described the institution's beliefs, and each member, including faculty and students, were required to sign a "Memorandum of Understanding" agreeing to these beliefs. *Id.* at *4. The faculty Life and Conduct Statement differed slightly from the student Life and Conduct Statement, specifically regarding expectations to abstain from "homosexual practice." *Id.* at *4-*5.

²¹ See *id.* (providing Gordon's reasons for DeWeese-Boyd's appointment to faculty). "Your achievements, academic pedigree, commitment to the Triune God, and expressed desire to benevolently serve in this Christian liberal arts setting have led to your appointment to the faculty." *Id.* In closing, the offer letter stated, "Welcome to Gordon College faculty. May the Lord always bless your work here as you join us in the 'precious trust' of developing young Christian hearts, hands, and minds." *Id.*

²² See *DeWeese-Boyd*, 2020 WL 1672714, at *8 (describing religious activities in which DeWeese-Boyd partook).

²³ See *DeWeese-Boyd*, 163 N.E.3d at 1007 (describing DeWeese-Boyd's promotion and tenure sequence); see also *DeWeese-Boyd*, 2020 WL 1672714, at *6 (noting approval for tenure in 2009).

ommended her to Provost Janel Curry.²⁴ In February 2017, after Provost Curry declined to recommend DeWeese-Boyd for promotion to President Lindsay and the Board of Trustees, DeWeese-Boyd filed her employment discrimination suit.²⁵ Gordon raised the ministerial exception as a defense, but the Essex County Superior Court ruled that the ministerial exception did not apply, denied Gordon's motion for summary judgment, and granted DeWeese-Boyd's cross-motion.²⁶ Affirming the lower court's judgement, the SJC held that DeWeese-Boyd's responsibility to integrate her Christian faith into her teaching and scholarship was not sufficient to make her a minister, rendering the ministerial exception inapplicable.²⁷

The First Amendment to the U.S. Constitution includes the Establishment Clause, which prohibits Congress from making any law "respecting an establishment of religion," and the Free Exercise Clause, which prohibits Congress from interfering with "the free exercise thereof."²⁸ The "ministerial exception," which prohibits most employment-related lawsuits against religious organizations, was created by courts under the First Amendment's Establishment and Free Exercise Clauses to prevent state in-

²⁴ See *DeWeese-Boyd*, 163 N.E.3d at 1007 (describing Faculty Senate unanimous recommendation for DeWeese-Boyd's tenure); see also *DeWeese-Boyd*, 2020 WL 1672714, at *7-8 (describing process for faculty evaluation).

According to the Faculty Handbook, "[t]he Faculty Senate and the provost are responsible for coordinating faculty evaluation efforts." The Faculty Senate is responsible for making recommendations on professors' applications for tenure and promotions . . . The Faculty Senate "found [her] to be meritorious in teaching and institutional service and [her] scholarship was assessed at the expected level."

Id. at *8 (citations omitted).

²⁵ See *DeWeese-Boyd*, 163 N.E. 3d at 1007 (explaining Provost Curry's and President Lindsay's reasoning behind rejection of tenure application and recommendation). Curry and Lindsay cited "a lack of scholarly productivity, professionalism, responsiveness, and engagement." *Id.*; see also *DeWeese-Boyd*, 2020 WL 1672714, at *8.

Lindsay "concurred with [Curry's] assessment." According to Curry, DeWeese-Boyd was a "strong teacher" with "very high" teaching evaluations. However, DeWeese-Boyd's scholarly productivity "did not reach acceptable levels" for a Gordon faculty member, and her professionalism and follow through on institutional projects about which she may not feel passionate was lacking.

Id. (citations omitted); see also Linnell, *supra* note 12 (noting DeWeese-Boyd's tenure denial and lawsuit).

²⁶ See *DeWeese-Boyd*, 2020 WL 1672714, at *1 (summarizing parties' motions and stating trial court ruling).

²⁷ See *DeWeese-Boyd*, 163 N.E.3d at 1018 ("In sum, we conclude that DeWeese-Boyd was expected and required to be a Christian teacher and scholar, but not a minister. Therefore, the ministerial exception cannot apply as a defense to her claims against Gordon.")

²⁸ See U.S. CONST. amend. I (establishing constitutionally protected freedom of religion, speech, and expression).

terference with the governance of churches.²⁹ The Supreme Court recognized the ministerial exception for the first time in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission* (“*Hosanna-Tabor*”),³⁰ when it considered whether—the defendant employer—church violated the Americans with Disabilities Act by firing the plaintiff employee after becoming sick.³¹ The Supreme Court concluded that the ministerial exception was not limited to hiring and firing decisions made for religious reasons, that the plaintiff employee functioned as a minister, and that the ministerial exception, therefore, applied.³² Building on *Hosanna-Tabor*, the Court in *Our Lady of Guadalupe School*

²⁹ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171, 188-90 (2012) (establishing ministerial exception). “The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.” *Id.* at 184. “Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.” *Id.* at 181; see also *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 604 (Ky. 2014) (“The ministerial exception is best understood as a narrow, more focused subsidiary of the ecclesiastical abstention doctrine”)

It would be difficult for the ecclesiastical abstention doctrine to be more clearly expressed than ‘[i]n such matters relating to the faith and practice of the church and its members, the decision of the church court is not only supreme, but is wholly without the sphere of legal or secular judicial inquiry.’

Kirby, 426 S.W.3d 597 at 618 (quoting *Marsh v. Johnson*, 82 S.W.2d 345, 346 (Ky. 1935)); *Doe v. First Presbyterian Church U.S.A.*, 421 P.3d 284, 289 (Okla. 2017) (affirming ministerial exception—termed “church autonomy doctrine”—to prohibit courts from interfering “in matters of church government, faith and doctrine.”)

³⁰ 565 U.S. 171 (2012).

³¹ See *id.* at 177-78 (outlining facts); *id.* at 188 (raising ministerial exception as issue of first impression); Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (prohibiting employers from discriminating against qualified individuals based on disability).

³² See *Hosanna-Tabor*, 565 U.S. at 188-92 (establishing ministerial exception and applying to facts); *id.* at 194 (finding purpose of ministerial exception “is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason.”); see also *DeWeese-Boyd*, 2020 WL 1672714, at *9 (discussing Court’s rationale in *Hosanna-Tabor*). The exception is, however, intended to “ensure[] that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical,’—is the church’s alone.” *Hosanna-Tabor*, 565 U.S. at 194-95 (citations omitted) (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 119 (1952)). This broad reading of the exception appears to provide too much protection to religious institutions; if the Supreme Court requires employment decisions to be rooted in ideological judgments, defendants like Gordon would merely need to be more precise about the religious basis for their discriminatory practices. See Amy Howe, *Argument analysis: Justices divided In debate over “Ministerial Exception”*, SCOTUS BLOG (May 11, 2020, 6:41 PM), <https://www.scotusblog.com/2020/05/argument-analysis-argument-analysis-justices-divided-in-debate-over-ministerial-exception/> (explaining Justices Ginsburg, Breyer, and Sotomayor’s concerns around broadening exception); *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049, 2080 (2020) (Sotomayor, J., dissenting) (noting ministerial exception should not apply based on teaching religious themes alone).

v. Morrissey-Berru (“*Our Lady of Guadalupe*”)³³ expressly declined “to adopt a rigid formula for deciding when an employee qualifies as a minister,” but emphasized that the key inquiry is what the employee does.³⁴

Before applying the ministerial exception, a court must determine: (1) whether the defendant organization is a religious institution; and (2) whether the plaintiff employee qualifies as a “minister.”³⁵ While the Supreme Court has not established a rigid formula for this inquiry, lower courts provide helpful precedent.³⁶ The classification of a defendant organization as a “religious institution” does not merely depend on whether it is a church or sect, but rather whether it is a religiously affiliated entity.³⁷ This means that institutions such as schools, hospitals, corporations, and retirement homes may avail themselves of the ministerial exception.³⁸

³³ 140 S. Ct. 2049 (2020).

³⁴ *See id.* at 2062 (noting Court’s ruling in *Hosanna-Tabor*); *id.* at 2067-68 (stating that, in applying exception, courts should “take all relevant circumstances into account and [] determine whether each particular position implicated the fundamental purpose of the exception.”) The factors the Court referenced under *Hosanna-Tabor* were specific to that case, and courts may consider other factors when determining whether an employee is a “minister” in a different context. *Id.* at 2063. The Court noted that educating young people in their faith—the responsibility of the plaintiffs in *Our Lady of Guadalupe*—is at the very core of a private religious school’s mission. *Id.* at 2055. *But see id.* at 2072 (Sotomayor, J., dissenting) (arguing plaintiff-employees not ministers, given that “the teachers taught primarily secular subjects, lacked substantial religious titles and training, and were not even required to be Catholic.”)

³⁵ *See* *Lishu Yin v. Columbia Int’l Univ.*, 335 F. Supp. 3d 803, 812 (D.S.C. 2018) (“In order for the ministerial exception to apply, an employer must be a religious institution, and an employee must be a minister.”); *see also* *Equal Emp. Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 581 (6th Cir. 2018) (outlining history and use of ministerial exception); *Kirby*, 426 S.W.3d at 609 (“The application of the ministerial exception requires two main inquiries: 1) is the employer a religious institution, and 2) is the employee a minister.”); Note, *Of Priests, Pupils, and Procedure: The Ministerial Exception as a Cause of Action for On-Campus Student Ministries*, 133 HARV. L. REV. 599, 602 (2019) (describing two-prong ministerial exception test applied by courts).

³⁶ *See supra* note 35 and accompanying text (describing two-prong ministerial exception test applied by courts); *Of Priests, Pupils, and Procedure*, *supra* note 35, at 602 (noting *Hosanna-Tabor*’s preference for fact-specific-inquiry).

³⁷ *See* *Shaliehsabou v. Hebrew Home of Greater Wash.*, 363 F.3d 299, 310 (4th Cir. 2004) (“Numerous courts have held that the term ‘religious institution,’ in this context, can include religiously affiliated schools, hospitals, and corporations.”); *Of Priests, Pupils, and Procedure*, *supra* note 35, at 602 (noting “the ministerial exception has never applied exclusively to established churches.”)

³⁸ *See* *Scharon v. St. Luke’s Episcopal Presbyterian Hosp.*, 929 F.2d 360, 362 (8th Cir. 1991) (holding hospital “act[ed] as a religious institution as Scharon’s employer”). The court was persuaded by plaintiff’s occupation as the hospital’s chaplain, even though the hospital “provides many secular services (and arguably may primarily be a secular institution).” *Id.*; *Hosanna-Tabor*, 565 U.S. at 177 (finding “member congregation” of Missouri Synod both church and school); *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 418 (2nd Cir. 2018) (holding hospital “only historically connected to the United Methodist Church” religious institution).

When determining whether a plaintiff-employee is a minister for purposes of the ministerial exception, the primary question is “what the employee does” at the institution.³⁹ Courts, therefore, utilize a functional test, focusing on the function of the position rather than ordination status of the employee.⁴⁰ Courts will consider the employee’s title, trainings received, whether they were ordained or commissioned, and whether the institution or the employee considered the employee a minister within the institution.⁴¹ Despite this flexibility, courts have emphasized the serious consequences of the exemption and have demonstrated their willingness to engage with the tension between religious freedom and employment discrimination.⁴²

In *DeWeese-Boyd v. Gordon College*, the SJC applied the Supreme Court’s findings from *Our Lady of Guadalupe* and took seriously the consequences of an overly broad analysis.⁴³ The SJC’s decision also emphasized that the existence and role of the ministerial exception is to prohibit “government interference with employment relationships between religious institutions and their ministerial employees[.]”⁴⁴ Applying the Supreme

³⁹ See *Our Lady of Guadalupe*, 140 S. Ct. at 2064 (finding employee’s role in relation to nature of institution important in determining whether a minister); see also *Temple Emanuel of Newton v. Mass. Comm’n Against Discrim.*, 975 N.E.2d 433, 443, 472 (Mass. 2012) (“the ministerial exception applies . . . regardless of whether [the employee] is called a minister or holds any title of clergy” because “a minister is defined by her function, rather than her title”).

⁴⁰ See *Hosanna-Tabor*, 565 U.S. at 190 (emphasizing functional analysis). The Court acknowledged the “functional consensus” among lower courts, noting that “[t]he ministerial exception has not been limited to members of the clergy.” *Id.* at 203 (quoting *Equal Emp. Opportunity Comm’n v. Catholic Univ.*, 83 F.3d 455, 461 (D.C. Cir. 1996)).

⁴¹ See *Hosanna-Tabor*, 565 U.S. at 191-92 (noting employee’s commission or ordinance); *id.* at 191-92 (emphasizing plaintiff-employee “[holding themselves] out as” minister); *Our Lady of Guadalupe*, 140 S. Ct. at 2067-68 (noting employee training); see also *Our Lady of Guadalupe*, 140 S. Ct. at 2060 (limiting exception to “individuals who play certain key roles” in religious institution).

⁴² See *Hosanna-Tabor*, 565 U.S. at 196 (“[T]he interest of society in the enforcement of employment discrimination statutes is . . . important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.”); *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1145-46 (D. Or. 2017) (“Courts have properly rejected such a broad reading . . . which would permit the ministerial exception to swallow the rule that religious employers must follow federal and state employment laws.”); see also *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) (“In our time, few pieces of federal legislation rank in significance” with legislation outlawing “discrimination in the workplace on the basis of race, color, religion, sex, or national origin.”); *Flagg v. AliMed*, 992 N.E.2d 354, 359 (Mass. 2013) (“Legislature determined that workplace discrimination harmed not only the targeted individuals but the entire social fabric.”)

⁴³ See *DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000, 1002, 1009, 1011-12 (Mass. 2021) (introducing issue of ministerial exception).

⁴⁴ See *id.* at 1002 (expressing difficulty surrounding minister title determination). The court further concedes that “the difficult issue is not at this point whether the ministerial exception should be created – it is well established, . . . [n]or whether it should eclipse and thereby eliminate

Court's precedent, the SJC first, for the purposes of the exception, found Gordon a religious institution due to its "obvious religious character."⁴⁵ While Gordon is not a traditional church nor organized sect, the SJC found that Gordon's "clear commitment to Christian principles, as well as its historical religious roots" satisfied the religious institution prong of the exemption.⁴⁶ Therefore, the SJC was not persuaded by DeWeese-Boyd's argument that Gordon's "'primary commitment' is to provide a liberal arts education" and thus is not a religious institution.⁴⁷

In the second prong of its analysis, the SJC found DeWeese-Boyd not a minister and therefore held the ministerial exception does not bar her claims.⁴⁸ The SJC reasoned that DeWeese-Boyd's role was not that of a minister because she did not "lead students in devotional exercises or chapel services" and she did not "teach classes on religion, pray with her students, or attend chapel with her students[.]"⁴⁹ Additionally, based on DeWeese-Boyd's title and training alongside Gordon's Faculty Handbook, the SJC found that DeWeese-Boyd was not held out as a minister by the school or herself.⁵⁰ The SJC compared DeWeese-Boyd's role as a profes-

civil law protection against discrimination – it clearly does. Rather, the difficult issue is who is a minister." *Id.* at 1009; *see also Hosanna-Tabor*, 565 U.S. at 188-89 (defining ministerial exception); *see also Williams v. Episc. Diocese of Mass.*, 766 N.E.2d 820, 824 (Mass. 2002) (demonstrating SJC's prior recognition of exception implications). "It is our understanding that the ministerial exception has been carefully circumscribed to avoid any unnecessary conflict with civil law." *See DeWeese-Boyd*, 163 N.E.3d at 1017.

⁴⁵ *See DeWeese-Boyd*, 163 N.E.3d at 1009-11 ("All of Gordon's governing documents reference religious purposes, and all members of the Gordon community, including its faculty, are expected to articulate and affirm their faith and abide by faith-based behavioral standards. Upon review of the abundant record concerning Gordon's obvious religious character, we conclude that it is a religious institution.") The SJC was particularly concerned itself with Gordon's non-denominational nature, drawing a comparison to *Conlon v. InterVarsity Christian Fellowship*. *See id.* at 1010 (finding both Gordon and InterVarsity religious institutions regardless of their "lack of denominational affiliation" because of their principles and history).

⁴⁶ *See DeWeese-Boyd*, 163 N.E.3d at 1010 (noting Gordon's institutional status).

⁴⁷ *See id.* (rejecting argument that under exception religious institutions cannot have primary purpose of providing liberal arts education).

Gordon identifies as both a Christian college and a liberal arts college, as the portion of the handbook the plaintiff quotes makes clear: Gordon is "a Christian community, distinguished from other Christian communities by its primary commitment to provide a liberal arts education."

Id.

⁴⁸ *See id.* at 1017-18 ("In sum, we conclude that DeWeese-Boyd was expected and required to be a Christian teacher and scholar, but not a minister. Therefore, the ministerial exception cannot apply as a defense to her claims against Gordon.")

⁴⁹ *See id.* at 1012.

⁵⁰ *See id.* at 1013-15 (analyzing whether DeWeese-Boyd was held out as or held herself as a minister). The SJC relied on the fact that "she [DeWeese-Boyd] was part of the group of professors opposed to the addition of 'minister' to the handbook because they viewed it as 'wrongly

sor with the specific and sectarian religious instructions in *Hosanna-Tabor* and *Our Lady of Guadalupe*, and thus remained unconvinced by Gordon's argument that DeWeese-Boyd's responsibility to integrate her Christian faith into her teaching and scholarship asserted that she was a minister.⁵¹ The SJC, engaging in a subjective analysis comparing the particular facts of the present case with available precedent, held that although Gordon is a religious institution, DeWeese-Boyd was not a minister and that the ministerial exception did not bar her claims.⁵²

DeWeese-Boyd v. Gordon poignantly demonstrates the tensions and consequences courts encounter when faced with the ministerial exception.⁵³ Though the SJC cannot ignore the existence of the ministerial exemption, it is evident that the Justices desire to avoid it so that employees of religious institutions can utilize civil law protections against discrimination.⁵⁴ In its introductory paragraph, the SJC laments that the "parameters of the exception . . . remain somewhat unclear," but it is this lack of clarity that allowed the SJC to reject a broad analysis of who qualifies as a minister under the exemption.⁵⁵ Given the Supreme Court's use of the ministeri-

describing the faculty role within the College." *Id.* at 1015. The court continued, "[u]nlike Perich, she never held herself out as a minister or referred to herself as such, and never claimed a ministerial housing allowance." *Id.*

⁵¹ See *DeWeese-Boyd*, 163 N.E.3d at 1014 ("Here, the integrative function is not tied to a sectarian curriculum: it does not involve teaching any prescribed religious doctrine, or leading students in prayer or religious ritual.") The SJC compared DeWeese-Boyd to the plaintiffs in *Hosanna-Tabor* and *Our Lady of Guadalupe*, where "the religious instructions were specific and sectarian, and the teachers led prayers and religious rituals." *Id.*

⁵² See *DeWeese-Boyd*, 163 N.E.3d at 1000 (holding Gordon was 'religious institution' under ministerial exception, but exception did not ultimately apply).

⁵³ See sources cited *supra* notes 2 & 42 and accompanying text (articulating the concern of balancing religious rights and employment rights). The court immediately introduces this tension. See *DeWeese-Boyd*, 163 N.E.3d at 1002.

We are thus presented with a potential conflict between two fundamental American legal principles. The application of the ministerial exception could eclipse, and thereby eliminate, civil law protection against discrimination within a religious institution; in contrast, the decision not to apply the exception could allow civil authorities to interfere with who is chosen to propagate religious doctrine, a violation of our country's historic understanding of the separation of church and State set out in the First Amendment to the United States Constitution.

Id.

⁵⁴ See sources cited *supra* note 44 and accompanying text (providing examples and restrictions of minister classification).

⁵⁵ See *DeWeese-Boyd*, 163 N.E.3d at 1002-03 ("Unfortunately, the parameters of the exception—that is to say, who is covered by the ministerial exception—remain somewhat unclear. We conclude that Gordon College (Gordon) is a religious institution, but that the plaintiff, Margaret DeWeese-Boyd, is not a ministerial employee. Her duties as an associate professor of social work differ significantly from cases where the ministerial exception has been applied."); *see also*

al exception to bar claims based on disability and age, it is no surprise that the exception is leveraged here to bar claims of discrimination based on gender and sexual orientation.⁵⁶ The SJC's findings do not, however, eliminate future uses of the exemption to bar employment discrimination claims based on age, disability, gender (including gender identity and gender expression), sexual orientation, race, or national origin.⁵⁷ Because such claims already face high pleading standards and challenges of intersectionality, limiting the ministerial exception provides *some* redress for plaintiffs regularly marginalized in society and disempowered by the justice system.⁵⁸

The SJC was unwilling to expand the scope of people who are considered ministers under the exception based on an employee's responsibility to integrate their faith with their role, because an expansion would increase the number of plaintiff employees left vulnerable to discrimination.⁵⁹ Not only does the SJC seem wary of expanding the reach of the exception, but it is compelled, in deference to Supreme Court precedent, to apply a more narrow reading of "integrate religious faith" to the facts of the instant case.⁶⁰ If mere integration of faith into her teaching and scholarship makes

sources cited *supra* note 51 and accompanying text (distinguishing professor's curriculum determining minister exemption).

⁵⁶ See *DeWeese-Boyd*, 163 N.E.3d at 1003 ("She alleged in her complaint that the defendants unlawfully retaliated against her for her vocal opposition to Gordon's policies and practices regarding individuals who identify as lesbian, gay, bisexual, transgender, or queer (or questioning), and others (LGBTQ+ persons), by denying her application for promotion to full professor, despite the fact that the faculty senate unanimously recommended her for the promotion. Specifically, she alleged unlawful retaliation in violation of G. L. c. 151B, § 9; unlawful discrimination on the basis of her association with LGBTQ+ persons or on the basis of her gender in violation of G. L. c. 151B, § 9.")

⁵⁷ See sources cited *supra* note 54 and accompanying text (exemplifying application of narrow religious and minister exemptions).

⁵⁸ See sources cited *supra* note 53 and accompanying text (identifying the need to balance religious interests and employment interests).

⁵⁹ See *DeWeese-Boyd*, 487 N.E.3d at 1002 (addressing parameters of the ministerial exception regarding how to evaluate the responsibility to integrate faith).

The Supreme Court has not specifically addressed the significance of the responsibility to integrate religious faith into instruction and scholarship that would otherwise not be considered ministerial. If this integration responsibility is sufficient to render a teacher a minister within the meaning of the exception, the ministerial exception would be significantly expanded beyond those employees currently identified as ministerial by the Supreme Court. The number of employees playing key ministerial roles in religious institutions would be greatly increased.

Id.

⁶⁰ See *id.* at 1014 ("[I]ntegrating the Christian faith generally into teaching and writing about social work. Whether this more general religious reflection was meant to be included in the Supreme Court's statement about 'educating young people in their faith,' and is enough to render

DeWeese-Boyd a minister, regardless of the sectarian or religious nature of that teaching and scholarship, then the inherently integrative roles of teachers, mentors, coaches, and other pedagogical professions are essentially ministerial.⁶¹ By finding that DeWeese-Boyd's claims are not barred by merely integrating her faith and her employment responsibilities, the SJC applies the Supreme Court's functional analysis without creating a bright line rule that could easily be used in the future to perpetuate discrimination against already marginalized plaintiff employees.⁶²

While the SJC acknowledges the tension between Gordon's rights under the First Amendment and DeWeese-Boyd's employment discrimination claims, the opinion does not address the broader applications of this affirmative defense.⁶³ In addressing this tension, the SJC does, however, take an intersectional approach, recognizing the impact of these intersecting legal principles on DeWeese-Boyd—a professional, Christian, woman—who affirms the dignity and rights of her LGBTQ+ associates.⁶⁴ By

her a minister, is not directly answered by precedent.”); *see also Our Lady of Guadalupe*, 140 S. Ct. at 2064 (exemplifying minister exemption requirement); sources cited *supra* notes 50 & 51 and accompanying text (discussing minister exemptions requirement and considerations).

⁶¹ *See DeWeese-Boyd*, 163 N.E.3d at 1013 (“While it may be true that Gordon employs Christians, and ‘Christians have an undeniable call to minister to others,’ this line of argument appears to oversimplify the Supreme Court test, suggesting that all Christians teaching at all Christian schools and colleges are necessarily ministers.”) If the SJC expanded the exception in this way, in line with Gordon's arguments, the only employees in America who would not be considered ministers would be those explicitly barred from integrating their faith with their work, a dynamic further at odds with the First Amendment. *See id.* at 1017.

We recognize that some of the language employed in *Our Lady of Guadalupe* may be read more broadly, in a way that would include every educator at a religious institution. As Gordon has stated, the integrative function applies to all teachers at the college, whether they teach computer science, calculus, or comparative religion.

Id.; *see also Richardson v. Northwest Christian Univ.*, 242 F. Supp. 3d 1132, 1138-39 (D. Or. 2017).

If plaintiff was a minister, it is hard to see how any teacher at a religious school would fall outside the exception. Courts have properly rejected such a broad reading . . . , which would permit the ministerial exception to swallow the rule that religious employers must follow federal and state employment laws.

Id.

⁶² *See supra* notes 51, 55, 59, & 60, and accompanying text (highlighting court's reasoning regarding integration of faith and teachings).

⁶³ *See DeWeese-Boyd*, 163 N.E.3d at 1009 (addressing “high stakes” surrounding ministerial exception but declining to further comment on its necessity).

⁶⁴ *See id.* (“The potential for conflict between these fundamental legal principles is therefore obvious and of great concern, not only to the individual plaintiffs, but also for our civil society and religious institutions. While ‘the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission’ is an undoubtedly important First

acknowledging these divergent principles and interests, while limited by available precedent, the SJC lays out a subjective and fact dependent analysis that lower courts can use as a model for future decisions.⁶⁵ While the merits of DeWeese-Boyd's discrimination claims are not examined in the scope of this SJC opinion, the court's unwillingness to apply the ministerial exemption to a Christian liberal arts college professor will protect similarly situated professors from discrimination on the basis of age, disability, gender (including gender identity and gender expression), sexual orientation, race, or national origin.⁶⁶

DeWeese-Boyd v. Gordon wrestles with the tension between two fundamental American legal principles: civil law protection against discrimination and "our country's historic understanding of the separation of church and State set out in the First Amendment to the United States Constitution."⁶⁷ In our increasingly polarized society, where the historically white, male, able-bodied, heterosexual, and Christian majority's power is consistently challenged, courts are faced with claims, like the instant case, that stretch our understanding of religious freedom today.⁶⁸ In its opinion, the SJC effectively applies the Supreme Court's functional analysis as developed in *Hosanna-Tabor* and *Our Lady of Guadalupe*, holding that while Gordon College is a religious institution, DeWeese-Boyd is not a minister and her employment discrimination claims are, therefore, not barred by the ministerial exemption. The precedent established by *DeWeese-Boyd v. Gordon* leaves the ministerial exception available as an affirmative defense to employment discrimination, while not expanding the exception to bar discrimination claims by employees who are required to integrate their religious faith into their professional responsibilities. Although DeWeese-Boyd's intersectional discrimination claim is not addressed in this holding, the SJC's decision balances their clear concern for the communities left unprotected by the ministerial exception and deference to Supreme Court precedent. The Justice's ultimately take an intersectional approach by upholding civil law protections against discrimination for similarly situated plaintiff employees.

Amendment right, so, too, is "[t]he interest of society in the enforcement of employment discrimination statutes.")

⁶⁵ See *supra* note 60 and accompanying text (noting lack of precedent addressing if faith is generally integrated into academics at religious institutions).

⁶⁶ See *supra* notes 55 & 61 and accompanying text (explaining court's reasoning in declining to expand scope of ministerial exception).

⁶⁷ See *DeWeese-Boyd*, 163 N.E.3d at 1002 (noting crux of opinion).

⁶⁸ See *id.* at 1002 (introducing intersection and tension between civil law protection against discrimination and separation of church and State).

Margaret R. Austen

**EDUCATION LAW—IDEA ELIGIBILITY:
HINDSIGHT IS 20/20—LISA M. EX REL. J.M. V.
LEANDER INDEP. SCH. DIST., 924 F.3D 205 (5TH
CIR. 2019)**

The Individuals with Disabilities Education Act (“IDEA”) was passed by Congress “to ensure that all children with disabilities have available to them a free appropriate public education.”¹ The IDEA provides special education services to children who need them.² To receive these services the child must: (1) have a qualifying disability and (2) need special education services to thrive due to said disability.³ If it is determined that a child has a qualified disability and is in need of special education services, the school district must construct an individualized education program (“IEP”) outlining how these services will be delivered.⁴ A parent who is dissatisfied with a school district’s evaluation or IEP may request a due

¹ See 20 U.S.C. § 1400(d)(1)(2010) (stating purpose of IDEA). The legislative purposes of the IDEA are:

- (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
- (B) to ensure that the rights of children with disabilities and parents of such children are protected; and
- (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities.

Id.; see also Antonis Katsiyannis et al., *Reflections on the 25th Anniversary of the Individuals with Disabilities Education Act*, 22 REMEDIAL & SPECIAL EDUC., 324, 324-25 (2001) (providing statistics regarding students with disabilities prior to IDEA). Before the IDEA was created, more than 1.75 million students were deprived of educational services due to their disabilities. Katsiyannis, *supra* note 1, at 324.

² See Katsiyannis, *supra* note 1, at 324 (noting IDEA “ensures all children with disabilities have access to a free appropriate public education.”)

³ See Lisa M. *ex rel.* J.M. v. Leander Indep. Sch. Dist., 924 F.3d 205, 208 (5th Cir. 2019) (outlining two-pronged test used to determine special education eligibility); 20 U.S.C. § 1401(3) (defining the term “child with a disability”); 20 U.S.C. 1414(d)(2)(A) (requiring an individualized education program be in effect).

⁴ See 34 C.F.R. § 300.306(c)(1)(i) (2021) (stating “if a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child”); see also *Leander Indep. Sch. Dist.*, 924 F.3d at 209 (outlining specific IDEA evaluation procedures in J.M.’s case).

process hearing before an impartial hearing officer.⁵ Parties who wish to appeal the decision of the hearing officer may subsequently seek relief in the federal courts.⁶

District courts tasked with reviewing a hearing officer's decision will review the administrative record and reach an independent decision as to the child's IDEA eligibility.⁷ Circuit courts reviewing a district court's findings of fact apply a clear error standard of review, however.⁸ In applying this standard, a circuit court must determine whether it will consider events that occurred after the school district's initial determination ("hindsight review") or only the information available to the district at the time of its initial determination ("contemporaneous review").⁹ Due to a lack of statutory guidance, courts are currently split on the issue.¹⁰ In *Lisa M. ex rel. J.M. v. Leander Indep. Sch. Dist.*,¹¹ the Court of Appeals for the Fifth Circuit incorrectly utilized a contemporaneous framework of review, further solidifying a circuit split in this area of law.¹²

When J.M. was a second-grade student in the Leander Independent School District, he experienced challenges at school related to writing and classroom behavior.¹³ Later that year, J.M. was diagnosed with Attention Deficit Hyperactivity Disorder and Developmental Coordination Disorder.¹⁴ During the summer before J.M.'s fourth grade year, his parents requested the school evaluate him for special education services under the IDEA.¹⁵ The school district denied the parents' request for IDEA services, claiming that the services provided to J.M. via the Rehabilitation Act were

⁵ See 34 C.F.R. § 300.507(a) (2021) (describing process for filing due process complaint); 34 C.F.R. § 300.510(a) (2021) (explaining resolution process for due process hearing); see also *Leander Indep. Sch. Dist.*, 924 F.3d at 209 (outlining initial IDEA evaluation procedures).

⁶ See 34 C.F.R. § 300.516(a) (2021) (providing right to bring civil action in federal court); see also *Leander Indep. Sch. Dist.*, 924 F.3d at 209 (outlining secondary IDEA evaluation procedures).

⁷ See 20 U.S.C. § 1415(i)(2)(C) (listing requirements for district courts in evaluating civil action). The court "shall receive the records of the administrative proceedings" and "basing its decision on the preponderance of the evidence . . . grant such relief as the court determines is appropriate." *Id.*

⁸ See *Leander Indep. Sch. Dist.*, 924 F.3d at 213 (noting appellate court's standard of review).

⁹ See *id.* at 214 (discussing contemporaneous and hindsight frameworks).

¹⁰ See *id.* (noting circuit split).

¹¹ 924 F.3d 205 (5th Cir. 2019).

¹² See *id.* at 214 (establishing contemporaneous standard of review in challenges regarding special education qualifications). The contemporaneous standard of review assesses the needs of a child receiving IDEA services "at the time of the child's evaluation and not from the perspective of a later time with the benefit of hindsight." *Id.*

¹³ See *Leander Indep. Sch. Dist.*, 924 F.3d at 208 (explaining J.M.'s difficulties in school).

¹⁴ See *id.* at 208 (identifying J.M.'s medical conditions and diagnoses).

¹⁵ See *id.* (noting J.M.'s parents' request that he be evaluated under IDEA).

sufficient.¹⁶ One month after the denial of IDEA services, a private neuropsychologist diagnosed J.M. with a Specific Learning Disability with particular impairment in written expression.¹⁷

In October of J.M.'s fourth-grade year, in order to determine if J.M. is eligible for special education services under the IDEA, the district scheduled a review of existing evaluation data ("REED") to establish whether J.M. qualified for a full and individual evaluation.¹⁸ The school district determined that J.M. qualified for a full and individual evaluation ("FIE"), and he subsequently received a drafted IEP, subject to change upon parental input.¹⁹ After reviewing J.M.'s drafted IEP, his mother requested an additional ten minutes of specialized writing instruction per day; however, ten days after this request, the district informed J.M.'s parents that they no longer believed J.M. was eligible for special education.²⁰ J.M.'s parents accused the school district administrators of pressuring teachers to down-play their concerns during a secret meeting held sometime between January 25th and February 23rd, and requested a due process hearing before a Special Education Hearing Officer (SEHO) to re-establish J.M.'s eligibility for special education.²¹ The SEHO ultimately found that

¹⁶ See *id.* (articulating school district's reasoning for denying services to J.M.); see also *Fry ex rel. E.F. v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 747 (2017) (noting differences between IDEA and Rehabilitation Act). While the "IDEA guarantees individually tailored education services . . . [the Rehabilitation Act] promise[s] nondiscriminatory access to public institutions" *Napoleon Cmty. Sch.*, 137 S. Ct. at 747. Despite the statutory differences between the IDEA and the Rehabilitation Act, there is some overlap in coverage. *Napoleon Cmty. Sch.*, 137 S. Ct. at 756; 29 U.S.C. § 794 (stating that "no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in . . . any program or activity receiving Federal financial assistance.")

¹⁷ See *Leander Indep. Sch. Dist.*, 924 F.3d at 208 (noting J.M.'s SLD diagnosis). Upon J.M.'s SLD diagnosis and recommendation by his neuropsychologist, the school agreed to evaluate him pursuant to the IDEA. *Id.*

¹⁸ See *id.* at 208-09 (describing J.M.'s initial evaluation and outlining IDEA evaluation procedures); see also 20 U.S.C. § 1414(a)(1)(C), (c)(1) (explaining process used to determine eligibility for special education services under IDEA).

¹⁹ See *Leander Indep. Sch. Dist.*, 924 F.3d at 209-10 (explaining school district's confirmation of J.M.'s positive qualification for special education). The school district held another REED meeting in November where teachers expressed growing concern for J.M.'s academic success and J.M.'s parents described his increased anxiety and distress due to his experiences at school. *Id.* at 210. The school district also updated the October REED to include the new evidence presented by J.M.'s teachers and parents in favor of his qualification for special education services. *Id.*; see also 20 U.S.C. § 1414(a)(1)(C), (c)(1) (describing process required to determine IDEA eligibility); 20 U.S.C. § 1414 (d)(1)(A)(i) (defining IEP). The IDEA defines an IEP as "a written statement for each child with a disability that is developed, reviewed, and revised" to ensure that their academic growth and development is promoted within that program. 20 U.S.C. § 1414 (d)(1)(A)(i).

²⁰ See *Leander Indep. Sch. Dist.*, 924 F.3d at 211 (noting school district's reversal of opinion).

²¹ See *id.* at 211-12 (outlining events leading up to legal dispute).

J.M. was eligible for special education services and ordered the District to revise the existing IEP as originally planned.²²

In accordance with IDEA procedures, J.M.'s parents filed a complaint in federal district court to receive attorney fees and the district answered with a counterclaim challenging the SEHO's conclusions as to J.M.'s eligibility.²³ The district court granted judgment on the administrative record in favor of J.M.'s parents and the school district appealed, arguing against J.M.'s need for special education.²⁴ Ultimately, the Fifth Circuit held that the district court did not err in holding that J.M. met eligibility criteria for special education.²⁵

In 1975, Congress passed the IDEA to combat the discrimination faced by children with disabilities in the American public school system.²⁶ Under the IDEA, school districts are responsible for conducting an FIE before a student is granted special education services.²⁷ In order to establish IDEA eligibility under an FIE, it must be determined: "(1) whether the child has a qualifying disability, and (2) whether, by reason of that disability, that child needs IDEA services."²⁸ Although it is the school district's responsibility to conduct the FIE and a REED, the student's teachers, medical professionals, and parents present evidence of the student's academic success or failure so the school can make an informed decision.²⁹ After the FIE and REED are completed, a team of qualified professionals ("committee") will determine whether the student is granted or denied special educa-

²² See *id.* at 212 (explaining SEHO's decision). The SEHO "concluded that '[t]he evidence establishes a reasonable presumption that District personnel at some level intervened with [J.M.'s] teachers . . . either directing or training them to a finding of no eligibility . . .'" *Id.*

²³ See *id.* (describing complaint and counterclaim).

²⁴ See *id.* (noting district court's ruling and subsequent appeal).

²⁵ See *Leander Indep. Sch. Dist.*, 924 F.3d at 207-08 (stating the court's holding).

²⁶ See 20 U.S.C. § 1400(d)(1)(A) (articulating congressional intent of IDEA). The purpose of IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education." *Id.*; see also 34 C.F.R. § 300.306(c)(2) (2021) (establishing statutory right to free and appropriate education).

²⁷ See 20 U.S.C. § 1414(a)(1)(A)-(C) (explaining relationship between IDEA and FIE). A FIE is conducted by the school district to determine if a student has a qualifying disability under the IDEA and what the specific educational needs of that student are. *Id.* at (a)(1)(C).

²⁸ See 20 U.S.C. §§ 1401(3), 1414(d)(2)(A) (articulating two-pronged inquiry to determine IDEA eligibility). In order to fully and adequately assess a student's educational needs under the IDEA, school districts conduct a REED which includes "'evaluations and information provided by the parents . . . current classroom-based, local, or State assessments, and classroom-based observations [and] observations by teachers and related services providers.'" 20 U.S.C. § 1414(c)(1).

²⁹ See 20 U.S.C. § 1414(a)(1) (stating "a State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation"); 20 U.S.C. § 1414(c)(1) (noting data to be reviewed in evaluations).

tion services under the IDEA.³⁰ If this committee finds the student eligible for special education services, an IEP will be created to promote the student's academic success.³¹ If a parent is dissatisfied with the services their child receives, they may file a due process complaint and request an informal meeting with the school district to discuss their grievances; if the parents' dissatisfaction continues, they may pursue relief in an administrative due process hearing held before an impartial Special Education Hearing Officer (SEHO).³²

Once an IDEA case makes its way to federal district court, the review is "virtually *de novo*," meaning that the court gives due weight to the SEHO's determinations provided the hearing officer came to an independent conclusion based on the preponderance of the evidence.³³ The district court will grant summary judgment in favor of the school when there has been compliance with the procedures prescribed under the IDEA.³⁴ If the district court's decision is appealed, the appellate court will review the de-

³⁰ See 20 U.S.C. § 1414(b)(4) (noting determination of IDEA eligibility made by team of qualified professionals); see also 19 TEX. ADMIN. CODE § 89.1040(b) (2021) (clarifying specific eligibility procedures under IDEA in Texas). Texas refers to this "team of qualified professionals" as the admission, review, and dismissal (ARD) committee. 19 TEX. ADMIN. CODE § 89.1040(b) (2021).

³¹ See 34 C.F.R. § 300.306(c)(2) (2021) (stating "if a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child . . ."); 20 U.S.C. § 1414(d)(2)(A) (outlining general requirements for IEPs); see also 20 U.S.C.S. § 1412(a)(1) (stating "a free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21 . . .") The IDEA utilizes IEPs as the vehicle to ensure that students with disabilities receive an education that is appropriate to their specific needs. 20 U.S.C.S. § 1412(a)(1).

³² See 34 C.F.R. § 300.507(a) (2021) (outlining process for filing due process complaint relating to "evaluation or educational placement of a child with a disability"); 34 C.F.R. §§ 300.510-12 (2021) (establishing process of and framework for review of IDEA complaints); 20 U.S.C. § 1415(i)(3)(B) (stating a court may award reasonable attorneys' fees for proceedings brought under § 1415). If the SEHO finds in favor of the parents, they are then permitted to file a complaint in federal district court to recover attorney's fees. 20 U.S.C. § 1415(i)(3)(B)(i)(II).

³³ See *Teague Indep. Sch. Dist. v. Mr. L ex rel. Todd L.*, 999 F.2d 127, 130-31 (5th Cir. 1993) (establishing *de novo* review of IDEA cases in Fifth Circuit); see also *Dallas Indep. Sch. Dist. v. Woody ex rel. K.W.*, 865 F.3d 303, 308-09 (5th Cir. 2017) (affirming *de novo* judicial review of IDEA cases in Fifth Circuit); 20 U.S.C. § 1415(i)(2)(C) (explaining procedural process of IDEA cases).

³⁴ See *Seth B. ex rel. Donald B. v. Orleans Par. Sch. Bd.*, 810 F.3d 961, 967 (5th Cir. 2016) (explaining standard for summary judgment in IDEA cases). ". . . in IDEA proceedings, summary judgment 'is not directed to discerning whether there are disputed issues of fact, but rather, whether the administrative record, together with any additional evidence, establishes that there has been compliance with IDEA's processes and that the child's educational needs have been appropriately addressed.'" *Id.* (quoting *Wall ex rel. Wall v. Mattituck-Cutchogue Sch. Dist.*, 945 F. Supp. 501, 508 (E.D.N.Y. 1996)).

cision as a mixed question of law and fact.³⁵ Judicial review of IDEA complaints is unique and, because Congress generally defers to state and local school officials, the role of the judiciary is purposefully limited, leading to various conflicting interpretations.³⁶ Due to the legislative nature of the IDEA and the lack of clearly defined terms, circuit courts have developed two different standards of review for predominant questions of fact when assessing a child's eligibility for special education services under the IDEA.³⁷

Courts are split as to whether they should assess IDEA eligibility under a hindsight standard or under a contemporaneous standard.³⁸ Under the contemporaneous standard of review, courts only review the facts that were available to the committee at the time of the original eligibility decision, adhering to the *de novo* review used by the district courts.³⁹ Circuits

³⁵ See *R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 808 (5th Cir. 2012) (explaining appellate standard of review for IDEA cases). “We review the district court’s findings of underlying fact . . . for clear error. Under a clear error standard, we will not reverse the district court unless we are ‘left with a definite and firm conviction that a mistake has been committed.’” *Id.* (quoting *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir. 2009)); see also *Orleans Par. Sch. Bd.*, 810 F.3d at 967 (articulating standard of review for appeal of district court’s determination in IDEA cases). If the appellate courts find that the question of fact is predominant to the question of law, then the case must be reviewed with clear error deference. *Orleans Par. Sch. Bd.*, 810 F.3d at 967. However, if the court finds that the question of law is predominant to the question of fact, the court reviews the case *de novo*. *Orleans Par. Sch. Bd.*, 810 F.3d at 967.

³⁶ See *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003) (quoting *Flour Bluff Indep. Sch. Dist. v. Lesa T. ex rel. Katherine M.*, 91 F.3d 689, 693 (5th Cir. 1996)) (explaining tension between judiciary and legislature when establishing IDEA procedures); see also 34 C.F.R. § 300.8(a)(2)(i) (2021) (requiring need for special education to qualify for IDEA).

³⁷ See Dennis Fan, *No IDEA What the Future Holds: The Retrospective Evidence Dilemma* 114 COLUM. L. REV. 1503, 1522-32 (2014) (articulating differences between contemporaneous and hindsight review); Maggie Wittlin, *Hindsight Evidence*, 116 COLUM. L. REV. 1323, 1386-88 (2016) (discussing different standards of review held by circuits across the country); see also H.R. REP. NO. 108-77 at 84 (2003) (discussing need for IDEA eligibility reform).

³⁸ See Fan, *supra* note 37, at 1522-32 (highlighting current circuit split regarding IDEA eligibility determinations); Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 83-84 (2009) (detailing lack of guidelines and circuit splits regarding IDEA eligibility).

³⁹ See *Hudson ex rel. L.J. v. Pittsburg Unified Sch. Dist.*, 835 F.3d 1168, 1175 (9th Cir. 2016) (citing *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999)) (refusing to consider hindsight evidence). “The appropriateness of a student’s eligibility should be assessed in terms of its appropriateness at the time of the child’s evaluation and not from the perspective of a later time with the benefit of hindsight.” *Id.*; *R.E. ex rel. J.E. v. New York City Dep’t of Educ.*, 694 F.3d 167, 187 (2d Cir. 2012) (refusing to consider hindsight evidence). “In determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision.” *New York City Dep’t of Educ.*, 694 F.3d at 187; *D.L. ex rel. J.L. v. Clear Creek Indep. Sch. Dist.*, 695 F. App’x 733, 738 (5th Cir. 2017) (establishing contemporaneous review for IDEA qualification); see also Fan, *supra* note 37, at 1516 (acknowledging some courts “enforce an intermediate

using the hindsight standard of review allow the admission of additional evidence to make an independent and current assessment of the child's need for special education services.⁴⁰

In *Lisa M. ex rel. J.M. v. Leander Indep. Sch. Dist.*, the court utilized a contemporaneous standard of review when evaluating J.M.'s eligibility for IDEA special education services.⁴¹ In its reasoning, the Fifth Circuit relied on precedent it established in *D.L. ex rel. J.L. v. Clear Creek Indep. Sch. Dist.*, where it ruled that it would “not judge a school district's determination in hindsight,” but rather “consider whether there was a present need for special education services.”⁴² The court acknowledged that, while the judiciary unavoidably views in retrospect, IDEA eligibility must be determined based on the information available to the ARD committee at the time of its decision because:

An erroneous conclusion that a student is ineligible for special education does not somehow become acceptable because a student subsequently succeeds. Nor does a proper finding that a student is ineligible become erroneous because the student later struggles. Subsequent events do not determine ex ante reasonableness in the eligibility context.⁴³

standard of review between substantial deference and de novo.”); Wittlin, *supra* note 37, at 1386-88 (identifying circuits utilizing contemporaneous decision review).

⁴⁰ See *Simchick ex rel. M.S. v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009) (noting “in some situations, evidence of *actual progress* may be relevant to a determination of whether a challenged IEP was reasonably calculated to confer some education benefit.”); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 590 (5th Cir. 2009) (explaining “[p]assing grades and advancement from year to year are factors that indicate a child is receiving a meaningful educational benefit.”); see also Fan, *supra* note 37, at 1533-40 (detailing varying levels of hindsight evidence allowed in circuit courts); Wittlin, *supra* note 37, at 1386-88 (identifying circuit stances on hindsight evidence).

⁴¹ See *Lisa M. ex rel. J.M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 214 (5th Cir. 2019) (noting court must “assess eligibility with the information available to the ARD committee at the time of its decision.”)

⁴² See *Clear Creek Indep. Sch. Dist.*, 695 F. App'x at 738 (establishing contemporaneous review for IDEA qualification); *Leander Indep. Sch. Dist.*, 924 F.3d at 215 (assessing J.M.'s IDEA qualification under contemporaneous review).

⁴³ *Leander Indep. Sch. Dist.*, 924 F.3d at 214 (explaining rationale behind exclusion of hindsight evidence). The contemporaneous standard approach decreases the court's role in establishing a student's eligibility for special education services under the IDEA and gives great deference to the ARD committee's decision. *Id.* at 218.

Under the contemporaneous standard of review, the court held that J.M. was eligible for services under the IDEA based upon the evidence presented to the ARD committee.⁴⁴

By applying a contemporaneous standard of review for IEP eligibility, the court in *Leander Indep. Sch. Dist.* adopted precedent that further complicated subsequent judicial review of IDEA challenges.⁴⁵ The contemporaneous standard of review prevents appellate courts from hearing new or additional evidence not originally available to the ARD Committee, adversely affecting a student's ability to qualify for services under the IDEA.⁴⁶ Preventing the admission of new evidence increases the likelihood of an erroneous special education eligibility determination because a significant amount of time elapses between the committee's hearing and the appellate court's review.⁴⁷ The severity of a student's disability and individualized educational needs can progress over time, and an appellate court is unable to render an accurate determination of a student's IDEA eligibility without current and up-to-date evidence.⁴⁸

⁴⁴ See *id.* at 217 (holding J.M. met eligibility criteria for special education provided by IDEA). The court based its decision on the evidence presented to the ARD committee which included documentation of J.M.'s difficulty in the general education environment, teacher observations, clinical observations, progress reports, parent observation, and a student self-evaluation. *Id.* at 216-17.

⁴⁵ See *Clear Creek Indep. Sch. Dist.*, 695 F. App'x at 738 (applying contemporaneous review of IDEA eligibility); *Leander Indep. Sch. Dist.*, 924 F.3d at 214 (utilizing contemporaneous review of IDEA eligibility set by *Clear Creek*); see also Weber, *supra* note 38, at 83-84 (detailing lack of guidelines and circuit splits regarding IDEA eligibility).

⁴⁶ See *Clear Creek Indep. Sch. Dist.*, 695 F. App'x at 737-38 (detailing court's process when reviewing IDEA eligibility under contemporaneous standard); *Leander Indep. Sch. Dist.*, 924 F.3d at 215 (declaring contemporaneous review prevents "Monday morning quarterbacking"); see also Hudson *ex rel.* L.J. v. Pittsburg Unified Sch. Dist., 850 F.3d 996, 1004 (9th Cir. 2017) (applying contemporaneous review). IDEA eligibility is decided by the ARD committee based on the student's need for special education services at a particular moment in time. 19 TEX. ADMIN. CODE § 89.1040(b) (2021).

⁴⁷ See *Leander Indep. Sch. Dist.*, 924 F.3d at 207-13 (showing three years and nine months between request for services and final decision); *Clear Creek Indep. Sch. Dist.*, 695 F. App'x at 735-36 (describing fifty months passed between request for services and final court decision); *Simchick ex rel. M.S. v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 320-23 (4th Cir. 2009) (describing forty months passed between request for services and final decision); see also Wittlin, *supra* note 37, at 1393 (explaining how using hindsight evidence increases accuracy of court adjudication).

⁴⁸ See 20 U.S.C. § 1414 (d)(4)(Aa)(i) (establishing that IEP appropriateness must be reviewed annually); 20 U.S.C. § 1414 (d)(5)(A)(i) (asserting students' IDEA eligibility must be re-evaluated every three years); Wittlin, *supra* note 37, at 1387-88 (articulating increased judicial accuracy when utilizing hindsight standard due to inclusion of most recent evidence). Once a school district deems a student eligible for IDEA services, the district reviews the student's IEP on an annual basis to ensure that the student's plan is still appropriate. 20 U.S.C. § 1414 (d)(4)(A)(i). In addition, the district reviews the student's IEP at least once every three years. 20 U.S.C. § 1414 (d)(5)(A)(i). Conversely, when a school district wrongly denies a student IDEA services, the student is expected to succeed academically in the general education setting while

It should be noted that most courts, including the Fifth Circuit, evaluate other aspects of the IDEA, such as IEP appropriateness and implementation, with the benefit of hindsight evidence.⁴⁹ The court in *Leander Indep. Sch. Dist.* refused to consider hindsight evidence in IDEA eligibility cases, explaining that “[a]n erroneous conclusion that a student is ineligible for special education does not somehow become acceptable because a student subsequently succeeds; nor does a proper finding that a student is ineligible become erroneous because the student later struggles.”⁵⁰ By this reasoning, an erroneous committee decision could be affirmed by the court, leaving a child to suffer.⁵¹

When a student is denied IDEA services based on inadequate or incomplete evidence provided to the committee, the student is denied their statutory right to a free appropriate public education until this mistake is

they wait for their case to reach the appellate level, because the district courts are not permitted to review evidence of eligibility. *Leander Indep. Sch. Dist.*, 924 F.3d at 212.

⁴⁹ See *Houston Indep. Sch. Dist. v. Juan P. ex rel. V.P.*, 582 F.3d 576, 588 (5th Cir. 2009) (categorizing certain hindsight evidence as “critical factor” when determining whether student received free appropriate public education); *Fairfax Cnty. Sch. Bd.*, 553 F.3d at 326-27 (concluding hindsight evidence of student progress relevant in determining IEP appropriateness); see also Fan, *supra* note 37, at 1522-39 (describing various circuit positions regarding hindsight evidence in IDEA cases). The Second, Seventh, Ninth, and Eleventh Circuits exclude all retrospective evidence in all IDEA cases involving a student’s denial of a free appropriate public education. Fan, *supra* note 37, at 1526. The Third, Fourth, Fifth, and Tenth Circuits will, however, allow hindsight evidence in varying circumstances and degrees. Fan, *supra* note 37, at 1533. The Third Circuit is the most liberal in their approach, allowing hindsight evidence to be considered in IEP appropriateness when it is helpful and relevant to the issue being adjudicated. Fan, *supra* note 37, at 1534-35. Grounding its liberal approach in the statutory purpose of the IDEA, the Third Circuit has intentionally set precedent with broad language, resulting in more equitable appellate decisions. Fan, *supra* note 37, at 1534-35.

⁵⁰ See *Leander Indep. Sch. Dist.*, 924 F.3d at 214 (articulating concerns regarding hindsight evidence when determining IDEA eligibility); *Clear Creek Indep. Sch. Dist.*, 695 F. App’x at 738 (stating court need only determine if student had “a present need for special education services”); see also Fan, *supra* note 37, at 1518-19 (explaining consequences of judiciary’s reluctance to overturn decisions made in due process hearings). The judiciary is well aware of the limitation on its power regarding IEP appropriateness review. Fan, *supra* note 37, at 1516-17. This limitation, although well-intentioned, hinders student and educator success because it creates challenges for both parties when the IEP is not applied and implemented as intended. Fan, *supra* note 37, at 1520-21. By giving unchecked deference to evidence presented during the due process hearing, it is difficult for the court to find in favor of the complaining party, thereby forcing the school district, the student, and the parents to start the entire process over again after being tied up in the legal system for what is often years. Fan, *supra* note 37, at 1521.

⁵¹ See Fan, *supra* note 37, at 1513 (inferring inadequate IEP constitutes denial of free appropriate public education); Weber, *supra* note 38, at 152 (proposing to look at issues once child is IDEA eligible, not in IDEA eligibility itself). Logically, if a student who qualifies for and receives IDEA services can be denied a free appropriate public education due to an inadequate IEP, a student who should have qualified for and never received IDEA services can also be denied a free appropriate public education. Fan, *supra* note 37, at 1531 n.163.

corrected.⁵² The school district also wastes valuable resources due to increased staffing and funding needed to support IEP students until the mistake is corrected by either the SEHO or judiciary.⁵³ When the court fails to hear additional evidence regarding a student's IDEA eligibility, the likelihood of correcting an inappropriate ruling by the committee or SEHO significantly decreases.⁵⁴

The court in *Leander Indep. Sch. Dist.* further entrenched the circuit split that exists regarding appellate review of IDEA eligibility by adopting a contemporaneous standard for reviewing committee determinations. When a student's IDEA eligibility is incorrectly decided, school districts waste valuable resources and students are denied their statutory right to a free appropriate public education. The Fifth Circuit in this case should not have established precedent that prohibits the admission of hindsight evidence that could help ensure IDEA eligibility findings are accurate and protect a student's right to receive a free appropriate public education.

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⁵² See 7 C.F.R. § 15b.22 (establishing statutory right to free appropriate public education); see also 20 U.S.C. § 1414 (establishing evaluation procedures under IDEA). The legislative purpose of the IDEA was to provide every child with a FAPE. 7 C.F.R. § 15b.22; 20 U.S.C. § 1414. The denial of a free appropriate public education is a violation of a child's inherent right to education, however, without the ability to review relevant hindsight evidence, courts are bound, more often than not, to deny a student petitioner this right because the evidence is either outdated, incomplete, or inaccurate. Fan, *supra* note 37, at 1546 (explaining incomplete information promotes needless litigation); Wittlin, *supra* note 37, at 1393 (discussing accuracy of hindsight evidence in litigation); Weber, *supra* note 38 at 152 (proposing reforming caselaw on eligibility for IDEA).

⁵³ See H.R. REP. NO. 108-77 at 84 (2003) (stating “[o]veridentification of children as disabled and placing them in special education where they do not belong hinders the academic development of these students . . . [and] takes valuable resources away from students who truly are disabled.” *Id.* Additionally, it is important to recognize that students who are wrongfully deemed eligible suffer academically in a way that is comparable to those who are wrongfully denied eligibility. *Id.*

⁵⁴ See Wittlin, *supra* note 37, at 1393 (explaining increased accuracy and consistency of decisions made by courts decisions that allow hindsight evidence).