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ABOUT THE SEVENTH CIRCUIT REVIEW

Purpose

The SEVENTH CIRCUIT REVIEW is an online journal dedicated to the analysis of recent opinions published by the United States Court of Appeals for the Seventh Circuit. The SEVENTH CIRCUIT REVIEW seeks to keep the legal community abreast of developments and trends within the Seventh Circuit and their impact on contemporary jurisprudence. The articles appearing within the SEVENTH CIRCUIT REVIEW are written and edited by Chicago-Kent College of Law students enrolled in the SEVENTH CIRCUIT REVIEW Honors Seminar.

The SEVENTH CIRCUIT REVIEW Honors Seminar

In this seminar, students author, edit, and publish the SEVENTH CIRCUIT REVIEW. The REVIEW is entirely student written and edited. Students identify cases recently decided by the Seventh Circuit to be included in the REVIEW, prepare initial drafts of case comments or case notes based on in-depth analysis of the identified cases and background research, edit these drafts, prepare final, publishable articles, integrate the individual articles into the online journal, and “defend” their case analysis at a semester-end roundtable. Each seminar student is an editor of the REVIEW and responsible for extensive editing of other articles. Substantial assistance is provided by the seminar teaching assistant, who acts as the executive editor.
The areas of case law that will be covered in each journal issue will vary, depending on those areas of law represented in the court’s recently published opinions, and may include:

- Americans with Disabilities Act
- antitrust
- bankruptcy
- civil procedure
- civil rights
- constitutional law
- copyright
- corporations
- criminal law and procedure
- environmental
- ERISA
- employment law
- evidence
- immigration
- insurance
- products liability
- public welfare
- securities

This is an honors seminar. To enroll, students must meet one of the following criteria: (1) cumulative GPA in previous legal writing courses of 3.5 and class rank at the time of registration within top 50% of class, (2) recommendation of Legal Writing 1 and 2 professor and/or Legal Writing 4 professor, (3) Law Review membership, (4) Moot Court Honor Society membership, or (5) approval of the course instructor.
PREFACE

I had the honor of serving as the Executive Editor of the SEVENTH CIRCUIT REVIEW during the 2017–2018 academic year. The SEVENTH CIRCUIT REVIEW is an online journal dedicated to the analysis of recent opinions published by the U.S. Court of Appeals for the Seventh Circuit. The SEVENTH CIRCUIT REVIEW seeks to keep the legal community abreast of developments and trends within the Seventh Circuit and their impact on contemporary jurisprudence. The articles appearing within the SEVENTH CIRCUIT REVIEW are written and edited by Chicago-Kent students enrolled in the SEVENTH CIRCUIT REVIEW Honors Seminar.

The SEVENTH CIRCUIT REVIEW Honors Seminar enables students to engage the legal process by actively critiquing recent and pertinent legal problems arising in the Seventh Circuit. This seminar is unique for this reason—students take an active role in engaging with the opinions of the Seventh Circuit in real time. Nowhere else in law school will you encounter such an opportunity. The articles appearing in this issue are as diverse as their authors. I learned a great deal working with these authors on a variety of topics, including transgender rights, the Second Amendment, Section 1983 prison claims, labor law, a class action suit regarding the Subway footlong sandwich being one inch too short, and more. Each author’s hard work and willingness to collaborate produced not only publishable articles, but also a legal reference for those who wish to learn the current state of Seventh Circuit law.

It was a privilege to work with the authors at every stage of the writing process, and I want to take this opportunity to thank them for their dedication. Their work has enabled this publication to continuously provide insightful and engaging discussions about the Seventh Circuit to the legal community. With a background in academics and as a former writing instructor, I found great joy in working with the seminar students on their publications. This
experience reminded me of the joy of the academic pursuit, and the joys of helping students in formulating ideas and polishing their writing. A special thank you to each of them for enabling me the chance to play academic and editor one more time before entering the working world.

And, finally, I want to personally thank Professor Morris for making my experience a memorable one. The continued success of this publication is all due to Professor Morris’s dedication and hard work. He continues to push his students, and his teaching assistant, to understand the complexities and nuances of the law—something not normally taught in law school. His classroom is interactive, and there is never a dull moment as he drills students, and his teaching assistant, with questions about the appeals process and legal formalities. I learned a great deal from working with Professor Morris during my time as Executive Editor, and I’m sure every seminar student would say the same.

Samuel Dixon will serve as the Executive Editor for the 2018–2019 academic year. Sam is a Senior Associate for the CHICAGO-KENT LAW REVIEW and President of the National Lawyers Guild Chicago-Kent student chapter. I had the great pleasure of working with Sam throughout my time in law school, as a colleague and student leader. I played an active role in selecting Sam for this position, and I know that he will ensure the continued success of the SEVENTH CIRCUIT REVIEW in the next year.

Very respectfully,

Katherine LaRosa
Executive Editor, SEVENTH CIRCUIT REVIEW
CREDITING THE INCREDIBLE: HOW THE SEVENTH CIRCUIT USES PROCEDURE TO MASK ITS IMPROPER PERFUNCTORY GRANT OF DEFERENCE TO CHICAGO’S LAW ENFORCEMENT OFFICERS

AVA B. GEHRINGER*


INTRODUCTION

On December 7, 2015, in the wake of the fatal shooting of Laquan McDonald by Chicago Police Officer Jason Van Dyke, the United States Department of Justice (DOJ) and the United States Attorney’s Office for the Northern District of Illinois jointly initiated an investigation into the City of Chicago’s Police Department (CPD) and its in-house accountability agencies, the Independent Police Review Authority (IPRA) and the Bureau of Internal Affairs (BIA). The DOJ then issued its Investigation Report, in which it concluded that it had found reasonable cause to believe that the CPD routinely engages in patterns or practices of using force in violation of the Fourth Amendment of the United States Constitution.¹ The DOJ


determined that those unlawful patterns or practices were the result of systemic deficiencies in training and accountability. Specifically, the DOJ found that IPRA and the BIA fail to conduct meaningful investigations into instances of police misconduct, thereby allowing, and implicitly encouraging, the continuation of those practices.\textsuperscript{2} Nowhere was this problem more prevalent than in predominantly black and Latino communities.\textsuperscript{3}

The DOJ’s investigation delved into racial, ethnic, and other disparities in the CPD’s force and accountability practices, and found that community trust has been broken by systems that have allowed CPD officers who violate the law to escape accountability.\textsuperscript{4} The DOJ also determined that the CPD’s accountability systems were broadly ineffective at deterring and detecting officer misconduct, and at holding officers accountable if and when they violate the law or CPD policy.\textsuperscript{5} Further, because attempts by investigators to hold officers accountable for misconduct have been frustrated by the “code of silence”\textsuperscript{6} and the “pervasive cover-up culture”\textsuperscript{7} among CPD officers, the potential for inappropriate coordination of testimony and risk of collusion are effectively built into the system.\textsuperscript{8} Thus, IPRA and the BIA accept the CPD’s culture and well-recognized code of silence as “immutable fact[s] rather than []thing[s] to root out.”\textsuperscript{9}

Though the DOJ Report focused primarily on the lack of accountability inherent in the agencies created to review instances of

\begin{itemize}
\item \textsuperscript{2} Id. at 145.
\item \textsuperscript{3} Id. at 144. In Chicago, black and Latino citizens account for approximately sixty-one-percent of the city’s population. Id. at 144.
\item \textsuperscript{4} Id.
\item \textsuperscript{5} In fact, during the five years preceding the DOJ’s Investigation, the City received over 30,000 complaints of police misconduct, yet fewer than two percent were sustained by IPRA or the BIA. Id. at 7.
\item \textsuperscript{6} The City, police officers, leadership within the CPD, its police officer union, and even the Mayor openly acknowledge that a code of silence among officers exists. Id. at 75.
\item \textsuperscript{7} Id. at 47.
\item \textsuperscript{8} Id. at 8.
\item \textsuperscript{9} Id. at 47.
\end{itemize}
officer misconduct, that institutional deficiency is only part of the problem. Between 1995 and 2015, federal prosecutors nationwide declined to levy charges against U.S. law enforcement officers alleged to have committed civil rights violations in 12,703 of 13,233 referrals made by the FBI and other agencies.\textsuperscript{10} That 96\% rejection rate, when contrasted with a 23\% rejection rate for all other allegations of criminal activity in the same period,\textsuperscript{11} illustrates the proverbial shield law enforcement officials enjoy against accountability in our justice system.\textsuperscript{12}

As a result of those institutional deficiencies, the burden of deterring police misconduct has effectively fallen on the victims themselves. Not only is this result fundamentally unfair to those whose rights have been violated by law enforcement, the primary tools at those victims’ disposal\textsuperscript{13} have yet to translate into an effective system for detecting and deterring police misconduct.\textsuperscript{14} Civil plaintiffs who bring charges against law enforcement officers are hampered by evidentiary and procedural difficulties, including but not limited to the

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\textsuperscript{11} Id.

\textsuperscript{12} Craig Futterman, founder of the Civil Rights and Police Accountability Project at the University of Chicago opined that “[t]his is an area where the feds need to be bolder and put greater resources in . . . [i]ndeed the failure to aggressively bring those cases has allowed too many abusive officers to believe that they can operate without fear of punishment.” Brian Bowling & Andrew Conte, supra note 10.

\textsuperscript{13} 42 U.S.C. §1983 and state law claims brought pursuant to that statute’s purpose.

\textsuperscript{14} See Elizabeth M. Schneider, \textit{The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases}, 158 U. PA. L. REV. 517, 548 (citing longitudinal studies conducted by the Federal Judicial Center on summary judgment that show a particularly high rate of termination by summary judgment in civil rights and employment discrimination cases (70\% and 73\%, respectively)—the highest of any type of federal civil case—and opining that these trends raise important questions as to whether meritorious cases are being decided and dismissed on incomplete factual records in the federal courts).
established “code of silence” among police officers and exceptionally high procedural burdens shouldered by civil rights plaintiffs in the pre-trial stages of litigation. These two factors combined often turn § 1983 suits into credibility contests, with one party enjoying great deference based on the authority vested in an officer displaying a star over his or her heart. Yet while the improper, perfunctory grant of deference to police officers has been mistakenly cited as an issue that plagues citizens serving on the jury, that cognitive bias has shown to often affect judges at the federal level.

Judges have traditionally followed three basic restrictive rules on the motion for summary judgment: the evidence is to be viewed in the light most favorable to the nonmovant, the credibility of witnesses is not to be evaluated, and contradictory evidence is not to be weighed.” Yet federal court judges have read the Supreme Court's 1986 “Summary Judgment Trilogy,” as a directive to be more receptive to summary judgment in ways that are more striking than anything actually articulated in those three cases. As a result, judges have stepped into the role of the jury, effectively removing an essential element of our adversarial system through procedural mechanisms. Not only has this practice resulted in judgments against plaintiffs in an unprecedented number of civil rights cases at the summary judgment

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15 Id. at 520 (noting that it is widely recognized that civil rights plaintiffs face enormous hurdles in federal court and, as a result, there appears to be a disparate impact on employment discrimination and civil rights cases).
16 Schneider, supra note 14, at 564-66 (listing cognitive bias, lack of judicial humility, incapacity to see issues outside their own perspective, and deep skepticism of civil rights cases as factors that help explain the results of the 2009 Clermont & Schwab study, which revealed that jury trials result in considerably more favorable verdicts for civil rights plaintiffs than bench trials).
19 Miller, supra note 17, at 1071.
stage,\textsuperscript{20} it also runs afoul of the Supreme Court’s ruling in \textit{Tolan v. Cotton} just three years ago.\textsuperscript{21}  

In \textit{Tolan}, the Court chastised the United States Court of Appeals for the Fifth Circuit for failing to “adhere to the axiom that in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.”\textsuperscript{22} The Court’s harsh criticism of the Fifth Circuit in \textit{Tolan} should have served as a much needed reminder to federal judges across the nation as it explicitly stated that “though [the Court] is not equipped to correct every perceived error coming from the lower federal courts,” it “felt compelled to intervene in Tolan’s case” because “the opinion below reflect[ed] a clear misapprehension of summary judgment standards in light of [its] precedents.”\textsuperscript{23}  

Yet the Fifth Circuit is not alone. The Seventh Circuit similarly misapplied the summary judgment standard in \textit{Colbert v. City of Chicago, et al.},\textsuperscript{24} when it affirmed the lower court’s grant of summary judgment in favor of defendant Chicago police officers despite numerous disputes over facts material to the plaintiffs’ respective claims. In \textit{Colbert}, the Seventh Circuit majority failed to review the lower court’s legal conclusions \textit{de novo} and stepped into the role traditionally reserved for the jury, taking it upon themselves to resolve credibility disputes in favor of the police officer-defendants, which effectively transformed officer testimony into undisputed facts in the record at the summary judgment stage.

Thus, while the Court’s expansion of summary judgment as a procedural tool was designed to control both the volume of litigation overall and its scope in any particular case, federal judges across the nation have used that mechanism to supplant the role of the jury in our

\begin{itemize}
    \item \textsuperscript{20} Schneider, \textit{supra} note 14, at 520 (noting that the greater impact of the change in the landscape of federal pretrial practice is the dismissal of civil rights and employment discrimination cases from federal courts in disproportionate numbers).
    \item \textsuperscript{21} \textit{Tolan v. Cotton}, 134 S. Ct. 1861 (2014).
    \item \textsuperscript{22} \textit{Id.} at 1863, citing \textit{Anderson}, 477 U.S. at 255 (1986).
    \item \textsuperscript{23} \textit{Tolan}, 134 S. Ct. at 1868.
    \item \textsuperscript{24} \textit{Colbert v. City of Chicago, et al.}, 851 F. 3d 649 (7th Cir. 2017).
\end{itemize}
Though this degradation of the adversarial system through misapplication of the summary judgment standard has undoubtedly reached all types of claims, nowhere is it more prevalent or more unjust than in the context of claims brought by minority plaintiffs against those acting under the color of law.

This article uses Colbert to examine the ways in which our justice system deteriorates when judges usurp the role of the jury at the pretrial stages of litigation, especially in the context of civil rights claims. Nowhere is this improper use of judicial authority more prevalent, or more harmful, than in the Seventh Circuit, which has jurisdiction in most cases involving the City of Chicago and its law enforcement officers. This article concludes by contending that, in light of the DOJ’s warnings about the pervasiveness of police

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25 The Supreme Court’s recent decision in Scott v. Harris provides a dramatic example of this problem. 550 U.S. 372 (2007). Scott involved a §1983 action brought by a motorist against the police and other officials claiming that those officials used excessive force during a high-speed chase in violation of his Fourth Amendment Rights. Id. at 375-76. The district court denied defendant’s motion for summary judgment, and the Eleventh Circuit affirmed. Id. at 376. On certiorari, eight Justices reversed the denial and entered judgment for the defendant after watching a videotape of the chase. Id. at 386. Those justices concluded that “no reasonable jury” could find for the plaintiff, which triggered a vigorous dissent from Justice Stevens. Id. at 379-80. In that dissent, Justice Stevens referred to the Justices in the majority as “my colleagues on the jury,” Id. at 392 (Stevens, J., dissenting), and criticized the Court for having “usurped the jury’s factfinding function and, in doing so, implicitly labeling the four other judges to review the case unreasonable.” Id. at 395. He further noted that “if two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court’s characterization of events.” Id. at 396; see also Dan M. Kahan, David A. Hoffman & Donald Braman, Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism, 122 HARV. L. REV. 837, 894-902 (2009) (discussing the importance of “judicial humility”).

26 Schneider, supra note 14, at 542-43 (noting that because civil rights cases often involve subtle issues of credibility, inferences, and close legal questions, where issues concerning the “genuineness” and “materiality” of the facts are frequently intertwined with law, a single district judge may be a less fair decisionmaker than jurors, who are likely to be far more diverse and to bring a broader range of perspectives to bear on the problem).
misconduct and the ineffectiveness of the CPD’s accountability systems, the Seventh Circuit must resist the temptation to grant improper deference to Chicago Police Department officers, redouble its efforts to properly evaluate summary judgment orders, and reverse them in cases in which plaintiffs have raised genuine issues of material fact that, if taken as true as required by Rule 56, would allow a reasonable factfinder to conclude that those plaintiffs’ rights were violated by those officers.

Part I of this article discusses the private civil remedies available to plaintiffs who have suffered civil rights violations by law enforcement, specifically those brought by the respective plaintiffs in Colbert—42 U.S.C. §1983 and the Illinois common law intentional tort of malicious prosecution—and the unintended consequences of the Supreme Court’s transformation of the summary judgment standard since its inception. Part II provides an overview of the factual and procedural background of Colbert v. Willingham, et al. Part III examines the district court’s grant of summary judgment in favor of Chicago Police Officers on all counts. Part IV then discusses the Seventh Circuit majority’s opinion in Colbert v. City of Chicago, et al., contrasting it with that of Judge David Hamilton, who dissented in part. Finally, Part IV applauds Judge Hamilton for avoiding the temptation to step into the role reserved exclusively for juries in American jurisprudence, and argues that his approach ensures fairness to parties seeking to enforce the protections guaranteed by our Constitution and is consistent with the Supreme Court’s summary judgment precedent and the stated goals of 42 U.S.C. §1983.

BACKGROUND

A. Private Civil Remedies Available to Civil Rights Plaintiffs

1. 42 U.S.C. §1983

Section 1983 was enacted on April 20, 1871 as part of the Civil Rights Act of 1871, and was the first statute to create a federal claim for civil rights violations.\(^\text{28}\) Later amended and codified, the Act affords a civil cause of action for any person deprived of any rights, privileges or immunities secured by the United States Constitution or other federal law by another person who was acting under color of any state law, statute, ordinance, custom or usage.\(^\text{29}\) Section 1983 is not itself a source of substantive rights, but rather provides a vehicle for the vindication of rights elsewhere conferred. Some of the most common claims brought pursuant to §1983, and those upon which this article is focused, are claims predicated on the Fourth Amendment, which protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”\(^\text{30}\)

Despite the formal recognition of this private remedy for violations of federal law, however, civil suits brought pursuant to §1983 were a rarity until the Supreme Court’s 1961 decision in Monroe v. Pape.\(^\text{31}\) In Monroe, the Court for the first time explicitly stated that the “under color of” provision of §1983 applied as well to unconstitutional actions taken without state authority as to

\(^{29}\) Id.
\(^{30}\) U.S. CONST. AMEND. IV.
\(^{31}\) Monroe v. Pape, 365 U.S. 167 (1961) (reversing the Seventh Circuit’s dismissal of plaintiffs’ claim brought against several Chicago police officers who searched plaintiffs’ home and arrested them without a warrant, holding that the guarantee against unreasonable searches and seizures contained in the Fourth Amendment was applicable to the states by reason of the Due Process Clause of the Fourteenth Amendment) (overruled on other grounds by Monell v. Dep’t of Soc. Servs., 436 U.S. 658 (1978)).
unconstitutional action authorized by the state. Further, in 1998, the Supreme Court in United States v. Ramirez broadened its traditional determination of what may constitute an unreasonable search pursuant to §1983 to encompass the manner in which that search was conducted. Noting that the “general touchstone of reasonableness which governs Fourth Amendment analysis governs the method of execution of the warrant,” the Court concluded that “excessive or unnecessary destruction of property during a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search not subject to suppression.”

In order to establish actionable individual liability under §1983, the Supreme Court has held that “it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.”

The Seventh Circuit has echoed the Court’s

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32 Monroe, 365 U.S. at 236.
33 The increased availability of federal remedies for plaintiffs whose Constitutional rights had been violated by persons acting under color of state law was enhanced by the codification of the Civil Rights Attorney’s Fees Awards Act of 1976, which allows the award of “a reasonable attorney’s fee” to the “prevailing party” in certain civil rights cases, including those brought pursuant to §1983. Courts have since routinely held that prevailing plaintiffs are entitled to recover attorneys’ fees unless special circumstances would render an award unjust, thereby allowing poor plaintiffs adequate representation and civil rights attorneys an opportunity to take cases that may result in minimal monetary damages. This practice reflects the Supreme Court’s view that when a plaintiff succeeds in remedying a civil rights violation, he serves “as a private attorney general, vindicating a policy that Congress considered of the highest priority.” Fox v. Vice, 563 U.S. 826 (2011). Fee shifting pursuant to §1988, the Court noted, “at once reimburses plaintiff for ‘what it cost him to vindicate civil rights,’ Riverside v. Riviera, 477 U.S. 561, 577-78 (1986), and holds to account ‘a violator of federal law.’” Christiansburg Garment Co. v. Equal Employment Opportunity Comm’n, 434 U.S. 412, 418 (1978).

35 Id. at 71.
37 If, however, the officer-defendant claims the doctrine of qualified immunity, the respective plaintiff must prove: (1) the officer-defendant’s conduct violated a constitutional right; and (2) that right was clearly established at the time of its alleged violation. Saucier v. Katz, 533 U.S. 194, 201 (2001); see also Pearson v.
standard, requiring an affirmative link between the misconduct complained of and the official sued.\textsuperscript{38} Individual liability has also been extended to those who, acting under color of state law, ignored a realistic opportunity to intervene while other officers acted illegally.\textsuperscript{39}

Despite the expansion of the ways in which a party may bring a §1983 claim against officers who have conducted an unreasonable search, plaintiffs bringing such claims nevertheless run into practical problems. In such circumstances, and pursuant to standard police protocol, plaintiffs are typically restrained and moved away from the officers conducting the search. While arguably necessary in most cases, that practice also effectively immunizes officers from property damage claims by preventing a prospective plaintiff from observing the officer responsible for the damage. As a result of the competing interests inherent in successfully showing an “affirmative link” between the named officer-defendant and the alleged misconduct in such circumstances, federal circuit courts of appeals vary greatly on exactly what a prospective plaintiff should be required to plead and/or prove in order to satisfy the individual liability requirement under §1983.

In fact, the Seventh Circuit itself seems to differentiate analogous cases with little to no explanation, requiring detailed identification in some cases,\textsuperscript{40} while accepting general identification in others.\textsuperscript{41} In an attempt to aid prospective plaintiffs, the Seventh Circuit has suggested that a plaintiff might allege a “conspiracy of silence

\begin{footnotes}
\footnote{Callahan, 555 U.S. 223, 236 (2009) (reconsidering the \textit{Saucier} procedure, holding that while the sequence set forth therein is often appropriate, it should no longer be regarded as mandatory in all cases). The inquiry turns on the “objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was undertaken,” \textit{Pearson}, 555 U.S. at 244, and must be analyzed “in light of the specific context of the case, not as a broad general proposition.” \textit{Saucier}, 533 U.S. at 201.}
\footnote{Wolf-Lillie v. Sonquist, 699 F. 2d 864, 869 (7th Cir. 1983).}
\footnote{Miller v. Smith, 220 F. 3d 491 (7th Cir. 2000).}
\footnote{See Molina ex rel. Molina v. Cooper, 325 F. 3d 963 (7th Cir. 2003): Hessel v. O’Hearn, 977 F. 2d 299 (7th Cir. 1992).}
\footnote{See \textit{Miller}, 220 F. 3d 491.}
\end{footnotes}
among the officers”\(^{42}\) in order to strengthen a claim against individual officers, yet has only found that allegation to be essential in certain circumstances, giving little to no guidance as to when a plaintiff is so required.

The Sixth and Ninth Circuits, by contrast, have offered an alternative approach that restores the balance of power between civil rights plaintiffs and police officer defendants.\(^{43}\) Recognizing the inherent imbalance of power between police officer defendants and civil rights plaintiffs, federal courts in those circuits allow the burden of production to shift to defendant-officers at the discovery stage of litigation, while leaving the ultimate burden of proof with the civil rights plaintiff in the §1983 context.\(^{44}\) Pursuant to that approach, the Sixth Circuit has held that once a plaintiff has named certain officers as being liable for the deprivation of his or her constitutional rights either directly or by ignoring a reasonable opportunity to intervene in their fellow officers’ misconduct, those officers are required to then come forth with evidence that negates that plaintiff’s allegation.\(^{45}\) The Ninth Circuit has echoed that approach, shifting the burden of production to defendants in cases in which the respective plaintiff cannot learn the identity of the officers involved in the alleged misconduct due to those officers’ own conduct.\(^{46}\)

\(^{42}\) See Molina, 325 F. 3d at 974; see also Hessel, 977 F. 2d at 305 (affirming summary judgment for defendant officers, despite recognizing the plaintiffs’ “bind,” in part because plaintiffs had “alleged no conspiracy”).

\(^{43}\) See e.g. Burley v. Gagacki, 729 F. 3d 610 (6th Cir. 2013); see also e.g. Dubner v. City and County of San Francisco, 266 F. 3d 965 (9th Cir. 2001).

\(^{44}\) Id.

\(^{45}\) See Burley, 729 F. 3d 610.

\(^{46}\) See Dubner, 266 F. 3d 959, 965 (9th Cir. 2001) (holding that a plaintiff may make a prima facie case simply by showing that her arrest was conducted without a valid warrant, at which point the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause).
2. Malicious Prosecution

The Seventh Circuit is the only circuit to disallow an individual’s Fourth Amendment right to be free from unreasonable seizure to continue beyond legal process so as to permit a federal malicious prosecution claim premised on the Fourth Amendment. Thus, while 42 U.S.C. §1983 provides a legal remedy for the violation of constitutional rights conferred in the Fourth Amendment, those within the Seventh Circuit’s jurisdiction who seek compensation based on the initiation of unlawful criminal proceedings must bring a state common law claim for the intentional tort of malicious prosecution.

Police officers may be held liable for malicious prosecution if they either signed a criminal complaint or “played a significant role in causing the prosecution of the plaintiff, provided all of the elements of the tort are present.” To state a claim for malicious prosecution under Illinois law, plaintiffs must establish: (1) the commencement or continuance of an original proceeding by the defendant; (2) the termination of that proceeding in favor of the plaintiff; (3) the absence of probable cause; (4) the presence of malice; and (5) damages. The absence of any one of those elements bars a plaintiff from pursuing the claim, and of those five elements, plaintiffs bringing malicious prosecution claims routinely encounter evidentiary and procedural difficulties in all but the issue of damages.

47 See Eric J. Wunsch, Fourth Amendment and Fourteenth Amendment—Malicious Prosecution and 1983: Is There a Constitutional Violation Remediable under Section 1983, 85 J. CRIM. L. & CRIMINOLOGY 878 (1994-1995); see also Albright v. Oliver, 975 F. 2d 343, 347 (7th Cir. 1993), cert. granted, 510 U.S. 266 (1994) (affirming Seventh Circuit’s dismissal of plaintiff’s complaint because Illinois provides a tort remedy for malicious prosecution, thereby negating the need for a federal remedy).
50 Id.
51 See Cult Awareness Network v. Church of Scientology Int’l, 177 Ill. 2d 267, 286 (1997) (noting that the elements requiring favorable termination of a plaintiff’s criminal proceeding and malice are “no easy hurdle for the plaintiff” and that “[a]n
Under Illinois law, prosecution for a misdemeanor may be commenced by indictment, information, or complaint, while prosecution for a felony is initiated only by information or indictment, the former of which requires a finding of probable cause at a preliminary hearing. The sole purpose of preliminary proceedings is to ascertain whether a crime charged has been committed and, if so, whether there is probable cause to believe that it was committed by the accused. Yet because the standard applied to preliminary hearings is not the same as that applied in a criminal defendant’s subsequent trial, “a finding of probable cause [at a preliminary hearing] is not binding upon the subsequent grand jury.”

In a presumed effort to better articulate what is required in order to establish a defendant officer’s initiation of criminal proceedings, the Seventh Circuit has effectively placed an extra hurdle before plaintiffs bringing those claims against police officer defendants, supported at least in part by a footnote in Justice Ginsburg’s concurrence in Albright v. Oliver. Accordingly, conceding that “it is conceivable that a wrongful arrest could be the first step towards a malicious prosecution,” the Seventh Circuit requires plaintiffs to establish a “chain of causation” between a police officer’s actions and a State’s Attorney’s resultant prosecution. An established “chain of causation,” however, is broken by an indictment, action for malicious prosecution remains one that is disfavored in law.

53 Id.
54 People v. Morris, 30 Ill. 2d 406, 411 (1964).
55 Id.
56 Albright v. Oliver, 510 U.S. 266, 279 n.5 (1994) (Ginsburg, J., concurring) (“a malicious prosecution action against police officers is anomalous,” because “[t]he principal player in carrying out a prosecution – in ‘the formal commencement of a criminal proceeding,’ – is not police officer but prosecutor.”).
as the indictment is presumed to have been supported by probable cause.\textsuperscript{57}

While “prima facie probable cause” is established by the grand jury’s return of the indictment, “it is not conclusive evidence of probable cause.”\textsuperscript{58} Rather, that presumption may be rebutted by evidence such as proof that the indictment was obtained by false or fraudulent testimony before the grand jury, or by failing to make a full or complete statement of the facts, or by other improper or fraudulent means.\textsuperscript{59} Yet, because the issue of probable cause is litigated months after the arrest, an arresting officer can merely deny a plaintiff’s claim and is afforded time to gather evidence that could arguably and retroactively support his defense of probable cause.

Additionally, for malicious prosecution purposes, criminal proceedings do not terminate, and a criminal defendant’s malicious prosecution claim does not accrue “until such time as the State [is] precluded from seeking reinstatement of the charges,”\textsuperscript{60} which the Supreme Court of Illinois has held is consistent with the expiration of the statutory speedy-trial period.\textsuperscript{61} Illinois courts have parsed through the various dispositions that can arise from preliminary hearings, concluding that “a favorable termination is limited to only those legal\

\textsuperscript{57} The question of probable cause is a mixed question of law and fact. Whether the circumstances showing probable cause are proven is a question of fact, but, if true, whether they amount to probable cause is a question of law to be decided by the court. Ely v. National Super Markets, Inc., 149 Ill. App. 3d 752, 758 (1986); see also Norris v. Ferro, 2009 U.S. Dist. LEXIS 32722, at *5 (N.D. Ill. Apr. 17, 2009) (noting the Seventh Circuit’s statement in Askew v. City of Chicago that “material” inconsistencies create jury questions, and denying summary judgment on false arrest claim where questions regarding defendant officer’s “credibility” were “so substantial that at the summary judgment stage,” the court could not accept any of his testimony).


\textsuperscript{59} 54 C.J.S. Malicious Prosecution, § 35 (1987); Freides, 33 Ill. 2d at 296 (emphasis added).

\textsuperscript{60} Ferguson v. City of Chicago, 213 Ill. 2d 94, 104 (2004).

\textsuperscript{61} Every person in custody in [Illinois] for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody. 725 ILCS 5/103-5(a).
dispositions that can give rise to an inference of lack of probable cause.” Importantly, “an order of dismissal for lack of probable cause is not an acquittal and is not final, as the State may later indict the accused or submit a new information.”

Thus, the Seventh Circuit’s “chain of causation” requirement appears to summarily demand a plaintiff prove most of the elements of the claim for malicious prosecution in one fell swoop, thereby providing numerous loopholes through which a plaintiff may fall. That high burden for plaintiffs is further compounded by the “liberalized” standards applied to summary judgment, which have resulted in an imbalance of power between plaintiffs and defendants, particularly in cases where defendant police officers are the movants against plaintiffs alleging officer misconduct in violation of their constitutional rights.

B. Summary Judgment

At its inception, as articulated by the Supreme Court, summary judgment was designed to protect courts from “frivolous defen[s]es” and “to defeat attempts to use formal pleading as a means to delay the recovery of just demands.” The codification of the Federal Rules of Civil in 1938, however, expanded the application of the summary judgment motion, making it available as a broad-scale tool for the entry of a final decree on the merits of all claims before the federal courts. This significant alteration of American jurisprudence was treated warily by federal judges, who collectively perceived it as “threatening a denial of such fundamental guarantees as the right to confront witnesses, the right of the jury to make inferences and

62 Cult Awareness Network v. Church of Scientology Int’l, 177 Ill. 2d 267, 278 (1997).
64 Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320 (1902).
65 Id. at 76.
determinations of credibility, and the right to have one’s cause advocated by counsel before a jury.”

Prior to the 1986 Trilogy, the leading summary judgment case was *Adickes v. S.H. Kress & Co.*, which involved a conspiracy claim arising out of the refusal of luncheonette service to, and subsequent arrest of, a white civil rights worker in Mississippi. The record contained allegations that the arresting policeman had been in the store when service was refused, but the plaintiff offered no specific evidence as to any conspiratorial activity. Defendant’s motion for summary judgment was nevertheless properly denied, the Court held, because “the affidavits of record did not foreclose a possible inference of a conspiracy by the jury from the fact that the policeman was present at the time that service was refused.” Accordingly, under the standard developed in *Adickes*, both the burden of proof and the full burden of production on the motion for summary judgment fell on the movant.

The first of the Court’s Trilogy, *Celotex Corp. v. Catrett*, fundamentally altered the *Adickes* standard by recasting the moving party’s burden of production to comport with the ultimate burden of proof the movant would have at trial. In so doing, the Court opened the door to pretrial adjudication on the merits, regardless of whether the district court judge would be constitutionally empowered to sit as

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66 *Id.* at 77.
67 *Adickes* v. S.H. Kress & Co., 398 U.S. 144 (1970). In fact, it has been said that, despite the liberalization of the summary judgment motion after the Supreme Court’s 1986 Trilogy, *Adickes* was the key precedent for the Court’s decision in *Tolan v. Cotton*, discussed *infra*, because it was “the quintessential ‘he said, she said’ summary judgment case.” Denise K. Berry, *Snap Judgment: Recognizing the Propriety and Pitfalls of Direct Judicial Review of Audiovisual Evidence at Summary Judgment*, 83 FORDHAM L. REV. 3343, 3346 (2015).
68 *Adickes*, 398 U.S. at 153 (the Court stated that such an inference could not be foreclosed from the factual allegations of the plaintiff’s complaint, finding that the defendant had failed to carry its burden of showing the absence of any genuine issue of fact).
the ultimate trier of fact at trial. The Court’s transformation of the motion for summary judgment did not stop there. Rather, while the Court’s holding in Celotex facilitated the process of bringing a summary judgment motion before the court, its subsequent decisions in Anderson v. Liberty Lobby, Inc.\(^{71}\) and Matsushita Elec. Indus. Co. v. Zenith Radio Corp.\(^{72}\) increased the chances of a trial court granting summary judgment in favor of a defendant-movant by allowing broad pretrial evidentiary review, thereby expanding the discretionary authority given to the district courts.\(^{73}\)

In Anderson, the Court recast summary judgment into the mold of a motion for a directed verdict.\(^{74}\) Yet as Justice William J. Brennan observed in his dissenting opinion, that approach marked a significant departure from the traditional view that “the measurement of the ‘caliber and quality’ of evidence ‘could only be performed by weighing the evidence.’”\(^{75}\) Accordingly, Justice Brennan concluded that the Court’s opinion was full of language which he feared “could surely be understood as an invitation–if not an instruction–to trial courts to assess and weigh evidence as much as a juror would.”\(^{76}\)\(^{77}\)

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73 Issacharoff & Loewenstein, supra note 69, 84.
74 Miller, supra note 17, at 44-45 (noting that the Court’s decision in Anderson allows a district court to enter judgment if the evidence produced by the plaintiff is not sufficient to convince the judge that a reasonable jury could return a verdict in his favor).
75 Id. at 266 (Brennan, J. dissenting) (emphasis added).
76 Id. (emphasis added).
77 Motions for summary judgment after the Trilogy have presented a fundamental conundrum: issues of credibility are supposed to be decided by the jury, but in order to decide if the proof is enough for a “reasonable juror,” the judge must implicitly decide issues of credibility. The impetus of Justice Brennan’s point was that he could not at once “square the direction that the judge ‘is not himself to weigh the evidence’ with the direction that the judge also bear in mind the ‘quantum’ of proof required and consider whether the evidence is of sufficient ‘caliber and quantity’ to meet that ‘quantum.’” Id. Further, Justice Brennan feared that the Court’s holding would transform what is meant to provide an expedited “summary” procedure into a full-blown paper trial on the merits. Id. at 266-67. This fear seems
Moreover, in *Matsushita*, the Court reached into the realm of fact-finding in upholding a grant of summary judgment against the plaintiffs despite the submission of detailed and unrebutted expert reports supporting plaintiffs’ claims. The Court’s holding triggered yet another vigorous dissent, this time by Justice Byron White, who read the majority opinion to be an “invitation to the district judge to go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the [non-moving party].”

Thus, while the Court’s liberalization of the summary judgment standard was intended to control both the volume and scope of litigation in any particular case, the Trilogy’s impact has gone far beyond this desired screening. One of the unanticipated consequences of the Trilogy has been the alteration in the balance of power between plaintiffs and defendants in the pretrial phases of litigation. The Trilogy tipped this balance in favor of defendants by raising both the costs and risks to plaintiffs while diminishing both for defendants, who as a class tend to be wealthier and more powerful than plaintiffs and are typically the beneficiaries of summary judgment. Accordingly, summary judgment after the Trilogy remains a “powerful but blunt instrument,” as it is not sufficiently finely-honed to distinguish sharply between genuine strike suits, and cases properly placed in the civil rights context, where jury trials result in considerably more favorable verdicts for civil rights plaintiffs than bench trials. Schneider, *supra* note 14, at 564.


79 Id. at 600 (White, J. dissenting).


81 Issacharoff & Loewenstein, *supra* note 69, at 75; Miller, *supra* note 17, at 47-48.

82 Id. at 107.

83 Cases initiated with the intention of extorting a payment from the defendant by threatening a costly legal battle. Issacharoff & Loewenstein, *supra* note 69, at 106.
of limited monetary value. Many lawsuits aimed at remedying constitutional violations fall squarely into the latter category.

More importantly, critics of the Trilogy have argued that, in deciding those three cases, the Court conferred too much discretion upon trial judges, essentially transforming them into pretrial factfinders. A post-Trilogy review of lower court decisions proves that courts have shown a new willingness to resolve issues of intent or motive at the summary judgment stage, and, in the extreme version, to grant summary judgment where “taken as a whole, [plaintiff’s evidence does not] exclude other reasonable hypotheses with a fair amount of certainty.” In fact, considerable evidence supports the proposition that federal courts across the nation have taken Matsushita and Anderson as the invitation the respective dissenting justices so feared. This development is particularly troubling in civil rights cases, which most commonly involve subtle issues of credibility, inferences taken from circumstantial evidence, and close legal questions.

Although the tension between the procedure’s screening value and the desire to protect the nonmovant has always been present in motions brought pursuant to Rule 50, it is heightened in the summary judgment context because of the more limited evidentiary record and the lack of any opportunity to evaluate witness credibility. When

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84 Issacharoff & Loewenstein, supra note 69, at 107.
85 Miller, supra note 17, 47-48.
86 Issacharoff & Loewenstein, supra note 69, 89.
87 Id.
88 Id.
89 Miller, supra note 17, at 61; see also UAW v. Johnson Controls, 886 F. 2d 871 (7th Cir. 1989) (en banc), cert. granted, 110 S. Ct. 1522 (1990) (holding, in the context of a sex discrimination case challenging the exclusion of women of child-bearing age from industrial positions, that despite the conflicts on material issues absolutely central to the disputed exclusion, the plaintiffs failed to survive summary judgment). Judge Posner dissented, opining, “I think it a mistake to suppose that we can decide this case once and for all on so meager a record,” before emphasizing that “whether a particular policy is unlawful is a question of fact that should ordinarily be resolved at trial.” Id. at 902, 906. The Supreme Court agreed, reversing and remanding that case in part because “if the Court of Appeals had properly analyzed
viewing evidentiary material on a pretrial motion without the safeguards and environment of a trial setting, courts may be tempted to treat the evidence in a piecemeal rather than cumulative fashion, draw inferences against the nonmoving party, or discount the nonmoving party’s evidence by weighing it against contradictory evidence.\textsuperscript{90} Further, today’s rhetoric about the “litigation explosion”\textsuperscript{91} may be encouraging district courts and courts of appeals to rely on the Trilogy to justify resorting to pretrial disposition too readily because they believe that there is a pressing need to alleviate overcrowded dockets or because they disfavor certain substantive claims.\textsuperscript{92}

The Supreme Court’s recent decision in \textit{Tolan v. Cotton}, however, evidences the Court’s renewed emphasis on the proper role of a district court in the summary judgment stages of litigation, especially in civil rights cases involving purely testimonial evidence.\textsuperscript{93} the evidence, it would have concluded that summary judgment against petitioners was not appropriate because there was a dispute over a material issue of fact.” Int’l Union v. Johnson Controls, 499 U.S. 187, 222 (1991).

\textsuperscript{90} Miller, \textit{supra} note 17, at 62. Miller goes on to say that, “[e]ncouraged by systemic concerns suggesting that summary judgment is desirably efficient, judges may be motivated to seek out weaknesses in the nonmovant’s evidence, effectively reversing the historic approach.” \textit{Id.} at 66.

\textsuperscript{91} Miller, \textit{supra} note 17, at 110.

\textsuperscript{92} \textit{Id.} Miller also notes that “[j]udges are human, and their personal sense of whether a plaintiff’s claims seem ‘implausible’ can subconsciously infiltrate even the more careful analysis.” \textit{Id.} at 66.

\textsuperscript{93} In \textit{Tolan}, an officer stopped Tolan in front of his parents’ home in Bellaire, Texas on the mistaken belief that the car he had been driving with his cousin was stolen. 134 S. Ct. 1861, 1863 (2014). Tolan told the officers that the car belonged to him, and after a few minutes, Tolan’s parents, hearing the commotion, came outside. \textit{Id.} His parents reiterated what Tolan had already told the officer and confirmed that Tolan lived with them. \textit{Id.} A sergeant then arrived on the scene and ordered Tolan’s mother to stand against the garage door. \textit{Id.} at 1863-64. The officer stated that Tolan rose to his feet from the facedown position in which the officer had ordered Tolan to remain, while Tolan testified that he rose to his knees. \textit{Id.} at 1864. The parties agreed that Tolan then exclaimed “Get your fucking hands off my mom,” at which point the sergeant on scene shot Tolan three times. \textit{Id.} Granting summary judgment to the officer-defendants, the district court relied on several disputed facts, including (1) the lighting of the porch, (2) how calmly Tolan’s mother disputed the officers’ allegations, (3) whether Tolan was “verbally threatening” the officer, and (4)
The facts of Tolan, as viewed by the Court, led to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment—police officers—and failed to properly acknowledge key evidence offered by the party opposing that motion—a young black man shot at the hands of one of those officers. It is natural, the Court noted, for witnesses on both sides to have their own “perceptions, recollections, and even potential biases,” but, the Court continued, “by weighing the evidence and reaching factual inferences contrary to Tolan’s competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.”

Failing to heed the Court’s warnings in Tolan, both the district court and the Seventh Circuit majority neglected to adhere to that same fundamental procedural tenet when it issued its opinion in Colbert v. City of Chicago, et al. just three years later.

**COLBERT V. WILLINGHAM, ET AL.**

**A. Factual Background**

In March of 2011, Plaintiff Jai Crutcher was discharged on mandatory supervised release after being incarcerated periodically for various offenses. After his release, Crutcher and his girlfriend moved in with Christopher Colbert, Crutcher’s brother by adoption, who lived in the West Englewood neighborhood of Chicago. As part of the terms of his supervised release, Crutcher was required to “consent to a
search of [his] person, property, or residence” and agreed that he “w[ould] not use or knowingly have under [his] control or in [his] residence any firearms, ammunition, or explosive devices.”

Shortly after Crutcher was released on parole, Defendant Chicago Police Officer Russel Willingham (“Willingham”) allegedly received information from a “cooperating individual” who claimed to have seen Crutcher in Colbert’s residence with two firearms: a 12-gauge shotgun and a 40-caliber handgun. Defendant Willingham ran a name check on Crutcher, which revealed that he was on parole for the use of a firearm. Based exclusively on that information, Willingham contacted Illinois Department of Corrections (“IDOC”) Parole Officer Jack Tweedle (“Tweedle”), and the two decided to conduct a parole check of Crutcher’s residence to ensure that he was in compliance with the terms of his supervised release.

At 6:30 a.m. on March 31, 2011, no fewer than 10 police and parole officers arrived at Colbert’s home to conduct that compliance check. Asleep in the basement at the time, Crutcher woke to the officers’ knock on the front door of the residence he shared with Colbert. Willingham, Tweedle, and IDOC Officers Luis Hopkins and Darryl Johnson (collectively, “Defendant Officers”), were among the group of agents. Crutcher looked outside and, seeing the enormous police presence, called Colbert at work to apprise him of the officers’ arrival. Crutcher let the officers in “several minutes later” and consented to the search pursuant to the terms of his supervised release.

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98 Id. at *2-3.
99 Id. at *3.
100 Id.
101 Id.
102 Id.
103 Colbert v. City of Chicago, et al., 851 F. 3d 649, 652 (7th Cir. 2017).
104 Id. at *4.
105 Id.
106 Id.
Before beginning the search, the officers handcuffed Crutcher.\textsuperscript{107} At some point during the search, Colbert arrived home and was also placed in handcuffs.\textsuperscript{108} As a result, neither Colbert nor Crutcher was permitted to observe the search, which encompassed the totality of the home.\textsuperscript{109} While both Plaintiffs were handcuffed and secured, the reporting officers ravaged the home, causing damage to both real and personal property.\textsuperscript{110}\textsuperscript{107} \textsuperscript{108} \textsuperscript{109} \\

Specifically, the officers pulled out insulation in the basement, put holes in the walls, ripped the couch open to search its contents, and tracked dog feces throughout the house.\textsuperscript{111} In the kitchen on the main floor, officers ransacked various food containers (\textit{i.e.} a sugar bowl), broke part of the kitchen countertop, and broke hinges off of shelves.\textsuperscript{112} Additionally, Plaintiffs described an officer who unholstered his firearm and threatened to shoot Crutcher’s six-week-old puppy before leaving the dog outside, where it was lost.\textsuperscript{113}\textsuperscript{111} \textsuperscript{112} \\

Just before concluding their search, the officers encountered the bedroom Colbert shared with his wife on the main floor, which was locked.\textsuperscript{114} The officers obtained a key and, once inside, found a 12-gauge shotgun in the closet with approximately 100 rounds of ammunition and a box for a 40-caliber semi-automatic handgun.\textsuperscript{115} Colbert admitted ownership of both firearms, neither of which was

\textsuperscript{107} Id. \\
\textsuperscript{108} Id. at *4-5. \\
\textsuperscript{109} Id. at *42. \\
\textsuperscript{110} Id. at *5. \\
\textsuperscript{111} Id. \\
\textsuperscript{112} Id. \\
\textsuperscript{113} Colbert v. City of Chicago, 851 F. 3d 649, 661 (7th Cir. 2017) (Hamilton, J., dissenting). In addition to the property damage referenced by the district court, Plaintiffs testified that the officers damaged clothing, a weight bench, the basement door, the steps, bedroom dressers, and an electronic tablet. Crutcher testified that the officers dismantled his stereo and television, damaging them in the process, and destroyed photographs of his grandmother, leaving them on the floor covered in dog feces. Colbert, 651 F. 3d at 661, n.1 (Hamilton, J., dissenting). \\
\textsuperscript{114} Colbert, 2015 U.S. Dist. LEXIS 67561, at *5. \\
\textsuperscript{115} Id. at *6.
registered with the City of Chicago, at which point the officers formally arrested both Colbert and Crutcher.\(^{116}\)

\textit{B. Procedural Background}

Crutcher was arrested for Unlawful Use of a Weapon/Felon in Possession of a Firearm\(^{117}\) and Violation of Parole.\(^{118}\) Officer Willingham prepared and submitted a criminal complaint against Crutcher in which he stated that Crutcher had admitted to “full knowledge of the firearm being in the residence” as well as to knowledge that a handgun had previously been in the residence.\(^{119}\) That prosecution ended on April 19, 2011, after a Cook County judge dismissed the case on a finding of no probable cause,\(^{120}\) but on May 6, 2011, an Illinois grand jury nevertheless indicted Crutcher on one count of being an armed habitual criminal and two counts of unlawful possession of a firearm by a felon.\(^{121}\) Crutcher was found not guilty on February 28, 2012, but only after being incarcerated for a total of approximately eleven months.\(^{122}\)

Colbert was arrested for failing to register his firearm pursuant to §8-20-140 of Chicago’s Municipal Code\(^{123}\) and an accompanying

\(^{116}\) Id.

\(^{117}\) Required Crutcher to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any firearm or firearm ammunition. 720 ILL. COMP. STAT. § 5/24-1.1(a) (LexisNexis 2017).

\(^{118}\) Required Willingham to have reasonable suspicion that Crutcher knowingly had a firearm or ammunition in his residence. 730 ILL. COMP. STAT. § 5/3-3-9 (2017); Colbert, 2015 U.S. Dist. LEXIS 67561, at *6.

\(^{119}\) Id. at *31.

\(^{120}\) Id. at *2.

\(^{121}\) Id.

\(^{122}\) Id., at *6-7.

\(^{123}\) Due to what Willingham calls “a scrivener’s error,” instead of charging Colbert under §8-20-140, the official charge listed on Colbert’s arrest report was §8-20-040, a statute declared unconstitutional by the United States Supreme Court in McDonald v. City of Chicago, 561 U.S. 742 (2010). Colbert, 2015 U.S. Dist. LEXIS 67561, at *38.
state-law charge for possessing a shotgun able to hold over three rounds pursuant to 520 ILCS 5/2.33(m). Colbert was released from custody on the same day of his arrest and the criminal case against him was later dismissed.

Plaintiffs Crutcher and Colbert filed their first complaint with the Northern District of Illinois, Eastern Division, on March 31, 2013, later amending it twice. Colbert alleged (1) a false arrest claim against all individual Defendant Officers, (2) that §8-20-040 of the Municipal Code of the City of Chicago was unconstitutional, and (3) an unreasonable search claim. Plaintiff Crutcher alleged (1) a false arrest claim against all individual Defendant Officers, and (2) a malicious prosecution claim against Willingham and the City of Chicago.

The City and Willingham moved for summary judgment on all claims, arguing: (1) Willingham had the requisite probable cause to arrest both Crutcher and Colbert or, in the alternative, Willingham had “arguable probable cause,” entitling him to qualified immunity on the Plaintiffs’ respective false arrest claims; (2) Crutcher’s malicious prosecution claim against Willingham and the City with respect to Crutcher’s first criminal proceeding was time-barred and that the requisite “chain of causation” applied to Crutcher’s second proceeding was broken by his indictment by the grand jury or, in the alternative, Willingham’s arrest and subsequent criminal complaint were supported by probable cause, barring Crutcher from relief as a matter of law; and (3) Colbert’s unreasonable search claim failed because there was no evidence that Willingham was personally involved in the destruction of Colbert’s property.

125 Id. at *7-8.
127 Colbert, 2015 U.S. Dist. LEXIS 67561, at *35.
128 Id. at *10-11.
IDOC agents Tweedle, Johnson and Hopkins also moved for summary judgment on all claims, asserting that the agents could not be held liable for: (1) Crutcher’s arrest because it was Willingham and the other Chicago Police Officers who arrested Crutcher; and (2) Colbert’s property damage claim because Colbert had failed to provide any evidence about the condition of the property before the search and because Colbert failed to provide any description of the officers who allegedly damaged his property. Colbert and Crutcher moved for partial summary judgment on their respective false-arrest claims against the City.

C. Statements of “Un”Disputed Material Facts

When ruling on motions for summary judgment, federal courts in the Northern District of Illinois obtain the material facts of the case from the parties’ respective Local Rule 56.1 statements. Those statements filed by the respective parties in Colbert, and their answers, collectively proved that numerous facts were in dispute between the parties. Those which are material and therefore relevant to the respective plaintiffs’ claims are summarized below.

First, Willingham stated that the “cooperating individual” upon whom he relied informed him that he or she had personally seen

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131 Colbert v. Willingham, et al., 2015 U.S. Dist. LEXIS 67561 (N.D. Ill. May 26, 2015) (No. 13 Civ. 394). In his motion for partial summary judgment, Colbert for the first time asserted that the registration requirements under §8-20-140, the ordinance actually underlying Colbert’s arrest, were unconstitutional. In response to Colbert’s claim, Willingham submitted an affidavit stating that Colbert had been arrested for violating §8-20-140, but Willingham had erroneously marked §8-20-040 as the cause of arrest. The district court accepted Willingham’s explanation and granted summary judgment to Defendants on Colbert’s false arrest claim. Colbert v. City of Chicago, et al., 851 F. 3d 649, 654 (7th Cir. 2017). Accordingly, this article does not discuss that claim.

132 Bordelon v. Chicago Sch. Reform Bd. of Trs., 233 F. 3d 524, 527 (7th Cir. 2000).
Crutcher repeatedly with two firearms—a 12-gauge shotgun and a 40-caliber handgun—while s/he was present in the home he shared with Colbert. Crutcher disputed the individual’s reliability because Willingham could not recall how many times he had received information from that individual prior to the search and had not made any reports about information the individual had provided him in the past nor the information provided to him prior to his search of plaintiffs’ residence. Further, Crutcher argued that because Willingham asserted privilege and refused to disclose what, if anything, the individual had told him about how he or she came to be inside of Crutcher’s residence, and also relied on that privilege to support his refusal to disclose how many times that individual claimed to have been inside Crutcher’s residence, the alleged “information” was uncorroborated, and thus Willingham should have been barred from using the evidence about the “tip” to support his “reasonable suspicion” or “probable cause” finding(s).

Relatedly, the parties disputed the circumstances of the officers’ visit. First, the parties disputed the length of Crutcher’s “delay” in answering the door. Crutcher testified it was approximately four minutes, while the Defendant Officers claimed it was between fifteen and twenty minutes. Additionally, plaintiffs disputed the true purpose of the officers’ visit. Willingham claimed the purpose was

134 Id.
136 Id.
138 Colbert v. City of Chicago et al., 851 F. 3d 649, 666 (7th Cir. 2017) (Hamilton, J., dissenting).
to ensure Crutcher was in compliance with the terms of his supervised release with respect to gun possession, yet Crutcher stated that he planned to dispute Willingham’s intent at trial because, as Crutcher testified at his deposition, when Willingham first entered the home he asked “[w]here’s the diesel?”139 and reported that he had received a tip “that [they] had some drugs,”140 before accusing Crutcher of flushing them down the toilet.141 Crutcher also pointed to the fact that as the officers searched through the house, they further indicated they were looking for drugs by looking through the sugar container in the kitchen and tearing apart the couch in the basement where Crutcher slept as it was unreasonable to believe guns could have been stored in either of those objects.142

Additionally, while Willingham claimed that Crutcher had admitted to “full knowledge of the firearm being in the residence” as well as to knowing that a handgun had previously been in the residence—claims he included in his arrest report—Crutcher testified that he neither admitted to knowing nor knew that a firearm had been in the house.143 Further, Crutcher testified that, after asking him about drugs, Willingham told Crutcher that he knew the shotgun was Colbert’s, but said “since you didn’t give me the information I needed, guess what? The shotgun is yours. [Hopkins] found it on you.”144 Notably, the IDOC Defendants admitted that fact for summary judgment purposes.145

Finally, and perhaps most importantly, there was undoubtedly a dispute over whether the named Defendant Officers were the same officers who caused the damage to Colbert’s property or, at the very

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139 “Diesel” is slang for cocaine.
140 *Colbert*, 851 F. 3d at 666 (Hamilton, J., dissenting).
141 *Id.*
142 *Id.*
144 *Id.* at ¶26.
least, ignored a realistic opportunity to intervene while other officers caused the property damage. Colbert’s second amended complaint named all four Defendant Officers. Willingham admitted the damage occurred, but claimed he was not personally responsible.146 The IDOC Defendants, by contrast, claimed to have no recollection of the incident and merely asserted a blanket denial of personal liability.147

.COLBERT V. WILLINGHAM, ET AL. – THE DISTRICT COURT DECISION

A. Jai Crutcher

1. False Arrest

Beginning its analysis of Crutcher’s Fourth Amendment false arrest claim, the district court stated that a warrantless search or seizure of a parolee’s person or belongings “can occur where the officer has reasonable suspicion of criminal activity.”148 Accordingly, the relevant inquiry was whether, under the totality of the circumstances, Willingham had reasonable suspicion that Crutcher had committed or was committing either of the two crimes for which he was arrested or any crime at all.149

Before answering that inquiry in the affirmative, the district court first stated that the fact that the officers found the shotgun in Colbert’s locked bedroom affected the analysis of whether Crutcher knowingly resided in a home with a firearm.150 Nonetheless, the court found that Willingham had the requisite reasonable and articulable suspicion to support Crutcher’s arrest based on: (1) knowledge that Crutcher was on parole for the use of a firearm, (2) information from

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148 Id. (emphasis in the original).
149 Id.
150 Id. at *15.
an informant relating that Crutcher had been in his residence with multiple firearms, including a shotgun, (3) the amount of time it took Crutcher to answer the door, and (4) the discovery of corroborating evidence (the shotgun that Defendant Officers found in Colbert’s locked bedroom after a full search of the residence). 151

In analyzing the disputed length of Crutcher’s delay in opening the door for the officers, the court differentiated between a “significant delay,” which would be sufficient to increase an officer’s suspicion, 152 and a “two-minute delay,” which would be an immaterial fact that would not contribute to finding reasonable suspicion, before concluding Crutcher’s delay belonged in the former category. 153 Notably, the court did not explicitly state that a four minute delay is “significant,” nor did it explain what led to its conclusion. Instead, the court bypassed that inquiry, the dispute over which would normally be considered a matter of credibility, and merely asserted that the delay was relevant “based on its duration,” Crutcher’s status as a parolee, the tip Willingham allegedly received, and the alleged purpose of the investigation. 154 Apart from Crutcher’s parolee status, each of the factors upon which the court relied were sources of dispute among the parties. The court thus could not have decided the issue as a matter of law without accepting the Defendant Officers’ version of the facts as true.

Finally, while the district court agreed with Plaintiffs’ contention that Willingham failed to provide evidence sufficient to establish the reliability of the “cooperating individual” from whom he received the tip about Crutcher possession guns, and therefore treated the individual like an anonymous tipster, the court nevertheless concluded that the Defendant Officers’ discovery of the specific firearm allegedly mentioned in the tip—the fruit of their search—was

151 Id.
153 United States v. Crasper, 472 F. 3d 1141, 1156 (9th Cir. 2007).
sufficient to retroactively corroborate the tip.\textsuperscript{155} Thus, the court seemingly used one contested fact to validate the next before summarily concluding that no dispute of material fact remained.

2. Malicious Prosecution

Before analyzing the merits of Crutcher’s malicious prosecution claim against Willingham and the City, the district court resolved a dispute between the parties regarding the date Crutcher’s claim accrued. Defendant Officers contended that Crutcher’s malicious prosecution claim accrued on April 19, 2011, when the state court judge issued a finding of no probable cause following Crutcher’s preliminary hearing.\textsuperscript{156} Crutcher, by contrast, argued that his claim accrued in February 28, 2012, when he was found not guilty of the charges brought via his subsequent grand jury indictment.\textsuperscript{157} Thus, the question for the court was whether the two criminal prosecutions against Crutcher, which stemmed from the same arrest and were premised on the same operative facts and police reports, should be treated as separate actions or as a single action.

The district court concluded that the two prosecutions brought against Crutcher should be considered separately, thereby time-barring any action based on Crutcher’s first criminal proceeding. Consequently, because the court found that “[t]he grand jury indictment of Crutcher [was] prima facie evidence of probable cause,” Crutcher was required to present evidence “such as proof that the indictment was obtained by false or fraudulent testimony before the grand jury or other improper or fraudulent means,” in the second matter in order to rebut that presumption.\textsuperscript{158}

\textsuperscript{155} Id. at \textsuperscript{*}17.
\textsuperscript{156} Id. at \textsuperscript{*}24.
\textsuperscript{157} Id. at \textsuperscript{*}24.
\textsuperscript{158} Id. at \textsuperscript{*}30 (citing Freides v. Sani-Mode Mfg. Co., 33 Ill. 2d 291, 296 (1965); Snodderly v. R.U.F.F. Drug Enforcement Task Force, 239 F. 3d 892, 901 (7th Cir. 2001)).
But by artificially separating the two criminal proceedings, the court discounted Crutcher’s argument that the two criminal proceedings had been initiated by one arrest and one police report for crimes different only in degree, which left the “chain of causation” intact. The court’s determination on that issue thus allowed it to conclude that Crutcher’s allegation of Willingham’s “improper act”—his drafting of a police report containing false statements regarding the facts of Crutcher’s arrest—related only to the initial, time-barred prosecution. Even in the light most favorable to Crutcher, the court stated, there was no evidence that Willingham had any influence over the grand jury’s decision to indict Crutcher in the second proceeding.\textsuperscript{159}

\textit{B. Christopher Colbert}

Disagreeing with the IDOC Defendants, the court found that because Colbert alleged specific facts describing how the police damaged specific items within his home, and because Willingham admitted those allegations, there existed a disputed issue of fact materially sufficient to withstand summary judgment on those grounds.\textsuperscript{160} Adhering to its strict individual liability standard for claims arising under §1983, however, the district court granted summary judgment to Defendant Officers because Colbert failed to provide evidence sufficient to establish an affirmative link between any individual Defendant Officer and the damage caused.\textsuperscript{161} Importantly, the court found Colbert’s argument that “[t]he question of which officers were responsible for trashing Colbert’s home should be left to the jury” unconvincing, citing \textit{Hessel v. O’Hearn}\textsuperscript{162} for the principle that while it may be assumed that the property damage was

\textsuperscript{159} Colbert, 2015 U.S. Dist. LEXIS 67561, at *32.
\textsuperscript{160} \textit{Id.} at *42.
\textsuperscript{161} \textit{Id.} at *44.
\textsuperscript{162} Hessel v. O’Hearn, 977 F. 2d 299, 305 (7th Cir. 1992) (asserting that “the principle of collective punishment is not generally part of our law.”).
caused by one or more of the officers who searched Colbert’s home, “[t]hat [wa]s not good enough to fend off summary judgment.”

**COLBERT V. CITY OF CHICAGO, ET AL. – THE SEVENTH CIRCUIT DECISION**

Exhibiting the same uncritical approach to the disputed issues of fact material to Plaintiffs’ claims and failing to review the lower court’s ruling *de novo*, in *Colbert v. City of Chicago et al.*, a divided Seventh Circuit affirmed the district court’s grant of summary judgment in favor of Defendant Officer-Appellees. Judge Joel Flaum, writing for the majority, was joined by Judge William Bauer, while Judge David Hamilton concurred in part and dissented in part.  

**A. The Majority Opinion**

1. Jai Crutcher – Malicious Prosecution

Beginning its analysis of Crutcher’s malicious prosecution claim with a footnote, the Seventh Circuit majority failed to review the lower court’s treatment of Crutcher’s underlying criminal proceedings as two separate actions despite owing no deference to the trial court’s legal conclusion. In so doing, however, the Seventh Circuit majority both ignored the fact that the court’s artificial separation of those proceedings ran counter to established law and discounted the dispositive effect of the district court’s legal conclusion by conflating two elements of Crutcher’s claim.

First, by failing to review the separation *de novo*, the majority neglected to adhere to the axiom that criminal proceedings do not terminate, and a criminal defendant’s malicious prosecution claim does not accrue, “until such time as the State [is] precluded from

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163 Colbert, 2015 U.S. Dist. LEXIS 67561, at *45 (citing Hessel, 977 F. 2d at 305).
164 Colbert v. City of Chicago, et al., 851 F. 3d 649, 652 (7th Cir. 2017).
165 *Id.* at 654, n.5.
seeking reinstatement of the charges."\textsuperscript{166} The record explicitly showed that the State was not only \textit{permitted} to seek reinstatement of the charges against Crutcher, but that it \textit{did in fact} reinstate the charges against Crutcher that resulted from the officers’ search of his residence on March 31, 2011, less than one month after the circuit court judge’s “no probable cause” finding.\textsuperscript{167}

More importantly, the majority predicated its judgment as a matter of law in favor of the Defendant Officers on the ultimate catchall: a broken “chain of causation.”\textsuperscript{168} Because Crutcher was subsequently indicted on charges stemming from his arrest on March 31, 2011, the court concluded that the chain of causation linking Willingham’s arrest to Crutcher’s prosecution had been broken.\textsuperscript{169} Though the majority admitted that Willingham’s allegedly false statement in the original case incident report he drafted constituted a post-arrest action, it nevertheless found that there was simply no evidence that the statement influenced the prosecutor’s decision to indict, or that the prosecutor relied on the contents of the report to obtain the indictment for Crutcher’s second proceeding.\textsuperscript{170} In support, the court pointed to the fact that Willingham had not testified before the grand jury and found that Crutcher failed to provide any evidence connecting Willingham’s allegedly false report to the officer who did testify.\textsuperscript{171}

Yet by focusing on the fact that Crutcher pointed to no evidence that Willingham committed perjury before the grand jury, the majority misapprehended the ways in which plaintiffs may rebut the presumption that an indictment is \textit{prima facie} evidence of probable cause. The Supreme Court of Illinois explicitly addressed the issue of what may constitute a post-arrest “improper act” sufficient to leave the chain of causation intact, stating that “[n]o decision of the court ever

\textsuperscript{166} Ferguson v. City of Chicago, 213 Ill. 2d 94, 104 (2004).
\textsuperscript{167} Colbert, 851 F. 3d at 653.
\textsuperscript{168} Id. at 654, n.5.
\textsuperscript{169} Id. at 655.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
has restricted the rebutting evidence solely to proof of false or incomplete testimony” because no such “insuperable burden . . . would serve the ends of justice.” The Seventh Circuit majority thus improperly narrowed its analysis and refused to credit Crutcher’s testimony, which supported the allegation that Willingham committed an improper act by knowingly misrepresenting facts that satisfied a required element of the offense for which Crutcher was subsequently charged and indicted.

Moreover, the court went on to muse that, “it [was] likely that the prosecutor knew that a judge had already dismissed Willingham’s complaint, which was based in part on th[at] arrest report, for lack of probable cause.” In so doing, however, the majority refused to confront the implausibility of its assumption. A grand jury entered a finding of no probable cause to indict Crutcher on two charges: one which required proof that Crutcher knowingly resided in a home with a firearm, the other which required proof that he had actual or constructive possession of a firearm. Crutcher was subsequently indicted on three charges, all of which required actual or constructive possession.

The record is incontrovertibly devoid of evidence prior to the Defendant Officers’ search. Even the alleged tip which triggered Willingham and Tweedle to conduct the search of Crutcher’s residence failed to appear in the record until Crutcher had already been taken into custody. According to the lower court, that anonymous tip and Crutcher’s “delay” formed the requisite reasonable suspicion for the Defendant Officers’ search, which in turn afforded them the opportunity to find the firearms in Colbert’s locked bedroom. Those facts, taken as true, would likely be sufficient to show actual

173 Id.
174 Id. at 653.
175 Id.
176 Id. at 666 (Hamilton, J., dissenting).
possession. Crutcher’s false confession, in turn, supports constructive possession.

Yet it was patently impossible for the prosecutor to discover any one of those facts independent from Crutcher’s arrest report, where they were all memorialized in writing by Willingham. Furthermore, Willingham testified in his deposition that he “related the facts of the case” to the prosecutor. 178 Not one of the Defendant Officers offered any evidence tending to prove that the prosecutor’s decision to charge Crutcher was the result of his or her independent investigation. The majority did not explain what evidence a prosecutor might have had to support an indictment for possession other than the evidence that was exclusively within Willingham’s control. Nonetheless, the court conclusively determined that there was no evidence that Willingham’s arrest report played any part in Crutcher’s second criminal proceeding which stemmed from the same operative facts as the first. 179

Therefore, one can reasonably conclude that the Seventh Circuit majority remained unperturbed by the fact that the only place from which evidence could be found supporting probable cause sufficient to initiate and continue Crutcher’s second criminal proceeding was within Willingham’s arrest report, which Crutcher alleged was falsified. Consequently, the district court’s decision to separate Crutcher’s two criminal proceedings was thus far from irrelevant. Rather, that decision effectively barred evidence of Willingham’s post-arrest improper act. The majority thus tacitly deferred to Defendant Officers’ version of events, and neglected to credit Crutcher’s sworn testimony denying the veracity of salient facts in Willingham’s arrest report from playing any role in his malicious prosecution claim. As a result, the presumption of probable cause inherent in Crutcher’s indictment remained unrebutted. Consequently, by way of a procedural technicality, the majority avoided crediting testimony of the non-moving party, and, as a result, was not forced to explicitly state what it implicitly had done.

178 Brief of Plaintiffs-Appellants at 22, Colbert v. City of Chicago et al. (7th Cir. Nov. 2, 2016) (No. 16-1362).
179 Colbert, 851 F. 3d at 655.
2. Christopher Colbert – Unreasonable Search

Applying the test enunciated in *Wolf-Lillie v. Sonquist*, the Seventh Circuit majority found Colbert unable to satisfy §1983’s personal liability requirement due to the lack of an affirmative link between the individuals sued and the misconduct alleged. Particularly problematic for the court was the fact that Colbert sued four of ten searching officers, while admitting that he was unable to identify which officer had caused which type of property damage. Unmoved by the fact that Colbert’s failure was a direct result of his removal from the rooms in which the officers were conducting the search, the majority concluded that because the officers denied personal responsibility and Colbert put forth “no evidence” to support his claim against them, no dispute of material fact remained.

The court did, however, recognize the “potential tension between §1983’s individuality responsibility requirement and factual scenarios of the kind present [in this case].” In its attempt to provide a solution for that inherent problem, however, the majority merely reiterated its prior suggestion to plaintiffs in two cases the court believed to be factually similar. First, in *Hessel v. O’Hearn*, a case in which officers allegedly stole items during a search of plaintiff’s house, the court for the first time “recognized the plaintiff’s bind,” but affirmed summary judgment for defendant officers because the plaintiffs had “alleged no conspiracy.” Delving into the realm of fact-finding, the court opined that “[t]here is no more reason to fix

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180 Wolf-Lillie v. Sonquist, 699 F. 2d 864, 869 (7th Cir. 1983) (holding that because §1983 creates a cause of action based on personal liability and predicated upon fault, “a causal connection, or affirmative link, between the misconduct complained of and the official sued is necessary.”).
181 Colbert, 851 F. 3d at 657.
182 Id. at 659.
183 Id. at 660.
184 Id. at 657.
185 Hessel v. O’Hearn, 977 F. 2d 299, 305 (7th Cir. 1992).
186 Id.
liability on [those] 14 police officers than on the entire population of Horicon, Wisconsin,"\textsuperscript{187} later qualifying that with "[w]ell, maybe a little more reason."\textsuperscript{188} Nonetheless, the court surmised that because "[e]ach of the defendants c[ould] deny liability, a jury may find it impossible to determine who is lying,"\textsuperscript{189} the plaintiff was not entitled to relief as a matter of law,\textsuperscript{190} thereby evidencing a propensity to improperly weigh evidence at the summary judgment stage.

Similarly, in \textit{Molina ex rel. Molina v. Cooper},\textsuperscript{191} the court suggested that plaintiffs in such a "bind" might allege "something akin to a 'conspiracy of silence among the officers,' in which defendants refuse to disclose which of them has injured the plaintiff."\textsuperscript{192} But because the officer named in Molina's lawsuit was one of seventeen officers and because the plaintiff failed to specifically articulate a conspiracy among the officers, the court boldly asserted that, "[n]o jury could reasonably infer . . . that [the named officer] caused the damage to the truck."\textsuperscript{193} In so doing, the court refused to acknowledge the important role a jury plays—that of making credibility determinations at trial.

Thus, under the pretense of Colbert's inability to satisfy the causal connection requirement, the court ignored the specific circumstances of Colbert's case and held that because Colbert had not specifically alleged "anything like a 'conspiracy of silence' . . . no jury could reasonably conclude that these particular Defendant Officers had any individual involvement in Colbert's alleged property damage."\textsuperscript{194} This most recent holding evidences a willingness to dismiss cases in which a plaintiff has offered undisputed direct evidence of extensive property damage as a result of an unreasonable search and circumstantial

\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Molina ex rel. Molina v. Cooper, 325 F. 3d 963 (7th Cir. 2003).}
\textsuperscript{192} \textit{Id. at 974.}
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Colbert v. City of Chicago et al., 851 F. 3d 649, 658 (7th Cir. 2017).}
evidence supporting the plaintiff’s argument that the officers failed to intervene on the pretense that no reasonable juror would believe the plaintiff standing before him. Regardless of the underlying intent, the resultant principle is that in cases in which a plaintiff is unable, due to the searching officers’ own conduct, to provide evidence of an officer’s direct involvement in the alleged misconduct, that claim necessarily must fail unless that plaintiff specifically pleads a conspiracy of silence in his or her complaint.

Recognizing the paradox of its assertion that plaintiffs in Colbert’s situation are required to plead a specific phrase in order to survive summary judgment, the majority explicitly refuted the natural implication of its holding by stating “[t]his is not to suggest that plaintiffs in this context must plead a legal theory.”195 Rather, the court indicated, those plaintiffs must plead a claim that plausibly forms a causal connection between the officer sued and some alleged misconduct and introduce facts that give rise to a genuine dispute regarding that connection, bringing the impossibility of producing such evidence full circle.196 As such, the Seventh Circuit majority’s conclusion left much to be desired, particularly because Colbert’s evidentiary showing seemed to meet that stated requirement.

Colbert’s alternative argument alleging that the named officers at the very least failed to intervene was met with the same fate. The Seventh Circuit erroneously concluded that the Colbert’s case was easily distinguishable from its precedent, Miller v. Smith,197 based on no more than a circumstantial technicality.198 This artificial differentiation evidenced the majority’s refusal to take a critical look at the facts of a specific civil rights plaintiff’s case using a “totality of the circumstances” approach, preferring instead to boil down those

195 Id.
196 Id.
197 Miller v. Smith, 220 F. 3d 491 (7th Cir. 2000).
198 The majority seemed to differentiate the facts of Miller from those of Colbert based on the fact that, though the plaintiff in Miller “could not identify which of the two officers had used excessive force, he did identify the remaining for officers who stood by and, as a result, ignored a realistic opportunity to intervene.” Colbert, 851 F. 3d at 660 (emphasis in the original).
facts and place the respective plaintiff in a category into which he may or may not belong. As a result, the court found that Colbert’s assertion that the four named Defendant Officers caused the damage, or at least failed to intervene when they had a realistic opportunity to do so, proven in part by circumstances such as the loud volume of the destructive search coupled with the undisputedly small home, was simply insufficient to dispute the Defendant Officers’ respective claims that “it wasn’t me.”

B. Judge David Hamilton’s Dissent

The first sentence of Judge David Hamilton’s dissenting opinion in Colbert v. Chicago summarily described the majority’s error, stating “[t]he factual account provided by Crutcher and Colbert may or may not be true, but that question is not before us.” Implicitly attacking the rose-tinted glasses with which the majority read the Defendant Officers’ barebones denial of all responsibility, Judge Hamilton reminded his colleagues that their duty in reviewing summary judgments is to treat the evidence of the nonmoving party as true and give them the benefit of all reasonable inferences from that evidence. Further, recognizing the gravity of the issue presented, Judge Hamilton properly framed the case at bar as one which raises larger questions about how courts should address claims of law enforcement misconduct, putting special emphasis on claims brought by people of color, who are disproportionately subject to police misconduct. For Judge Hamilton, the issues raised in Colbert almost exclusively involved credibility determinations, which the majority either resolved themselves or summarily avoided by standing behind a proverbial shield of procedure.

First, Judge Hamilton took issue with the majority’s suggestion that plaintiffs who hope to survive summary judgment after being subjected to an unreasonable search or seizure during which they are

199 Colbert, 851 F. 3d at 661 (Hamilton, J., dissenting).
200 Id.
201 Id.
effectively blindfolded should, in general, allege a “conspiracy of silence” to strengthen their claim. Recognizing that the majority’s suggestion was founded on Hessel and Molina, Judge Hamilton clarified that nothing in those cases stood for the proposition that plaintiffs in Colbert’s position are required to meet a new pleading requirement. As a result, compelling a civil rights plaintiff to plead a fact patently obvious to every Chicago resident would require that plaintiff to interpret the Seventh Circuit’s suggestion as an actual pleading and/or evidentiary prerequisite. Yet neither Hessel nor Molina took a firm stance on that issue, and by categorizing Colbert as a Hessel/Molina case, the Seventh Circuit majority failed to recognize critical differences between those factual scenarios.

The fourteen officers in Hessel conducted a search of plaintiffs’ premises for evidence of illegal gambling pursuant to a valid warrant. Plaintiffs claimed that the officers exceeded the scope of that warrant and stole items of property, including three cans of soda, an antique chest and an envelope with six hundred dollars of cash inside. Declining to reverse the lower court’s grant of summary judgment for the officers, the Seventh Circuit cited a “controversial decision” that came out of a case in California, in which the court held that the doctrine of res ipsa loquitur could be used to thwart a “conspiracy of silence” of medical personnel. Importantly, however, the Seventh Circuit concluded Hessel by stating, “[w]hether any such approach might have been used by the plaintiffs in this case we need not decide.”

Further, in Molina, the court refused to credit plaintiffs’ attempt to name the officer they believed to be responsible for causing damage to their truck during the search. In so doing, however, the court stated

\[\text{Sources:}\]

202 Id. at 662 (Hamilton, J., dissenting).
203 Id.
204 Hessel v. O’Hearn, 977 F. 2d 299, 301 (7th Cir. 1992).
205 Id.
206 Id. at 305 (citing Ybarra v. Spangard, 25 Cal. 2d 486 (1944)).
207 Hessel, 977 F. 2d at 305.
208 See Molina ex rel. Molina v. Cooper, 325 F. 3d 963 (7th Cir. 2003).
that the facts of the plaintiffs’ case bore “a strong resemblance to those in Hessel,” thereby denying differentiation based on a “complete inability” in Hessel versus the “likely culprit” in Molina. What’s more, the only reference the Seventh Circuit made to a supposed pleading requirement in Molina was when they noted that the plaintiffs “ha[d] not alleged a conspiracy of silence among the officers (a move that might have strengthened their argument that Hessel is inapplicable).”

Moreover, the majority’s “conspiracy” suggestion stands in stark contrast to the recognized principle that a plaintiff is not required to plead legal theories in his complaint and is inherently ironic given the immeasurably liberal pleading requirements applied to claims for conspiracy in the Seventh Circuit. In fact, by asserting that Colbert should have explicitly alleged a “conspiracy of silence,” the Seventh Circuit majority implicitly admitted the impossibility of Colbert’s situation. Because conspiracies are “by their nature shrouded in mystery,” courts have found that they “do not permit the plaintiff to allege, with complete particularity, all of the details of the conspiracy or the exact role of the defendants in the conspiracy.” A plaintiff cannot be required to “allege facts with precision where the necessary information to do so is within the knowledge and control of the defendant and unknown to the plaintiff.”

As a result, states under the Seventh Circuit’s jurisdiction merely require a plaintiff to allege the parties involved, the general purpose, and the approximate date of the conspiracy. Colbert incontrovertibly surpassed those minimal requirements. Further, Colbert’s brief explicitly stated that because both Plaintiffs expect each Defendant

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209 Id. at 973.
210 Id. at 974.
211 Walker v. Thompson, 288 F. 3d 1005, 1007 (7th Cir. 2002) (stating “it is enough in pleading a conspiracy merely to indicate the parties, the general purpose, and approximate date, so that the defendant has notice of what he is charged with.”).
213 Id. at 66.
214 Loubster v. Thacker, 440 F. 3d 439, 443 (7th Cir. 2006).
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Officer to deny wrongdoing, the jury should be permitted to assess the credibility of those claims. “It is unclear,” Judge Hamilton opined, “what else Colbert should have said to assert a ‘conspiracy of silence.’”

Judge Hamilton then contended that the majority also improperly denied Colbert’s claim that at a minimum, the four named officers failed to intervene when their fellow officers searched his home in an unreasonable manner. The majority stated that Colbert’s claim failed because he did not observe the officers failing to intervene. Noting that requiring an aggrieved plaintiff to observe officers failing to intervene would be a marked departure from circuit precedent, Judge Hamilton criticized the majority for its inconsistent and conflicting evidentiary requirements applied to individual liability under that theory.

In Miller v. Smith, the district court granted summary judgment to police officers on plaintiff’s claim of excessive force because Miller was unable to “identify the officers who allegedly attacked him or otherwise support his claim with sufficient facts.” The Seventh Circuit reversed, concluding, “[i]f Miller can show at trial that an officer attacked him where another officer ignored a realistic opportunity to intervene, he can recover.”

The majority in Colbert attempted to differentiate Miller based on the fact that Miller “narrowed his excessive force allegation to two of the six arresting officers” and was able to identify the remaining four officers who stood by. Though Colbert narrowed his unreasonable search claim to four of the ten officers who were present during the search, this was not enough for the majority. Failing to understand the way in which

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215 Colbert v. City of Chicago et al., 851 F. 3d 649, 662 (7th Cir. 2017) (Hamilton, J. dissenting).
216 Id. at 664 (Hamilton, J., dissenting) (citing Miller v. Smith, 220 F. 3d 491 (7th Cir. 2000) (“An official satisfies the personal responsibility requirement of §1983 if she acts or fails to act with a deliberate or reckless disregard of plaintiff’s constitutional rights.”)).
217 Miller, 220 F. 3d at 493.
218 Id. at 495.
219 Colbert, 851 F. 3d at 661 (Hamilton, J., dissenting).
220 Id. at 660.
the two cases were distinguishable, Judge Hamilton argued that the Seventh Circuit should have taken the same approach to Colbert’s unreasonable search claim as it did to that of Miller.  

If it had, the result would have been quite different for Colbert. Taking an approach consistent with Seventh Circuit precedent, Judge Hamilton analyzed the issue using the totality of the circumstances and pointed to factors such as the officers’ testimony, in which they stated that Colbert’s home was “a very small residence” and testimony that the officers’ search was “incredibly loud and disruptive, as one might expect when doors are torn from their hinges” to conclude that the four Defendant Officers must have been close to any other officer in the home. The Seventh Circuit required no more than that in Miller, yet inexplicably came to the opposite result in Colbert, finding Colbert’s case more similar to a case in which plaintiff complained about a stolen soda and one which involved a search of a truck, not a residence. Moreover, Judge Hamilton highlighted the dispositive issue of credibility the majority implicitly resolved, noting, “while the defendants might argue that they did not notice their colleagues in the next room putting holes in the walls, the plausibility of that argument should be a jury issue.”

Thus, rejecting the majority’s “conspiracy” suggestion, Judge Hamilton ventured to find a legitimate and instructive solution to a plaintiff’s predictable problem. In contrast to the majority, Judge Hamilton found persuasive the burden-shifting approach, which has been used in other circuits facing similar evidentiary issues and was propounded by Colbert.

In Burley v. Gagacki, the Sixth Circuit

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221 Id. at 664 (Hamilton, J., dissenting).
222 Id. at 655 (Hamilton, J., dissenting).
223 Hessel v. O’Hearn, 977 F. 2d 299, 301 (7th Cir. 1992).
224 Molina ex rel. Molina v. Cooper, 325 F. 3d 963, 973 (7th Cir. 2003).
225 Colbert, 851 F. 3d at 665 (Hamilton, J., dissenting).
226 The majority summarily dismissed Colbert’s proposed burden-shifting approach for two reasons: (1) the Seventh Circuit has never adopted such an approach; and (2) even using a burden-shifting approach, Colbert “at least would have needed to have sued all of the officers he had reason to believe were responsible for the alleged property damage.” Colbert, 851 F. 3d at 659.
permitted the district court to shift the burden of production on remand from plaintiff to defendants after the involved officers masked their identities before ransacking the plaintiff’s home, stating “while an officer’s mere presence at the scene of the search is insufficient” to establish individual liability under §1983, “here the agents’ intent to conceal contributed to plaintiffs’ impaired ability to identify them.”

Judge Hamilton then cited the Ninth Circuit’s decision in *Dubner v. City and County of San Francisco*, to clarify that such an approach is only a procedural adjustment, which shifts the burden of production based on the defendants’ own actions when they act together. Under this approach, a defendant seeking summary judgment is required to present evidence that he is not personally liable for the unreasonable search, either by identifying who caused the damage or through some other means. Importantly, if the officers fail to present exculpatory evidence, Judge Hamilton argued, the matter should proceed to trial so a jury can evaluate credibility.

With regard to Crutcher’s malicious prosecution claim, Judge Hamilton condemned the uncritical approach the majority took to conclude that Crutcher’s grand jury indictment broke the requisite chain of causation between Willingham and the alleged constitutional deprivation for two reasons. First, Judge Hamilton correctly clarified that Crutcher’s claim was based not on a wrongful arrest, but on Willingham’s alleged lie after the officers arrested him. Therefore, Crutcher’s claim was by definition premised on the malicious steps Willingham took to ensure Crutcher’s prosecution. Crutcher alleged

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227 *Id.* at 663 (Hamilton, J., dissenting).
228 *Burley v. Gagacki*, 729 F. 3d 610, 622 (6th Cir. 2013) (citations omitted).
229 *Dubner v. City and County of San Francisco*, 266 F. 3d 959, 965 (9th Cir. 2001) (holding that “although the plaintiff bears the burden of proof on the unlawful arrest, she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest.”).
230 *Colbert*, 851 F. 3d at 664.
231 *Id.* at 663-64 (Hamilton, J., dissenting).
232 *Id.* at 665 (Hamilton, J., dissenting).
that Willingham signed his name to his arrest report, knowing that the report contained a patently false admission that formed the basis of one of the elements of both crimes for which Crutcher was charged. Accordingly, the chain of causation remained intact after Crutcher’s indictment in his second criminal proceeding.

Second, Judge Hamilton criticized the Seventh Circuit majority for refusing to confront the implausibility of its assumption. The majority, the prosecutor seeking the indictment for knowing possession of a firearm that was found in Colbert’s locked bedroom never presented the grand jury with information that Crutcher had confessed he knew the gun was in the home. Notably, the majority remained silent as to what other evidence the prosecutor could have offered that would have provided the probable cause necessary to indict Crutcher on charges requiring actual or constructive possession. As Judge Hamilton correctly noted, Willingham’s arrest report was the prosecutor’s “only evidence [in the record presented] that Crutcher knew about the gun in Colbert’s bedroom closet.” Consequently, finding it unlikely that a competent prosecutor would have failed to present that evidence to the grand jury, Judge Hamilton criticized the majority for making “such an improbable assumption in favor of the defense” in reviewing summary judgment for the defense.

Finally, the majority’s disposal of Crutcher’s claim based on the grand jury indictment allowed it to avoid addressing Defendant Officers’ argument that they had probable cause to arrest Crutcher. Whether Willingham reasonably believed that Crutcher either knowingly resided in a home with or actually or constructively possessed a firearm was one of the most hotly contested of the aforementioned disputed facts, the truth of which only a jury could

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233 Id.
234 Id. (emphasis added).
235 Id. (emphasis in the original).
236 Id.
determine. Understanding the pivotal role the probable cause analysis played in Crutcher’s malicious prosecution claim, Judge Hamilton took it upon himself to respond to Defendant Officers’ probable cause argument.

There were two genuine disputes of material fact that the majority simply avoided by finding a broken chain of causation. That chain of causation would have remained intact, however, had the majority declined to implicitly resolve several credibility determinations in favor of Willingham. First, Crutcher claimed that he did not know about the gun that was found in Colbert’s locked bedroom. Willingham, by contrast, claimed that Crutcher confessed to knowing. Crutcher then testified denying that claim. Because Crutcher’s “knowledge” of the gun was highly relevant to whether Crutcher could have been found in constructive possession of a firearm, this conflicting evidence, Judge Hamilton concluded, presented a genuine issue of material fact.

Second, Defendant Officers attempted to lessen the impact of that genuine issue of material fact by arguing that the tip Willingham received about Crutcher being seen with a gun from a cooperating individual, combined with the corroborating evidence—the discovery of the gun itself—was also sufficient to establish probable cause. Yet by relying on that cooperating individual, the majority’s holding showed a willingness to ignore several facts that called Willingham’s version of events into question. In fact, there existed significant

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237 See Hunter v. Bryant, 502 U.S. 224, 229 (1991) (Scalia, J., concurring, Stevens J., dissenting) (stating “[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment or a directed verdict in a §1983 action based on the lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach.”).

238 Colbert, 851 F. 3d at 665-66 (Hamilton, J., dissenting).

239 Id. 666 (Hamilton, J. dissenting).

240 Id.

241 Id.

242 Id.

243 Id.
problems in Willingham’s testimony about the “cooperating individual.”

The parties did not dispute the fact that Willingham failed to provide any details about the purported reliability of the individual, “despite fervent questioning by Plaintiff’s counsel,” which forced the district court to treat the individual as an “anonymous tipster.” An anonymous tipster, without more, is insufficient at law to establish probable cause. Worse yet, neither the majority nor the district court addressed the genuine dispute as to which came first, the search or the supposed tip. Willingham provided no evidence of the tip prior to the search. In fact, Willingham’s arrest report did not even document the alleged tip. Rather, the first mention of that tip was in Willingham’s case incident report, which was drafted after Crutcher was taken into custody—a fact that was compounded by Crutcher’s sworn testimony in which he stated that when the officers first arrived they were searching not for guns but for drugs.

Taken together, those determinations evidenced the Seventh Circuit majority’s perfunctory acceptance of the Defendant Officers’ version of events as undisputed despite testimonial evidence put forth by the non-moving party that called the veracity of the officers’ testimony into question. The facts of Colbert, like those of Tolan, considered together, thus lead to the “inescapable conclusion” that the majority credited the evidence of the party seeking summary judgment—Chicago Police Officers—and failed to properly consider key evidence offered by the non-moving party—two black men, one

\[244\] Id.
\[245\] Id.
\[246\] Id.
\[247\] Id.
\[248\] Id.
\[249\] Id.
\[250\] Id. As discussed infra, Crutcher supported his allegation that the officers were looking for drugs with specific statements Willingham made and actions the Defendant Officers took, including that Willingham said he had received a tip that “[they] had some drugs,” specifically cocaine, and searched through the sugar in Colbert’s kitchen. Id.
with a criminal conviction, living in a predominantly black neighborhood. In so doing, the court neglected to adhere to the fundamental principle that “at the summary judgment stage, all facts and the reasonable inferences therefrom should be drawn in favor of the nonmoving party.”

**CONCLUSION**

While the Department of Justice’s Investigation of the Chicago Police Department and the events preceding it have triggered the Mayor’s promise to redouble the City’s efforts to combat police misconduct, that type of response from the city’s chief executive is far from novel. The Chicago Police Department has cycled in and out of the national consciousness almost since its inception, yet its practices apparently have remained unchanged. Further, as the DOJ stated, “[w]hen officers falsify reports and affirmatively lie in interviews and testimony, this goes well beyond any passive code of silence; it constitutes a deliberate, fundamental, and corrosive violation of CPD policy that must be dealt with independently and without reservation if the City and the CPD are genuine in their efforts to have a functioning system of accountability that vindicates the rights of individuals who are abused by CPD officers.”

Thus, while it is encouraging that public outrage has forced the City to yet again commit to structural changes within the CPD, if we have learned anything from Chicago’s history, it is that the type of change this City so desperately needs will require cooperation from each branch of government. Included in that is the United States Court of Appeals for the Seventh Circuit. Yet the way in which the Seventh Circuit has handled factual disputes between police officers defendants

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252 U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIVISION & U.S. ATTORNEY’S OFFICE NORTHERN DISTRICT OF ILL., supra note 1, 19 (Mayor Rahm Emmanuel responded by establishing the Police Accountability Task Force (PATF) and charged PATF with assessing and making recommendation for change in five years, including “oversight and accountability.”). *Id.*
253 *Id.* at 75.
and civil rights plaintiffs based largely upon incomplete pretrial records only perpetuates the already near impossible task of holding officers accountable for misconduct.

As meritorious claims of officer misconduct continue to be disposed of in the pretrial phases of litigation, officers are afforded the opportunity to patrol the streets of Chicago with a judicially fortified shield against liability for their unlawful actions. The judiciary must work together with the executive branch in order to effect meaningful change, rather than merely accepting officer misconduct—both prior and subsequent to an arrest—as an immutable trait inherent in the CPD. Accordingly, the Seventh Circuit must heed the DOJ’s warnings against allowing and effectively encouraging officer misconduct to continue and resist the temptation to use procedural tools to validate the perfunctory grant of deference to Chicago Police Officers. At the very least, the Seventh Circuit must decline the invitation to go beyond the traditional summary judgment inquiry and instead allow meritorious claims of police misconduct to go to a jury.
BETWEEN SCYLLA AND CHARYBDIS: EZELL V. CITY OF CHICAGO (EZELL II) AND HOW THE SEVENTH CIRCUIT CONTINUES TO NARROW CHICAGO’S CONSTITUTIONAL PATH FORWARD ON GUN CONTROL

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“We then sailed on up the narrow strait with wailing. For on one side lay Scylla and on the other divine Charybdis terribly sucked down the salt water of the sea.”  

INTRODUCTION

In 2008, the United States Supreme Court reset the landscape of the Second Amendment when it issued its landmark decision in District of Columbia v. Heller.2 The Court held for the first time that the Second Amendment right to “keep and bear arms” was an individual right unconnected with any militia service.3 Two years after this watershed decision, the Court took the inevitable next step in


3 Id. at 595.
McDonald v. City of Chicago and held that the individual right recognized in Heller was fully applicable to state and local governments via incorporation by the Fourteenth Amendment.\(^4\)

Justice John Paul Stevens warned in his dissent in McDonald that the Court’s decision would lead to “an avalanche of litigation that would mire federal courts in fine-grained determinations about which state and local regulations comport with the Heller right—the precise contours of which are far from pellucid.”\(^5\) Indeed, Heller did not fully define the scope of this newly recognized Second Amendment right, nor did it include a standard of review for how the lower courts were to enforce it.\(^6\) Now, because of McDonald, these same lower courts faced the daunting prospect of reviewing a seemingly endless array of state and local gun control legislation with little guidance from the Supreme Court on the proper Second Amendment analytical framework.\(^7\)

In the void left by the Supreme Court, a majority of the Federal Circuit Courts of Appeals eventually settled on a two-step means-end framework similar in many ways to the framework used for challenges under the First Amendment.\(^8\) However, state and local officials and gun control advocates still faced an uncertain path forward. Advocates and legislators had to determine what regulations remained viable and worth pursuing to combat gun violence in the new constitutional regime of the Second Amendment.\(^9\) Some gun-control advocates remained hopeful that the Heller and McDonald decisions would have

\(^4\) McDonald v. City of Chicago, 561 U.S. 742, [] (2010).

\(^5\) Id. at 904 (Stevens, J., dissenting).

\(^6\) See Heller, 554 U.S. at 718 (Breyer, J., dissenting) (“Because [the Court’s decision] says little about the standards used to evaluate regulatory decisions, it will leave the Nation without clear standards for resolving those challenges.”).


\(^8\) See infra at Section IB.

a limited affect on other gun control measures across the country.\textsuperscript{10} Although the Supreme Court had declared total bans on handgun ownership unconstitutional, advocates maintained that there was still a “broad range of gun regulation that remain[ed] presumptively legal.”\textsuperscript{11}

While it is true that in the years following \textit{Heller} and \textit{McDonald} a range of federal, state, and local gun regulations were upheld by courts across the United States,\textsuperscript{12} the same is not necessarily true for the jurisdiction where \textit{McDonald} originated: the Seventh Circuit Court of Appeals. The Seventh Circuit, with some exceptions, has steadily expanded the scope of the Second Amendment right first recognized in \textit{Heller}, and it has repeatedly struck down state and local gun control measures as unconstitutional.\textsuperscript{13}

The most recent example of this trend is the case of \textit{Ezell v City of Chicago} (\textit{Ezell II}), decided in January of 2017.\textsuperscript{14} \textit{Ezell II} was the second round of litigation aimed at multiple Chicago gun control ordinances which the city had put in place after its total handgun ban had been invalidated by the Supreme Court in \textit{McDonald}.\textsuperscript{15} \textit{Ezell II} specifically involved various city ordinances setting zoning and

\textsuperscript{10} See Robert Barnes and Dan Eagen, \textit{Supreme Court Affirms Fundamental Right to Bear Arms}, \textit{Washington Post} (June 29, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/06/28/AR2010062802134.html (“Over the long run, this apparent victory for gun rights may be more symbol than substance. It’s actually a very narrow holding.”).


\textsuperscript{12} See generally, Stephen Kiehl, \textit{In Search of a Standard: Gun Regulations After Heller and McDonald}, 70 MD. L. REV. 1131, 1151 (2011) (arguing that the response to \textit{Heller} and \textit{McDonald} was muted and that “[l]ower courts have been reluctant to read \textit{Heller} and \textit{McDonald} as inviting open season on gun regulations”).

\textsuperscript{13} See discussion and cases cited infra at Section II.

\textsuperscript{14} Ezell v. City of Chicago, 846 F.3d 888 (7th Cir. 2017) (hereinafter “\textit{Ezell II}”).

\textsuperscript{15} \textit{Id.} at 889-90.
distancing restrictions on the construction of live firing ranges, as well as a restriction on minors’ access to such ranges.16

A divided three judge Seventh Circuit panel struck down the ordinances as unconstitutional.17 Circuit Judge Diane Sykes wrote the majority opinion, in which she applied a “sliding scale” form of the two-step means-end test used by other circuits for Second Amendment claims and subjected the regulations to a heightened level of review akin to strict scrutiny.18 Judge Illana Rovner wrote a concurrence, dissenting in part, where she argued that some of the restrictions should have withstood constitutional scrutiny.19 Judge Rovner also had notably disagreed with the same majority and their use of the two-step means-end test in the previous iteration of the case Ezell I.20

This article examines Ezell II in the context of the current state of Second Amendment jurisprudence in the Seventh Circuit and the Federal Courts at large, an area of constitutional law which is still in its relative infancy. This article argues that the sliding scale means-end test the majority articulated and used in Ezell I & II was not properly applied to Chicago’s firing range ordinances. Furthermore, this article argues that the level of heightened scrutiny the court used in Ezell I and applied again in Ezell II, which appeared to be strict scrutiny, was inappropriate and out of sync with the level of scrutiny that has been applied in the majority of other circuits in comparable cases.

Part I of this article examines the background of Heller and McDonald, and the two-step means-end framework developed by the Circuit Courts to apply the decisions to a range of federal and local gun control regulations. Part II looks at the Seventh Circuit’s Second Amendment jurisprudence prior to Ezell II, and the background of the

16 Id. at 890.
17 Id.
18 See generally, id. at 892-93. As will be discussed further infra, Judge Sykes used different labels in Ezell I and Ezell II for the level of scrutiny being applied, but Judge Rovner noted in her opinion in Ezell I that it appeared to be strict scrutiny.
19 See id. at 898-900 (Rovner, J., concurring in part and dissenting in part).
20 See Ezell v. City of Chicago, 651 F.3d 684, 711 (7th Cir. 2011) (Rovner, J., concurring) (hereinafter “Ezell I”).
case, including the important decision in *Ezell I*. Part III examines the
decision and the different opinions in *Ezell II* and argues that the
majority incorrectly applied the two-step means-end scrutiny test, both
in terms of the heightened level of scrutiny selected by Judge Sykes
and how it was applied to the regulations at issue.

2016 marked a record year for gun violence in Chicago, and 2017
has shown little signs of improvement. In *Ezell II*, Judge Rover
expressed her “sympathy for the City's difficult path between this
Scylla and Charybdis,” as they attempt to combat gun violence while
navigating the Constitutional reality imposed by *Heller* and
*Mcdonald*. Unfortunately, the Seventh Circuit in *Ezell II* further
narrowed the path forward for Chicago city officials to craft
meaningful gun control ordinances that can survive constitutional
scrutiny.

I. Background: *Heller & McDonald*, and the New Second
Amendment Landscape in the Federal Courts

When the Supreme Court issued its decision in *Heller*, it marked
the first time in nearly 70 years that the highest court in the United
States had tackled the Second Amendment. The prior case, *Miller v.
United States* in 1939, did not contain much elaboration on the scope
of the Second Amendment. *Miller* involved a challenge to a state ban
on sawed-off shotguns which the Court upheld as constitutional under
the Second Amendment. The Court concluded that there was a lack
of evidence showing “some reasonable relationship” between the use
of a sawed-off shot gun and “the preservation or efficiency of a well

22 *Ezell II*, 846 F.3d at 898.
24 See Henderson, *supra* note 9, at 432.
regulated militia,” and remanded the case for further proceedings, which did not occur.26

Although the opaque language of the Miller opinion led to decades of debate among courts and commentators as to the scope of the Court’s Second Amendment holding,27 the language in the opinion did appear to strongly suggest the Court’s view that the Second Amendment right to bear arms was only connected to militia service.28 Regardless of the merits of this view, the interpretation that the right to keep and bear arms is tied to militia service was foreclosed when the Supreme Court issued its landmark ruling in Heller.

A. D.C v. Heller & McDonald v. City of Chicago: The Supreme Court Resets the Stage on the Second Amendment

The District of Columbia’s total ban on hand gun ownership was the strictest gun control regulation in the country, and a ripe target for gun rights advocates.29 A leading libertarian think-tank spent years strategically assembling the perfect “law-abiding” plaintiffs to challenge the law and finally achieve judicial recognition of an individual right to keep and bear arms.30 The group found its ideal

26 Id. No further proceedings occurred because the original defendant Miller had died, and the remaining defendant struck a plea deal after the Supreme Court’s decision. See Id.


28 See Henderson, supra note 9, at 432. As Justice Stevens noted in his dissent in Heller, virtually every Court of Appeals to interpret Miller understood it to hold that “the Second Amendment does not protect the right to possess and use guns for purely private, civilian purposes. D.C. v. Heller, 554 U.S. 570 n.2 (2008) (Stevens, J., dissenting) (listing cases).


plaintiff in Dick Heller, a security guard who carried a gun on duty but was denied a license by the District to keep his firearm in his home.\textsuperscript{31} In a bitterly split opinion, the Court in \textit{Heller} ruled that the District’s ban was unconstitutional.\textsuperscript{32} The Court held that the Second Amendment conferred an individual right to “possess a firearm unconnected with service in a militia,” as well as the right to use that arm for “traditionally lawful purposes such as self defense in the home.”\textsuperscript{33} In a sprawling opinion for the majority, Justice Scalia relied on what some scholars have called “new originalism” principles by looking at the “text, history and tradition” of the Second Amendment to conclude that it conferred an individual right.\textsuperscript{34} Additionally, Justice Scalia argued that the text and history indicated that the central core of an individual’s Second Amendment right was the “inherent right of self-defense.”\textsuperscript{35} By casting the Second Amendment in this way—as protecting an individual right to keep a firearm in the home for self-defense—the Court found that the District’s ban was necessarily unconstitutional.\textsuperscript{36}

Justice Stevens wrote a highly critical dissent in which he called the majority opinion a “strained and unpersuasive reading” of the Second Amendment’s text and history.\textsuperscript{37} Justice Stevens presented his own historical and textual analysis to argue that the right to keep and bare arms under the Second Amendment was solely connected to

\begin{itemize}
  \item \textsuperscript{31} Greenhouse, \textit{supra} note 29; D.C. v. Heller, 554 U.S. 570, 574 (2008).
  \item \textsuperscript{32} \textit{Heller}, 554 U.S. at 570.
  \item \textsuperscript{33} \textit{Id.}
  \item \textsuperscript{35} \textit{Heller}, 554 U.S. at 628.
  \item \textsuperscript{36} \textit{See id.} at 630.
  \item \textsuperscript{37} \textit{Heller}, 554 U.S. at 639 (Stevens, J., dissenting).
\end{itemize}
militia service, and that neither the text nor the history presented by the majority “evidenced the slightest interest” on the part of the Founders “in limiting any legislature's authority to regulate private civilian uses of firearms.”

Justice Breyer also wrote a dissent arguing for an “interest-balancing inquiry” whereby the interests protected by the Second Amendment would be weighted against the public safety interests of the government to determine “whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.” The majority opinion expressly rejected Justice Breyer’s proposed framework, which is ironic given the interest balancing that is an inherent part of the two-step means-end test that would emerge in the lower courts.

Apart from its principle holding recognizing the individual right to keep and bear arms in the home for the purposes of self defense, the Court in Heller declined to “clarify the entire field” of the Second Amendment. The Court did note, however, that the right was not “unlimited” and indicated that many areas of gun regulation remained “presumptively lawful.”

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

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38 Id. at 637.
39 Id. at 689 (Breyer, J., dissenting).
40 See generally, Allen Rostron, Justice Breyer's Triumph in the Third Battle over the Second Amendment, 80 GEO. WASH. L. REV. 703, 711 (2012).
41 Heller, 554 U.S at 635.
42 Id. at 595.
43 See Kopel & Greenlee, supra note 27, at 214.
44 Heller, 554 U.S. at 626-27.
Additionally, in an attempt to square its holding with the cryptic ruling in *Miller*, the Court stated that the Second Amendment “does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.” Furthermore, the Second Amendment did not protect “dangerous and unusual” weapons. Apart from sawed-off shot guns and “machineguns,” however, the court did not explicitly point to other types of “unusual” weapons not typically used for “lawful purposes.”

Notably absent from the *Heller* majority’s discussion of Second Amendment principles was any concrete standard of review. The Court only stated that the District’s ban would fail under “any of the standards of scrutiny that we have applied to enumerated constitutional right,” though the Court later conceded in a footnote that the law would likely pass rational-basis review “like almost all laws” would. The only standard the Court seemed to foreclose was rational basis, stating that the test was not appropriate for evaluating legislative regulation of a “specific, enumerated right” under the Bill of Rights. Justice Breyer was critical of the majority leaving the lower courts “without clear standards” for resolving future Second Amendment disputes, and he warned that without clear standards the

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45 See Kopel & Greenlee, supra note 27, at 214.
46 *Heller*, 554 U.S. at 625.
47 *Id.* at 627.
48 *Id.* at 624-25 (“We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”). The Court did indicate that current bans on “machineguns” remained valid, and suggested that military style assault rifles like the M-16 were not protected arms. See *id*. For more on how the lower courts have approached this question of what arms constitute unprotected “dangerous and unusual” weapons, see Kopel & Greenlee, *supra* note 27, at 230-241.
49 For more analysis of the opinions in *Heller*, see generally, Rostron, *supra* note 40; Griepsma, *supra* note 34.
50 Griepsma, *supra* note 34.
51 *Heller*, 554 U.S. at 628.
52 *Id.* at 628, n. 27.
53 *Id.*
imminent wave of Second Amendment litigation “threaten[ed] to leave cities without effective protection against gun violence.”

The Court did not clarify the standard of review question when it revisited the Second Amendment two years later in *McDonald v City of Chicago*. The Court in *McDonald* embarked on a historical inquiry to determine if the right to individual self-defense, which was recognized in *Heller* as a “central component of the Second Amendment,” was also so “deeply rooted in this Nation’s history and tradition” as to be part of the liberty protected by the Fourteenth Amendment. A majority of Justices answered in the affirmative, holding that the individual right to keep and bear arms for self-defense was one of the “fundamental rights necessary to our system of ordered liberty.” Therefore, the Second Amendment was incorporated and applied against state and local government through the Fourteenth Amendment.

The plurality opinion by Justice Samuel Alito restated many of the same principles from *Heller*, including the recognition of presumptively valid regulations such as longstanding prohibitions of firearm possession by felons or the carrying of guns in “sensitive places.” However, the Court again did not fully elaborate the contours of the Second Amendment’s protections. Instead, after invalidating Chicago’s ban on handguns, Justice Alito signaled to

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54 *Id.* at 718 (Breyer, J., dissenting).

55 As previously mentioned, *McDonald* involved a challenge to hand gun ban’s in Chicago (and neighboring suburb of Oak Park, IL). *See* McDonald v. City of Chicago, 561 U.S. 742, 748 (2010).


57 *McDonald*, 561 U.S. at 777.

58 *Id.*

59 *Id.* at 786. (“We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons and the mentally ill,’ ‘laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.’ We repeat those assurances here.”).
states and local governments to continue to experiment with “reasonable firearms regulation.”

The Court, however, offered no additional guidance on what experiments in gun regulations might be “reasonable” and gave no standard to lower courts as to how they were to review the constitutionality of these state and local experiments in gun control. Though the *McDonald* Court reaffirmed its rejection of any sort of a judicial balancing inquiry, like that proposed by Justice Breyer in *Heller*, the Court declined to address what standards of review or levels of scrutiny should guide lower courts going forward.

Justice Breyer’s dissent in *Heller* and Justice Stevens’s dissent in *McDonald* both warned of the inevitable flood of litigation in the lower courts, and the dangers of leaving no clear standards to guide the decisions. Over time though, a majority of the Federal Circuit Courts of Appeals would eventually develop and adopt their own framework for analyzing the new wave of Second Amendment challenges they encountered.

**B. The Federal Courts React to the New Second Amendment Regime: The Development of the Two-Step Means-End Test**

Not surprisingly, in the initial few years following *Heller* and then *McDonald*, there were hundreds of challenges to firearm regulations in the lower courts. As the Supreme Court had avoided describing the full scope of the Second Amendment’s protections, some of the initial lower court cases were concerned with the question of what other “lawful” uses of firearms were protected by the Second Amendment.

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60 See Id. at 785.
61 Kiehl, supra note 56, at 1140-41.
62 *McDonald*, 561 U.S. at 785.
63 See Kiehl, supra note 56, at 1140-41.
64 Id. at 1141.
besides the right to keep arms in the home for self-defense. The problem that arose early on in all these cases was what standard courts should use to review regulations on firearm use when they allegedly burdened conduct determined to be within the scope of the Second Amendment.

In the initial years following the Supreme Court decisions, lower courts used virtually the complete range of standards to evaluate gun control measures, including varying levels of intermediate or strict scrutiny (or a hybrid of both), a reasonableness test, and an undue burden test similar to that applied in abortion cases. Some courts avoided setting any standard all together. Regardless of the test used, the gun control measures usually survived review.

Eventually, a guiding framework for analysis emerged in the form of a two-part means-end test similar to that used in the First Amendment context. The test was first explicitly articulated by the Third Circuit in United States v Marzzarella. The first step of this analysis is to determine whether the regulation at issue burdens conduct that falls within the scope of the Second Amendment protections. If the conduct does not fall within the scope of the Second Amendment or there is no burden, then the inquiry is complete and the regulation withstands constitutional review. If there is a burden on protected conduct, the second step is to evaluate the

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65 See e.g., Heller v. District of Columbia (Heller II), 670 F.3d 1244, 1252 (D.C. Cir. 2011) (stating that the Second Amendment protects other lawful uses of firearms like hunting); see generally, Kopel & Greenlee, supra note 27.

66 Kiehl, supra note 56, at 1141.

67 See id. at 1145-49 (describing cases).

68 Id.

69 Id. at 1141. (“[T]he only consistency in the lower court cases is in the results. Regardless of the test used, challenged gun laws almost always survive.”) (internal citation omitted).

70 See Kopel & Greenlee, supra note 27, at 212-14.

71 United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

72 Id.

73 Id.
regulation under some level of means-end scrutiny. The burden of proof is on the government throughout both steps.

As to the first step, Heller described only one clear area of conduct that is at the core of the Second Amendment’s protection: the right of law-abiding individuals to keep a firearm in the home for self-defense. For other forms of conduct that do not clearly fit in the realm of home self-defense, the inquiry on whether the conduct is covered by the Second Amendment is primarily a historical and textual analysis modeled after the Heller decision itself. The courts rely on a “wide array of interpretative materials to conduct a historical analysis” in order to determine if the “historical traditions” surrounding the conduct at issue indicate it was considered protected activity. In practice, this step involves combing through a “variety of legal and other sources to determine the public understanding of [the] legal text in the period after its enactment or ratification.”

Drawing analogies to historical gun control measures is rife with limitations, given the fundamental differences between the interests involved with the use of firearms in the founding area compared to gun violence concerns today. This conflict between current and

74 Id.
75 Kopel & Greenlee, supra note 27, at 214.
76 Marzzarella, 614 F.3d at 88; see also Kopel & Greenlean, supra note 27, at 211 (“Heller leaves no doubt that self-defense is at the core of the right” under the Second Amendment.).
77 See Kopel & Greenlee, supra note 27, at 229.
78 See NRA v. BATFE, 700 F.3d 185, 194 (5th Cir. 2012).
79 Id. at 194 n.8. (citing Heller, 554 U.S. at 605). Examples of these sources include similar arms-baring protections in state constitutions or legislation; commentaries by scholars and legislatures around the time of ratification; and 19th century legislation limiting or burdening the same or analogous conduct as the present law under review. See Id.
80 See Heller, 554 U.S. at 714-15 (Breyer, J., dissenting) (noting that the “self defense” interests of the founding era were not comparable to the urban-crime prevention interest of the present day, given that, to the founding era Americans living on the frontier, self defense meant protection from “outbreaks of fighting with Indian tribes, rebellions such as Shays' Rebellion, marauders, and crime-related dangers to travelers on the roads, on footpaths, or along waterways.”).
historical interests reflects the larger deficiency with using “original public meaning” analysis to determine the current scope of a constitutional right.\footnote{For a general critique of originalism and original public meaning analysis in the context of \textit{Heller}, see generally Morgan Cloud, \textit{A Conclusion in Search of a History to Support It}, 43 TEX. TECH L. REV. 29 (2010).} Placing these issues aside for now, for this article’s purposes it is enough to say that under the two-step test adopted by the lower courts, the first step requires that judges examine all the historical evidence that the parties and the jurists themselves can muster. The ultimate goal is to determine if the present restriction on gun use or ownership under review “is consistent with a longstanding tradition” of founding era and 19th century legislatures restricting gun use or ownership in a comparable manner.\footnote{See \textit{BATFE}, 700 F.3d at 194 (5th Cir. 2012) (concluding after an exhaustive historical review that the challenged federal statute banning licenses dealers from selling firearms to minors under 21 was “consistent with a longstanding tradition of age- and safety-based restrictions on the ability to access arms,” which meant that the ability of 18-20 year olds to purchase firearms “falls outside the Second Amendment's protection.”). The \textit{BATFE} court indicated that they were “inclined” to uphold the statute based on their historical analysis in step one, but they noted the “institutional challenges” in reaching a definitive historical conclusion, and thus they proceeded to analyze the statute under step two. \textit{Id}. For more examples of the historical inquiry of step one in practice, see, e.g., United States v. Rene E., 583 F.3d 8, 16 (1st Cir. 2009) (upholding similar statute banning minors from possessing firearms based on historical evidence); United States v. Greeno, 679 F.3d 510, 519 - 520 (6th Cir. 2012) (upholding sentencing enhancements for using firearms in the commission of a crime based on historical analysis).}

In terms of the second step and the proper level of means-end scrutiny to apply, the Court in \textit{Heller} only foreclosed the use of rational basis review.\footnote{\textit{Heller}, 554 U.S. at 628 n.27.} Therefore, the lower courts have almost uniformly agreed that some level of heightened scrutiny applies.\footnote{See Kopel & Greenlee, \textit{supra} note 27, at 274 n. 486 (listing cases from nearly every circuit agreeing that the use of rational basis is foreclosed and some heightened level of scrutiny applies). According to Kopel & Greenlee, the sole exception appears to be the Second Circuit, which requires a “substantial burden” on protected conduct for the Court to apply more than rational basis review. \textit{Id}.} The courts select a level of scrutiny in a manner similar to the general First
Amendment framework, where “the level of scrutiny applicable under the Second Amendment ... ‘depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.”

Therefore, a law that imposes a “substantial burden” upon the core rights protected by the Second Amendment, such as self-defense in the home, needs to have a “strong justification” akin to strict scrutiny.

A law that imposes a less substantial burden or that implicates conduct that is not a core right, like self-defense in the home but is more ancillary conduct such as registration requirements or permit fees, should be “proportionately easier to justify.”

The way in which any individual panels describe the level of scrutiny they are applying can vary widely from case to case and judge to judge. As a general principle, the highest level of scrutiny (strict scrutiny) is typically reserved for those laws that threaten the core Second Amendment rights of law abiding citizens to use a firearm in the home for self-defense or that restrict other activity that the historical inquiry of the first step indicates was traditionally at the core of the Second Amendment’s protections, such as hunting.

For example, courts have applied strict scrutiny to lifetime bans on handgun ownership for nonviolent misdemeanants and a categorical ban on persons buying guns from outside their home state.

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85 Heller II, 670 F.3d at 1257 (citing United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010).
86 Id.
87 See id.
88 See Kopel & Greenlee, supra note 27, at 196.
89 See NRA v. BATFE, 700 F.3d 185, 195 (5th Cir. 2012) (“A regulation that threatens a right at the core of the Second Amendment—for example, the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family—triggers strict scrutiny.”) (citing Heller 554 U.S. at 635).
90 See Heller II, 670 F.3d at 1252. For additional cases recognizing activities like hunting and target practice as covered by the Second Amendment, see generally Kopel & Greenlee, supra note 27, at 204-07.
92 Mance v. Holder, 74 F. Supp. 3d 795, 804 (N.D. Tex. 2015); For more examples, see generally Kopel & Greenlee, supra note 27, at 274-78.
Conversely, for regulations shy of the total bans on gun ownership found in *Heller* and *McDonald* that do not substantially burden the core rights protected under the Second Amendment, but which still implicate conduct within the scope of the Amendment’s protections, the courts tend to apply a less heightened standard more akin to intermediate scrutiny. The overwhelming majority of lower court decisions post- *Heller* involving the Second Amendment have applied something akin to intermediate scrutiny, whereby the regulation must be substantially related to an important government interest.94 Many courts using this two-step framework draw comparisons to the First Amendment framework for how they decide which level of heightened scrutiny to apply.95 For example, total bans on gun ownership in the home could be seen as comparable to content-based restrictions on speech, and thus subject to strict scrutiny.96 Similarly,

93 See Kopel and Greenlee, *supra* note 27, at 314.
94 See *e.g.*, *Heller v. District of Columbia*, 670 F.3d 1244, 1261–64 (D.C. Cir. 2011) (applying intermediate scrutiny to prohibition on possession of magazines with a capacity of more than ten rounds of ammunition); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (applying intermediate scrutiny to a federal law prohibiting the possession of firearms by a person convicted of a misdemeanor crime of domestic violence), cert. denied, 132 S. Ct. 1538, 182 L.Ed.2d 175 (2012); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (applying intermediate scrutiny to a federal regulation which prohibits “carrying or possessing a loaded weapon in a motor vehicle” within national park areas), cert. denied, 132 S.Ct. 756, 181 L.Ed.2d 482 (2011); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny to a federal law which prohibits the possession of firearms with obliterated serial numbers), cert. denied, 131 S.Ct. 958, 178 L.Ed.2d 790 (2011); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny to a federal law which prohibits the possession of firearms while subject to a domestic protection order), cert. denied, 131 S.Ct. 2476, 179 L.Ed.2d 1214 (2011); *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (ban on magazines holding more than ten rounds is valid under intermediate scrutiny).
95 See *e.g.*, *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010).
96 *Cf.* *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014) (San Francisco ordinances regulating firearm storage in the home were distinguishable from the total bans on handgun possession invalidated in *Heller*, and were “akin to a content-neutral time, place, and manner restriction,” thus they only needed to survive intermediate scrutiny).
content-neutral regulations that only restrict the “time, place, and manner” by which the Second Amendment rights can be exercised, for example by regulating how firearms are stored when not in use, should be subjected only to intermediate scrutiny as in the speech context. \(^{97}\) Furthermore, at least one court has argued that intermediate scrutiny makes particular sense and is preferred in the Second Amendment context because of the unique public safety risk of the activity being regulated—firearm use—which sets it apart from other fundamental rights which are typically evaluated under strict scrutiny. \(^{98}\)

Thus, the consensus that has emerged in the courts appears to be a for applying a form of intermediate scrutiny in the majority of cases involving the Second Amendment, and reserving strict scrutiny for those cases that substantially burden the core right of self defense in the home, or other conduct that historical inquiry reveals is a core right of the Second Amendment. \(^{99}\)

The Seventh Circuit’s approach, however, has not been entirely in line with this majority view. Several of the Seventh Circuit’s early post-

\(^{97}\) Id.

\(^{98}\) Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1126 (10th Cir. 2015), cert.
denied, 136 S. Ct. 1486 (2016) (“The risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny test, such as the right to marry and the right to be free from viewpoint discrimination, which can be exercised without creating a direct risk to others. Intermediate scrutiny appropriately places the burden on the government to justify its restrictions, while also giving governments considerable flexibility to regulate gun safety.”).

\(^{99}\) See Griepsma, supra note 34, at 296 (arguing intermediate scrutiny appears to be the most common level of scrutiny used in Second Amendment cases). See generally Kopel & Greenlee, supra note 27 (collecting cases, the majority of which apply something akin to intermediate scrutiny).
circuits, in both those cases the test was improperly applied to strike down gun control measures.

II. THE SEVENTH CIRCUIT’S APPROACH

The en banc Seventh Circuit has only granted review of a Second Amendment challenge on one occasion, and it was in the relatively immediate aftermath of *Heller* and *McDonald* in 2010. The en banc court, in an opinion authored by then Chief Judge Frank Easterbrook, held a federal statute that banned firearm possession by individuals convicted of misdemeanor crimes of domestic violence was permissible under the Second Amendment. The court noted the language from *Heller* on presumptively valid regulations—like bans on felons possessing guns—as evidence that some categorical bans on firearm ownership could be constitutional. But, Judge Easterbrook’s opinion strongly cautioned the lower courts against reading too much into the language of *Heller* beyond its principle holding conferring an individual right, one part of which was to keep a firearm in the home for self defense. While the *Skoien* court declined to delve too “deeply into the ‘levels of scrutiny’ quagmire,” it did agree that some form of “strong showing” was necessary and indicated that the law would pass intermediate scrutiny review.

100 Ezell v. City of Chicago, 846 F.3d 888, 893 (7th Cir. 2017) (“We note for good measure that most other circuits have adopted the framework articulated in *Ezell I*”).

101 See United States v. Skoien, 614 F.3d 638 (7th Cir. 2010).

102 See id. at 640-42.

103 Id. at 640.

104 Id. (“We do not think it profitable to parse these passages of *Heller* as if they contained an answer to the question whether § 922(g)(9) is valid. They are precautionary language. . . . What other entitlements the Second Amendment creates, and what regulations legislatures may establish, were left open. The opinion is not a comprehensive code; it is just an explanation for the Court's disposition. Judicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration.”)

105 Id. at 642 (The government conceded the regulation was only valid “if substantially related to an important governmental objective” and the court stated
Though it is not the explicit framework in the opinion, the analysis in *Skoien* can be viewed as roughly in line with the two-step means-end test. The court recognized that misdemeanants with domestic violence convictions were not totally excluded from Second Amendment protection (step one) and indicated the statute would pass intermediate scrutiny (step two). Not long after *Skoien*, the three-judge panel in *Ezell I* (2011) formally adopted the same two-step framework now used by the majority of other circuits. *Ezell I* is discussed in more detail below as important background for *Ezell II*.

A. Too Clever by Half: *Ezell I* and Chicago’s First Attempt at Post-McDonald Gun Regulation

*Ezell I* is worth examining in some detail as it is not only the first round of litigation for the case that is the primary subject of this article, but it also is critically important to the Seventh Circuit’s Second Amendment jurisprudence in how the majority adopted and described the two-step test. Furthermore, the manner in which the majority in *Ezell I* inappropriately applied the two-step framework was significant in constraining the constitutional path forward for gun control advocates seeking to curtail gun violence in Chicago.

After the Supreme Court declared Chicago’s ban on handgun ownership unconstitutional in *McDonald*, the City Council organized hearings to determine what steps they could take to continue to combat gun violence in the city. Just four days after the decision in *McDonald*, and after testimony from a range of academics, experts,

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106 See Kopel & Greenlee, *supra* note 27, at 242. The Seventh Circuit had also applied what appeared to be a form of the two-step test in the panel decision in *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009), which was later vacated when the case was reheard en banc, and again in *United States v. Williams*, 616 F.3d 685, 691 (7th Cir. 2010), which followed the logic of the en banc *Skoien* decision to uphold the federal ban on convicted felons possessing firearms. *Id.*

107 *Id.*

108 *Ezell v. City of Chicago*, 651 F.3d 684, 689 (7th Cir. 2011).
and community activists, the City Council passed the Responsible Gun Owners Ordinance (the “Ordinance”).\(^{109}\) The Ordinance contained a sweeping array of gun control measures and restrictions including: bans on certain types of weapons, ammunition and accessories; forbidding the sale or transfer of weapons except in limited circumstances; and a complex permitting regime.\(^{110}\) Inevitably, the Ordinance was challenged in a flood of new litigation by gun owners, retailers, and rights activists.\(^{111}\)

\textit{Ezell I} specifically involved provisions of the Ordinance that banned all live firing-ranges within the city limits.\(^{112}\) The range ban on its own would perhaps already be suspect, but another part of the Ordinance conditioned firearm permits on the completion of a state certified firearm safety course with a mandated requirement of one-hour of range-training.\(^{113}\) Thus, as a practical matter, no individual could satisfy their Chicago permit requirements within the city limits.\(^{114}\)

A group of gun owners, activists, and a prospective firing range operator brought suit against the city seeking a restraining order and injunction against enforcement of the firing-range ban.\(^{115}\) The plaintiffs argued that the Ordinance burdened their Second Amendment right to keep a firearm in the home for self-defense—because live training was required for a permit—as well as their right to maintain proficiency in firearm use which they claimed was also protected by

\(^{109}\) Id.
\(^{110}\) See Id. at 690-91. The full Ordinance is available at https://www.ispfsb.com/Public/Firearms/Ordinances/chicago.pdf.
\(^{111}\) See e.g., Illinois Ass'n of Firearms Retailers v. City of Chicago, 961 F. Supp. 2d 928, 931 (N.D. Ill. 2014) (ordinance banning nearly all sale and transfer of arms); Second Amendment Arms v. City of Chicago, 135 F. Supp. 3d 743, 747 (N.D. Ill. 2015) (zoning requirements for gun stores and ban on displaying their firearms in windows, as well as a permit fee requirement).
\(^{112}\) Ezell I, 651 F.3d at 690-91 (CHI. MUN.CODE § 8–20–280 prohibited all “[s]hooting galleries, firearm ranges, or any other place where firearms are discharged”)
\(^{113}\) Id.
\(^{114}\) Id.
\(^{115}\) Id.
the Second Amendment. After a hearing and some limited testimony, the District Court denied both the plaintiffs’ motions for a temporary restraining order and for a preliminary injunction.

The Court of Appeals, in a unanimous judgment, reversed the district court and remanded with instructions for the district court to issue a preliminary injunction against the firing range ban. Judge Diane Sykes, who notably had dissented from the en banc decision in Skoien, wrote the majority opinion which was joined by Judge Michael Kanne. Judge Ilana Rovner concurred in the judgment but filed a separate opinion. Judge Sykes described the primary issue before the court as whether the firing range ban violated the Second Amendment on its face, and whether the ability to maintain proficiency in firearm use through live range training fell within the scope of the Second Amendment.

To answer this question, Judge Sykes utilized the framework of the two-step means-end test discussed supra, which at the time was already starting to be utilized in several other circuits. Judge Sykes described the first step of the analysis as “a textual and historical inquiry into original meaning” to determine if the conduct fell within the scope of the Second Amendment right as it was publicly

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116 Id.
118 Ezell I, 651 F.3d at 703.
119 Id. at 689.
120 Id. at 711.
121 Id. at 697-98. The court also addressed the preliminary issues of standing, and the district court’s improper conclusion that the ability of the plaintiffs to leave the city limits for firearm training meant that the second Amendment was not implicated at all. Id. Rather, the court noted the general rule that the ability to exercise a constitutional right someplace else does not mean the right is not infringed, and because this was a facial challenge to a law and involved a burden on a constitutional right, irreparable harm was presumed and the inquiry needed to move to the likelihood of success on the merits.
122 Id. at 703 (noting the Third, Fourth, and Tenth Circuit had recently adopted the framework).
understood at the time of ratification. Judge Sykes described the second step as an inquiry into “the strength of the government’s justification for regulating or restricting” the exercise of that right. Similar to the second step in the other circuits, this involves applying some heightened level of “mean-end scrutiny” to the law.

In this case, the majority answered the first inquiry by holding that the core right to possess firearms for self defense also “implies a corresponding right to acquire and maintain proficiency in their use.” The City attempted to point to a number of founding era, antebellum and Reconstruction laws that limited the discharge of firearms in public urban environments as evidence that the original public meaning of the Second and Fourteenth Amendment did not include a right to live firing-range training. The majority dismissed these statutes as unpersuasive, claiming that most were restrictions on the “time, place, and manner” that firearms could be discharged and were not as severe as the City’s total ban on firing ranges. As the majority concluded the City failed to meet its burden in showing that live firearm training was “wholly outside the Second Amendment,” the analysis needed to proceed to step two.

Similar to the court in Marzzarella, Judge Sykes next looked to First Amendment doctrine for guidance on the level of scrutiny to

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  \item[id] Id. at 700. The relevant time period depends on whether the law at issue is federal or state/local action. \textit{See id.} (“\textit{Heller} suggests that some federal gun laws will survive Second Amendment challenge because they regulate activity falling outside the terms of the right as publicly understood when the Bill of Rights was ratified; \textit{McDonald} confirms that if the claim concerns a state or local law, the “scope” question asks how the right was publicly understood when the Fourteenth Amendment was proposed and ratified.”)
  \item[id] Id. at 703.
  \item[id] Id.
  \item[id] Id. at 705.
  \item[id] Id. The city did offer some evidence of historical regulations that totally banned the discharge of firearms in city limits, but the majority distinguished those regulations as focused on “fire suppression” and not relevant to Chicago’s offered justifications for theft prevention and injury from stray bullets. \textit{Id.}
  \item[id] Id. at 706.
\end{itemize}
chose, and the appropriate circumstances for applying intermediate or strict scrutiny. Setting the “labels aside,” however, Judge Sykes extrapolated from the First Amendment doctrine to a “sliding scale” test for Second Amendment claims, whereby the general principles of review are:

First, a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.

Judge Sykes’ formulation of the second step is generally similar to that developed in the other circuits at the time, but her mention of setting aside the labels of strict and intermediate scrutiny is significant. The other circuits to adopt the two-step test at the time had typically described the choice of what level of scrutiny at the second step of the analysis in more binary terms as a choice between strict and intermediate scrutiny. Judge Sykes opinion later demonstrates that the application of this sliding-scale scrutiny as she has described it allows for even more flexibility for judges to tilt the scale in how they characterize the nature of the right and the appropriate level of

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130 Id. 706-708.
131 Id. at 708.
132 See, e.g., United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010) (“the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right”).
133 See e.g., United States v. Marzzarella, 614 F.3d 85, 97 (3d Cir. 2010) (choosing between strict and intermediate scrutiny); United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010) (same).
scrutiny. Furthermore, setting aside labels can obscure just exactly what level of review a judge is applying.\textsuperscript{134}

In terms of the appropriate level of scrutiny for the City’s ordinance banning firing ranges, Judge Sykes contrasted the case with the factual circumstances of \textit{Skoien} where the court had required a “strong showing” akin to intermediate scrutiny.\textsuperscript{135} In \textit{Skoien}, intermediate scrutiny was appropriate because the ban on domestic violent misdemeanants did not impact the rights of “law-abiding, responsible citizens,”\textsuperscript{136} nor, according to Judge Sykes, did it implicate the central right of self defense.\textsuperscript{137} Here, the the firearm ban prevented “law-abiding citizens” from engaging in target practice, which, according to Judge Sykes, was a “serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense.”\textsuperscript{138} Also of note was that a firearm permit in Chicago required live range training.\textsuperscript{139} Taken together, this necessitated “a more rigorous standard than was applied in \textit{Skoien},” or what Judge Sykes described as “not quite ‘strict scrutiny.’”\textsuperscript{140} This standard required the city “establish a close fit between the range ban and the actual public interests it serves, and also that the public’s interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights.”\textsuperscript{141}

The court held that the city did not come close to meeting this burden, stating that the record contained no data or expert opinion but only mere speculation on the public health risks due to stray bullets

\textsuperscript{134} As is discussed further infra, \textit{Ezell I} and \textit{Ezell II} are themselves prime examples of this, as the majority describes the standard of review in different ways in each case, despite it supposedly being the same.

\textsuperscript{135} \textit{Ezell I}, 651 F.3d at 708.

\textsuperscript{136} \textit{id.} at 708 (citing \textit{Heller}, 554 U.S. at 634).

\textsuperscript{137} \textit{id.}

\textsuperscript{138} \textit{id.}

\textsuperscript{139} \textit{id.}

\textsuperscript{140} \textit{id.}

\textsuperscript{141} \textit{id.} at 708-709.
and more guns susceptible to theft.\footnote{142 Id.} Interestingly, Judge Sykes noted that the concerns of the city on the record could be “addressed through sensible zoning and other appropriately tailored regulations,”\footnote{143 Id. at 709.} which is of note considering her later opinion in \textit{Ezell II} discussed below. Because the range ban was “wholly out of proportion” to the public interests the city purported to serve, the court concluded that the plaintiffs had a strong likelihood of success on the merits and ordered the issuance of a preliminary injunction.\footnote{144}

Judge Rover wrote a concurrence in which she agreed with the ultimate judgment insofar that the firing range ban was an unconstitutional burden on the core right of self-defense identified in \textit{Heller} because the practical effect was that law abiding citizens would not be able to obtain a permit for a gun even if the sole purpose was self-defense in the home.\footnote{145} Judge Rovner also did seem to agree that the right to use a firearm for self-defense in the home implied some protected right to train to use guns safely,\footnote{146} but she pointed out that did not necessarily imply a right to \textit{live} firearm training, as there were other options like classroom and simulated training.\footnote{147} Regardless,

\footnote{142 Id.}\footnote{143 Id. at 709.}\footnote{144 Id. In addition to the range ban itself, the court order injunctions for a range of other ordinances prohibiting the carrying of guns in public and the permit requirement, in so far as they prohibited individuals from exercising their right to range training. \textit{See id.}}\footnote{145 \textit{See Ezell I}, 651 F.3d at 711 (Rovner, J. concurring) (“The regulation is two clever by half...That residents may travel outside the jurisdiction to fulfill the training requirement is irrelevant to the validity of the ordinance inside the City. In this I agree with the majority...the City may not condition gun ownership for self-defense in the home on a prerequisite that the City renders impossible to fulfill within the City limits.”).}\footnote{146 Id. at 712 (“the right to use a firearm in the home for self-defense would be seriously impaired if gun owners were prevented from obtaining the training necessary to use their weapons safely for that purpose”).}\footnote{147 Id. (“There is no ban on classroom training. There is no ban on training with a simulator and several realistic simulators are commercially available, complete with guns that mimic the recoil of firearms discharging live ammunition.”) (citing to examples of simulation systems).}
Judge Rovner concluded that the limited evidence on the record supporting the City’s public safety justifications, and the fact that the Ordinance was a complete ban on the training necessary to obtain a permit, meant that the range ban was “unlikely to withstand scrutiny under any standard of review.”

However, this conclusion was the end of Judge Rovner’s agreement with the majority, and her concurrence was highly critical of the manner in which Judge Sykes applied the two-step analysis, specifically the level of scrutiny the majority applied. Despite Judge Sykes eschewing labels, Judge Rovner recognized the standard applied by the majority as “akin to strict scrutiny,” which she argued was “more stringent [a standard] than is justified by the text or the history of the Second Amendment.” Judge Rovner noted that the range ban was not a complete ban on conduct “implicating the core of the Second Amendment,” but rather the ban should be characterized as a “regulation in training, an area ancillary to a core right.” Because the “right to maintain proficiency in firearms handling is not the same as the right to practice at a live gun range,” Judge Rovner could not agree that a more rigorous standard than the intermediate scrutiny that was applied in Skoien was necessary.

Additionally, Judge Rovner noted that the historical evidence of regulations offered by the City was proof that intermediate scrutiny was the more appropriate standard. Despite the majority’s attempt to distinguish the ban on live training from the historical regulations, Judge Rovner argued that the Ordinance fell into the same category of many of the historical laws which regulated the “time, place and manner of gun discharges.” Just as some of the historical examples of regulations were focused on only the time of day or location that

148 Id.
149 See id. at 713.
150 Id.
151 Id. (emphasis added).
152 Id.
153 See id.
154 Id.
firearms could be discharged, the live firing range ban was just a restriction on one “aspect of firearms training,” i.e. a restriction on one manner of training (live as opposed to simulated) and on the place (within the city limits). Given these similarities, the “intermediate scrutiny applied to time, place and manner restrictions” in the First Amendment context would have been “both adequate and appropriate” in this Second Amendment case.

Furthermore, the manner in which the majority summarily dismissed the City’s offered public safety justification as “entirely speculative” was, in Judge Rovner’s words, “naïve” and “unfounded.” Judge Rovner argued that the historical examples of gun regulation offered by the city showed that “public safety was a paramount value to our ancestors,” and that public safety concerns sometimes “trumped the Second Amendment right to discharge a firearm in a particular place.” Though the nature of the public safety concern may have changed from the founding area to now, the “historical context” nonetheless should have been proof for the majority that “cities may take public safety into account in setting reasonable time, place and manner restrictions on the discharge of firearms within City limits.” Given the unique “inherently dangerous” nature of guns, Judge Rovner argued that Chicago “has a right to impose reasonable time, place and manner restrictions on the operation of live ranges in the interest of public safety and other legitimate governmental concerns.” Viewing the regulations as a

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155 Id. (“as the majority itself points out, one statute prohibited the discharge of firearms before sunrise, after sunset, or within one quarter mile of the nearest building. Others prohibited firearms discharge without specific permissions and only then at specific locations”).
156 Id. at 714.
157 Id.
158 Id.
159 Id.
160 Id.
161 Id.
162 Id. at 714-15.
“time, place and manner” restriction, the appropriate means of analysis should have been intermediate scrutiny.\footnote{Id. at 714.}

While Judge Rovner may have agreed that the City could not even meet this level of scrutiny, based on the lack of evidence on the record and the ban effectively making it impossible to achieve a permit in the city limits,\footnote{Id. at 712.} her concurrence in \textit{Ezell I} is incredibly important to the future of Second Amendment analysis in the Seventh Circuit. Judge Rovner was operating in the same two-step framework as the majority, by looking at the historical evidence for the scope of the Second Amendment right and choosing the appropriate level of scrutiny based on the nature of that right and how it was being regulated. Doing this analysis led her to appropriately conclude intermediate scrutiny as the standard of review based on the nature of the ban as a time, place, and manner restriction.\footnote{Id. at 714.} This approach is in line with how other circuits have applied the two-step analysis and likewise applied intermediate scrutiny for time, place, and manner style gun restrictions, or when the activity at issue is an ancillary right and not a core Second Amendment right.\footnote{See e.g., cases cited supra, note 94.} Judge Rovner’s concurrence in \textit{Ezell I} in other words is an early post-\textit{Heller} example of faithful application of the two-step analysis to gun regulation under the Second Amendment.

Conversely, Judges Sykes majority opinion, while it was pivotal in laying the foundation and formally adopting the two-step Second Amendment analysis for the Seventh Circuit,\footnote{For examples of cases since \textit{Ezell I} applying the two-step test, see Horsley v. Trame, 808 F.3d 1126, 1132 (7th Cir. 2015) (applying test to parent signature requirement for minors under 21 to get FOIA card); Justice v. Town of Cicero, Ill., 827 F. Supp. 2d 835, 844 (N.D. Ill. 2011) (applying test to township ordinances requiring firearm registration and fees); Southerland v. Escapa, 176 F. Supp. 3d 786, 789 (C.D. Ill. 2016) (applying two-step test to state ban on public carrying of long guns and rifles).} is an example in how
the test leaves perhaps too much room for individual judges to place a finger on the sliding scale. It is ironic that Judge Sykes, who touted the “original public meaning” historical analysis in *Heller*, was so quick to dismiss the substantial historical evidence offered by the City as irrelevant and unpersuasive. This irony perhaps can serve as a larger indictment on this form of original public meaning analysis because judges without formal training as historians can come to widely different views on what conclusions to draw from history; indeed, just as Justice Scalia and Justice Stevens did in *Heller*. However, this is beyond the scope of this article. Regardless, if nothing else it was an inappropriate application of the historical inquiry aspect of the two-step test for Judge Sykes to so quickly reject the historical corollaries between the City’s firing range regulation and past “time, place, manner” restrictions. Judge Sykes instead characterized the right of live fire arm training as one “implicating the core of the Second Amendment” without much historical justification of her own for that conclusion. Characterizing the right in this way allowed Judge Sykes to apply “something akin to strict scrutiny,” despite her own claim it was “not quite strict scrutiny.”

Regardless of the label, the regulation appeared subject to a level of scrutiny that few gun control measures could survive, and certainly higher than the intermediate scrutiny that would have been appropriate for such a “time, place, and manner” measure. While the regulation in *Ezell I* would have likely failed any level of scrutiny, setting the precedent of essentially strict scrutiny, which is binding on the lower courts, can have far-reaching implications for future gun control regulations. The decision also set a narrow path forward for

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168 *Ezell I*, 651 F. 3d at 711 (Rovner concurring) (“Given the majority's nod to the relevance of historical regulation, curt dismissal of actual regulations of firearms discharges in urban areas is inappropriate.”).


170 *Ezell I*, 651 F.3d at 711 (Rovner, concurring).

171 *Id.*

172 See, e.g., Tony Kole And Ghost Industries, LLC, Plaintiffs, v. Village Of Norridge, Defendant., No. 11 C 3871, 2017 WL 5128989, at *11 (N.D. Ill. Nov. 6,
Chicago to enact replacement gun control measures, which, as we will see in *Ezell II*, it was unable to navigate.

B. Variations on the Two-Step: Other Notable Post Ezell I Cases in the Seventh Circuit

After the Court in *Ezell I* adopted the two-step framework in 2011, the test became the general standard for the Seventh Circuit in Second Amendment challenges going forward. However, the en banc Seventh Circuit has notably not addressed the two-step framework adopted in *Ezell I*, nor has it revisited the Second Amendment at all since *Skoien*, though it came very close in *Moore v. Madigan*. The panel decision in *Moore* was significant in that it found two Illinois statutes categorically banning the carrying of guns in public unconstitutional. Rather than explicitly apply the two-step framework adopted in *Ezell I*, Judge Richard Poser in his majority opinion instead concluded that the text and the history of the Second Amendment implied that the right to “keep and bear arms” for self-defense was not limited to the home but extended to the right to carry a gun for self-defense in public. The court held that Illinois had

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173 See, e.g., Southerland v. Escapa, 176 F. Supp. 3d 786, 789 (C.D. Ill. 2016) (acknowledging that “the Seventh Circuit has provided a two-step analysis in evaluating the constitutionality of statutes under the Second Amendment”) (citing to *Ezell I*, at 701).

174 *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). A petition for a rehearing en banc was denied, though four of the ten active judges reviewing the petition would have granted the rehearing and seemed to indicate the panel decision should be overturned. See generally *Moore v. Madigan*, 708 F.3d 901, 902 (7th Cir. 2013) (Hamilton, J., dissenting, joined by, Rovner, Williams, & Wood, JJ.).

175 *Moore*, 702 F.3d at 933 (The laws at issue had exceptions for police officers and security personal, as well as certain exclusions for carrying a gun on one’s own property, but otherwise prohibited the carrying of any “ready to use” gun outside.).

176 *See id.* ("The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as..."
failed to offer “more than merely a rational basis for believing that its uniquely sweeping ban [was] justified by an increase in public safety,” thus the laws could not withstand constitutional scrutiny.177

Where the majority in Moore did not seem to explicitly utilize the two-step means-end test in striking down the state-wide gun control law, the majority in Friedman v. City of Highland Park, Illinois similarly used its own unique analysis in upholding a ban on certain semi-automatic assault weapons and high capacity magazines.178 In his opinion for the majority, Judge Easterbrook developed a three-part test that looked at: (1) whether the arms being banned were common at the time of the Second Amendments ratification; or alternately (2) whether the type of arm had a “reasonable relationship” to militia service; and finally (3) the availability of other unrestricted firearms to be used for self-defense.179

Both Friedman and Moore appear to be outliers in the Seventh Circuit’s jurisprudence on the Second Amendment in terms of their analytical approach, though interestingly they reached opposite conclusions regarding the ultimate constitutionality of the gun regulations.180 Moore in particular was a major set-back for gun
control advocates, but the court did leave the door open for a wide range of more nuanced legislation than the invalidated blanket bans. Indeed, the new state-wide licensing requirements for carrying guns in public that replaced the outright ban have been upheld.

Apart from these notable outliers, most decisions in the Seventh Circuit since *Ezell I* have applied the two-step framework the majority adopted.

III. *Ezell II* – Chicago Takes Another Shot at Regulation of Firing Ranges

The decision in *Ezell I* is critically important not just in relation to the application of the two-step analysis in the Seventh Circuit, but because its holding required that Chicago had to find a new approach to regulate live firing-ranges in the city. The new approach the City adopted became the subject of *Ezell II*.

Chicago responded to the decision in *Ezell I* by promulgating a large variety of new regulations concerning firing ranges, including “zoning restrictions, licensing and operating rules, construction standards, and environmental requirements.” The same plaintiffs from *Ezell I* returned to court to argue that the new regulations also

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a dissenting opinion joined by Justice Alito arguing the court should have taken the case. Justice Thomas argued that the lower courts across the country had been incorrectly applying the decisions in *Heller* and *McDonald*, and the Supreme Court needed to intervene. See *Friedman v. City of Highland Park, Ill*, 136 S. Ct. 447 (2015) (Thomas, J., dissenting).

181 See *Moore v. Madigan*, 708 F.3d 901, 902 (7th Cir. 2013) (Hamilton, J., dissenting in denial of re-hearing en banc). Judge Hamilton also encouraged district court judges to develop a full record so courts could appropriately way the state interests and the burdens in each case. *Id.*


183 See, e.g., cases cited *supra*, note 167.

184 *Ezell v. City of Chicago*, 846 F.3d 888, 891 (7th Cir. 2017) (firing ranges operated by law enforcement and private security firms were exempt from the regulations).
violated the Second Amendment. After cross-motions for summary judgment at the district court level, the trial judge issued a ruling invalidating some ordinances while upholding many others, which both sides appealed. Only three of the ordinances remained at issue on appeal: (1) a zoning requirement that permitted ranges only in “manufacturing districts”; (2) a distancing requirement that barred any firing range within 100 feet of other ranges or within 500 feet of any district zoned for residential use, as well as within 500 feet from any “preexisting school, day-care facility, place of worship, liquor retailer, children’s activities facility, library, museum, or hospital”; and (3) a regulation prohibiting anyone under the age of 18 from entering a shooting range. The district court had invalidated the manufacturing district zoning requirement, finding the City had failed to provide enough evidence to support “more than merely a rational basis” for the necessity of placing firing ranges exclusively in manufacturing districts. However, the court had upheld the distancing requirements based on Heller’s language supporting “longstanding prohibitions on the carrying of firearms in sensitive places,” and the ban on minors largely because “minors are not guaranteed Second Amendment Rights.”

Judge Sykes, again writing for the majority and joined by Judge Kanne, affirmed the lower court in holding the manufacturing district zoning requirement unconstitutional, but reversed regarding the other two regulations, finding that the distancing requirements and the ban

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185 Those plaintiffs being individual gun owners, gun rights originations, and a company seeking to build firing ranges. See id.
186 Id.
187 Id at 89. The unchallenged rulings involved ordinances setting construction standards, requiring range masters be present, and that all firing range employees had FOID cards, which were all upheld, and limits on firing range hours of operation which were declared unconstitutional. See generally, Ezell v. City of Chicago, 70 F. Supp. 3d 871, 875 (N.D. Ill. 2014), aff’d in part, rev’d in part, 846 F.3d 888 (7th Cir. 2017).
189 Id. at 889.
on minors in ranges also were unconstitutional. Judge Rovner concurred in the judgment regarding the manufacturing district requirement and the total ban on minors entering firing ranges, but she dissented from the decision regarding the distancing requirements.

A. The Next Round of Ordinances Meets the Next Application of the Two-Step Test from Ezell I

Judge Sykes began her majority opinion in Ezell II by restating the key principals of the two-step analysis established in her opinion in Ezell I, where “resolving Second Amendment cases usually entails two inquiries. The threshold question is whether the regulated activity falls within the scope of the Second Amendment . . . then there must be a second inquiry into the strength of the government’s justification for restricting or regulating the exercise of Second Amendment rights.” Again, the first step is a “textual and historical” inquiry to determine whether the regulated conduct falls within the scope of the Second Amendment, and the second step is a sliding scale “means-end” test where the regulation is examined under a “heightened standard of scrutiny,” the precise level of which depends on “how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on the right.” Judge Sykes further noted that, by the time of Ezell II, the majority of other circuits had now adopted the same or similar two-step framework.

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190 Ezell II, 846 F.3d at 890.
191 See generally, id. at 898-907 (Rovner, J., concurring in part and dissenting in part).
192 Id. at 892 (majority opinion).
193 Id.
194 See id. at 893; see generally, Tyler v. Hillsdale Cty. Sheriff's Dep’t, 775 F.3d 308, 326 (6th Cir. 2014) (en banc); Jackson v. City & County of San Francisco, 746 F.3d 953, 961 (9th Cir. 2014); Nat'l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 194 (5th Cir. 2012); Heller v. District of Columbia, 670 F.3d 1244, 1252 (D.C. Cir. 2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792,
In terms of the threshold scope question, the same holding and analysis from *Ezell I* was applied in the current case: that the Second Amendment “individual right of armed defense . . . includes a corresponding right to acquire and maintain proficiency in firearm use through target practice at a range.”195 Interestingly, when describing how the court had applied step two of the framework in *Ezell I*, Judge Sykes stated that the court “applied a strong form of intermediate scrutiny.”196 What was once “not quite strict scrutiny” before was now a “strong form of intermediate scrutiny.”197 Whatever the level of scrutiny, the majority did not elaborate further on what specific form of scrutiny it was applying to the regulations at issue in *Ezell II*.198 Rather, Judge Sykes focused on the language from the sliding-scale test in *Ezell I*, which requires that the City demonstrate “a close fit between the range ban and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights.”199 In order to establish this “close fit” between the challenged regulations and the “actual public benefits they serve,” the majority agreed with the lower court in finding that the City needed to do so with “actual evidence, not just assertions.”200

Judge Sykes proceeded to examine this evidence and analyze whether there was such a close fit.201 In doing so, Judge Sykes argued that the critical failure of the lower court’s approach was analyzing the zoning and distancing requirements separately, stating instead that they “stand or fall together,” and that they are “a single regulatory

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800–01 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).
195 *Id.* at 892-93 (restating that “[r]ange training is not categorically outside the Second Amendment. To the contrary, it lies close to the core of the individual right of armed defense.”).
196 *Id.* at 893.
197 See *Ezell v. City of Chicago*, 651 F.3d, 708 (7th Cir. 2011).
198 *Ezell II*, 846 F.3d at 893.
199 *Id.*
200 *Id.* at 894.
201 *Id.*
package for purposes of Second Amendment Scrutiny. Furthermore, Judge Sykes disagreed with the lower courts understanding of the *Heller* language on prohibitions of carrying firearms in “sensitive places.” While declining to resolve the question of the presumptive validity of those categories of “longstanding prohibitions,” Judge Sykes indicated that the distancing requirement did not fall into any of those categories, because it dealt with firing ranges and not the carrying of firearms themselves. In addition, Judge Sykes argued that the distancing requirement from residential districts implied that the City was suggesting that firearms “are categorically incompatible with residential areas,” which she stated was “flatter inconsistent with *Heller*, which was explicit that firearm possession in the home for self-defense is the core of the Second Amendment.”

Judge Sykes’s opinion next examined the city’s evidence that the zoning and distance requirements together supported their offered public safety interests, specifically that “firing ranges attract gun thieves, cause airborne lead contamination, and carry a risk of fire.” On this score, the City was severely lacking in evidence, having presented no empirical data that the mere presence of a firing range would increase the risk of theft or crime, or that distancing firing ranges from schools and residences had a connection to reducing these risks. The City’s own expert witnesses also had testified to the lack of empirical support for the connection between the regulations and

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202 *Id.* Judge Sykes elaborated by arguing that: “The two zoning requirements work in tandem to limit where shooting ranges may locate. The impact of the distancing rule cannot be measured “standing alone,” as the district judge thought; to meaningfully evaluate the effect of the buffer-zone requirement, we need to know which zoning districts are open to firing ranges.” *Id.*

203 *See Id.* at 894-95.

204 *Id.*

205 *Id.*

206 *Id.* at 895.

207 *Id.* The City did cite to a National Institute for Occupational Safety and Health report on the dangers of improperly ventilated shooting ranges to the environment, but the same report included guidelines on techniques for how to avoid those consequences. *Id.*
the risks to public safety and health from fire or environmental hazards. Furthermore, insofar as there was evidence of risks, Judge Sykes noted that the City had promulgated a host of other regulations on the proper construction and operation of firing ranges which would alleviate many of the safety concerns without necessitating zoning or distance requirements. These construction requirements had been upheld by the District Court and were not on appeal.

While Judge Sykes did not dismiss the general concerns of the city to public health and safety, in the end she stated that “there must be evidence” to support the City’s rational. The lack of such evidence meant that the city had failed to establish a “close fit” between the regulations and their justification, and they were unconstitutional under the “strong form of intermediate scrutiny” or the “not quite strict scrutiny” that the court was applying.

In terms of the ban on minors, Judge Sykes noted that there was “zero historical evidence that firearm training” for minors under 18 was “categorically unprotected,” and neither the City nor the Court could find any evidence to the contrary. Furthermore, the cases relied upon by the City all dealt with prohibitions on minors “possessing, purchasing, or carrying firearms,” and the only Seventh Circuit case related to minors dealt with a parental signature

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208 id.
209 id.
210 id.
211 id.
212 id.
213 id. at 896.
214 See, e.g., NRA v. McCraw, 719 F.3d 338 (5th Cir. 2013) (upholding a state law banning 18- to 20-year-olds from carrying handguns in public); NRA v BATFE, 700 F.3d 185 (5th Cir. 2012) (upholding a federal law prohibiting 18- to 21-year-olds from purchasing a handgun); United States v. Rene E., 583 F.3d 8 (1st Cir. 2009) (upholding a federal law prohibiting juvenile handgun possession); People v. Mosley, 33 N.E.3d 137 (2015) (upholding a state law banning 18- to 20-year-olds from carrying handguns outside the home).
requirement for so called “FOID” cards. Because the City could not prove minors were categorically excluded, the court preceded to the second step. Again, the City had little evidence other than generalized assertions about the safety of children, with one of their own witnesses admitting that the best place for minors to train with firearms would in fact be a controlled firing range. The City offered many other general justifications based on child development and health, but with no concrete evidence the categorical ban could not withstand constitutional scrutiny.

B. Judge Rovner: Separating and Weighing the Heavy Public Interests

Judge Rovner, again finding herself writing separately, restated the sliding-scale test from *Ezell I* and her own contradictory assertion from that case that the right to participate in range training was not an “important corollary” to the core right of self defense but was, at most ancillary to the core right. Judge Rovner argued that for the purposes of the current dispute “we can ignore whether there is a difference in these two descriptions and assume that the right is an important one: although not part and parcel of the core right, close to but subordinate to it. How far subordinate is yet unknown.” What Judge Rovner and the majority did agree on was that this case was different, and that what they were reviewing was not an outright ban but a “regulation of where when and how firing ranges may operate.” Interestingly, Judge Rovner did not seek to characterize

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215 See *Horsley v Trame*, 808 F.3d. 1126, 1127 (7th Cir. 2015). The Seventh Circuit panel in *Horsley* did not answer the question of whether minors are categorically excluded from the Second Amendment, as the district court in *Ezell II* believed they were, but rather the *Horsley* court had held the FOID card requirement satisfied intermediate scrutiny whatever the scope of minor’s rights. *Id.*

216 *Ezell II*, 846 F.3d at 897.

217 *See id.* at 898.

218 *Id.* at 899 (Rovner, J., concurring in part and dissenting in part).

219 *Id.*

220 *Id.*
these firing-range regulations as “time, place and manner” restrictions as she had in Ezell I, but instead stated in a footnote that the term “is heavily loaded with attachments to a particular level of scrutiny under First Amendment jurisprudence—a quagmire better to avoid in this case.”

Now eschewing labels of the proper level of scrutiny herself, Judge Rovner instead focused on the manner of the majority’s application of the two-part test, and specifically the assertion, “without any rationale,” that the manufacturing district and distance requirements “stand or fall together.” Judge Rovner agreed with the majority on the manufacturing district requirement being unconstitutional on the lack of evidentiary support but was highly critical of Judge Sykes’ claim that the zoning requirement necessarily fell with it. Judge Rovner agreed that there was a lack of any “robust, reliable evidence” tying the manufacturing district requirement to the actual public safety justifications offered by the City, and that the “generalized propositions that firing ranges pose a danger—in terms of both crime and environmental impact—did not justify restricting them to manufacturing districts only as opposed to other industrial zones.”

However, Judge Rovner noted that unlike the manufacturing regulation, which made a categorical determination on where a particular land use belongs, the distancing regulation was a “much more focused determination of how close a particular use (which may have unique impacts) may be to other uses.” In Judge Rovner’s view, under a sliding scale levels of scrutiny test, the two regulations had to be addressed separately because they had separate government rationales and separate effects on the public interest of Chicago citizens.

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221 Id. n. 2.
222 Id. at 900.
223 See id. at 899-900.
224 Id. at 901.
225 Id. at 900.
226 Id.
Judge Rovner proceeded to evaluate these interests and regulations separately, and even though she came to the same conclusion on the manufacturing district requirement, she reached the opposite on the distance requirements.\footnote{Id.} For the distance requirement, Judge Rovner first noted that, on its own, it did not impact as much of the available land in the city as it did when taken together with the zoning requirement, which only made about 10.6\% of the land in the city available for firing ranges.\footnote{Id. at 902.} On its own, the distancing requirement did not reduce the available land as much; therefore, it “imposed a significantly lighter burden on the placement of firing ranges,” and the sliding-scale test from \textit{Ezell I} dictated that “a lighter burden requires a lesser justification.”\footnote{Id.} Where the zoning requirement was a blanket prohibition for all firing ranges in every area except manufacturing districts, the distancing regulation was a “precise and targeted approach” to protect areas that the city “routinely singles out for protection—places where children and the sick are gathered, for example.”\footnote{Id.} Thus, the difference between the two was the “difference between a carpet bomb and a surgical strike,” and the evaluation of the public benefit was vastly different.\footnote{Id.}

Moreover, Judge Rovner disagreed with the majority regarding the “sensitive places” language from \textit{Heller} regarding longstanding historical prohibitions on “carrying of firearms in sensitive places such as \textit{schools and government} buildings.”\footnote{Id.} Judge Rovner declined to opine whether this language indicated a categorical exception for such regulations but argued that it was enough to support the conclusion that a “sufficiently strong public interest” justified regulations distancing these “sensitive places” from firing ranges.\footnote{Id. (emphasis in original).}
Judge Rovner also criticized the majority’s argument that the distancing requirement, specifically regarding the distance from residential areas, was incompatible with *Heller*’s main premise of keeping a gun in the home for self-defense. As Judge Rovner noted:

> [k]eeping or even carrying a firearm for self-defense poses a substantially different risk than does creating a public accommodation where large numbers of people will gather with firearms loaded with lead-contaminated, explosive-filled ammunition and fire them. Firing a gun poses significantly greater risks than the mere keeping or carrying of a gun, in terms of potential accidents, attractiveness to criminals, and environmental lead exposure.\(^{234}\)

In short, the uniquely dangerous nature of guns, and firing ranges with large quantities of them being regularly discharged, as well as the interests in preventing theft in crime, all “cause a heavy weight on the public interest side of the scale”\(^ {235}\).

In terms of evidence, Judge Rovner noted that in the First Amendment context the Supreme Court had rejected any requirement for empirical data showing an ordinance will successfully lower crime.\(^ {236}\) While the City could not tie any evidence to the manufacturing district requirement, they did have evidentiary support for their argument that locating firing ranges near vulnerable populations and residences carried risks that could be alleviated through distancing requirements.\(^ {237}\) Judge Rovner noted this evidence in the numerous other examples in the City code of setting distancing requirements which created a “buffer zone” between dangerous or adult-themed businesses and sensitive areas such as schools or

\(^{234}\) [*Id.* at 903.]

\(^{235}\) [*Id.*]

\(^{236}\) [*Id.*]

\(^{237}\) [*Id.* at 903-904.]
hospitals.238 This support, along with the heavy public interest rational, was enough to allow the distancing regulations to survive constitutional scrutiny in Judge Rovner’s view.239

Finally, in terms of the ban on minors, Judge Rovner agreed that the City had failed to show any evidence supporting the categorical exclusion of minors from firing ranges under the Second Amendment.240 However, Judge Rovner noted that in the First Amendment context, the rights of minors are limited to different degrees in different contexts,241 and that even beyond that “it goes without saying that the government may restrict the rights of minors for the purposes of protecting their health and safety.”242 Pointing to examples of the “long history of protecting minors, even where fundamental rights are in play,” Judge Rovner felt it important to note that where an outright ban on entering firing ranges was too far, a variety of “stringent regulations for minors in firing ranges would withstand much scrutiny when supported by appropriate evidence.”243

C. The State of the Two-Step Test and Gun Control Legislation in the Seventh Circuit after Ezell II

The majority opinion in Ezell II is interesting not only because it further cemented the use of the two-step sliding-scale analysis established in Ezell I, but also because Judge Sykes avoided stating with clarity what level of scrutiny on that scale was being applied.

238 See id. (citing to municipal distancing restrictions for “machine shops,” “nitrocellulose” manufacturing facilities, slaughter houses, and the operation of unmanned aircraft).
239 Id. at 904.
240 Id.
240 Id. (“To the extent that McDonald and its progeny allow for firearm ownership within the City of Chicago, the practical argument that parents who have guns within the City limits might also wish to teach gun safety to their children is not without merit.”).
241 Id at 904-905.
242 Id. at 905.
243 Id.
After characterizing the level of scrutiny from *Ezell I* as “a strong form of intermediate scrutiny,” and requiring a “close fit,” the opinion focuses largely on the lack of evidence proffered by the city and a failure to show more than mere general and speculative health and safety concerns.  

It is true that the hard evidence was particularly lacking for the manufacturing district requirement and the requirement would likely have failed under any standard of review. Indeed, that the manufacturing ban would have failed regardless of the standard of scrutiny perhaps answers the question of why Judge Sykes concluded that the distancing requirement—which seemed on more solid footing on its own—necessarily had to fall with it. As Judge Rovner noted, the correct application of the sliding scale test would have seen the two restrictions analyzed separately and on its own the distancing requirement should have survived.

Regardless of the decision to examine both regulations together, it is important to highlight the standard of review the court used in *Ezell II* because of its implications on future decisions. Based on the discussion of *Ezell I*, we can assume that what Judge Sykes was applying was the same “not quite strict scrutiny” or “strong form of intermediate scrutiny” she had previously described and applied to regulations affecting firearm training. Similarly for Judge Rovner, though she also avoided explicit description of any standard of scrutiny, we can likely assume that she was applying a form of

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244 See id at 896 (majority opinion).
245 See id. at 901-902 (Rovner, J., concurring in part and dissenting in part) (observing that the City’s limited evidence that the manufacturing requirement prevented lead contamination at most established a rational basis for the law, which was not enough to survive review).
246 Id. at 894 (majority opinion).
247 Id. at 900 (Rovner, J., concurring in part and dissenting in part).
248 See id. at 892-93 (majority opinion) (“We take as settled what was established in *Ezell I* . . . This holding and these observations control here.”).
intermediate scrutiny appropriate for “time, place, manner” gun use restrictions, based on her allusions to her own opinion in *Ezell I*.\(^{249}\)

While in *Ezell I* the distinction may not have been important because the complete ban on firing ranges would have failed under either level,\(^{250}\) we can see in *Ezell II* why it is vitally important what standard of scrutiny on the sliding scale the courts apply. Applying intermediate scrutiny for time, place, and manner style gun restrictions as Judge Rovner has advocated would have almost certainly led the distancing requirement to survive review.\(^{251}\) But, by characterizing the right in a manner that requires what is essentially strict scrutiny review, Judge Sykes has all but ensured that regulations involving firing ranges, or implicating this right to live fire arm training, must necessarily fail. While the City failed to present more than speculative evidence for the manufacturing zoning requirement, and their evidence for the distancing requirements was far from robust,\(^{252}\) one is left to wonder how much evidence they would have to muster to meet a standard of review akin to strict scrutiny.

The result in *Ezell II* is also ironic given Judge Sykes’ own words in *Ezell I* encouraging Chicago to replace its total ban on ranges with zoning regulations.\(^{253}\) Judge Sykes incorrectly discounted the Supreme Court’s language from *Heller* regarding the validity of longstanding

\(^{249}\) See id. at 899 (Rovner, J., concurring in part and dissenting in part) (describing her disagreement with the majority in *Ezell I* has how to characterize the right to range training).

\(^{250}\) See *Ezell I*, 651 F. 3d 684, 712 (Rovner, J. concurring).

\(^{251}\) See *Ezell II*, 846 F.3d at 904 (Rovner, J. concurring in part and dissenting in part) (“given the lighter burden imposed by the distancing regulations, the strong public interest in protecting residential areas and sensitive areas from the risks associated with firing ranges, these regulations pass constitutional muster”); see also *Ezell I*, 651 F. 3d at 712 (Rovner, J. concurring) (“The City has a right to impose reasonable time, place and manner restrictions on the operation of live ranges in the interest of public safety and other legitimate governmental concerns.”).

\(^{252}\) See *Ezell II*, 846 F. 3d at 901-02 (Rovner, J. concurring in part and dissenting in part).

\(^{253}\) *Ezell I*, 651 F. 3d at 709 (“on this record [the City’s] concerns are entirely speculative and, in any event, can be addressed through sensible zoning and other appropriately tailored regulations.”)
prohibitions on carrying guns in “sensitive places” like schools. Judge Sykes conclusion that the distancing requirements were not a “limitation on where firearms may be carried” and thus did not fall under the “sensitive places” language in *Heller* was erroneous. Quite the opposite, firing ranges are places with high concentrations of firearms being carried and discharged in one location. It seems obvious that restricting how close these firing ranges can be located to schools and residences falls squarely within the coverage of the Supreme Court’s language on presumptively valid longstanding prohibitions on the carrying of guns in “sensitive places.” If nothing else, they would seem to be the kind of “sensible zoning” restrictions that Judge Sykes herself encouraged the City to pursue. Indeed, as Judge Rovner noted in her dissent, the City has commonly enacted similar distancing restrictions on how close dangerous businesses can be located to places that serve vulnerable populations at schools or hospitals.

254 *See Ezell II*, 846 F.3d at 894-95.
255 *See id* at 902 (Rovner, J., concurring in part and dissenting in part).
256 *See id*. at 903 (“owning, keeping or even carrying a firearm for self-defense poses a substantially different risk than does creating a public accommodation where large numbers of people will gather with firearms loaded with lead-contaminated, explosive-filled ammunition and fire them.”).
257 *See id*.
258 *See Ezell I*, 651 F.3d at 709.
259 *See Ezell II*, 846 F.3d at 903 (Rovner, J., concurring in part and dissenting in part). A related argument, which Judge Rovner does not directly address, would be to draw an analogy between analyzing zoning and distancing requirements under the Second Amendment to how courts have approached zoning restrictions on adult book stores and theaters under the First Amendment. *See Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 754 (N.D. Ill. 2015). The district court in *Second Amendment Arms* considered this very possibility in a case involving similar Chicago zoning ordinances which limited the location of firearms retailers. *Id*. The court rejected the use of the Supreme Court’s First Amendment burden shifting framework for zoning restrictions of adult-use businesses. *Id*. The court said the framework was a poor fit in the Second Amendment context because regulations on the commercial sale of fire-arms fell into *Heller’s* language regarding presumptively valid longstanding regulations. *See id*. Interesting then, and contrary to the *Ezell II*
For now, *Ezell II* is binding precedent in the Circuit, and lower courts that encounter regulations that burden, or could be seen as burdening, this “right to maintain proficiency in firearm use,” will presumably be bound to apply this “strong form of intermediate scrutiny.”\(^{260}\) Of course, the flexibility inherent in the sliding-scale means-end test should still allow other panels or district courts in the Seventh Circuit to apply the more deferential form of intermediate scrutiny for other gun regulations that only implicate the “time, place, and manner” of firearm use.

The full effects of this precedent remain to be seen, but what can be said is *Ezell II* gives support to courts to apply a heightened standard of review akin to strict scrutiny to strike down gun control regulations. The use of this stringent standard of review for regulations that in reality only regulate the time, place, and manner of firearm use is wholly inappropriate and ultimately dangerous given the unique public safety risks involved.

**CONCLUSION**

After initially asking for a delay in the injunctions ordered by the Seventh Circuit, the City withdrew its motion.\(^{261}\) Thus, after seven years the *Ezell* litigation appears to have come to a close. While it remains to be see how the City will respond to the ordinances being struck down, we can assume for the time being that construction of firing ranges can soon begin without concern for their distance from schools, residential areas, or high crime areas where their concentrated stock of guns could be susceptible to theft.

This result has very real effects for the people of Chicago, whom are already struggling with an unprecedented level of gun violence causing injury and death in their city. Obviously, preventing the construction of firing ranges in practical terms does nothing to

\(^{260}\) *Ezell II*, 846 F.3d at 893 (majority opinion).

\(^{261}\) See docket report for, *Ezell* et al., v. City of Chicago, 1:10CV05135.
affirmatively lower the current historical levels of gun violence. However, given the uniquely dangerous nature of fire arms and the extraordinary risk they pose to public safety, it is not hard to understand the City’s desire to enact whatever control measures they can. Indeed, it appears a fairly legitimate concern that allowing firing ranges, with their high concentrations of firearms packed in one location, might make the task of limiting the number of guns on the street more difficult.

That task has been made monumentally more difficult in the current Second Amendment constitutional regime. After *McDonald* foreclosed the City’s complete bans on handgun ownership, the realm of permissible regulation has only been further narrowed in the years since. *Ezell I* and *II*, though focused on the seemingly confined issue of firing range training, have great implications for future attempts at regulation. Any future gun control measures that implicate this newly recognized right to live firearm training seem destined to fall under the strict scrutiny review used by the court.

The time will soon come for the en banc Seventh Circuit to clarify the position for the lower courts that encounter Second Amendment challenges. If presented with the opportunity, the en banc court should use Judge Rovner’s opinions in both *Ezell I* & *II* as examples of how to correctly apply the the two-step test for the Second Amendment. Local governments like Chicago do have their own responsibility in future lawsuits to present better and more concrete empirical evidence to support the public health justifications for their proposed gun control measures. In turn, these local governments need courts to apply the appropriate standard of review. That standard needs to be one where gun control regulations that only affect the “time, place and manner” of firearm use, or other ancillary conduct unconnected with self-defense in the home, are only subject to intermediate scrutiny.

In the meantime, Chicago has been left, as Judge Rovner sympathized, navigating a narrow straight between a dreaded “Scylla and Charybdis.” On one hand, the City faces a gun violence epidemic garnering national attention and threatening the health and safety of its citizens on a daily basis. On the other, there is an expanding realm of protected Second Amendment activities historically unconnected to
the past and far beyond the original right to self-defense in the home recognized in *Heller*. The City will have to continue to experiment with gun control regulations to find those measures that can tread this narrow constitutional path forward.

Of course, in the absence of similar regulations in neighboring jurisdictions, the actual impact of any local regulations on gun violence is very much an open question. In the end, any truly effective measure to combat the City’s gun violence problem will likely require a more national scale.
BABY GOT (A BROKEN) BACK, BUT NO REMEDY: THE SEVENTH CIRCUIT’S REFUSAL TO PROVIDE A REMEDY FOR EIGHTH AMENDMENT VIOLATIONS

TIMOTHY LAVINO


INTRODUCTION

In November 2006, William Miller was sentenced to ten years in prison for bank robbery.\(^1\) Thirteen months later, he began to serve his sentence at the Federal Correctional Complex in Terre Haute, Indiana.\(^2\) During the time between his sentencing and starting his sentence, Miller was diagnosed with a thalamic brain tumor that caused reduced sensation in the left side of his body.\(^3\) Because of this tumor, the prison’s medical staff gave Miller a lower-bunk restriction because it was unsafe for him to be in an upper-bunk.\(^4\) Two years later, Miller was reassigned to a “special housing unit,” where he was assigned to an upper-bunk despite repeatedly requesting a lower-bunk from the

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\(^1\) Estate of Miller v. Marberry, 847 F.3d 425, 429 (7th Cir. 2017).
\(^2\) Id.
\(^3\) Id. at 427.
\(^4\) Id.
prison guards and to the prison’s warden.\(^5\) Miller fell from his assigned upper-bunk several times, and one of these falls fractured Miller’s back.\(^6\) Miller brought a civil suit against Gary Rogers, a prison guard, and Helen Marberry, the Warden of the prison.\(^7\) Miller alleged that Rogers and Marberry acted with deliberate indifference to his serious medical condition in violation of his Eighth Amendment\(^8\) right to be free from cruel and unusual punishments.\(^9\)

The district court construed his complaint as an action falling under the purview of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the 1971 United States Supreme Court case that first established a private cause of action for damages against federal officials for violating constitutional rights.\(^10\) The district court granted a motion for summary judgment in favor of Rogers and Marberry for two reasons: first, neither Rogers nor Marberry were responsible for bunk assignments; and, second, if Rogers had checked the prison’s electronic database, he would not have found a lower-bunk restriction.\(^11\) The United States Court of Appeals for the Seventh Circuit affirmed the lower court’s decision, holding that Miller did not seek relief from the correct parties because neither of the defendants were responsible for bunk assignments or deciding who had a medical need for a lower-bunk.\(^12\)

By affirming the lower court, the Seventh Circuit made several critical errors. First, the court ignored precedent establishing that deliberate indifference to a serious medical condition can violate the Eighth Amendment. Second, the court overextended the holding in *Ashcroft v. Iqbal*\(^13\) to absolve the defendants of liability. Third, the

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\(^{5}\) *Id.* at 426.
\(^{6}\) *Id.*
\(^{7}\) *Id.*
\(^{8}\) U.S. CONST. amend. VIII
\(^{9}\) *Estate of Miller*, 847 F.3d at 431.
\(^{10}\) 403 U.S. 388 (1971).
\(^{11}\) *Estate of Miller*, 847 F.3d at 427.
\(^{12}\) *Id.* at 426.
\(^{13}\) *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009).
court ignored genuine disputes of material fact and improperly affirmed the lower court’s grant of summary judgment to the defendants. The Seventh Circuit’s holding in Estate of Miller v. Marberry will ultimately release federal officials from liability for violating constitutional rights and will limit the remedies for prisoners whose constitutional rights are violated.

A CAUSE OF ACTION FOR CONSTITUTIONAL VIOLATIONS

The 42nd Congress enacted 42 U.S.C. § 1983 which created a cause of action for damages under the Fourteenth Amendment against state officials for constitutional violations.\(^{14}\) However, 42 U.S.C. §1983 did not provide for a cause of action against federal officials for constitutional violations. This meant that there was no remedy for individuals whose constitutional rights had been violated by a federal official. The United States Supreme Court took on the job of creating a private cause of action for individuals whose constitutional rights are violated by federal officials in a case called Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.\(^{15}\)

\(A.\) Bivens v. Six Unknown Named Agents – Creating A Private Cause of Action Against Federal Officials

On November 26, 1965, six agents of the Federal Bureau of Narcotics entered the apartment of Webster Bivens without a search or arrest warrant.\(^{16}\) The agents searched the apartment from top to bottom.\(^{17}\) After the warrantless search of his apartment, Bivens was arrested for allegedly violating federal narcotics laws and was handcuffed and detained in front of his wife and children.\(^{18}\) Bivens

\(^{15}\) 403 U.S. 338 (1971).
\(^{16}\) Bivens, 403 U.S. at 389.
\(^{17}\) Id.
was then taken to the Federal Narcotics Bureau where he was interrogated, photographed, fingerprinted, strip-searched, and booked. A United States Commissioner eventually dismissed Bivens’ narcotics charges, but he still suffered “great humiliation, embarrassment, and mental suffering” because of the warrantless search and subsequent arrest.

After his release, Bivens sued the six federal agents in the United States District Court for the Eastern District of New York. He sought $15,000 in damages from each of the six agents for violating his Fourth Amendment right to be free from unreasonable searches and seizures. The district court dismissed the complaint claiming the court lacked jurisdiction, or in the alternative, claiming that Bivens had failed to state a claim for which relief could be granted.

On appeal, the United States Court of Appeals for the Second Circuit held that the district court did have proper jurisdiction, but still affirmed the lower court’s decision on the basis that Bivens’s claim failed to state a cause of action. The court hinged its decision on the fact that there was no established remedy for individuals whose rights had been violated by federal officials. The court reasoned that policy decisions concerning the enforcement of a federal right should be left to Congress. Thus, in the absence of an explicit congressional authorization for damages against federal officials, Bivens could not state a claim for which relief could be granted. Under the Second Circuit’s analysis, Bivens could only recover damages in an action between private citizens under state law.

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19 Id.
20 *Bivens*, 403 U.S. at 389.
21 *Bivens II*, 409 F.2d at 719.
22 *Id.* at 719.
23 *Id.* at 719–20.
24 *Bivens*, 403 U.S. at 390.
25 *Bivens II*, 409 F.2d at 719.
26 *Id.* at 726.
27 *Id.*
28 *Bivens*, 403 U.S. at 392.
The United States Supreme Court reversed the decision of the Second Circuit. The Court emphasized the differences in a relationship between two private citizens and a relationship between a private citizen and a federal agent. The Court reasoned that “[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.” Further, the Court pointed out that its “cases make clear the Fourth Amendment operates as a limitation upon the exercise of federal power” and “guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority.” The Court did not concern itself with the absence of an express authorization from Congress for damages as a remedy because “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief,” and “[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.” This was the first time the Supreme Court recognized a private cause of action for damages against federal agents for constitutional violations.

Even though the Court approved money damages against federal agents as an appropriate remedy, the holding in Bivens was deliberately narrow. The Court urged future courts to be wary of permitting an action for damages in the absence of Congressional approval unless there were no “special factors counselling hesitation.” Moreover, the Court did not create a damages remedy for any and all constitutional violations. The Court specified that this

29 Id. at 390.
30 Id. at 391–92.
31 Id. at 392.
32 Id.
33 Id. (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).
34 Id. at 395.
35 Id. at 396.
36 Id.
remedy was reserved specifically for violations of the Fourth Amendment.  

B. The Evolution of Bivens

Bivens established that when federal officials violate the Fourth Amendment, money damages are an appropriate and acceptable remedy. However, Bivens gave no guidance on what to do for constitutional violations outside of the Fourth Amendment. Since 1971, the Court has reexamined the Bivens action several times.

1. Expanding Bivens.

In Bivens, the Supreme Court specified that its holding extended only to violations of the Fourth Amendment. However, there are many other ways to violate an individual’s constitutional rights. It was inevitable that once the Court opened the door for lawsuits against federal officials for violating an individual’s Fourth Amendment rights, litigants would begin to bring lawsuits when federal officials violated other constitutional rights as well.

a. Davis v. Passman – The Fifth Amendment

Eight years after Bivens was decided, the Supreme Court reconsidered the scope of the Bivens action for the first time. In Davis v. Passman, the Court confronted the issue of whether a cause of action and a damages remedy could be implied under the Constitution when the Fifth Amendment’s Due Process Clause is

37 Id.
38 Id.
39 The Supreme Court addressed the Bivens issue in several cases during these eight years, but none of these decisions impacted the scope of Bivens. See, e.g., Butz v. Economou, 437 U.S. 478 (1978) (addressing whether qualified immunity trumps a Bivens action).
40 Davis v. Passman (Davis I), 442 U.S. 228 (1979).
violated. The Court of Appeals for the Fifth Circuit, sitting en banc, determined that “no civil action for damages” could be implied. However, the Supreme Court disagreed.

The plaintiff in Davis was a female employed as a deputy administrative assistant for a United States Congressman. About six months after the plaintiff began working for the congressman, the congressman terminated her employment. The congressman wrote her a note that said she was “able, energetic and a very hard worker,” but he had decided “that it was essential that the understudy to [his] Administrative Assistant be a man.”

The plaintiff alleged that her boss discriminated against her “on the basis of sex in violation of the United States Constitution and the Fifth Amendment thereto.” The plaintiff sought damages in the form of back pay, and reinstatement to her position with a promotion and salary increase. However, the matter was complicated by two things. First, the congressman argued that he was immune from liability for damages under the doctrine of qualified immunity. And second, the congressman had lost his re-election and was no longer in office. Therefore, there was no longer the possibility of relief by reinstatement, promotion, and a salary increase.

The district court dismissed the suit for failure to state a claim on which relief could be granted because “the law afford[ed] no private right of action” for her claim. A panel of the Court of Appeals for the

41 Id. at 229.
42 Davis v. Passman (Davis II), 571 F.2d 793, 801 (5th Cir. 1978) (en banc).
43 Davis I, at 229.
44 Id.
45 Id.
46 Id. at 230–31
47 Id. at 231.
48 Id. n.4.
49 Id. at 231 n.5.
50 Id. at 230 n.1, 245.
51 Id. at 245.
52 Id. at 230.
Fifth Circuit reversed the district court, but the panel’s decision was reversed by an en banc decision of the Fifth Circuit.\textsuperscript{53}

The Supreme Court reversed the Fifth Circuit’s en banc decision for four reasons. First, damages were the appropriate remedy in this case: the plaintiff could not be reinstated at her job because the congressman was no longer in office and no longer had a congressional staff. Because “it [was] damages or nothing” for the plaintiff, the Court held that damages were appropriate.\textsuperscript{54} Second, even though allowing a lawsuit against a congressman for actions taken in the course of his official conduct raised special concerns counseling hesitation, the concerns were alleviated by the protections afforded to congressmen by the Speech and Debate Clause.\textsuperscript{55} Because the congressman’s actions were not shielded by the Speech and Debate Clause, the Court applied the principle that “legislators ought . . . generally be bound by [the law] as are ordinary persons.”\textsuperscript{56} Third, there had been “no explicit congressional declaration that persons in petitioner’s position injured by unconstitutional federal employment discrimination ‘may not recover money damages from’ those responsible for the injury.”\textsuperscript{57} Finally, the Court was not concerned with flooding federal courts with claims because a similar remedy was already available for similar injuries when they occurred under state law by virtue of 42 U.S.C. § 1983.\textsuperscript{58} The Court concluded that the petitioner had a cause of action under the Fifth Amendment, and the appropriate remedy would be damages if the petitioner prevailed on the merits of her case.\textsuperscript{59}

\textsuperscript{53} Id.
\textsuperscript{54} Id. at 246 (quoting \textit{Bivens}, 403 U.S. at 410).
\textsuperscript{55} Id. at 236.
\textsuperscript{56} Id.
\textsuperscript{57} \textit{Davis I}, 442 U.S. at 246–47 (quoting \textit{Bivens}, 403 U.S. at 397).
\textsuperscript{58} Id. at 248.
\textsuperscript{59} Id. at 248–49.
b. Carlson v. Green – The Eighth Amendment

In 1980, the Supreme Court considered expanding *Bivens* once again, this time for a violation of Eighth Amendment rights. The action was brought by a mother on behalf of her deceased son. She alleged that her son was injured and died because federal prison officials violated his equal protection, due process, and Eighth Amendment rights.\(^{60}\)

The Court reiterated that *Bivens* established damages as the appropriate remedy when federal officials violate an individual’s constitutional rights.\(^ {61}\) The Court gave two specific situations in which *Bivens* actions for constitutional violations may be defeated. First, if the defendants demonstrate “special factors counselling hesitation in the absence of affirmative action by Congress.”\(^ {62}\) Or second, if the defendants show Congress has provided an equally effective alternative remedy and has explicitly declared it to be a substitute for recovery under the Constitution.\(^ {63}\)

The Court found no “special factors counseling hesitation” because the prison officials were not exempt from judicially created remedies, and they were adequately protected by the qualified immunity afforded to them under *Butz v. Economou*,\(^ {64}\) which states, “Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law.”\(^ {65}\)

Similarly, there was no congressional declaration substituting another form of recovery for violations of the Eighth Amendment.\(^ {66}\) The prison officials argued that the Federal Tort Claims Act (FTCA) acted as the necessary substitution, but the Court disagreed. The Court pointed to congressional commentary to support its assertion that

\(^{60}\) Carlson v. Green, 446 U.S. 14, 18 (1980).
\(^{61}\) *Id.* at 19.
\(^{62}\) *Id.* (quoting *Bivens*, 403 U.S. at 396).
\(^{63}\) *Id.* at 18–19.
\(^{64}\) 438 U.S. 478 (1978).
\(^{65}\) *Id.* at 507.
\(^{66}\) *Id.*
FTCA was not meant to be a substitute for a Bivens action, but was a parallel and complementary cause of action.\textsuperscript{67}

The Court pointed to four additional factors that suggested Bivens was an effective remedy for violations of the Eighth Amendment, and to support its conclusion that Congress did not intend for FTCA to be an exclusive substitute remedy. First, the Bivens remedy would compensate the victim and act as a deterrent because it is recoverable against individuals.\textsuperscript{68} Second, the Court’s previous decisions indicated that punitive damages could be awarded in a Bivens suit.\textsuperscript{69} Punitive damages were particularly appropriate where they would be available in a comparable 42 U.S.C. § 1983 action against a state official, and the “‘constitutional design’ would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression.”\textsuperscript{70} Third, there is the option for a jury in a Bivens action.\textsuperscript{71} Fourth, the liability of federal officials who violate citizens’ constitutional rights should be subject to uniform rules.\textsuperscript{72} The Court held that in the absence of an explicit congressional mandate, the FTCA was an exclusive remedy, and the FTCA did not sufficiently protect citizens’ rights.\textsuperscript{73}

Ultimately, the Court extended a private cause of action under Bivens against federal officials who violate a person’s Eighth Amendment Constitutional rights.

2. Refining Bivens

After Bivens, Davis, and Carlson, federal courts recognized non-statutory causes of action against federal officials for violating an individual’s Fourth, Fifth, or Eighth Amendment rights. If a plaintiff
could show that there were no special factors counseling hesitation, and that Congress had not expressly declared a new cause of action as an equally remedial substitute for *Bivens*, a *Bivens* action was appropriate.

The Court then veered from its pattern of expanding *Bivens*, and began to refine the cause of action until it developed into what it is today. After *Carlson*, the Court examined who could be a proper defendant in a *Bivens* action, and when a *Bivens* action was unavailable.

a. *Bush v. Lucas – The First Amendment*

In 1983, the Supreme Court once again considered expanding the scope of *Bivens*. This time, the Court was asked to authorize a non-statutory damages remedy under *Bivens* for a federal employee whose First Amendment rights were violated by his superiors. The petitioner was an aerospace engineer employed at a facility run by the National Aeronautics and Space Administration. The facility where the petitioner worked underwent a series of reorganizations, which caused him to be reassigned to new positions twice. He appealed both reassignments, and, while the appeals were pending, he gave two public interviews and made several public comments condemning the facility for fraudulent and wasteful use of taxpayers’ money.

The respondent, the director of the facility, commenced an adverse personnel action charging the petitioner with publicly making misleading and false statements that demonstrated a malicious attitude towards management and all personnel of the facility, thus stunting efficiency and negatively affecting public confidence in the government and its services. The respondent determined that although the petitioner’s conduct could justify termination, demotion

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75 *Id.* at 369.
76 *Id.*
77 *Id.*
78 *Id.* at 369–70.
was the appropriate consequence for a first offense.\textsuperscript{79} The petitioner appealed to the Federal Employee Appeals Authority, and the Authority concluded that the demotion was justified.\textsuperscript{80}

Two years later, the Civil Service Commission’s Appeals Review board reopened the petitioner’s proceedings and recommended that he be restored to his former position with backpay because his statements were not “wholly without truth” and did not “justify abrogation of the exercise of free speech.”\textsuperscript{81} While this appeal was pending, the petitioner filed an action against the respondent seeking to recover damages for defamation and violation of his First Amendment free speech rights.\textsuperscript{82} The district court granted the respondent’s motion for summary judgment and the Fifth Circuit affirmed, holding the “plaintiff had no cause of action for damages under the First Amendment for retaliatory demotion in view of the available remedies under the Civil Service Commission Regulations.”\textsuperscript{83}

The Supreme Court affirmed the Fifth Circuit and declined to expand the \textit{Bivens} action to this new scenario.\textsuperscript{84} The Court pointed to Congress’ step by step development of the Civil Service Commission Regulations and its elaborate remedial system as a reason not to create a new judicial remedy.\textsuperscript{85} Similarly, subjecting management personnel to personal liability for employment decisions they believed to be a proper response to improper criticism of an agency would deter management from imposing necessary discipline in future cases.\textsuperscript{86} Finally, the Court pointed to Congress’ ability to accurately assess the need for a new remedy and to create a statutory remedy as a reason not to create a judicial remedy.\textsuperscript{87}

\textsuperscript{79} \textit{Id.} at 370.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.} at 372.
\textsuperscript{82} \textit{Id.} at 372.
\textsuperscript{83} \textit{Bush} v. Lucas (Bush II), 647 F.2d 573, 574 (4th Cir. 1981).
\textsuperscript{84} \textit{Bush}, 462 U.S. at 390.
\textsuperscript{85} \textit{Id.} at 388.
\textsuperscript{86} \textit{Id.} at 389.
\textsuperscript{87} \textit{Id.}
In 1994, the Supreme Court was asked to extend a cause of action under *Bivens* against an agency of the Federal Government. In *FDIC v. Meyer* involved a man who sued the Federal Savings and Loan Insurance Corporation for depriving him of a property interest without due process of law in violation of the Fifth Amendment. The Court refused to extend a *Bivens* action against a federal agency for two reasons. First, creating a direct cause of action for damages against federal agencies could potentially subject the Federal Government to enormous financial burdens. Second, the Court was concerned that if claimants were permitted to bring an action directly against a federal agency, the aggrieved party would have no reason to bring an action for damages against the individual officers who caused the harm. This would effectively eliminate the deterrent effects that the *Bivens* action was intended to promote. Because the purpose of the *Bivens* action is to deter federal officials from violating constitutional rights, the *Bivens* action is only appropriate against federal officials, not against federal agencies.

**Estate of Miller v. Marberry**

For reasons not identified within the record, William Miller died before his appeal reached the Seventh Circuit. His estate was

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89 *Id.*
90 *Id.* at 474.
91 *Id.* at 486.
92 *Id.* at 485.
93 *Id.*
94 *Id.*
95 *Estate of Miller*, 847 F.3d at 426.
substituted as the plaintiff in the case. I will identify the plaintiff by Miller’s name for clarity and expediency.

A. Facts of the Case

The facts presented in the majority opinion are slightly different from the facts presented by Judge Posner in his dissenting opinion. This statement of facts will attempt to consolidate the facts from both opinions.

In November 2006, William Miller was convicted of bank robbery and was sentenced to ten years in prison. Sometime after his sentencing and before and he began serving his sentence, Miller was diagnosed with a thalamic brain tumor.

After being diagnosed with the brain tumor, Miller began serving his sentence in the Federal Correctional Complex in Terre Haute, Indiana (“FCC Terre Haute”). One month after arriving at FCC Terre Haute, Miller’s doctor ordered that he be restricted to a lower-bunk because of his thalamic brain tumor. The tumor caused Miller to have impaired feeling in the left side of his body, and his doctor thought that a lower-bunk restriction was necessary to ensure his safety as a prisoner. The lower-bunk restriction was supposed to be entered into the prison’s computer database system called SENTRY.

About a year later, Miller was moved from the prison’s general population to a more restrictive housing unit called the “Special Housing Unit.” When Miller was first moved to the “Special Housing Unit,” he was assigned to a lower-bunk in accordance with

96 Id.
97 Id. at 429.
98 Id.
99 Id.
100 Id.
101 Id. at 430.
102 Id. at 426.
103 Id. at 429.
his medical restriction. However, before he was able to spend even one night in his assigned lower-bunk, he was reassigned to an upper-bunk. Miller told Gary Rogers, the head guard in his new housing unit, that he had a lower-bunk restriction because of his brain tumor. Rogers told Miller that he would not be reassigned to a lower-bunk, and that if he refused to sleep in his assigned upper-bunk he would “receive a disciplinary report for refusing a direct order.”

Five days after Rogers denied Miller’s initial plea for a lower-bunk, Miller became dizzy while climbing down the ladder from his upper-bunk, slipped, and fell. Miller hit his head on the concrete floor and lost consciousness. Miller was taken to a hospital, treated for his injuries, and given a CAT scan. When Miller returned to the prison, he was again assigned to an upper-bunk. Miller once again told Rogers about his lower-bunk restriction, and Rogers once again did nothing.

Around this same time, Helen Marberry, the prison’s warden, had an encounter with Miller during one of her weekly walks through the special housing unit. Miller told Marberry about his fall and his subsequent trip to the hospital. He then informed Marberry that he had improperly been assigned to an upper-bunk, and he asked for her help to get him a corrected bunk assignment. Marberry would not even listen to Miller. According to Miller’s complaint, Marberry “walked

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104 Id.
105 Id.
106 Id.
107 Id.
108 Id.
109 Id.
110 Id.
111 Id.
112 Id.
113 Id. at 430.
114 Id. at 429.
115 Id.
away from [Miller’s] cell door leaving him midspeech.”

Marberry ignored Miller’s plea for a bunk reassignment “despite the fact that before he entered the Special Housing Unit, Miller had repeatedly discussed his brain tumor with [Marberry] on her visits to prisoners during their lunch period.”

In February of 2009, less than six weeks after his first fall, Miller once again fell from his upper-bunk, this time in the middle of the night. Miller severely compacted a segment of his cervical spine and fractured his thoracic spine. Miller, with a broken back, remained lying on the floor for over an hour before any member of the prison staff noticed that he was injured. Miller was taken to the emergency room of a nearby hospital and placed in a hard clamshell brace.

When Miller returned to the prison from the hospital, he again asked for a lower-bunk assignment, and his request was again denied with no reason given. Warden Marberry continued to have weekly

walks through the “Special Housing Unit,” and each time she approached Miller’s cell, she would see him on his assigned upper-bunk wearing his clamshell back brace and a cervical neck brace. Every time she approached Miller’s cell, he asked her to be re-assigned to a lower-bunk, but his requests went ignored. The head guard, Rogers, also frequently saw Miller wearing multiple body braces while sitting on his upper-bunk. Rogers did nothing in response to Miller’s frequent requests that his lower-bunk restriction

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116 Id.
117 Id.
118 Id. at 430.
119 Id.
120 Id.
121 Id.
122 Id.
123 Id.
124 Id.
125 Id.
be honored. Throughout this entire period of time, Miller was in acute pain from his severe back injuries.

Finally, ten months after Miller fractured his back, he was given a new lower-bunk restriction. However, Miller was not immediately reassigned to a lower-bunk. Eleven days after the new restriction was given, but before Miller had actually been assigned to a lower-bunk, a wound on Miller’s back that had been stapled burst open, “discharging a large amount of a yellowish fluid consisting mainly of blood.” Miller was taken to a hospital and remained there for four months until the wound had finally healed. After returning to the prison from his four month stay in the hospital, Miller was at last given a lower-bunk.

Miller filed an administrative complaint with the prison, but his complaint was denied on the grounds that “although he’d had a lower-bunk restriction since January 29, 2008 – he had never submitted a document confirming that restriction to a member of the prison’s staff, as required by a notice to the prisoners that ‘It is your responsibility to have all medical restrictions on your person to present to staff.’” Unfortunately for Miller, even though he had been given a lower-bunk restriction, he had lost the document confirming this restriction, and he was unable to obtain a new copy.

Miller’s complaints culminated in a remarkable brush-off from the Federal Bureau of Prisons Office of Regional Counsel stating: “investigation of your claim did not reveal you suffered any personal

\[^{126}\text{id.}\]
\[^{127}\text{id.}\]
\[^{128}\text{id.}\]
\[^{129}\text{id.}\]
\[^{130}\text{id.}\]
\[^{131}\text{id.}\]
\[^{132}\text{id.}\]
\[^{133}\text{id.}\]
\[^{134}\text{id.}\]
injury as a result of the negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment.°

Miller then filed a claim in The United States District Court for the Southern District of Indiana alleging that Marberry and Rogers violated his Eighth Amendment rights.° The district court granted the Defendants’ motion for summary judgment on the reasoning that neither Marberry nor Rogers were in charge of bunk assignments.° Further, the court stated that Miller had “not identified a genuine issue of material fact as to his claim against any of the defendants.”°

B. The Seventh Circuit Majority Opinion

In a split panel decision, the Seventh Circuit affirmed the decision of the district court.° Judge Easterbrook and Judge Sykes voted to affirm the lower court, while Judge Posner voted to reverse the lower court.°

The majority made several critical errors by affirming the decision of the district court. First, the majority ignored precedent establishing that a prison official’s deliberate indifference to a serious medical condition can violate the Eighth Amendment. Second, the majority overextended the holding in Ashcroft v. Iqbal° to absolve the defendants of liability for their inaction. Third, the majority ignored genuine disputes of material fact and improperly affirmed the district court’s grant of summary judgment to the defendants.

°Id.
°Id. at 11–15.
°Id. at 16.
°Estate of Miller, 847 F.3d at 426.
°Id. at 425.
1. The Eighth Amendment Violation

In the eyes of the majority, “Miller’s principal problem [was] the identity of the two defendants.”\(^{142}\) The majority believed that Miller should have sued either the guard responsible for making the bunk assignments, or the person in the prison’s medical department responsible for deciding who has a medical need for a lower-bunk.\(^{143}\) The majority minimized Miller’s claim by focusing only on the lower-bunk restriction and its enforcement, without considering the actions, or inaction, of Rogers and Marberry. The majority pointed out that “the Supreme Court has never held that Bivens actions can be used to enforce administrative orders,” nor has it “held that every public official has a duty to carry out every other public official’s decision.”\(^{144}\) The majority then analogized Miller’s case to *Town of Castle Rock v. Gonzales*,\(^ {145}\) which held that neither prosecutors nor police officers are liable for failure to enforce a judicial no-contact order,\(^ {146}\) and questioned why Miller’s lower-bunk restriction should receive greater status than a judicial no-contact order.\(^ {147}\) Unfortunately for Miller, this was a gross mischaracterization of his claim.

The majority stated that for Miller to get anywhere with his claim, he had to establish that Rogers and Marberry violated his constitutional rights, which Miller did not do.\(^ {148}\) For Miller to succeed with a medical claim under the Eighth Amendment, he needed to establish the defendants knew of, or were deliberately indifferent to, Miller’s serious medical condition and did not take minimally competent steps to deal with that condition.\(^ {149}\) According to the majority, there was no way that Rogers or Marberry could have known

\(^{142}\) Id. at 426.

\(^{143}\) Id.

\(^{144}\) Id. at 427.

\(^{145}\) 545 U.S. 748 (2005).

\(^{146}\) Id. at 768.

\(^{147}\) *Estate of Miller*, 847 F.3d at 427.

\(^{148}\) Id. at 428.

\(^{149}\) Id.
about Miller’s serious medical condition. The majority believed that Miller’s statements to Rogers and Marberry about his brain tumor fell short of demonstrating a serious medical condition because there are many types of brain tumors that have a range of effects, and “benign tumors can last decades without causing adverse consequences.” It is true that not all brain tumors constitute a serious medical condition, but Miller’s brain tumor actually caused symptoms that made it a serious medical condition. The majority seems to overlook that the Seventh Circuit acknowledged in Edwards v. Snyder that a broad variety of medical conditions can amount to a serious medical need, “including a dislocated finger, a hernia, arthritis, heartburn and vomiting, a broken wrist, [or] minor burns from lying in vomit.” Surely a brain tumor that causes numbness on one half of the body is at least as serious heartburn, vomiting, or a minor burn.

Further, the majority stated that Rogers and Marberry were “not obliged to believe Miller’s assertion that he had a brain tumor and a lower-bunk pass” because prisoners often use manipulation and deceit to obtain advantages in prison. Even if Rogers and Marberry did not believe that Miller had a serious medical condition after his first few pleas for a lower-bunk, it seems unreasonable that they would still believe he was trying to manipulate them after his first fall from the upper-bunk. Could they reasonably believe that he was attempting to manipulate them after his second fall fractured his spine? A major problem with the majority’s opinion is that each fact from the case seems to have been examined in a vacuum. Each instance of Rogers or Marberry ignoring Miller’s pleas may not individually amount to a violation of the Eighth Amendment, but looking at the facts of the case as a whole established that Miller’s Eighth Amendment rights were violated.

150 Id.
151 Id. at 428.
152 478 F.3d 827 (7th Cir. 2007).
153 Id. at 831.
154 Id. at 428.
At the very least, Rogers and Marberry were deliberately indifferent to Miller’s serious medical condition. Deliberate indifference occurs when a prison official “realizes that a substantial risk of serious harm to a prisoner exists, but disregards it.” Deliberate indifference can be found where a prison official knows about a constitutional violation and “turns a blind eye” to it. Rogers and Marberry both turned a blind eye to Miller’s substantial risk of serious harm by repeatedly ignoring his pleas.

Because Rogers and Marberry knew about, or were deliberately indifferent to, Miller’s serious medical condition, Miller would have succeeded on an Eighth Amendment claim if he could have proved that they did not take minimally competent steps to deal with his condition. Neither Rogers nor Marberry took the minimally competent steps to assist Miller with his condition. In fact, neither of them took any steps to help him at all. The majority repeatedly brings up the fact that Miller should have complained to the guard who sat in an isolated pod and was responsible for bunk-assigning duties. Unfortunately, Miller only complained to Rogers and Marberry, who apparently were not capable of verifying Miller’s complaints or fixing the problem. But, would it have been that difficult for Rogers, who regularly roamed the halls of the prison, to ask the guard in the pod if Miller was telling the truth? Did Marberry, the warden of the prison, really not have the ability to verify if Miller was telling the truth? At the very least, Rogers or Marberry could have informed Miller of the proper person to bring his complaint to. Instead, Rogers and Marberry did nothing. They ignored Miller time after time. Rogers and Marberry did not have to fix the problem in its entirety; they only had to take minimally competent steps to fix the problem, which they failed to do. Rogers and Marberry both violated Miller’s Eighth Amendment rights when they acted with deliberate indifference to Miller’s serious

155 Perez v. Fenoglio, 792 F.3d 768, 781 (7th Cir. 2015).
156 Id.
157 Estate of Miller, 847 F.3d at 428.
158 Id.
medical condition and failed to take the minimally competent steps to deal with that condition.

2. The Majority Overextended *Ashcroft v. Iqbal*’s Holding

Next, the majority pointed to *Ashcroft v. Iqbal*\(^{159}\) to relieve Rogers and Marberry from liability because “liability under *Bivens* is personal rather than vicarious.”\(^{160}\) It is true that vicarious liability is inapplicable to *Bivens*,\(^ {161}\) but the majority overextended the holding in *Iqbal* to absolve Rogers and Marberry of liability. In *Iqbal*, the Supreme Court rejected the proposition that a supervisor’s mere knowledge of a subordinate’s intent to discriminate amounts to the supervisor violating the Constitution.\(^ {162}\) The Court in *Iqbal* made it clear that federal officials with supervisory authority “may not be held accountable for the misdeeds of their agents,” and that “purpose rather than knowledge is required to impose . . . liability . . . [on] an official charged with violations arising from his or her superintendent responsibilities.”\(^ {163}\) In *Miller*, the majority failed to recognize that knowledge can impact an official’s duty: “A prison official’s knowledge of prison conditions learned from an inmate’s communications can, under some circumstances, constitute sufficient knowledge of the conditions to require the officer to exercise his or her authority and to take the needed action to investigate and, if necessary, to rectify the offending condition.”\(^ {164}\) The majority failed to recognize that Marberry was not named as a defendant because her subordinate failed to assign Miller to the proper bunk; she was named as a defendant because she had sufficient knowledge of Miller’s condition to require her to exercise her authority and take some form of action.

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\(^{159}\) 556 U.S. 662 (2009).

\(^{160}\) *Id.*

\(^{161}\) *Id.* at 676.

\(^{162}\) *Id.* at 677.

\(^{163}\) *Id.*

\(^{164}\) Vance v. Peters, 97 F.3d 987, 993 (7th Cir. 1996).
In an attempt to bolster its theory of vicarious liability, the majority analogized Miller’s case to *Burks v. Raemisch*\(^{165}\) where the Seventh Circuit held that prison officials do not become liable for rejecting prisoner’s grievances merely because the official fails to ensure an adequate remedy.\(^{166}\) However, in *Burks*, the prisoner brought a lawsuit against every prison official who knew or should have known about his medical condition, and also everyone higher up in the prison’s bureaucratic chain.\(^{167}\) The prisoner in *Burks* had named defendants that he had never even come into contact with.\(^{168}\) Miller’s case was different because he only named defendants who he had actually had contact with and were somehow involved in his plight.

The majority stated that Miller’s argument was deficient because it “suppose[d] that every federal employee is responsible, on pain of damages, for not implementing the decision of any other federal employee,”\(^ {169}\) but this is not true. Miller was not seeking damages because a federal official did not implement the decision of another federal employee; Miller was seeking damages because Rogers and Marberry did absolutely nothing to assist him with his repeated requests to be placed in bed that was safe for him. As the court stated in Burkes: “Doing nothing could be simple negligence, but it does not stretch the imagination to see that it might also amount to deliberate indifference.”\(^ {170}\) Ultimately, the majority rested its decision on the assertion that failing to enforce another federal official’s decision cannot amount to an Eighth Amendment violation, and ignored the defendants’ inaction.

\(^{165}\) 555 F.3d 592 (7th Cir. 2009).
\(^{166}\) *Id.* at 596.
\(^{167}\) *Id.* at 594.
\(^{168}\) *Id.* at 593.
\(^{169}\) *Estate of Miller*, 847 F.3d at 427.
\(^{170}\) *Burks*, 555 F.3d at 594.
3. Summary Judgment in Favor of the Defendants was Improper

Lastly, the district court’s grant of summary judgment in favor of the defendants should not have been affirmed. Summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”\textsuperscript{171} A factual dispute is “material” if it might affect the outcome of the case.\textsuperscript{172} A material factual dispute is “genuine” if “a reasonable jury could return a verdict for the nonmoving party.”\textsuperscript{173} Lastly, on a motion for summary judgment, the facts must be presented in the light most favorable to the non-moving party.\textsuperscript{174} When the facts are presented in the light most favorable to Miller, there are genuine disputes of material fact that would not entitle the defendants to judgment as a matter of law.

The district court granted summary judgment to the Defendants for two reasons. First, neither Rogers nor Marberry were responsible for bunk assignments.\textsuperscript{175} Second, if Rogers had consulted the prison’s SENTRY database, he would not have found a lower-bunk restriction in the database.\textsuperscript{176} The district court found it uncontested that Miller’s first lower-bunk restriction was not in the SENTRY database, and a new restriction was not issued until December 1, 2009.\textsuperscript{177} The district court relied on affidavits filed by Rogers and other guards stating that in January and February of 2009, Miller’s lower-bunk restriction was not recorded in the SENTRY database, and a new restriction was not issued until December 1, 2009.\textsuperscript{177} The district court relied on affidavits filed by Rogers and other guards stating that in January and February of 2009, Miller’s lower-bunk restriction was not recorded in the SENTRY database, and a new restriction was not issued until December 1, 2009.\textsuperscript{177} However, this was directly contradicted by Warden Marberry, who confirmed in writing that Miller had received a lower-bunk restriction in January 2008, and the

\begin{thebibliography}{99}
\bibitem{171} FED. R. CIV. P. 56(a).
\bibitem{172} \textit{Anderson v. Liberty Lobby, Inc.}, 477 U.S. 242, 248 (1986).
\bibitem{173} \textit{Id.}
\bibitem{174} \textit{Id.}
\bibitem{175} \textit{Estate of Miller}, 847 F.3d at 427.
\bibitem{176} \textit{Id.}
\bibitem{177} \textit{Id.}
\bibitem{178} \textit{Id. at 427}.
\end{thebibliography}
restriction was recorded in the SENTRY database. This inconsistency was sufficient to create a genuine dispute of material fact that should have precluded summary judgment. This factual dispute is material because it might have affected the outcome of the case. Similarly, the dispute was genuine because a jury could have returned a verdict in favor of Miller. If there was a lower-bunk restriction recorded in the SENTRY database, and Rogers had completely ignored it, a jury could reasonably find that Rogers had violated Miller’s Eighth Amendment rights.

CONCLUSION

The Seventh Circuit made several critical errors when it affirmed the decision of the lower court in *Estate of Miller v. Marberry*. The majority opinion ignored binding precedent, overextended the holdings of cited cases, and affirmed a grant of summary judgment when there were genuine disputes of material fact. In doing so, the Seventh Circuit has told prison officials that it is acceptable to ignore prisoners. The Seventh Circuit has told federal inmates that they have no remedy for harm caused to them by a federal official’s inaction and apathy. The United States Supreme Court has stated that the purpose of the *Bivens* action is to deter federal officials from violating constitutional rights, but the Seventh Circuit’s opinion in *Estate of Miller v. Marberry* deviates from the desired purpose.

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179 *Id.* at 431 (Posner, J., dissenting).
NEITHER CRUEL NOR UNUSUAL:
AN HOUR AND A HALF DELAY IN TREATMENT
CAN NOW AMOUNT TO DELIBERATE
INDIFFERENCE

MONICA J. RAVEN


INTRODUCTION

United States penitentiaries housed 2,173,800 inmates in 2015.¹ According to the 2010 United States Census, correctional facilities, as a whole, are more populous than fourteen states.² The prison population suffers from higher rates of mental illness, chronic medical conditions, and infectious diseases compared to the general United

States population. In fact, more than eight in ten inmates, in both state and federal prison, receive medical care while incarcerated.

A constitutional violation may arise out of the Eighth Amendment if a prisoner’s medical treatment, or lack thereof, is found to constitute “cruel and unusual punishment.” Claims of deficient medical care do not always rise to the level of an Eighth Amendment violation. Negligence in diagnosis or medical treatment, typically addressed in medical malpractice or medical negligence actions, does not become a constitutional violation merely because the victim is a prisoner.

In *Estelle v. Gamble*, the Supreme Court of the United States established the “deliberate indifference” standard to analyze whether the acts or omissions in a prisoner’s medical treatment violate the Eighth Amendment. A claim of deliberate indifference contains an objective as well as a subjective component. To establish the objective component, a court must find that the plaintiff-prisoner suffered from an objectively serious medical condition. The subjective component requires the court to analyze whether the defendants knew of and disregarded a substantial risk to the prisoner’s health. To establish this second component, the defendant must, first, have been aware of the facts from which he could infer the existence of a substantial risk of serious harm, and, second, have actually drawn the inference.

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6 *Estelle*, 429 U.S. at 97.

7 *Id.*

8 *Id.*

9 Lewis v. McLean, 864 F.3d 556, 563 (7th Cir. 2017).


11 *Id.*

12 *Id.* at 837.
Recently, the United States Court of Appeals for the Seventh Circuit was tasked with applying the deliberated indifference standard. In *Lewis v McLean, et al.*, James Lewis, a prisoner, alleged that Lieutenant Joseph Cichanowicz and Nurse Angela McLean, amongst other defendants, were deliberately indifferent by delaying his access to medical care. On the other hand, Cichanowicz and McLean argued that they were unable to provide care to Lewis because McLean was not following their commands. The Seventh Circuit vacated the district court’s grant of summary judgment on the deliberate indifference claim against Cichanowicz and McLean. The majority reasoned that a reasonable jury could find that Cichanowicz and McLean exhibited deliberate indifference in delaying Lewis's treatment, causing Lewis unnecessary suffering. The concurrence illustrated that the deliberate indifference standard used by courts is merely tangential to the Eighth Amendment of the Constitution.

This article will analyze the strength of the Seventh Circuit’s decision in light of precedent and public policy. Part I contains the legal standards applicable to claims of deliberate indifference brought under 42 U.S.C. § 1983, and the legal distinctions between such claims and state law medical malpractice claims. Part II discusses the factual and procedural background of *Lewis v. McLean, et al.* Part III argues that the Seventh Circuit incorrectly decided *Lewis v. McLean, et al.* on precedential and public policy grounds. It further argues that the courts should return to following the text of the Constitution and apply the cruel and unusual punishment standard.

**BACKGROUND AND STANDARDS**

The Supreme Court established the government has a duty to provide medical care for those it is punishing by way of

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13 *Lewis*, 864 F.3d at 560.
14 *Id.* at 564.
15 *Id.* at 566.
16 *Id.* at 563–64.
17 *Id.* at 566 (Manion, J., concurring).
incarceration. 42 U.S.C. § 1983 provides a cause of action for prisoners subjected to cruel and unusual punishment in violation of the Eighth Amendment, made applicable to the States by the Fourteenth Amendment.

A. History of Eighth Amendment’s Proscription of Cruel and Unusual Punishment

The drafters of the United States Constitution took the language of the Eighth Amendment from the English Bill of Rights of 1689. Like the English, the primary concern of the drafters of the Eighth Amendment was to prevent torture and other barbarous methods of punishment. Use of the Eighth Amendment was limited through the nineteenth century. During this time, the courts declined arguments to extend the protections of the Eighth Amendment to include punishments disproportionate to the crime.

In 1910, the Supreme Court modified its approach in analyzing the cruel and unusual protection clause of the Eighth Amendment. In Weems v. United States, the Court extended Eighth Amendment protections to excessive punishment, no longer limiting its protections strictly to torture and barbarous acts. The Court stated: “a principle to be vital must be capable of wider application than the mischief

20 Stuart Klein, Prisoners’ Rights to Physical and Mental Health Care: A Modern Expansion of the Eighth Amendment’s Cruel and Unusual Punishment Clause, 7 FORDHAM URBAN L.J. 1, 2 (1978). The English Bill of Rights of 1689 provided that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Id.
21 Estelle, 429 U.S. at 102; Klein, supra note 20, at 3.
22 Estelle, 429 U.S. at 102; Klein, supra note 20, at 3.
23 Estelle, 429 U.S. at 102; Klein, supra note 20, at 3.
which gave it birth.”26 Hence, the Court adopted the view that the Eighth Amendment was to continually evolve with changing societal views of prison conditions and humane justice.27 Decades later, the Supreme Court returned to the cruel and unusual punishment clause analysis.28 In *Trop v. Dulles*, the Court reinforced that the Eighth Amendment must draw its meaning from “evolving standards of decency.”29

Post *Trop*, courts began analyzing the constitutionality of treatment in prisons against this backdrop of “evolving standards of decency.”30 The relative vagueness of this guideline created pressure to analyze claims of cruel and unusual punishment under new standards.31 This led courts to apply many different judicial tests to inadequate medical care claims, such as “abuse of discretion,” “deprivation of basic elements of adequate medical treatment,” and “deliberate indifference.”32

The Supreme Court, in *Estelle v. Gamble*, resolved the lower court confusion by adopting the standard of “deliberate indifference.”33 In *Estelle*, inmate J.W. Gamble was injured when a bale of cotton fell on him while performing prison work.34 He continued to work for four hours until he became stiff.35 Gamble was granted a pass to the unit hospital and was seen by a physician.36 The prison physician prescribed a pain reliever, a muscle relaxant, in-cell meals, and

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26 Id. at 373; Klein, supra note 20, at 4.
27 Boyer, supra note 24; Klein, supra note 20, at 5.
28 Boyer, supra note 24.
30 Klein, supra note 20, at 6.
31 Id. at 7.
32 See Flint v. Wainwright, 433 F.2d 961 (5th Cir. 1970); Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972); Corby v. Conboy, 457 F.2d 251, 254 (2d Cir. 1972); Klein, supra note 20, at 7.
34 See id. at 99.
35 See id.
36 Id.
allowed Gamble to remain in his cell except for showers.\(^{37}\) Despite the measures taken by the physician, Gamble continued to complain of pain.\(^{38}\) Gamble was seen by prison medical professionals seventeen times within a three-month period.\(^{39}\)

The District Court dismissed Gamble’s complaint for failure to state a claim upon which relief could be granted.\(^{40}\) The Court of Appeals reversed and remanded with instructions to reinstate the complaint.\(^{41}\) The Supreme Court granted certiorari.\(^{42}\)

In its decision, the *Estelle* Court rejected the Fourth Circuit’s application of the broader standard of “reasonable care.”\(^{43}\) Rather, the Court held that “in order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.\(^{44}\) A medical need is “serious,” satisfying the *Estelle* test, if it is “one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor’s attention.”\(^{45}\) It is only such indifference that can offend ‘evolving standards of decency’ in violation of the Eighth Amendment.”\(^{46}\) The Court reiterated that prison personnel are required to provide medical care for a prisoner “who cannot, by reason of the deprivation of his liberty, care for himself.”\(^{47}\) The Court reversed, finding that while deliberate indifference to a prisoner’s serious medical condition constitutes cruel

\(^{37}\) *Id.*

\(^{38}\) *Id.* at 99-101.

\(^{39}\) *Id.* at 107.

\(^{40}\) *Id.* at 98.

\(^{41}\) *Id.*

\(^{42}\) *Id.*

\(^{43}\) Blanks v. Cunningham, 409 F.2d 220 (4th Cir. 1969); Klein, *supra* note 20 at 15.

\(^{44}\) *Estelle*, 429 U.S. at 106.


\(^{46}\) *Estelle*, 429 U.S. at 106.

\(^{47}\) *Id.* at 104.
and unusual punishment in violation of the Eighth Amendment, Gamble’s complaint was insufficient to state a cause of action.\(^{48}\)

Despite the Court’s attempt to clarify in *Estelle*,\(^{49}\) lower courts inconsistently interpreted and applied the deliberate indifference test.\(^{50}\) This resulted in different analyses of claims brought under 42 U.S.C. §1983.\(^{51}\) The Court revisited the deliberate indifference standard in *Farmer v. Brennan* and further clarified its meaning.\(^{52}\)

In *Farmer*, Dee Farmer a transsexual inmate filed a Bivens\(^{53}\) action alleging that the prison officials acted with deliberate indifference to the substantial risk of physical abuse and sexual abuse he\(^{54}\) suffered while in the penitentiary.\(^{55}\) Although *Farmer* did not involve treatment by a medical professional, the Court applied the same analysis.\(^{56}\) Evaluating whether Farmer’s claim was a violation of the Eighth Amendment, the Court maintained that a violation of the cruel and unusual punishment provision occurs when a two-prong test\(^{57}\) has been satisfied.\(^{58}\) Following *Wilson v. Seither*, a constitutional

\(^{48}\) Id. at 98.

\(^{49}\) See id. at 97.


\(^{51}\) Id.


\(^{53}\) Civil rights cases against the federal government and its agents are brought pursuant to the Eighth Amendment, knowns as “Bivens actions.” See Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

\(^{54}\) Farmer is a pre-operative transsexual, biologically born a male. Farmer took several medical steps to transition to a female but ultimately did not complete sex reassignment. To avoid confusion, pronouns referencing Farmer correspond with those used by the Court.

\(^{55}\) Farmer, 511 U.S. at 829.


\(^{57}\) The Supreme Court in *Wilson v. Seiter*, 501 U.S. 294, 297 (1991), held that claims of inadequate medical treatment only implicate the Eighth Amendment if the
violation occurs when the alleged deprivation is objectively and sufficiently serious, and the prison official acted with deliberate indifference to inmate health or safety. Expanding on the second requirement, the Court stated that “a prison official must have a ‘sufficiently culpable state of mind’ to violate the Eighth Amendment's cruel and unusual punishments clause.”

The Farmer Court clarified the meaning of deliberate indifference by comparing the criminal and civil definitions of recklessness. In the criminal context, criminal law requires that one is aware of harm and disregards that risk of harm. However, civil law only requires that one knew or should have known of an unjustifiably high risk of harm. The Court adopted the criminal law standard “that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety.” The Court expanded that the official “must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” The Court noted, however, that an official who actually knew of a substantial risk to inmate health or safety may be found free from liability if the official responded reasonably to the risk, even if the harm was not ultimately averted. Applying this standard, the Farmer Court held

alleged deprivation is “sufficiently serious” and the deprivation was an “unnecessary and wanton infliction of pain.”

58 Farmer, 511 U.S. at 834.
59 Id. at 834 (citing Wilson, 501 U.S. at 297).
60 Id.
61 Id. (citing Wilson, 501 U.S. at 297).
62 Id. at 837.
63 Id. at 837-38.
64 Id. at 837.
65 Id.
66 Id.
67 Id. at 844.
that prison officials did not violate the Eighth Amendment. \textsuperscript{68} The Court instructed that a prison official’s duty under the Eighth Amendment deliberate indifference standard is to ensure “reasonable safety” to inmates, \textsuperscript{69} and that the occurrence of an injury by a prisoner at the hands of a prison official does not automatically translate to a constitutional violation. \textsuperscript{70}

\textbf{B. 42 U.S.C. § 1983 and Medical Malpractice}

There are two avenues under which medical professionals treating prisoners are vulnerable to lawsuits: Eighth Amendment claims brought under 42 U.S.C. §1983 \textsuperscript{71} and state law medical malpractice actions. The \textit{Estelle} Court explicitly stated that a prisoner’s claim of inadequate medical care does not always constitute an Eighth Amendment claim. \textsuperscript{72} Moreover, medical malpractice claims alleging negligent treatment or diagnosis of a medical condition do not transform into an Eighth Amendment claim merely because the patient is a prisoner. \textsuperscript{73} Although the facts surrounding the claims may be

\begin{footnotesize}
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\item \textsuperscript{68} \textit{Id.} at 825.
\item \textsuperscript{69} \textit{Id.} at 844.
\item \textsuperscript{70} \textit{Id.} at 834.
\item \textsuperscript{71} 42 U.S.C. §1983. This section provides: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.” \textit{Id.}
\item \textsuperscript{72} \textit{Estelle} v. \textit{Gamble}, 429 U.S. 97, 105 (1976).
\item \textsuperscript{73} \textit{Id.} at 106.
\end{itemize}
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identical, state medical malpractice claims and Eight Amendment claims are more different than similar.\footnote{Chapman Law Group, The Difference Between a Medical Malpractice Claim and a Deliberate Indifference (42 § USC 1983 Civil Rights) Claim, CHAPMAN LAW GROUP BLOG (Jan. 23, 2015), http://chapmanlawgroup.com/medicalmalpractice_1983civilrights/.
}{\footnote{Steven E. Pegalis, Expert Testimony, AM. LAW MED. MALP. §8:1 (June 2017).
}{\footnote{See supra notes 139-150 and accompanying text for the history and nuances of the deliberate indifference standard.}
}{\footnote{See e.g., Chapman, supra note 74 (“In most states before the plaintiff can file a medical malpractice claim he/she must obtain a written opinion from a physician or other health care professional licensed in the same specialty.”).}
}{\footnote{See e.g., Chapmen, supra note 74.
}{\footnote{See e.g., id.
}{\footnote{See e.g., id.
}{\footnote{Joel H. Thompson, Today’s Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs, 45 HARV. C.R. C.L. L. REV. 635, 651-52 (2010).}

A primary difference between these two claims is the standard which the plaintiff must prove. In a medical malpractice claim, the plaintiff must prove that the medical care provider deviated from the standard of care and that the deviation proximately caused the plaintiff’s injury.\footnote{See supra notes 139-150 and accompanying text for the history and nuances of the deliberate indifference standard.}

In contrast, under 42 U.S.C. §1983 a plaintiff must prove a “deliberate indifference.”\footnote{See supra notes 139-150 and accompanying text for the history and nuances of the deliberate indifference standard.}

A second distinction between the two claims lies in the use of expert witnesses and expert testimony. In state medical malpractice actions, experts are a barrier to entry for many state actions\footnote{See e.g., Chapman, supra note 74 (“In most states before the plaintiff can file a medical malpractice claim he/she must obtain a written opinion from a physician or other health care professional licensed in the same specialty.”).}
and virtually a necessity in the pleading stages. While retaining an expert is not necessarily difficult, it is expensive.\footnote{See e.g., Chapman, supra note 74.}

This expense generally prevents most inmates from retaining an expert.\footnote{See e.g., id.}
If the inmate cannot retain an expert, then the inmate cannot file a state law medical malpractice claim.\footnote{See e.g., id.}
Conversely, Eighth Amendment claims do not require the support of an expert; a plaintiff need only file a suit.\footnote{Joel H. Thompson, Today’s Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs, 45 HARV. C.R. C.L. L. REV. 635, 651-52 (2010).}
A final distinction is that most states impose a cap on damages and prohibit punitive damages on medical malpractice claims, whereas Eighth Amendment claims have no such cap or limitation. A successful Eighth Amendment suit entitles the plaintiff to recover attorneys’ fees in addition to compensatory damages.

LEWIS V. MCLEAN, ET AL.

A. The Facts

James Lewis was incarcerated at Wisconsin State Secure Program Facility when, on February 8, 2014, he woke up at approximately 5:15 a.m. and attempted to get out of bed. Upon his attempt, he experienced sharp pain from the base of his neck to his tailbone. Due to the pain, Lewis could neither lie back down nor stand up. He remained unable to move until 5:39 a.m. when he leaned forward and pressed the emergency call button on the wall of his cell. As Lewis was housed in segregation, the guard who answered the call looked at the live video footage from the security camera in Lewis’s cell and

82 Notably, Wisconsin, the state where James Lewis presides as a prisoner, had a $750,000 limitation on noneconomic medical malpractice damages when Lewis filed his case. Wis. Stat. Ann. § 893.55 (2008). However, on July 5, 2017, the Court of Appeals of Wisconsin held that the statutory cap on noneconomic damages was unconstitutional. Mayo v. Wisconsin Injured Patients & Families Comp. Fund, 2017 WI App 52, ¶ 1. The court reasoned that the statutory cap was unconstitutional on its face because it violated the principles the Wisconsin Supreme Court articulated in Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440, “by imposing an unfair and illogical burden only on catastrophically injured patients, thus denying them the equal protection of the laws.” Id.

83 Chapman, supra note 74.


85 Lewis v. McLean, 864 F.3d 556, 558 (7th Cir. 2017).

86 Id.

87 Id.

88 Id. at 559.
saw him sitting on the bed. The guard then inquired what the emergency was; Lewis replied that he was suffering from extreme pain in his back and was unable to move. The guard relayed this information to Lieutenant Joseph Cichanowicz, a security supervisor.

At some time thereafter, Cichanowicz went to Lewis’s cell where Lewis explained that he was experiencing terrible pain and could not stand up or lie down. After ten or fifteen minutes had passed and no nurse had arrived, Lewis pushed the emergency call button again and requested medical assistance. At approximately 6:05 a.m., Cichanowicz returned to Lewis’s cell with Nurse Angela McLean. Lewis reported to McLean that he was experiencing “terrible pain in his back” and “couldn’t move.” Wisconsin State Secure Program Facility’s policy discourages staff from examining an inmate in his cell. Therefore, following the policy, McLean relayed to Lewis that guards would escort him to the infirmary after the headcount, which typically occurred at 6:15 a.m. McLean and Cichanowicz stated that Lewis would first have to stand with his back to his cell door so he could be handcuffed from behind through the slot in the door. Lewis contended that he was in terrible pain and he could not stand or move; he was only able to lean forward to press the call button. At this point Cichanowicz warned Lewis that if correctional officers had to be sent into the cell without first handcuffing Lewis, they would throw him on the ground and handcuff him from behind. Lewis reiterated

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89 Id.
90 Id.
91 Id.
92 Id.
93 Id.
94 Id.
95 Id.
96 Id.
97 Id.
98 Id.
99 Id.
100 Id.
he could not move.\textsuperscript{101} McLean maintained that if Lewis wanted help he needed to follow Cichanowicz’s orders; Cichanowicz and McLean then walked away.\textsuperscript{102}

After Cichanowicz and McLean left Lewis’s cell, Cichanowicz viewed the video footage of Lewis in his cell.\textsuperscript{103} Around 6:40 a.m., Cichanowicz told McLean that Lewis had not moved from a seated position on his bed since about 5:15 a.m.\textsuperscript{104} McLean did not take any actions.\textsuperscript{105} Less than an hour later, Sergeant Wayne Primmer heard from other staff that Lewis was complaining of pain and that he was unable to stand.\textsuperscript{106} Primmer viewed the live video footage from Lewis’s cell and saw him fall to the floor.\textsuperscript{107} Primmer then contacted Lieutenant Joni Shannon-Sharpe and briefed her about Cichanowicz’s earlier encounter with Lewis, Lewis’s continuing complaints of pain and inability to stand or walk, and Lewis was now lying on the floor.\textsuperscript{108}

At approximately 7:30 a.m., Shannon-Sharpe went to Lewis’s cell.\textsuperscript{109} Like Cichanowicz, Shannon-Sharpe informed Lewis that guards could not enter the cell to take him to the infirmary unless he was restrained.\textsuperscript{110} Lewis repeated that he could not reach the door because of the pain in his back and that being on the floor increased his pain.\textsuperscript{111} Shannon-Sharpe then spoke with McLean and directed her to contact the on-call physician, Dr. Meena Joseph.\textsuperscript{112}
Soon thereafter, at 7:40 a.m., McLean telephoned Dr. Joseph. Dr. Joseph directed that Lewis be taken to a hospital. Subsequently, Shannon-Sharpe gathered five guards, two of which had medical training, to transport Lewis. The group entered Lewis’s cell at 7:58 a.m. After abandoning their effort to force Lewis to a standing position to search him, the group restrained him, placed him in a wheelchair, searched him with a handheld metal-detector, lifted him into a van, and drove him to a local hospital. Lewis was admitted to the emergency room at 8:53 a.m. In the emergency room, doctors gave Lewis morphine for his back pain and Ativan for his agitation. Lewis was diagnosed with myalgia and muscle spasms of the neck and upper back. An hour later, Lewis was able to stand and walk. Lewis was prescribed ibuprofen and a muscle relaxant, and was discharged from the hospital at 10:24 a.m.

B. District Court Opinion

In April 2014, Lewis filed a lawsuit under 42 U.S.C. § 1983 against Lieutenant Cichanowicz, Lieutenant Shannon-Sharpe, Nurse McLean, Dr. Joseph, and the five guards who removed him from his cell with the United States District Court for the Western District of Wisconsin. Lewis alleged that all of the named defendants showed

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113 Id.
114 Id.
115 Id.
116 Id.
117 Id.
118 Id.
119 Id.
120 The American Heritage Medical Dictionary defines myalgia as “[m]uscular pain or tenderness, especially when diffuse and nonspecific.”
121 Id.
122 Id.
123 Id.
124 Id.
deliberate indifference to his severe back pain by delaying his access to medical care.\footnote{125} Lewis also argued that Shannon-Sharpe and the five guards were indifferent to his back pain because they restrained him and did not take him to the hospital on a stretcher.\footnote{126} Further, Lewis claimed that Shannon-Sharpe and the five guards used excessive force when handcuffing and transporting him to the hospital.\footnote{127} Lastly, Lewis asserted malpractice claims against Nurse McLean and Dr. Joseph.\footnote{128}

Both parties filed cross-motions for summary judgment.\footnote{129} Writing for the district court, Chief U.S. District Judge James Peterson granted summary judgment for the defendants.\footnote{130} The district court reasoned that undisputed evidence established only a “modest amount of force” was used, and none of it was applied “maliciously or sadistically for the purpose of infliction of pain.”\footnote{131} The district court further reasoned that even if Lewis’s back pain was a serious medical condition, a jury could not reasonably find from the evidence that “the defendants took longer than was necessary to assess [Lewis’s] medical issue and get him treatment” or that they “treated him unnecessarily roughly in restraining him.”\footnote{132} Finally, the court relinquished supplemental jurisdiction over Lewis’s medical malpractice claim.\footnote{133}
C. Appeal to Seventh Circuit

The Court of Appeals for the Seventh Circuit reviewed the district court’s grant of summary judgment de novo,134 “viewing the facts in the light most favorable to Lewis.”135

The majority considered whether a reasonable jury could find that the defendants were deliberately indifferent to Lewis’s serious medical need.136 They vacated the district court’s grant of summary judgment on the deliberate indifference claim against Cichanowicz and McLean,137 concluding that “a jury reasonably could find that Cichanowicz and McLean exhibited deliberate indifference by delaying Lewis’s treatment for approximately one and a half hours—the time that passed between their learning of Lewis’s condition and Dr. Joseph’s directive prompting action—thus causing Lewis unnecessary suffering.”138

1. Judge Rovner’s Majority Opinion

Reviewing the record in the light most favorable to Lewis, the majority found that the disputed facts pertaining to Cichanowicz and McLean’s state of mind precluded a grant of summary judgment in their favor on Lewis’s claim of deliberate indifference to a serious medical need.139

Citing Farmer v. Brennan, Judge Ilana Rovner posited that in determining an Eighth Amendment violation alleged by a prisoner, the court performs a two-step analysis.140 First, the Court examines

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134 While the Court of Appeals for the Seventh Circuit did not explicitly state it reviewed the case de novo, the court reviews grants of summary judgment de novo. See e.g., Whiting v. Wexford Health Sources, Inc., 839 F.3d 658, 661 (7th Cir. 2016).
135 Lewis, 864 F.3d at 565.
136 Id. at 558.
137 Id. at 566.
138 Id. at 563–64.
139 Id. at 565.
140 Id. 562-563.
whether the prisoner established an “objectively serious” medical condition.\textsuperscript{141} Second, the court determines whether the prison officials acted with a “sufficient state of mind,” specifically, that the officials “both knew of and disregarded an excessive risk to [an] inmate[s] health.”\textsuperscript{142}

In analyzing the first step, the court concluded that there was enough evidence to support a finding that Lewis’s muscle spasm and accompanying back pain was a serious medical condition.\textsuperscript{143} The court explained that a medical condition is significantly serious, as to fulfill the first step of the analysis, if an inmate has been diagnosed by a medical professional as needing treatment or is obvious in nature that a lay person would perceive the need for a physician’s attention.\textsuperscript{144} Further, the court suggested that a medical condition need not be life threatening to be deemed serious.\textsuperscript{145} Rather, it could be a condition that, if not treated, would result in significant injury or unnecessary and wanton infliction of pain.\textsuperscript{146}

Turning to the second step, the majority first acknowledged that a jury could not reasonably find that Lieutenant Shannon-Sharpe, Dr. Joseph, and the guards who transported Lewis were deliberately indifferent in either assessing Lewis’s medical condition or in restraining and transporting him.\textsuperscript{147} The court commented that Lewis wisely limited his deliberate indifference claim to McLean and Cichanowicz, discussing the remaining defendants limitedly.\textsuperscript{148}

Accordingly, the Court then focused on the deliberate indifference claim specifically against Cichanowicz and McLean.\textsuperscript{149} Quoting Perez v. Fengolio, the majority maintained that “[a] delay in treatment may

\textsuperscript{141} Id. at 563.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
show deliberate indifference if it exacerbated the inmate's injury or unnecessarily prolonged his pain,” and “even brief, unexplained delays in treatment may constitute deliberate indifference.”

Judge Rovner took issue that Cichanowicz and McLean had not provided an explanation for their inaction, and, instead, blamed Lewis for the delay. Judge Rovner noted that Cichanowicz and McLean argued that they were entitled not to act because Lewis failed to comply with their orders. Thus, they were asking the court to construe the evidence against Lewis, rather than in his favor. Judge Rovner posited that, in effect, Cichanowicz and McLean requested to flip the standard for a review of summary judgment.

Judge Rovner stated that, construed in the light most favorable to Lewis, the evidence at summary judgement showed that Lewis experienced back pain from 5:15 a.m. until he received an injection of morphine—approximately four hours later. Further, that Lewis’s back pain was severe, and that Lewis begged Cichanowicz and McLean for help after they told him he would not receive treatment until he was restrained. The court also noted that Cichanowicz did nothing to help Lewis. Likewise, McLean did not help Lewis until Shannon-Sharpe’s involvement promoted McLean to call Dr. Joseph. Judge Rovner contended that it was unclear if McLean and Cichanowicz would have assisted Lewis at all had Sergeant Primmer not reported his observations to Shannon-Sharpe.
2. Judge Manion’s Concurrence

Judge Daniel Manion began his concurrence by asserting that the Court’s opinion correctly applied controlling precedent, and he joined the opinion in full. Judge Manion argued that a reasonable juror could conclude from the record that Cichanowicz and McLean delayed Lewis’s treatment by more than an hour when they knew that Lewis was in severe pain. Specifically, Judge Manion purported that said juror could infer deliberate indifference because both Cichanowicz and McLean were aware from the video footage that Lewis had not moved since 5:15 a.m., nonetheless, did not take action to move the process along. Judge Manion reiterated that under controlling precedent, that would constitute deliberate indifference.

Judge Manion contended that he wrote separately to make two points. In his first point, Judge Manion stated that he did not read the Court’s opinion as being contingent on the length of the delay that Cichanowicz and McLean created. Judge Manion posited that the facts of this case, particularly that Cichanowicz and McLean confirm that Lewis was suffering in severe pain via the video footage, permit Lewis to survive summary judgment. Judge Manion acknowledged that under another set of facts an hour delay of treatment for a similar condition may not be enough to establish deliberate indifference.

In Judge Manion’s second point, he suggested that although he believed the court correctly applied controlling precedent, this case is a “striking example” of how far courts have departed from the text of the Eighth Amendment. Judge Manion urged that courts should not

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159 Id. at 566 (Manion, J., concurring).
160 Id.
161 Id.
162 Id.
163 Id.
164 Id.
165 Id.
166 Id.
167 Id.
forget the Eighth Amendment prohibits “cruel and unusual punishment,” and that the deliberate indifference standard is tangentially related to the text, at best. Judge Manion emphasized that it seemed unlikely, from his perspective, that a prisoner who is taken to the hospital and entirely cured within five hours has endured anything cruel and unusual in the context of the prison system. In conclusion, Judge Manion suggested that courts should eventually return to faithfully applying the text of the Constitution.

**ANALYSIS**

The Seventh Circuit majority incorrectly decided *Lewis v. McLean, et al.* because it failed to consider controlling Seventh Circuit precedent. Its own precedent holds that an inmate, who complains that a delay in medical treatment rose to a constitutional violation, must place verifying medical evidence in the record to establish the detrimental effect of the delay. As follows, in delay-in-treatment cases, courts should apply the verifying medical evidence standard. If there is no evidence of a detrimental effect, a defendant should be entitled to judgment as a matter of law.

**A. The Seventh Circuit Failed to Consider the Absence of Verifying Medical Evidence**

Lewis’s objectively serious medical condition was a muscle spasm and accompanying back pain. There was an hour and a half
delay between the time Cichanowicz and McLean learned of Lewis’s condition and Dr. Joseph’s directive prompting action. In light of these facts, the Seventh Circuit concluded that there was sufficient evidence for a reasonable jury to conclude that Cichanowicz and McLean were deliberately indifferent to Lewis’s medical needs. However, the Seventh Circuit’s analysis was incomplete as it failed to consider precedent set forth in Langston v. Peters. Langston v. Peters requires a plaintiff to place verifying medical evidence into the record that an alleged delay in medical treatment had a detrimental effect.

In cases where there is a delay in medical treatment, courts require the plaintiff to establish “verifying medical evidence” that the delay, rather than the underlying condition, caused harm. In Langston v. Peters, the Seventh Circuit adopted the Eighth Circuit’s standard that “[a]n inmate who complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of delay in medical treatment to succeed.” The Seventh Circuit previously maintained the injury subsequent to a delay as the deciding factor in a case. This case hinges on Cichanowicz and McLean’s delay and, therefore, should implicate a Langston analysis. Yet, no such analysis took place on the part of the Seventh Circuit. The district court,

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174 Id. at 563–64.
175 Id. at 565.
176 See Langston, 100 F.3d at 1240.
177 See e.g., id.; Petty v. County of Franklin, Ohio, 478 F.3d 341, 344 (6th Cir. 2007); Laughlin v. Schriro, 430 F.3d 927, 929 (8th Cir. 2005); Surber v. Dixie County Jail, 206 Fed. Appx. 931, 933 (11th Cir. 2006).
178 Langston, 100 F.3d at 1240; see also Williams v Liefer, 491 F.3d 710, 714-15 (7th Cir. 2007).
179 Walker v. Peters, 233 F.3d 494, 502 (7th Cir. 2000) (“The decisive factor, however, is that Walker has no evidence that he was injured by the defendants’ refusal on some occasions to provide him Factor VIII.”).
however, considered the verifying medical evidence standard. In doing so, the court concluded, “[Lewis]’s allegations of deliberate indifference [were] not enough at th[at] point; [and] he [] also [had to] show with verifying evidence that defendants’ actions caused him harm.”

While a handful of cases hold that brief delays in treatment may constitute deliberate indifference, these cases are readily distinguishable from Lewis v. McLean, et al. The most similar of these cases, in terms of the length of delay, is Williams v. Liefer. In Williams v. Liefer, Williams awoke with chest pains and soon thereafter complained to a prisoner officer. Despite his complaint, Williams was required to complete a physically demanding transfer out of segregation. Approximately five hours after his initial complaint to the officer, Williams blacked out and fell backwards while walking up the stairs. At the hospital, six hours after William’s complaints, he was diagnosed with hypertension and chest pain. Williams’s blood pressure decreased after an hour but he remained in the infirmary for six days.

The material distinctions between this case and Williams are evident. First, the delay in Williams’s treatment was six hours, whereas the delay in Lewis’s treatment was an hour and a half.

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181 Id. (citing Williams v. Liefer, 491 F.3d 710, 714-15 (7th Cir. 2007)).
182 See e.g., Williams, 491 F.3d at 714-15; Edwards v. Synder, 478 F.3d 827 (7th Cir. 2007); Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996).
183 Williams, 491 F.3d at 712.
184 Id. at 712-13.
185 Id. at 713.
186 Id.
187 The American Heritage Medical Dictionary defines hypertension as “[p]ersistent high blood pressure.”
188 Id.
189 Id. at 716.
190 Lewis v. McLean, 864 F.3d 556, 563-64 (7th Cir. 2017).
Second, Lewis could stand and walk an hour after he was given pain medication, whereas William’s condition necessitated a six-day stay in the infirmary. This six-day stay in the infirmary essentially placed verifying medical evidence into the record that the delay caused Williams harm. No such evidence was presented by Lewis. Moreover, Lewis was discharged from the hospital ninety-one minutes after being admitted. Finally, in Williams, the delay itself was not related to safety concerns, but because Williams was moving from one building to another.

1. Precedential and Public Policy Concerns

Holding that an hour and a half wait, with no detrimental effects, violates the Eighth Amendment is dangerous precedent and is contrary to public policy. From a precedent standpoint, very few delay-in-treatment cases will now be decided at the summary judgment stage. While Judge Manion indicated that he did not read the majority’s opinion as contingent on the length of the delay the defendants caused, the majority made no mention that the time frame was narrowly confined to the specific facts of the case. Read broadly, an hour and a half delay in any treatment can now amount to

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191 Id. at 560.
192 Williams, 491 F.3d at 713.
193 Lewis, 864 F.3d at 560.
194 Williams, 491 F.3d at 713.
195 The application of the verifying medical evidence standard, rather than a bright line rule that dictates how long of a wait is too long, is necessary for courts to come to consistent and logical outcomes. Consider if the facts of this case were the same but, rather than the inmate suffer from severe back pain, he suffered from a heart attack. The defendants, due to the same security concerns, waited over an hour and a half to take the inmate to the hospital. On the way to the hospital, the inmate dies due to heart failure. This is precisely verifying medical evidence that the delay, rather than the condition, caused harm. Without consideration of the impact the conduct had on the inmate, courts will be forced to erroneously decide how long is too long to delay treatment.
196 Lewis, 864 F.3d at 566 (Manion, J., concurring).
deliberate indifference of a serious medical need. This has implications in both the legal and medical fields.

The purpose of summary judgment is to prevent wasting judicial resources on unnecessary trials. The Lewis Court’s decision runs contrary to this principal as it substantially narrows the number of cases that will be disposed at the summary judgment stage. In practice, a delay amounting to an hour and a half or longer will now preclude granting summary judgment. Even more concerning is the potential that any delay will amount to deliberate indifference. Given the trajectory Seventh Circuit delay cases have taken, this is a realistic prospect.

From the medical perspective, the effects of this decision are equally devastating. First, this decision may place unattainable requirements on prison officials and prison medical professionals. Unfortunately, delays are common in prisons with limited resources. Delays, however, are not exclusive to prison health care but are present in nearly all health care circumstances. “In fact, the public often waits longer at hospital emergency rooms.”

Second, few medical professionals will be able to dispose of cases in the early stages of litigation. Significantly, prison medical professionals facing potential liability under the deliberate indifference standard risk being held personally financially accountable for the judgment; insurers often do not cover deliberate or intentional acts. The prospect of facing personal financial liability may disincentivize

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199 Langston v. Peters, 100 F.3d 1235, 1240 (7th Cir. 1996).
competent physicians from working in the prison health care system to protect themselves from liability. This may prove even more accurate as it will be difficult to decide claims early in litigation. The likely result: fewer competent physicians and a lower quality prison health care system.

2. Penological Concerns

The Supreme Court has regularly upheld prison regulations that may otherwise violate an inmate’s constitutional right where the regulation is legitimately related to penological concerns; in particular, when the regulation is necessary to protect institutional order and security. At the crux of this rationale is that internal security is a central goal of all corrections institutions. It is in light of these legitimate penological objectives that courts must assess challenges to prison regulations based on asserted constitutional rights of prisoners. While the Supreme Court has commented that security and medical needs do not ordinarily conflict, the needs in this case did.

Of significance, the Seventh Circuit did not take into consideration, nor even mention that the Wisconsin State Secure Program Facility in which Lewis was housed is a maximum-security prison. This narrow view of Lewis’s medical care and surrounding circumstances runs contrary to previous holdings of the court. The Seventh Circuit has long held that when examining a claim of deliberate indifference for either alleged action or inaction, it is

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201 Sweeney, supra note 56, at 90.
203 Id. at 93.
205 Id.
obligated to examine the totality of the circumstances. In this case, however, the Seventh Circuit all but turned a blind eye to the fact that the delay was because of prison protocol and for safety purposes.

The Seventh Circuit decided cases that directly analyzed the interplay between deliberate indifference and penological interests. These cases stand for the proposition that an inexplicable delay in treatment supports an inference of deliberate indifference where there is no penological interest. Here, there was a penological interest that caused the delay, and yet, the Seventh Circuit paid this no lip service.

Applying the verifying medical evidence standard, the defendants should be entitled to judgment as a matter of law. Considering the complete absence of verifying medical evidence, the totality of the prison context, and the ease in which Lewis was treated, it is hard to imagine a reasonable fact finder concluding that the hour and a half delay between the time Cichanowicz and McLean learned of Lewis’s condition and Dr. Joseph’s directive prompting action was so unreasonable that it amounted to cruel and unusual punishment.

B. Courts Should Return to Applying the Proscription of Cruel and Unusual Enumerated in the Constitution

The Eighth Amendment jurisprudence in this area has extended far beyond what “cruel and unusual” suggests to a lay person. The Eighth Amendment prohibits the imposition of cruel

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207 Cavalieri v. Shepard, 321 F.3d 616, 625–26 (7th Cir. 2003); Dunigan ex rel. Nyman v. Winnebago County, 165 F.3d 587, 591 (7th Cir. 1999). See also Gutierrez v. Peters, 111 F.3d 1364, 1375 (7th Cir.1996).

208 See e.g., Petties v. Carter, 836 F.3d 722, 730 (7th Cir. 2016), as amended (Aug. 25, 2016), cert. denied (2017); Grieveson v. Anderson, 538 F.3d 763, 779 (7th Cir. 2008); Edwards v. Snyder, 478 F.3d 827, 830–31 (7th Cir. 2007).

209 See e.g., Petties, 836 F.3d at 730.

and unusual punishment.\textsuperscript{211} Therefore, it is instructive that the action
or inaction is what is relevant in an Eighth Amendment inquiry. Yet, the
deliberate indifference inquiry analyzes the intent of the individual
alleged to have violated the constitution. The disconnect between the
focus of both inquiries results in an unworkable standard.

1. The Deliberate Indifference Standard is Only Tangentially Related
to the Text of the Constitution

Since the inception of the deliberate indifference standard, courts
seem to have forgotten that the Amendment proscribes the infliction of
cruel and unusual punishment.\textsuperscript{212} It is a stretch of monumental
proportion to hold that Lewis endured anything cruel and unusual in
the prison context, either by present day definition or as the framers
intended. As Judge Manion highlighted in his concurrence: “this case
is a striking example of how far we have departed from the text of the
Eighth Amendment.”\textsuperscript{213}

2. Deliberate Indifference is Difficult to Apply and Does Not Get to
the Heart of “Cruel and Unusual”

The deliberate indifference standard for cruel and unusual
punishment in prisoner health care traditionally requires a showing of
intent to harm.\textsuperscript{214} This requirement makes the standard amorphous and
unworkable.\textsuperscript{215} Given that the text of the cruel and unusual punishment
clause concerns the action or inaction taken in deciding whether there
is a violation,\textsuperscript{216} it is inappropriate to hinge a finding of cruel and

\textsuperscript{211} U.S. Const. amend. VIII.
\textsuperscript{212} See id.
\textsuperscript{213} Lewis v. McLean, 864 F.3d 556, 566 (7th Cir. 2017) (Manion, J.,
concurring).
\textsuperscript{214} Michael Cameron Friedman, Cruel and Unusual Punishment in the
 Provision of Prison Medical Care: Challenging the Deliberate Indifference
\textsuperscript{215} Id. at 935.
\textsuperscript{216} See generally U.S. Const. amend. VIII.
unusual punishment on the subjective state of the prison official or medical professional.\textsuperscript{217} The all-encompassing nature of prisons complicates attempts to determine intent because it is difficult to pinpoint whose intent is relevant.\textsuperscript{218} Additionally, many courts seem to infer intent on the part of the prison official\textsuperscript{219} or the prison medical professional.

The difficulties of the standard are evidenced by the range of court interpretations. The Seventh Circuit’s recent decisions alone paint a picture of inconsistency.\textsuperscript{220} Therefore, what should be relevant are the treatment itself and the harm, if any, the inmate suffered.

\textbf{C. State Law Medical Malpractice Claims are Best Fit for Actions Against Medical Professionals}

In \textit{Estelle}, the Supreme Court held that the proper forum for claims of substandard medical care is state medical malpractice lawsuits.\textsuperscript{221} Particular to this case, Lewis did not contend that he did

\textsuperscript{217} The dissent in Gamble stated, “whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it.” \textit{Estelle v. Gamble}, 429 U.S. 97, 116 (1967) (Stevens, J., dissenting). \textit{See also} Friedman, \textit{supra} note 214, at 947.

\textsuperscript{218} Friedman, \textit{supra} note 214, at 947.


\textsuperscript{220} On January 30, 2017, less than six months before deciding \textit{Lewis v. McLean}, the Seventh Circuit decided \textit{Estate of Miller by Chassie v. Marberry}. In \textit{Miller}, inmate William Miller told various prison guards he suffered from a brain tumor and required placement on a bottom bunk; despite his medical need, he was placed on the top bunk. \textit{Estate of Miller by Chassie v. Marberry}, 847 F.3d 425, 426 (7th Cir. 2017). Miller fell off the top bunk twice; the second time breaking his back and suffering other serious injuries. \textit{Id.} at 426-27. The Court affirmed the district court’s grant of summary judgment on behalf of the defendants, reasoning that Miller did not sue the right defendants. \textit{Id.} at 427. The Court additionally reasoned that Miller’s communication to the guard that he had a brain tumor “[fell] short of demonstrating a serious medical need.” \textit{Id.} at 428.

not received care—he was taken to the hospital and prescribed ibuprofen and a muscle relaxant.\textsuperscript{222} Instead, Lewis argued that he received inadequate care because of the delay in his treatment. This is a quintessential claim of medical malpractice.

Where a prisoner has received some medical attention and the dispute is about the adequacy of the treatment, “federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law.”\textsuperscript{223} The rationale behind this is that balance of protecting interests cannot be left to the unguided discretion of a judge or jury.\textsuperscript{224}

State medical malpractice laws are often best equipped to evaluate claims against medical professionals\textsuperscript{225} by requiring the support of an expert who is educated, trained and experienced in the area of health care or medicine at issue in the action.\textsuperscript{226} The policy underlying this requirement is that experts familiar with the field are able to testify, and guide the court to determine if the defendant deviated from the applicable standard of care.\textsuperscript{227} There is no expert witness affidavit requirement for federal claims of deliberate indifference under 42 U.S.C. § 1983.\textsuperscript{228} In effect, this leads to

\begin{thebibliography}{99}
\bibitem{222} Lewis v. McLean, 864 F.3d 556, 560 (7th Cir. 2017).
\bibitem{223} See \textit{e.g.}, Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976); Laye v. Vinzant, 657 F.2d 468, 474 (1st Cir. 1981); United States ex rel. Walker v. Fayette County, 599 F.2d 573, 575 n. 2 (3d Cir. 1979); Harris v. Thigpen, 941 F.2d 1495, 1507 (11th Cir. 1991).
\bibitem{224} Youngberg v. Romeo, 457 U.S. 307, 321 (1982).
\bibitem{225} Nearly all medical professionals can be held liable for deliberate indifference, not just physicians. See \textit{e.g.}, Berry v. Peterman, 604 F.3d 435, 443 (7th Cir. 2010) (holding nurse could reasonably be deemed to show deliberate indifference to inmate’s pain); Key v. Kolitwenzew, 630 Fed. Appx. 620, 623 (7th Cir. 2015) (holding inmate set forth a plausible account of facts that the physician’s assistant demonstrated deliberate indifference).
\bibitem{226} 735 ILCS 5/2-622.
\bibitem{228} See \textit{e.g.}, Brief for Correctional Medical Services, Inc. as Amicus Curiae, p. 15, Correctional Medical Services, Inc. v. Alma Glisson, Personal Representative of
\end{thebibliography}
unwarranted and frivolous lawsuits against prison health care providers that are unsupported by law or medicine.\textsuperscript{229}

The economics of inmate-initiated litigation is abundantly present in the conversation. On the one hand, retaining an expert may be prohibitively expensive for an inmate.\textsuperscript{230} If an inmate cannot retain an expert, he cannot file\textsuperscript{231} a medical malpractice action.\textsuperscript{232} Courts are not authorized to offer financial assistance to inmates to hire expert witnesses, as they are not similarly authorized to do so for non-prisoners.\textsuperscript{233} On the other hand, inmate litigation is inherently unique.\textsuperscript{234} This uniqueness includes: free time, seeing litigation as “recreation,” incentives to humiliate their jailors, access to legal materials,\textsuperscript{235} “proclivity to violate the law,” and a lack of financial or other disincentives for pursuing meritless claims.\textsuperscript{236}

CONCLUSION

A minor delay in treatment is a disappointing disparity from deliberate indifference leading to cruel and unusual punishment. Given the present-day framework of the deliberate indifference standard, courts considering alleged violations of constitutional rights should

\textsuperscript{229} Id.
\textsuperscript{230} See Chapman, supra note 74.
\textsuperscript{231} Few medical malpractices cases do not require expert testimony. \textit{Res Ipsa Loquitur} claims, Latin for “the thing speaks for itself,” do not require expert testimony where negligence is obvious and within the common knowledge of a juror. Examples of this include operating on the wrong limb or leaving surgical instruments or sponges within the body. B. Sonny Bal, \textit{An Introduction to Medical Malpractice in the United States}, CLIN. ORTHOP. RELAT. RES. 467(2): 384 (2009).
\textsuperscript{232} See 735 ILCS 5/2-622.
\textsuperscript{234} See Johnson v. Daley, 339 F.3d 582, 599 (7th Cir. 2003).
\textsuperscript{235} Including “inmate writ-writers” who engaged in unauthorized practice of law.
\textsuperscript{236} See id. at 592-93.
concentrate on the inmate’s treatment and the harm, if any, the inmate suffered, rather than the intent of the accused individual. Accusations of harm should require reinforcement by medical records or medical expert testimony. Until courts return to applying the text of the constitution, these modifications are necessary to ensure that claims under the cruel and unusual punishment provision of the Eighth Amendment are truly cruel and unusual.
THE COST OF OBEYING THE LAW?: THE SEVENTH CIRCUIT REJECTS THE BONA FIDE ERROR DEFENSE FROM A DEBT COLLECTOR WHO FOLLOWED THE THEN-BINDING LAW

JUN QIU*


INTRODUCTION

People should follow the law, which includes the statutes themselves and the judicial rulings interpreting those statutes. However, if the binding judicial interpretation changes, should a party be liable for following an old binding judicial interpretation of a federal statute at a time when the interpretation was still in effect? Or, should a defense allow the parties to shield themselves from liability for relying in good faith on the old binding judicial interpretation?

The courts in the Seventh Circuit faced such a dilemma in 2014 after a change in that circuit’s judicial interpretation of the venue provision in the Fair Debt Collection Practices Act (FDCPA).¹ The

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¹ Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC, 185 F. Supp. 3d 1062, 1065 (N.D. Ill. 2015) [hereinafter Oliva I], aff’d, 825 F.3d 788 (7th Cir. 2016) [hereinafter Oliva II], and vacated on reh’g en banc, 864 F.3d 492 (7th Cir. 2017) [hereinafter Oliva III]. All of the district court decisions on point other than Oliva I
FDCPA requires that a debt collector who sues to collect a consumer debt must sue in the “judicial district or similar legal entity” where the debtor lives or signed the contract in question.\(^2\) In 1996, in *Newsom v. Friedman*, the Seventh Circuit interpreted “judicial district” to mean a circuit court.\(^3\) Thus, for example, when a debt collector file suit in Cook County, the “judicial district” is the Circuit Court of Cook County and the debt collector can file suit in any of the county’s six municipal districts, as long as the debtor resides in Cook County or signed the underlying contract there.\(^4\)

In 2013, relying on *Newsom*, a debt collection law firm Blatt, Hasenmiller, Leibsker & Moore, LLC (“BHLM”) filed suit against a debtor, Ronald Oliva, in the first municipal district of Cook County in downtown Chicago.\(^5\) Oliva did not reside in that district at the time the lawsuit was filed.\(^6\) While the lawsuit was pending, the Seventh Circuit overruled *Newsom* and issued a new rule in *Suesz v. Med-1 Solutions, LLC* that interpreted the “judicial district or similar legal entity” to mean a circuit court.


\(^3\) *Newsom v. Friedman*, 76 F.3d 813, 820 (7th Cir. 1996), overruled by *Suesz*, 757 F.3d 636.
\(^4\) *Id.* at 819-20.
\(^5\) *Oliva* I, 185 F. Supp. 3d at 1064.
\(^6\) *Id.*
language in the FDCPA’s venue provision to mean “the smallest geographic area that is relevant for determining venue in the court system in which the suit is filed.” Such an area can be smaller than a county if the court system there uses smaller districts, such as the six districts of Circuit Court of Cook County. Eight days later, BHLM voluntarily dismissed its pending lawsuit against Oliva.

About one month later, Oliva sued BHLM under the FDCPA alleging that BHLM violated the venue provision in § 1692i when it filed a collection suit against him at the Daley Center rather than at a Cook County courthouse closest to his residence.

The district court ruled in favor of BHLM (Oliva I). Oliva appealed to the Seventh Circuit, which affirmed the district court’s decision (Oliva II). Then the Seventh Circuit reheard the case en banc (Oliva III), where it refused to apply Suesz only prospectively, concluding that the debt collector’s venue choice violated the FDCPA and that the bona fide error defense did not apply to BHLM’s violation. In the petition for the rehearing en banc, Oliva argued, among other things, that the panel decision in Oliva II incorrectly applied the Supreme Court’s ruling in Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, which held that the bona fide error defense under the FDCPA was not available with respect to a mistake of law. The panel in Oliva II read Jerman to mean that only a debt collector’s own mistaken interpretation of the law would prevent the application of the bona fide error defense, and found that BHLM’s reliance on Newsom was not a mistake of law on BHLM’s part, but

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7 Id. (quoting Suesz, 757 F.3d at 638).
8 Suesz, 757 F.3d at 648; Oliva I, 185 F. Supp. 3d at 1066.
9 Oliva I, 185 F. Supp. 3d at 1064.
10 Id.
11 Id. at 1067.
12 Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC, 825 F.3d 788, 793 (7th Cir. 2016), on reh’g en banc, 864 F.3d 492 (7th Cir. 2017).
14 Id. at 495; Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 576 (2010).
rather an unintentional bona fide error for which such defense remained available.\textsuperscript{15} In contrast, the en banc court in \textit{Oliva III} read \textit{Jerman} more broadly, concluding that the bona fide error defense is not available with respect to \textit{all} mistakes of law, including where a debt collector relies in good faith on a binding court’s interpretation of the law that is later overruled.\textsuperscript{16} Essentially, the Seventh Circuit reasoned that reliance on the court’s precedent is permitted \textit{only} if there can be no doubt whatsoever as to the accuracy of the court’s interpretation of the law.\textsuperscript{17} Consequently, the en banc Seventh Circuit held that BHLM was not excused under the safe harbor of the bona fide error defense.\textsuperscript{18}

Part I of this article discusses the FDCPA, its venue provision and the bona fide error defense, and the retroactive application of judicial decisions. Part II reviews the facts and holdings of the Seventh Circuit’s en banc decision in \textit{Oliva III}, as well as the district court decision in \textit{Oliva I} and the Seventh Circuit panel decision in \textit{Oliva II}. Finally, Part III asserts that the Seventh Circuit’s en banc decision in \textit{Oliva III} was improperly reasoned and decided.

THE FAIR DEBT COLLECTION PRACTICES ACT

Concerned about debt collectors’ use of abusive, deceptive, and unfair debt collection methods, Congress enacted the FDCPA in 1977 to establish some nationally-uniform controls on debt collection methods.\textsuperscript{19} Congress noted that abusive debt collection practices

\textsuperscript{15} \textit{Oliva II}, 825 F.3d at 792.
\textsuperscript{16} \textit{Oliva III}, 864 F.3d at 498.
\textsuperscript{18} \textit{Oliva III}, 864 F.3d at 500.
contributed to the number of personal bankruptcies, marital instability, the loss of jobs, and to invasions of personal privacy. Congress stated three purposes of the FDCPA: (1) “to eliminate abusive debt collection practices by debt collectors”; (2) “to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged”; and (3) “to promote consistent State action to protect consumers against debt collection abuses.” The FDCPA deters abusive debt collection practices, and “imposes civil liability on ‘debt collector[s]’ for certain prohibited debt collection practices.” Among other provisions, the FDCPA prohibits debt collectors from making false representations as to a debt’s character, amount, or legal status; communicating with consumers at unusual and inconvenient times or places; or using obscene language, violence, or threats.

The FDCPA is enforced both through administrative actions and private lawsuits. The following sections explain relevant FDCPA provisions and judicial interpretations.

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20 § 1692(a).
21 § 1692(e).
25 §§ 1692k–1692l. In administrative actions, for example, debt collectors are subject to penalties of up to $16,000 per day if they acted with “actual knowledge or knowledge fairly implied on the basis of objective circumstances that [their actions were] unfair or deceptive and [were] prohibited [by the FDCPA].” § 45(m)(1)(A)–(C); see also Federal Civil Penalties Inflation Adjustment Act of 1990, 16 C.F.R. § 1.98(d) (2010) (adjusting the maximum civil penalties to $16,000). In civil cases, in addition to actual damages, courts may award statutory damages up to $1,000 in any action by an individual, or, in a class action, award up to “the lesser of $500,000 or 1 [percent] of the net worth of the debt collector.” § 1692k(a); see Vartan S. Madoyan, Attorneys Beware: Jerman v. Carlisle Holds You Liable for Technical Legal Errors under the FDCPA, 44 LOY. L.A. L. REV. 1091, 1093 (2011).
A. Venue Provision of the FDCPA

The venue provision of the FDCPA limits the venues in which debt collectors can file legal actions to collect consumer debts, providing in pertinent part that:

Any debt collector who brings any legal action on a debt against any consumer shall—

(1) in the case of an action to enforce an interest in real property securing the consumer’s obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity—

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.\(^{26}\)

When a debt collector files a debt collection suit in the wrong venue, the FDCPA permits the consumer to sue the debt collector and recover “actual damage[s],” costs, “a reasonable attorney’s fee as determined by the court,” and statutory “additional damages.”\(^{27}\)

In accordance with § 1692n, federal courts have ruled in several cases that state venue statutes or rules must yield to the venue provision of the FDCPA.\(^{28}\) As applied to debt collection actions in state courts, “§ 1692i must be understood not as a venue rule but as a

\(^{26}\) § 1692i(a) (emphasis added).

\(^{27}\) § 1692k.

penalty on debt collectors who use state venue rules in a way that Congress considers unfair or abusive.”29

The following sections detail the Seventh Circuit precedent on the venue issue under the FDCPA, Newsom and Suesz.30 The debt collector BHLM in Oliva filed the debt collection claim against the debtor Oliva when Newsom was in effect. While the case was pending, the Seventh Circuit issued Suesz, overruling Newsom.

1. Newsom v. Friedman

In Newsom, the Seventh Circuit, interpreting the venue provision of the FDCPA, expressly held that for consumer debt collection suits in Cook County, Illinois, the relevant “judicial district” in which the debt collector could file the debt collection suit was the entire county and not the smaller municipal districts within the county.31 The Seventh Circuit explained that the statutory language of the FDCPA was not ambiguous in the context of this case,32 and thus an Illinois circuit court constituted a “judicial district or similar legal entity” where a debtor resides under the plain meaning of the FDCPA.33 The court pointed to the procedural rules of the circuit court, which provided that any action may be assigned to any circuit court judge in Cook County for hearing or trial, regardless of the municipal department, division or district in which the case was filed.34 The circuit court possessed original jurisdiction, and the division of the circuit court into subordinate divisions was for administrative purposes only, rather than for jurisdictional purposes.35 This interpretation of the

29 Suesz v. Med-1 Sols., LLC, 757 F.3d 636, 653 (7th Cir. 2014) (en banc).
30 There is no Supreme Court precedent on this issue.
31 Newsom v. Friedman, 76 F.3d 813, 819 (7th Cir. 1996), overruled by Suesz, 757 F.3d 636.
32 Id. at 816–17.
33 Id. at 820.
34 Id. at 818–19; ILL. COOK CTY. CIR. CT. R. Order 1, ¶ 1.3(a).
35 Newsom, 76 F.3d at 818.
venue provision in the FDCPA was controlling law for eighteen years—until the *Suesz* decision.

2. *Suesz v. Med-1 Solutions, LLC*

In *Suesz*, some eighteen years later, the Seventh Circuit, in a divided en banc opinion, held that the “judicial district or similar legal entity” for purposes of § 1692i is the smallest geographic area that is relevant for determining venue in the court system in which the suit is filed. The geographic area can be smaller than a county where the court system uses smaller districts, such as the township small claims courts in Marion County, Indiana that were at issue in *Suesz*. Overruling *Newsom*, the court in *Suesz* ruled that the smallest geographic area was the township where the debtor lived or where the contract giving rise to alleged debt had been signed. Therefore, the township’s small claims court was the proper venue for purposes of an FDCPA claim, even though state trial courts in Indiana were organized by county for both court administration and venue purposes; and the Indiana statute and court rule regarding venue in effect at the time permitted debt collectors to bring an action in any one of the nine small claims courts located in the county where the debtor resided or the contract was signed.

Judge Hamilton and Judge Posner, in their joint opinion for the majority, explained that although the FDCPA does not define “judicial district,” the statute’s inclusion of the phrase “or similar legal entity” indicated that it was drafted broadly—presumably so the venue provision could be applied flexibly to all court systems around the country, which vary in structure and nomenclature. The court thus

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36 *Suesz*, 757 F.3d at 648.
37 *Id.* (concluding that if a debt collector chooses to file suit in a township small claims court, venue is determined at the township level, whereas if the debt collector chooses to file suit in a circuit or superior court, the debt collector could file it in a courthouse in the center of the county).
38 *Id.*
39 *Id.* at 648–49.
40 *Id.* at 639.
overruled Newsom, explaining that Newsom had adopted a test based on the details of court administration rather than on the applicable venue rules.\footnote{Id. at 638.}

The Supreme Court denied certiorari in \textit{Suesz};\footnote{Med-1 Sols., LLC v. Suesz, 135 S. Ct. 756 (2014) (mem.).} therefore, the Seventh Circuit’s decision is still the controlling law in this circuit.

\section*{B. Bona Fide Error Defense}

Notwithstanding the civil liability provisions under the FDCPA, the FDCPA permits a debt collector to avoid liability for violating the FDCPA provisions if the debt collector “shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.”\footnote{15 U.S.C. § 1692k(c) (2012).} Under certain circumstances, this defense provides a safe harbor for debt collectors who improperly file a claim in the wrong venue.\footnote{See id.; see also Nichols v. Byrd, 435 F. Supp. 2d 1101, 1108 (D. Nev. 2006).}

However, in \textit{Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA}, the Supreme Court held that the bona fide error defense to civil liability under the FDCPA does not apply to a mistake of law—that is, a violation of the FDCPA resulting from a debt collector’s incorrect interpretation of the FDCPA’s legal requirements.\footnote{Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 604–05 (2010).}

In the \textit{Jerman} case, the respondents, a law firm and one of its attorneys (“Carlisle”), had filed a lawsuit in Ohio state court on behalf of a mortgage company to foreclose on property owned by the petitioner Karen L. Jerman, a debtor.\footnote{Id. at 578.} The complaint included a “notice” that the mortgage debt would be assumed valid unless the
debtor disputed it in writing. Jerman’s lawyer sent a letter disputing the debt, and when the mortgage company acknowledged that the debt had in fact been paid, Carlisle withdrew the suit.

Jerman then brought a putative class action against Carlisle, asserting that they violated § 1692g of the FDCPA by erroneously representing that a debt will be assumed valid absent a written dispute. Section 1692g(a) requires a debt collector, within five days of an “initial communication” about the collection of a debt, to send the consumer a written notice containing, among other things, “a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector.”

The district court heard the case and granted summary judgment to the defendants, concluding that the notice violated § 1692g by requiring Jerman to dispute the debt in writing. However, because the violation was not intentional, resulted from a bona fide error, and occurred despite the maintenance of procedures reasonably adapted to avoid any such error, the defendants were shielded from liability by the FDCPA’s bona fide error defense.

Jerman appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the district court’s decision and held that the defense in § 1692k(c) is not limited to clerical or factual errors, but extends to mistakes of law. Factual errors, for instance, include a debt collector sending a debtor a collection letter without knowing that the debtor has filed for bankruptcy, regardless of the various procedures the debt collector maintained to identify bankruptcy and to

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47 Id. at 579.
48 Id.
49 Id.
51 Jerman, 559 U.S. at 579. At that time, no Sixth Circuit precedential opinion had addressed the issue, so defendants relied on another circuit court’s decision.
52 Id.
53 Id. at 580.
ensure compliance of the FDCPA.\textsuperscript{54} Clerical errors, for instance, include a debt collector mailing a second collection letter shortly after receiving consumer’s cease and desist letter—and thus violating the FDCPA—notwithstanding the procedures it adapted to avoid any such error.\textsuperscript{55} In contrast, mistakes of law, for instance, include a debt collector mistakenly interpreting a provision of the FDCPA.\textsuperscript{56} Jerman petitioned for certiorari to the Supreme Court, which reversed the Sixth Circuit’s decision.\textsuperscript{57} The Court first examined the case using the elements of § 1692k(c).\textsuperscript{58} The Court then stated that a violation resulting from a debt collector’s misinterpretation of the legal requirements of the FDCPA under § 1692k(c) cannot be unintentional: it is a “common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.”\textsuperscript{60} The Court noted that the administrative-penalty provisions of the Federal Trade Commission Act, which are expressly incorporated into the FDCPA, apply only when a debt collector acts with “actual knowledge or knowledge fairly implied on the basis of objective circumstances” that its action was “prohibited by [the FDCPA].”\textsuperscript{61} Given the absence of similar language in § 1692k(c), the Court reasoned it was fair to infer that Congress chose to permit injured consumers to recover damages for “intentional” conduct, including violations resulting from a mistaken interpretation of the FDCPA, while reserving the more onerous administrative penalties for debt collectors whose intentional actions reflected “knowledge fairly

\textsuperscript{55} Smith v. Transworld Sys., Inc., 953 F.2d 1025, 1034 (6th Cir. 1992).
\textsuperscript{56} \textit{Jerman}, 559 U.S. at 578.
\textsuperscript{57} \textit{Id.} at 605.
\textsuperscript{58} \textit{Id.} at 576–77.
\textsuperscript{59} \textit{Id.} at 581.
\textsuperscript{60} \textit{Id.} (quoting Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833)).
\textsuperscript{61} \textit{Id.} at 583–84 (alteration in original); 15 U.S.C. §§ 45(m)(1)(A), (C) (2012).
implied on the basis of objective circumstances” that the conduct was prohibited.62

Second, the Court stated that § 1692k(c)’s requirement that debt collectors maintain “procedures reasonably adapted to avoid any such error” is “more naturally read to apply to processes that have mechanical or other such ‘regular orderly’ steps to avoid mistakes.”63 Even though the majority conceded that some attorney debt collectors may maintain procedures to avoid legal errors, nevertheless, it stated that “legal reasoning is not a mechanical or strictly linear process.”64 Therefore, the Court concluded that “the broad statutory requirement of procedures reasonably designed to avoid ‘any’ bona fide error indicates that the relevant procedures are ones that help to avoid errors like clerical or factual mistakes.”65

Moreover, the Court found additional support for this reading in the statute’s context and history.66 The Court noted that Congress had essentially copied the relevant sections of the bona fide error defense from the Truth in Lending Act (TILA) into the FDCPA.67 In the nine years between the TILA’s enactment and the FDCPA’s passage, the three federal courts of appeals to consider the question had interpreted the TILA’s bona fide error defense as referring to clerical errors; none

62 Jerman, 559 U.S. at 584; see also id. (comparing 29 U.S.C. § 260 (2012), which allows courts to reduce liquidated damages relying on the Portal–to–Portal Act of 1947 if an employer demonstrates that “the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938”); id. (comparing 17 U.S.C. § 1203(c)(5)(A) (2012), a provision of Digital Millennium Copyright Act authorizing court to reduce or remit the total award of damages where “the violator was not aware and had no reason to believe that its acts constituted a violation”).

63 Id. at 587 (emphasis added). The Court gave two examples: “the kind of internal controls a debt collector might adopt to ensure its employees do not communicate with consumers at the wrong time of day, § 1692e(a)(1), or make false representations as to the amount of a debt, § 1692e(2).” Id.

64 Id.
65 Id.
66 Id.
67 Id. at 590.
had interpreted the defense to extend to mistaken legal interpretations.\(^68\) Thus, the Court inferred that Congress agreed with those interpretations when it enacted the FDCPA.\(^69\) Additionally, the Court reasoned that Congress’ amendment to the defense in the TILA, but not in the FDCPA, to exclude errors of legal judgment, was not evidence of Congress’s intent to give the defense in the FDCPA a more expansive scope for several reasons.\(^70\) First, the amendment did not obviously change the scope of the TILA’s bona fide error defense in a way material to the Court’s analysis, given the consistent interpretations of three courts of appeals holding that the TILA defense does not extend to mistakes of law.\(^71\) Next, it was also unclear to the Court why Congress would have intended the FDCPA’s defense to be broader than the TILA’s.\(^72\) Finally, the Court noted that Congress had not expressly included mistakes of law in any of the parallel bona fide error defenses elsewhere in the U. S. Code.\(^73\)

Further, the majority stated that this decision does not place “unmanageable burdens on lawyers practicing in the debt collection industry,”\(^74\) because the FDCPA contains multiple provisions expressly protecting against abusive lawsuits and provides courts discretion to

\(^{68}\) Id. at 589 & n.10 (citing Ives v. W.T. Grant Co., 522 F.2d 749, 757–58 (2d Cir. 1975) (bona fide error defense unavailable for reliance on a pamphlet issued by the Federal Reserve Board); Haynes v. Hogan Furniture Mart, Inc., 504 F.2d 1161, 1167 (7th Cir. 1974) (bona fide error defense unavailable for reliance on advice from private counsel); Palmer v. Wilson, 502 F.2d 860, 861 (9th Cir. 1974) (similar)). However, none of them relied on a binding judicial decision. The Court also noted that the interpretations by the three Federal Courts of Appeals may not have “settled” the meaning of the TILA’s bona fide error defense. Id. at 590.

\(^{69}\) Id. at 590.

\(^{70}\) Id. at 591.

\(^{71}\) Id.

\(^{72}\) Id. at 592.

\(^{73}\) Id. at 593. The Court compared the bona fide error provision in the Expedited Funds Availability Act, 12 U.S.C. § 4010(c)(2) (2012), which expressly excludes “an error of legal judgment with respect to [obligations under that Act],” as well as those in the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693m(c), 1693h(c) (2012), which are silent as to mistakes of law. Id.

\(^{74}\) Id. at 604.
adjust any additional damages and attorney’s fees.\textsuperscript{75} Furthermore, many state consumer protection and debt collection statutes contain bona fide error safe harbors that are either silent as to, or expressly exclude, legal errors.\textsuperscript{76}

\textbf{RETROACTIVITY OF JUDICIAL DECISIONS}

Another important consideration in analyzing the \emph{Oliva} decisions is the retroactivity of \emph{Suesz} in declaring a new interpretation of the FDCPA’s venue provision. The following sections analyze Supreme Court precedent on when judicial decisions ought to be applied retroactively.

\textit{A. Chevron Oil Co. v. Huson}

The Supreme Court articulated its modern approach to decisional retroactivity in the 1971 \emph{Chevron Oil Co. v. Huson} test.\textsuperscript{77} The test considers three factors: (1) whether the decision to be applied nonretroactively establishes a new legal principle; (2) whether the retroactive application of the new rule would further or retard the rule’s operation, given its previous history, purpose, and effect; and (3) whether the retroactive application would cause inequity to the extent of “injustice or hardship.”\textsuperscript{78} In \emph{Chevron Oil}, the issue before the Court was whether its decision in \emph{Rodrigue v. Aetna Casualty & Surety Co.}\textsuperscript{79}—which resulted in the imposition of a one-year statute of limitations for personal injury actions—barred Huson’s action, even though \emph{Rodrigue} was decided after Huson’s action was commenced.\textsuperscript{80}

\begin{itemize}
\item \textsuperscript{75} Id. at 597–98.
\item \textsuperscript{76} Id. at 601.
\item \textsuperscript{78} See \textit{Chevron Oil Co.}, 404 U.S. at 106–07 (quoting Cipriano v. City of Houma, 395 U.S. 701, 706 (1969)).
\item \textsuperscript{79} 395 U.S. 352 (1969).
\item \textsuperscript{80} \textit{Chevron Oil Co.}, 404 U.S. at 98–99.
\end{itemize}
The Court held that the *Rodrigue* holding should not be applied to bar Huson’s action retroactively.81

**B. Harper v. Virginia Department of Taxation**

The Supreme Court reexamined the retroactivity issue in *American Trucking Associations, Inc. v. Smith*82 and *James B. Beam Distilling Co. v. Georgia*,83 but left the issue unresolved. The Court confronted it again in *Harper v. Virginia Department of Taxation*, and, by a clear majority, held that “this Court’s application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision.”84

Note that there are instances of pure prospectivity and selective prospectivity: the former indicates that a court refuses to apply the decision not only to the parties before the court but also to any case where the relevant facts predate the decision, while the latter indicates that a court applies the rule to some but not all cases where the operative events occurred before the court’s decision, depending on the equities.85

Therefore, the Supreme Court in *Harper* forbade only “selective prospectivity,” where courts consider whether to apply a new rule which the Court has already applied to the parties before it.86 It did not

81 *Id.* at 100.
86 *See Harper*, 509 U.S. at 90; *see also* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 752 (1995) (noting, but not expressly addressing, that respondent Hyde alleged “*Harper* overruled *Chevron Oil* insofar as the case (selectively) permitted the prospective-only application of a new rule of law”); *see Laurence H. Tribe, American Constitutional Law* § 3-3, at 226 (3d ed. 2000) (noting that the *Harper* Court simply “did not hold that all decisions of federal law must necessarily be applied retroactively” and explaining that the Supreme Court has never expressly “renounced the power to make its decisions entirely prospective, so that they do not apply even to the parties before it”).
overrule Chevron Oil, which was an instance of “pure prospectivity,” where the new rule was not applied to the parties before the Court retroactively. The Supreme Court most recently addressed the retroactivity issue in Reynoldsville Casket Co. v. Hyde. The Court in Hyde held that litigants cannot prevail by offering no more than their simple reliance on the old law as a basis for creating an exception to Harper’s retroactivity rule, or arguing that a court’s refusal to apply the new federal law to the parties in a prior case was an effort to create a “remedy,” rather than being based on “non-retroactivity.” However, the Court stated that prospective-only effect may be given under special circumstances “where [a] new rule, for well-established legal reasons, does not determine the outcome of the case.” Under such special circumstances, a court may find (1) an alternative way of curing the constitutional violation; (2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief; (3) as in the law of qualified immunity, a well-established general legal rule that trumps the new rule of law, which general rule reflects both reliance interests and other significant policy

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87 See Harper, 509 U.S. at 90; Chevron Oil Co. v. Huson, 404 U.S. 97, 100 (1971). The Ninth Circuit recently held that, in the absence of explicit overruling, it was still bound to apply new rules purely prospectively when the three Chevron Oil factors so required. See Nunez-Reyes v. Holder, 646 F. 3d 684, 690–95 (9th Cir. 2011); see also Jill E. Fisch, Retroactivity and Legal Change: An Equilibrium Approach, 110 HARV. L. REV. 1055, 1062 (1997). However, we need not address the “pure prospectivity” issue here because the Seventh Circuit already determined to apply the new rule to the parties before the court in Suesz.


89 Id. at 754.

90 Id. at 758–59.

91 See e.g., McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep’t of Bus. Regulation of Fla., 496 U.S. 18, 40–41 (1990) (finding that where the violation depends, in critical part, upon differential treatment of two similar classes of individuals, then one might cure the problem either by similarly burdening, or by similarly unburdening, both groups).
justifications;92 or (4) a principle of law93 that limits the principle of retroactivity itself.94 Therefore, Hyde allows a court to not apply a new rule retroactively even if the court which declared the new rule has applied it to the parties before the court.

Today, when the Court has applied a rule of federal law to the parties before the Court, courts consult Harper and Hyde to determine whether to give that decision retroactive application.95 In the absence of explicit overruling, courts still need to apply new rules purely prospectively when the three Chevron Oil factors so require.96

OLIVA V. BLATT, HASENMILLER, LEIBSKER & MOORE LLC

The following sections explain the factual and procedural background of the Oliva case, and the district court’s and the Seventh Circuit’s decisions.

A. Factual Background

In 2002, Ronald Oliva, the plaintiff-debtor, opened an HSBC MasterCard account in Chicago while a student at DePaul University,

92 See e.g., Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that government officials performing discretionary functions generally are shielded from liability for civil damages to avoid excessive disruption of government insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known).

93 See e.g., Teague v. Lane, 489 U.S. 288 (1989) (concluding that a habeas corpus petitioner cannot obtain a habeas corpus remedy where doing so would require the habeas court to retroactively apply a new rule of criminal law). However, “the Teague doctrine embodies certain special concerns—related to collateral review of state criminal convictions—that affect which cases are closed, for which retroactivity-related purposes, and under what circumstances.” Hyde, 514 U.S. at 758.

94 Hyde, 514 U.S. at 759.


96 See Chevron Oil Co. v. Huson, 404 U.S. 97, 100 (1971); Nunez-Reyes v. Holder, 646 F. 3d 684, 690–95 (9th Cir. 2011).
and continued to use the account during his subsequent employment with CDW at its downtown office.\footnote{Oliva v. Blatt, Hasenmiller, Leibsker & Moore LLC, 185 F. Supp. 3d 1062, 1063 (N.D. Ill. 2015), \textit{aff’d}, 825 F.3d 788 (7th Cir. 2016), \textit{and vacated on reh’g en banc}, 864 F.3d 492 (7th Cir. 2017). Oliva graduated from DePaul University in 2005 and worked at CDW until August 2015. \textit{Id.}} Oliva lived and worked in Chicago almost continuously from 2002 until he moved back home to Orland Park, Illinois in August 2013.\footnote{\textit{Id.}}

Oliva ended up falling behind on his credit card payments and HBSC charged off his account in 2012.\footnote{\textit{Id.}} At the end of 2012, Oliva’s HSBC account had a final balance of $8,205.20.\footnote{\textit{Id.}} Portfolio Recovery Associates, LLC (“PRA”) ultimately acquired Oliva’s account.\footnote{\textit{Id.}}

On behalf of PRA, the law firm BHLM filed a collection suit in 2014 against Oliva in the Circuit Court of Cook County.\footnote{\textit{Id.}} For such relatively small claims, the Circuit Court of Cook County divides the county into six municipal districts for venue purposes.\footnote{\textit{Id.}} BHLM filed the suit against Oliva in the first municipal district at the Richard J. Daley Center in downtown Chicago.\footnote{\textit{Id.}}

In deciding where to file suit, BHLM relied on \textit{Newsom}, which held that the Circuit Court of Cook County is a single “judicial district” for purposes of the FDCPA’s venue provision, allowing a debt collector to file a suit in any of the circuit court’s six districts as long as the debtor lived in Cook County or signed the underlying debt contract there.\footnote{\textit{Id.}} BHLM’s standard practice after \textit{Newsom} was to sue all Cook County residents in the first municipal district even if the debtor, like Oliva, lived in a different municipal district.\footnote{\textit{Id. at 1064}; \textit{see} Newsom v. Friedman, 76 F.3d 813, 819 (7th Cir. 1996), \textit{overruled by} Suesz v. Med-1 Sols., LLC, 757 F.3d 636 (7th Cir. 2014) (en banc).}

\footnote{\textit{Oliva I}, 185 F. Supp. 3d at 1064.}
At the time the collection suit was filed, Oliva lived in Orland Park, which falls within the Cook County Circuit’s fifth municipal district, not the first municipal district. Oliva retained counsel, but never challenged venue in the collection suit. Indeed, Oliva admitted that the first municipal district Daley Center courthouse was a more convenient forum for him than the fifth municipal district Bridgeview courthouse, the closest Circuit Court of Cook County to his residence.

On July 2, 2014, while BHLM’s debt collection suit against Oliva was still pending, the Seventh Circuit overruled Newsom and held that “the correct interpretation of ‘judicial district or similar legal entity’ in § 1692i [the FDCPA’s venue provision] is the smallest geographic area that is relevant for determining venue in the court system in which the case is filed.” Eight days later, BHLM voluntarily dismissed the suit against Oliva.

**B. Procedural Background**

Later in 2014, Oliva filed a lawsuit alleging that BHLM had violated the FDCPA’s venue provision, § 1692i, by suing him in a venue where he did not reside and had not signed the contract in suit. The parties filed cross-motions for summary judgment. The district court granted BHLM’s motion and denied Oliva’s motion.
C. The District Court’s Decision

The district court judge, Judge Elaine E. Bucklo, held that BHLM had shown that its violation of the venue provision in § 1692i was the result of a bona fide error in relying on the circuit precedent of Newsom. The court differentiated Jerman stating that the debt collector in Jerman had relied on a non-controlling case, and therefore, the debt collector could not escape liability relying on the bona fide error defense because of his own mistaken interpretation of law. However, here BHLM relied on Newsom, the then-controlling ruling interpreting the FDCPA’s venue provision, and “did not exercise any ‘legal judgment’ of its own.” Furthermore, the court drew an analogy to another defense under the FDCPA for debt collectors who rely on an advisory opinion by the Consumer Financial Protection Bureau of the Federal Trade Commission (FTC) to avoid liability even if “such opinion is [later] amended, rescinded, or determined by judicial or other authority to be invalid for any reason.” Therefore, BHLM’s reliance on Newsom was not a legal error that would preclude the bona fide error defense to apply.

Moreover, the court rejected Oliva’s argument that Suesz—which declared a new interpretation of the FDCPA’s venue provision while BHLM’s debt collection case against Oliva was pending—should apply. The court stated that the debt collector in Suesz attempted to extend Newsom’s holding to a different county court system, whereas BHLM squarely relied on Newsom’s holding that the Circuit Court of Cook County was one judicial district for purposes of the FDCPA.

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115 Oliva I, 185 F. Supp. 3d at 1067.
116 Id. at 1066.
117 Id. (quoting Kort v. Diversified Collection Servs., Inc., 394 F.3d 530, 538 n.9 (7th Cir. 2005) (finding no mistake of law where debt collector relied on implementing agency’s interpretation and did not exercise independent legal judgment)).
118 Id. (alteration in original) (quoting 15 U.S.C. § 1692k(e) (2012)).
119 Id.
120 Id. at 1066–67.
Judge Bucklo noted that “[i]f the Seventh Circuit had overruled Newsom in a case involving a Cook County collection suit, the court may well have applied its ruling only on a prospective basis.” Judge Bucklo concluded that the retroactivity holding in Suesz was limited to the parties in Suesz.

Accordingly, the court held BHLM’s violation of the FDCPA’s venue provision was result of a bona fide error in relying upon the then-binding precedent, thereby precluding liability under FDCPA.

D. The Seventh Circuit’s Panel Decision

On Oliva’s appeal, a panel of the Court of Appeals for the Seventh Circuit affirmed the district court’s decision.

121 Id.
122 Id. at 1067 (citing Suesz v. Med-1 Sols., LLC, 757 F.3d 636, 650 (7th Cir. 2014) (en banc) (permitting prospective overruling where “the law had been so well settled before the overruling that it had been unquestionably prudent for the community to rely on the previous legal understanding”)).
123 Id. (citing Suesz, 757 F.3d at 649 (“[A]dopting a new rule while refusing to apply it to the parties before us would raise serious constitutional concerns.”)).
124 Id. at 1065. BHLM had also argued in the alternative that venue in the first judicial district was proper on the ground that Oliva had signed the relevant contract in that district. Id. Relying on Portfolio Acquisitions, L.L.C. v. Feltman, 909 N.E.2d 876, 881 (Ill. App. Ct. 2009), which held that “each time [a] credit card is used, a separate contract is formed between the cardholder and bank,” BHLM argued that “Oliva signed separate contracts with HSBC each time he used his MasterCard in the City of Chicago while attending DePaul University and working at CDW’s downtown office.” Id. (alteration in original). “Oliva counter[ed] that credit card agreements are considered oral contracts, which are incapable of being ‘signed’ within the meaning of the FDCPA’s venue provision.” Id. (citations omitted). The district court did not address that argument. Id.
125 Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC, 825 F.3d 788, 793 (7th Cir. 2016), on reh’g en banc, 864 F.3d 492 (7th Cir. 2017). The panel included Judge Bauer, Flaum, and Manion, and Judge Manion authored the opinion. Id. at 789. The Seventh Circuit reviewed the district court’s grant of summary judgment de novo, “construing all facts and reasonable inferences in the light most favorable to the nonmoving party.” Id. at 791; see Hammarquist v. United Cont’l Holdings, 809 F.3d 946, 949 (7th Cir. 2016).
Even though the panel noted in *Oliva II* that *Suesz* did not specify the scope of its retroactivity, the judges assumed without deciding that *Suesz*’s holding would apply retroactively to BHL, and held that BHL’s decision to file suit in the first municipal district of the Circuit Court of Cook County violated § 1692i as interpreted by *Suesz*.126 The parties did not dispute that BHL’s violation was unintentional or that BHL maintained procedures reasonably adapted to avoid the error that led to the violation.127 Therefore, the panel focused only on the issue of whether the violation was the result of a bona fide error.128 The court reasoned that “*Newsom’s* unambiguous holding expressly permitted [BHL] to file suit exactly where it did,” and that “*Suesz* may have created a retroactive cause of action for violations that preceded it, but it did not retroactively proscribe the application of the bona fide error defense.”129 Therefore, the court held that BHL’s violation of § 1692i as interpreted by *Suesz* was the result of a bona fide error that precluded liability under the FDCPA.130

The panel also found that the Supreme Court’s opinion in *Jerman* did not apply to mistakes of law that relied on controlling circuit precedent.131 First, the panel stated that *Jerman* applied only when the debt collector’s violation resulted from the debt collector’s mistaken interpretation of the law.132 Here, BHL simply abided by the judicial interpretation in *Newsom* and did not make “an independent (and entirely futile) ‘interpretation’” of the FDCPA’s venue provision, “which *Newsom* had already definitely interpreted and handed down as the binding law of this Circuit.”133 *Newsom*, the then-controlling

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126 *Oliva II*, 825 F.3d at 790–91.
127 *Id.* at 791.
128 *Id.*
129 *Id.*
130 *Id.* at 791–92.
131 *Id.* at 792.
132 *Id.*
133 *Id.*
law, expressly permitted BHLM’s conduct.\footnote{Id.} Thus, the court concluded that if BHLM’s venue choice under \textit{Newsom} was the result of a mistaken interpretation of the FDCPA, it was the result of the Seventh Circuit’s mistaken interpretation, not BHLM’s.\footnote{Id. at 790.} “[BHLM’s] failure to foresee the retroactive change of law heralded by \textit{Suesz} was not a mistaken legal interpretation, but an unintentional bona fide error that preclude[d] liability under the [FDCPA].”\footnote{Id. at 790.}

Second, even if BHLM’s violation was the result of its own interpretation of the law, BHLM’s interpretation was not mistaken \textit{when it was made}, resulting in \textit{Jerman} inapplicable.\footnote{Id. at 792.} It was the retroactive change of the law—entirely outside BHLM’s control—that caused BHLM’s conduct later to be deemed a violation under \textit{Suesz}, not BHLM’s mistaken interpretation of the FDCPA.\footnote{Id.}

The panel then concluded that BHLM had shown by a preponderance of evidence that its challenged conduct was the result of an unintentional good-faith mistake that it took every reasonable precaution to avoid; accordingly, the bona fide error defense applied.\footnote{Id.} Therefore, the panel affirmed that the district court properly granted summary judgment to BHLM.\footnote{Id.}

\textbf{E. The Seventh Circuit’s Rehearing En Banc}

Oliva petitioned for rehearing en banc under Federal Rule of Appellate Procedure 35, arguing that the panel decision conflicted with both the en banc decision in \textit{Suesz} and the Supreme Court’s decision in \textit{Jerman}.\footnote{Oliva v. Blatt, Hasenmiller, Leibsker & Moore LLC, 864 F.3d 492, 495 (7th Cir. 2017) (en banc).} The Seventh Circuit granted en banc review,
and eventually vacated the judgment of the district court and remanded for proceedings consistent with its opinion.142

The en banc court, in an opinion written by Judge Hamilton, first examined the venue issue.143 The court emphasized the FDCPA’s congressional purpose “to eliminate abusive debt collection practices by debt collectors,” which include “abusive forum-shopping by debt collectors choosing the venues for lawsuits to collect consumer debts.”144

The court then analyzed the Seventh Circuit precedent interpreting the venue provision of the FDCPA, noting that Newsom allowed debt collectors in Cook County to choose freely among the six different municipal department districts when BHLM initially filed the debt collection case, for purposes of the FDCPA.145 Regardless of the sharp change in the interpretation, the court acknowledged that the reasoning and holding of Suesz, decided while BHLM’s debt collection’s case was pending, “clearly extend[ed] to the municipal department districts in Cook County, Illinois.”146

The court went on to discuss the retroactivity issue under Suesz.147 The en banc decision in Suesz refused to give the decision only prospective effect, and applied the new rule to Suesz itself.148 The court acknowledged that as a general rule, judicial decisions are given retroactive effect, unlike legislation, which ordinarily is not given retroactive application.149 Nevertheless, the Supreme Court sometimes

142 Id. at 494. The court elected not to schedule a further oral argument because the court noted that the issues were presented sufficiently in the briefs and opinions under review. Id.
143 Id. at 495.
145 Oliva III, 864 F.3d at 496.
146 Id. Suesz overruled Newsom and held that a “judicial district or similar legal entity” under § 1692i is “the smallest geographic area that is relevant for determining venue in the court system in which the case is filed.” Id. (quoting Suesz v. Med-1 Sols., LLC, 757 F.3d 636, 638 (7th Cir. 2014) (en banc))
147 Id. at 497.
148 Id.
149 Id.
applied its rulings in civil cases only prospectively “to avoid injustice or hardship to civil litigants who have justifiably relied on prior law.”\textsuperscript{150} However, a prospective-only ruling would be “impermissible unless the law had been so well settled before the overruling that it had been unquestionably prudent for the community to rely on the previous legal understanding.”\textsuperscript{151} The court in \textit{Suesz} hypothesized that if a circuit court of appeals had continued to follow \textit{Newsom} but the Supreme Court had granted certiorari in \textit{Suesz} and reversed, neither \textit{Newsom} nor the panel’s decision in \textit{Suesz} would have justified the Supreme Court giving its decision only prospective effect.\textsuperscript{152} The court also reasoned that none of the Supreme Court’s FDCPA decisions against debt collectors have given any sign of applying their holdings only prospectively.\textsuperscript{153}

The court \textit{claimed} that “[t]he panel opinion in this case declined to apply the \textit{Suesz} holding on retroactivity,” that the panel noted that “\textit{Suesz} ‘did not specify the scope of its retroactivity,’” and that “the panel assumed without deciding that the \textit{Suesz} retroactivity holding would apply to [BHLM].”\textsuperscript{154} The court then went on to consider the good-faith mistake issue under § 1692k(c).\textsuperscript{155}

As noted by the court in \textit{Oliva III}, the Supreme Court in \textit{Jerman} held that the bona fide error defense in § 1692k(c) does not apply to “a violation of the FDCPA resulting from a debt collector’s incorrect

\textsuperscript{150} \textit{Id.} (quoting \textit{Suesz}, 757 F.3d at 649).
\textsuperscript{151} \textit{Id.} (quoting \textit{Suesz}, 757 F.3d at 650).
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Id.; see Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573 (2010).}
\textsuperscript{154} \textit{Oliva III}, 864 F.3d at 497 (majority opinion) (quoting Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC, 825 F.3d 788, 790–91 (7th Cir. 2016), \textit{on reh’g en banc}, 864 F.3d 492 (7th Cir. 2017)). However, the panel in \textit{Oliva II}, joined by Judge Kanne, disputed in the dissenting opinion that “[t]he panel explicitly assumed that \textit{Suesz}’s retroactivity did apply in this case—applied it—and then concluded that the bona fide error defense excused [BHLM] from liability for its retroactive violation.” \textit{Id.} at 503 (Manion, J., dissenting).
\textsuperscript{155} \textit{Id.} at 498 (majority opinion).
interpretation of the requirements of that statute.”156 The en banc court in Oliva III disagreed with the panel in Oliva II that read Jerman narrowly as applying only to the debtor collector’s own mistaken interpretation of law but not to reliance on a precedent that was later overruled as mistaken.157 Instead, the court in Oliva III read Jerman as to include all mistaken interpretations of the FDCPA, both mistakes supported by “controlling” legal authority and those supported by “substantial” legal authority.158 The court also pointed out (and agreed with) the Jerman decision that, if § 1692k(c) is a broad defense for good-faith mistakes of law, it is not necessary to specify another safe harbor under § 1692k(e) for the FTC advice.159 Therefore, the court concluded that the Jerman opinion rejected the application of § 1692k(c) to any legal errors concerning the FDCPA.160 In essence, as the court in Oliva III stated, the Court in Jerman read the FDCPA as putting the risk of legal uncertainty on debt collectors, incentivizing them to stay well within legal boundaries.161

The court also noted that Newsom and the FDCPA permitted, but did not require BHLM to sue Oliva in the venue it chose.162 However, the court acknowledged that “if any mistaken interpretations of the [FDCPA] were made in good faith, it was in cases like this,” because the debt collectors relied on circuit precedent in believing they could file debt collections suits in any districts within the county.163

156 Id. (emphasis added) (quoting Jerman, 559 U.S. at 604–05).
157 Id.
158 Id.
159 Id. at 499 (quoting Jerman, 559 U.S. at 588 (“Debt collectors would rarely need to consult the FTC if § 1692k(c) were read to offer immunity for good-faith reliance on advice from private counsel.”)); see also id. (citing Jerman, 559 U.S. at 605–06 (Breyer, J., concurring) (noting that Justice Breyer “emphasiz[ed] the safe harbor for FTC advice as solution for legal uncertainty”)).
160 Id.
161 Id.
162 Id. The majority opinion in Oliva III clarified that they did not address the situations where the FDCPA required a debt collector to file in such a venue that a court later determined was prohibited. Id. at 501 n.5.
163 Id. at 500.
Moreover, the court declared that a judicial decision interpreting a statute is not the law, or the controlling law. The court stated as follows:

With a statute, however, the controlling law is and always has been the statute itself, as enacted by both houses of Congress and signed by the President. One judge or a panel of judges may or may not understand that text correctly, but the statute remains the law even if judges err. . . . Defendant was mistaken about the meaning of the statute, and so were the panels in Newsom and Suesz. The fact that different sets of lawyers, including those with judicial commissions, made a legal error does not make it less a legal error.

Nevertheless, the court stated that in determining damage when the FDCPA safe harbor is not available, the court “shall consider, among other relevant factors . . . the extent to which such noncompliance was intentional.”

The court concluded the discussion by comparing the debt collection cases with certain Fourth Amendment cases. The Supreme Court recognized a good-faith exception to the exclusionary rule for Fourth Amendment violations when police officers reasonably relied on facially valid search warrants in United States v. Leon. Then, in Davis v. United States, the Supreme Court extended the good-faith exception to searches—that would otherwise be Fourth Amendment violations—conducted in objectively reasonable reliance

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164 Id.
165 Id.
166 Id. (quoting 15 U.S.C. § 1692k(b)(1) (2012)).
167 Id.
168 Id. (citing United States v. Leon, 468 U.S. 897 (1984)). The exclusionary rule under the Fourth Amendment indicates that evidence illegally seized by law enforcement officers in violation of a suspect’s right to be free from unreasonable searches and seizures cannot be used against the suspect in a criminal prosecution. See Weeks v. United States, 232 U.S. 383 (1914).
on binding appellate precedent. The en banc court in Oliva III stated that such extended rule was unusual, and it was based on “the exclusionary rule’s ‘high cost to both the truth and the public safety,’ and the absence of offsetting benefits resulting from deterring police misconduct when the police are complying with circuit precedent.” The court then distinguished the interest in protecting debt collectors’ choice of venue from the stakes under the exclusionary rule as “not at all comparable,” and concluded there was no need to create a similar exception under the FDCPA.

THE SEVENTH CIRCUIT’S EN BANC DECISION DEPARTS FROM PRECEDENT AND CONSISTENCY

The Seventh Circuit’s en banc decision was improper in at least three respects, as discussed in the following sections: (1) retroactivity of the new interpretation of the venue provision; (2) bona fide defense; and (3) policy justification.

A. Retroactivity of the New Interpretation of the Venue Provision

It is undisputed that when the debt collector BHLM initially filed the claim against Oliva in the first municipal district of the Cook County, the venue choice was permissible under the then-binding decision in Newsom, which interpreted the “judicial districts or similar legal entity” under § 1692i as the entire county for Cook County, Illinois, rather than the internal municipal department districts. While the case was pending, the Seventh Circuit issued its en banc decision in Suesz, overruling Newsom, under which BHLM’s venue choice would be improper because Oliva resided in Orland Park, the fifth municipal district, and BHLM filed the case in the first municipal

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169 Oliva III, 864 F.3d at 500 (citing Davis v. United States, 564 U.S. 229 (2011)).
170 Id. (quoting Davis, 564 U.S. at 232).
171 Id.
172 See id. at 496.
district, a different “smallest geographic area that is relevant for determining venue in the court system in which the case is filed.”

Oliva relied on the “new” law under Suesz to sue BHLM, alleging it violated the FDCPA by filing the debt collection case in the wrong venue.

The Seventh Circuit’s conclusions in Oliva III on retroactivity depart from precedent and consistency for the following two reasons. First, Harper arguably applies only to the judicial rulings of the Supreme Court interpreting federal law, where the court determined that:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule.

The court in Oliva III stated several times that if it were the Supreme Court reversing the decision, the decision would have a retroactive application; however, it overlooked the fact that the implication of a Supreme Court decision may differ materially from that of a Seventh Circuit decision, which could support the view that Harper applies only to Supreme Court interpretations.

Second, even if Harper applies to judicial rulings of the circuit courts, and not only to Supreme Court decisions, the retroactive application of the new rule in Suesz itself did not extend automatically

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173 See id.
174 Id. at 495.
175 See id. at 497.
176 See Harper v. Va. Dep’t of Taxation, 509 U.S. 86, 86 (1993) (emphasis added); see also Gibson v. Am. Cyanamid Co., 719 F. Supp. 2d 1031, 1045 (E.D. Wis. 2010) (declining to apply Harper’s retroactivity rule to a Wisconsin Supreme Court decision because “the United States Supreme Court’s interpretation of federal law is not at issue”).
177 See Oliva III, 864 F.3d at 497–500.
or guarantee retroactivity to other cases.178 Because the court in Suesz already declined to give the new rule prospective-only effect, it was a matter of selective prospectivity—whether Suesz applied to other cases that involved similar conduct or events occurring prior to the date of the decision—triggering analysis under Hyde.179 In Hyde, the Supreme Court made it clear that reliance alone may be insufficient to justify prospective-only application; however, other special circumstances may allow the court to depart from the norm of retroactive application under such circumstances.180 Had the court in Oliva applied Hyde, it likely would have found a “previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief”—the bona fide error defense.181 Therefore, the court should not have applied Suesz retroactively to Oliva because of the special circumstance of the bona fide error defense.

B. Bona Fide Error Defense

Furthermore, even if Suesz created a cause of action for retroactive violations of the venue provision in § 1692i, the Seventh Circuit in Oliva III erred by rejecting the bona fide error defense in § 1692k(c).182 The following sections explain the en banc court’s misinterpretation of Jerman and Oliva III’s inconsistencies with the FDPCA and its legislative intent.

178 See id. at 497; Suesz v. Med-1 Sols., LLC, 757 F.3d 636, 649 (7th Cir. 2014) (en banc) (noting that “adopting a new rule while refusing to apply it to the parties before [the court] would raise serious constitutional concerns,” but saying nothing about applying the rules to other cases).


182 Oliva III, 864 F.3d at 498–500; see also id. at 502 (Manion, J., dissenting) (maintaining that, as the original panel in Oliva II, 825 F.3d 788, 791 (7th Cir. 2016), stated, Suesz may have created a cause of action for retroactive violations, but it did not “retroactively proscribe the application of the bona fide error defense,” and that Suesz said nothing about the bona fide error defense).
1. Misinterpretation of Jerman

The Seventh Circuit erroneously relied on Jerman to reject any bona fide error defense resulting from mistakes of law. However, Jerman materially differed from Oliva, and therefore did not mandate the outcome in the latter case.

First, the court in Oliva III overlooked the distinction between a debt collector’s own independent mistaken interpretation of the federal law and a debt collector’s good faith reliance on federal judicial interpretation of the federal law, even if that interpretation is later overruled. The Supreme Court in Jerman held that “[t]he bona fide error defense in § 1692k(c) does not apply to a violation resulting from a debt collector’s mistaken interpretation of the legal requirements of the FDCPA.” However, the debt collector in Oliva, BHLM, did not independently interpret the FDCPA’s venue provision when it filed the suit in the first municipal district within Cook County. It was simply relying on the then-binding judicial interpretation under the Seventh Circuit’s decision in Newsom.

Second, the Seventh Circuit failed to find a clear and “manageable way to distinguish between mistakes” supported by “substantial” legal authority, as in Jerman, and those supported by “controlling” legal authority, as in Oliva. Substantial legal authority, as described in Jerman and discussed in Oliva III, is non-binding and “at best persuasive,” whereas controlling legal authority is binding in a given

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183 See id. at 498–500 (majority opinion).
184 See id.
185 See id. at 498; Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 574–75 (2010); see also Daubert v. NRA Group, LLC, 861 F.3d 382, 394 (3d Cir. 2017) (noting that Jerman concerns with and controls in cases where the debt collectors relied on persuasive legal authority regarding legal issues that were unsettled by any relevant binding authority).
186 Jerman, 559 U.S. at 574 (emphasis added).
187 See Oliva III, 864 F.3d at 494–95.
188 Id.
189 See id. at 499.
jurisdiction. Therefore, it might have been a mistaken interpretation of law for the debt collector in *Jerman* to erroneously rely on another circuit court’s decision (substantial legal authority) when that issue was unsettled by any relevant binding authority in its own circuit. However, BHLM made no mistake of law at the time of filing, when it correctly relied on the then-binding decision *Newsom* in this circuit—controlling legal authority—where the issue was well settled for eighteen years at that time. That is a fundamental difference from the mistakes supported merely by substantial, non-binding legal authority.

Third, the Seventh Circuit en banc decision concluded that a court’s legal error about the meaning of a statute does not make it less a legal error because the statute itself is the only controlling law; however, that conclusion is self-contradictory. On one hand, the Seventh Circuit likely mistook the controlling law as law that will always control when it reasoned that “[o]ne judge or a panel of judges may or may not understand that text correctly, but the statute remains the law even if judges err. That is why overrulings of earlier statutory decisions, like reversals by the Supreme Court, are retroactive.” However, the judicial interpretations of federal statutes have always been treated as controlling law just as the words of the statutes themselves. The judicial interpretation may evolve over time, as

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190 See id. at 505 (Manion, J., dissenting).
191 See *Jerman*, 559 U.S. at 597.
192 See *Oliva III*, 864 F.3d at 502–03 (Manion, J., dissenting).
193 See id. at 494–95 (majority opinion).
194 See id. at 500.
195 See id.
196 See e.g., 42 U.S.C. § 1988 (1964) (“[Section 1983 and other civil rights] shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to
well as the statue itself when Congress makes amendments. Therefore, the judicial decision of the Seventh Court in Newsom interpreting the FDCPA was the controlling law until Suesz, where the en banc court adopted a new interpretation regarding the statute and that interpretation became the new controlling law. On the other hand, the Seventh Circuit en banc concluded that BHLM violated the FDCPA as interpreted by Suesz, assuming implicitly that Suesz controlled. But, ironically, as the court claimed explicitly in Oliva III, a judicial decision is not law, or controlling law. Moreover, if as the court stated the statute remains the (only) law even after judicial interpretation changes, there is no change of law when the Seventh Circuit declared a new judicial interpretation of the FDCPA’s venue provision, but the provision itself remained the same. Consequently, there is no new “law” in Suesz that needs to apply retroactively to Oliva.

Finally, nothing in Jerman indicates that the Court intended to prohibit the bona fide error defense from being used with respect to all mistakes of law. The Court expressly refused to consider whether § 1692k(c) applies when a violation results from a debt collector’s misinterpretation of the legal requirements of state law or federal law other than the FDCPA. Moreover, the Court was clear in its warning that “we need not authoritatively interpret the [FDCPA]’s conduct-regulating provisions to observe that those provisions should not be assumed to compel absurd results when applied to debt collecting attorneys.” But the Oliva III decision is exactly an absurd result, by punishing the debt collector for its venue choice expressly permitted and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.”).

197 Oliva III, 864 F.3d at 494.
198 Id. at 500; see also id. at 509 (Manion, J., dissenting) (“By denying the controlling effect of its own legal determinations, the court pulls the rug out from under its own feet.”).
200 Id. at 580 n.4.
201 Id. at 600.
under the then-controlling law, \textit{Newsom}, and by giving superior liability protection to factual and clerical errors as compared to good-faith reliance on controlling judicial decisions.

Therefore, \textit{Jerman} did not bind the court’s decision in \textit{Oliva}, and the Seventh Circuit should have applied the elements under § 1692(c) to determine whether BHLM’s venue selection constituted an excusable bona fide error.

2. Inconsistency with the FDCPA and Its Legislative Intent

Additionally, excluding all mistakes of law from the bona fide error defense under § 1692k(c) runs afoul of the FDCPA’s legislative intent and its other provisions.

Relying on the court’s binding interpretation to choose the venue for filing an FDCPA suit is not an abusive debt collection practice of the type that the FDCPA aims to eliminate.\footnote{\textit{Oliva III}, 864 F.3d at 495 (majority opinion).} BHLM’s choice of venue was permissible under the then-binding law when it filed the collection suit against Oliva.\footnote{\textit{Oliva v. Blatt, Hasenmiller, Leibsker \& Moore, LLC}, 185 F. Supp. 3d 1062, 1064 (N.D. Ill. 2015), \textit{aff’d}, 825 F.3d 788 (7th Cir. 2016), \textit{and vacated on reh’g en banc}, 864 F.3d 492 (7th Cir. 2017).} Also, as Oliva admitted, the venue where BHLM initially filed the suit was more convenient for Oliva than the closest courthouse, the proper venue under \textit{Suesz}.\footnote{\textit{Oliva III}, 864 F.3d at 500.}

Moreover, as the Seventh Circuit noted in \textit{Oliva III}, “if any mistaken interpretations of the [FDCPA] were made in good faith, it was in cases like this.”\footnote{\textit{Oliva III}, 864 F.3d at 495 (majority opinion).} Contrary to the FDCPA’s legislative intent to regulate debt collection methods, the Seventh Circuit’s en banc decision in \textit{Oliva III} increased the legal uncertainty of debt collection methods and discouraged debt collectors from following courts’ controlling precedent, enlarging the harmful risks to debtors.

Further, there is no reason to believe an agency’s advisory opinion should be given more authority than a binding circuit court’s opinion.
The FTC may answer requests for advice when “[t]he matter involves a substantial or novel question of fact or law and there is no clear [FTC] or court precedent” or “[t]he subject matter of the request and consequent publication of [the FTC] advice is of significant public interest.”\(^{206}\) Therefore, the FTC advisory opinions are supplementary to court precedent, and the FTC will not issue advisory opinions if there is clear court precedent, as was the case with the well-settled law in Newsom.\(^{207}\) Moreover, if relying on an FTC advisory opinion could protect debt collectors from liability even if the opinion later is amended, rescinded, or determined by judicial or other authority to be invalid for any reason,\(^{208}\) relying on binding judicial interpretation should offer, at least, the same degree of protection. Additionally, unlike the Court’s concern in Jerman of relying on private counsel’s advice, as compared with an FTC advisory opinion, in the case of Oliva, relying on a circuit court’s binding interpretation did not “give a competitive advantage to debt collectors who press the boundaries of lawful conduct.”\(^{209}\) Congress sought to regulate debt collectors’ practices by requiring them to comply with the FDCPA’s provisions, which is exactly what BHLM did in Oliva.\(^{210}\)

Therefore, the FDPCA and its legislative intent suggest the bona fide error defense should have protected a debt collector who relied on the binding judicial interpretation in filing suit in what subsequently turned out to be the wrong venue, resulting in an FDCPA violation.

\(^{206}\) 16 C.F.R. § 1.1 (2016).
\(^{209}\) See Jerman, 559 U.S. at 602 (majority opinion).
\(^{210}\) As the majority noted in Oliva III, Newsom permitted, but did not require, BHLM to file the suit in the first municipal district. Oliva III, 864 F.3d at 499. But that did not affect the analysis here because BHLM’s choice of venue was still in compliance with the law.
C. Policy Justification

Additionally, the Seventh Circuit’s en banc decision was improper when considered from a policy perspective.

1. Extra Burden on the Courts

The courts adjudicate cases based on the controlling law at that time. The en banc decision in *Oliva III* will result in significant legal uncertainty in the FDCPA, because the opinion states that judicial interpretations and decisions (including *Oliva III*) are not controlling law.\(^211\) Therefore, the courts will have to independently interpret the FDCPA every time when they hear cases, increasing the risk of inconsistent interpretations of the FDCPA.

2. Extra Burden on the Public

As the dissent noted, *Oliva III* violates due process by not giving fair notice to debt collectors of the FDCPA’s requirements.\(^212\) “A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”\(^213\) Therefore, it is not “unusual” to give exceptions to good-faith mistakes by relying on the then-binding judicial interpretation of federal statute. The court in *Oliva III*, however, penalized a law-abiding litigant who followed the then-controlling law, which is a direct violation of this due process principle.

Additionally, the en banc decision in *Oliva III* diminishes the court’s authority and credibility.\(^214\) Under this decision, no protection is available for good-faith reliance on the court’s controlling precedent.

\(^{211}\) See *id.* at 500.

\(^{212}\) *Id.* at 511 (Manion, J., dissenting).


\(^{214}\) *Oliva III*, 864 F.3d at 511 (Manion, J., dissenting) (“Today’s decision also gravely undermines the rule of law by discouraging debt collectors from following this court’s controlling precedent.”).
precedent, or even worse, a federal circuit court’s interpretation of federal statute such as the FDCPA can no longer be viewed as controlling. How can a party know what is legal if it is required to follow only the statute, but not the applicable court of appeals cases interpreting such statute? Consequently, the public has to understand and interpret the law by themselves. But if our judges are unable to make the right decision, how can we fairly impose liability on the parties without legal training if they interpret wrongly? In the context of the FDCPA, debt collectors have to hope that the existing judicial interpretations related to their collection and litigation efforts do not change before the case concludes or the statute of limitations runs, and that the courts adjudicating their cases adopt the same interpretations. Or, if debt collectors apply their own interpretation of the statute and act differently from an existing judicial interpretation, they have to hope that the courts adjudicating their cases do not rely on the existing judicial interpretation and interpret the FDCPA provisions in the same way as the debt collectors.

CONCLUSION

The Seventh Circuit’s en banc opinion in Oliva III was erroneously reasoned in several aspects, and they reached an improper decision as a result. The reasoning failed because Suesz should not have been applied retroactively to this case, based on the special circumstance exception under Hyde.

Furthermore, Jerman, which held that the bona fide error defense does not extend to debt collectors’ mistaken interpretation of law, is not instructive in Oliva, and therefore, even if Suesz applied retroactively here, the bona fide error defense should have excused BHLM’s liability for the violation of the FDCPA.

Finally, the en banc decision will result in extra burdens on both the courts and the public, and diminish the court’s authority and credibility. The public has to understand and interpret the law by themselves and hope their interpretation will be same as the judicial tribunal’s if challenged at the court.
Accordingly, when deciding whether a new interpretation of the federal statute should have retroactive effect to the parties before a particular court, the court should apply the *Chevron Oil* test. Once it decides to apply the new interpretation to the parties before the court, the court then should consult the holdings in *Harper* and *Hyde* to determine its retroactivity to other cases. In addition, the bona fide error defense, if applicable, should excuse the liability for violations resulted from good faith reliance on a then-controlling judicial interpretation in the event that such judicial interpretation subsequently evolves.
STRANDED AT SEA: THE SEVENTH CIRCUIT AND THE RULE 11 “SAFE HARBOR” RULE

DANIEL RISTAU*


INTRODUCTION

Federal Rule of Civil Procedure 11 (“Rule 11”) performs a critical, but often overlooked, function in civil disputes. It imposes a “signing requirement” on attorneys.1 The rule requires attorneys to certify that their pleadings and motions have a proper purpose by providing their signature as a stamp of approval.2 By endorsing filings with their signature, attorneys attest that the claims they are submitting on behalf of their clients are supported by law or a good faith extension of the law3 and bolstered by evidence.4 Though the signing requirement may appear to be little more than a procedural formality, “[t]here may be no better example than Federal Rule of Civil Procedure 11 . . . of how the law of civil procedure has influenced the legal profession.”5


2 FED. R. CIV. P. 11(b)(1).
3 FED. R. CIV. P. 11(b)(3).
4 FED. R. CIV. P. 11(b)(2).
“Federal courts exercise considerable discretion and great power... essential in preserving the rule of law and the rights and liberties of the American people, in cases large and small, landmark and mundane.”\textsuperscript{6} When a party invokes these powers in a civil case, it ignites a “powerful, intimidating, and often expensive” legal process that is often vulnerable to abuse by litigants.\textsuperscript{7} This is in part because meritless pleadings are distracting, costly, and an impediment to swift justice.\textsuperscript{8} Despite the common misconception, Rule 11 is more than a toothless, guiding principle. Rather, it regulates attorney conduct by discouraging them from pursuing “baseless filings” that can bungle proceedings in federal court.\textsuperscript{9} Rule 11’s regulatory might is rooted in the discretion it gives district court judges to levy sanctions.\textsuperscript{10} Rule 11(c) provides that “the court may impose an appropriate sanction on any attorney, law firm, or party that violate[s] the rule or is responsible for the violation.”\textsuperscript{11} The rule encourages thorough pre-filing investigation by attorneys when analyzing their clients’ claims.\textsuperscript{12} To avoid sanctions, lawyers and their clients must limit their pleadings and motions to those reasonably supported by the law.\textsuperscript{13} The threat of sanctions can be “petrifying” for attorneys.\textsuperscript{14} The very existence of Rule 11 is a constant reminder of the problems that fester within the federal civil

\textsuperscript{6} Northern Illinois Telecom, Inc. v. PNC Bank, N.A., 850 F.3d 880, 883 (7th Cir. 2017).
\textsuperscript{7} Id.
\textsuperscript{8} Id. at 883-84.
\textsuperscript{10} Id. at 399.
\textsuperscript{11} FED. R. CIV. P. 11(c).
\textsuperscript{13} Id.
\textsuperscript{14} Id.
litigation system.\textsuperscript{15} It serves as “a model and potent tool” for deterring and sanctioning misconduct during the early stages of litigation.\textsuperscript{16}

There is currently a circuit split among the United States courts of appeals about the procedure attorneys must follow to trigger sanctions against opposing counsel.\textsuperscript{17} A plain reading of the rule suggests that attorneys must serve a motion upon opposing counsel before filing for sanctions with the court pursuant to Rule 11.\textsuperscript{18} This “warning shot” provides targeted parties and their legal counsel an opportunity to seek “safe harbor” by correcting or withdrawing sanctionable pleadings.\textsuperscript{19} The Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits are unified in demanding strict compliance with this procedure.\textsuperscript{20} The Seventh Circuit, however, has developed precedent that mere “substantial compliance” is sufficient.\textsuperscript{21} In \textit{Northern Illinois Telecom, Inc. v. PNC Bank, N.A.}, the Seventh Circuit was presented with an opportunity to clarify its position. Part I of this note discusses the origins of Rule 11 and explores how the rule has transformed since its inception. Part II takes a deeper look at how substantial compliance became controlling precedent in the Seventh Circuit and why other circuits have chosen not to adopt the same approach. Part III discusses the Seventh Circuit’s recent decision in \textit{Northern Illinois Telecom v. PNC Bank, N.A.} Part IV analyzes the decision and explores the arguments for and against the strict and substantial compliance interpretations of Rule 11. And, finally, Part V provides a brief

\begin{thebibliography}{99}
\bibitem{15} \textsc{Georgene M. Vairo}, \textit{Rule 11 Sanctions: Case Law, Perspectives, and Preventive Measures} 2 (Richard G. Johnson ed., 3\textsuperscript{rd} ed. 2004).
\bibitem{16} \textit{Id.} at 2.
\bibitem{17} Matrix IV, Inc. v. Am. Nat’l Bank & Trust Co. of Chicago, 649 F.3d 539, 542 (7th Cir. 2011).
\bibitem{18} Penn, LLC v. Prosper Business Development Corp. 773 F.3d 764, 767 (6th Cir. 2014); Roth v. Green, 466 F.3d 1179, 1192 (10th Cir. 2006).
\bibitem{19} Northern Illinois Telecom, Inc. v. PNC Bank, N.A., 850 F.3d 880, 882 (7th Cir. 2017).
\bibitem{20} \textit{Penn}, 773 F.3d at 768.
\bibitem{21} \textit{Matrix IV}, 649 F.3d at 553 (7th Cir. 2011); Nisenbaum v. Milwaukee County, 333 F.3d 804, 808 (7th Cir. 2003).
\end{thebibliography}
summation of the note and assesses the likely future of the “substantial compliance” rule in the Seventh Circuit.

I. HISTORICAL BACKGROUND

Rule 11, at its simplest, is an effort to ensure that attorneys act responsibly while advancing their clients’ interests.\textsuperscript{22} The threat of sanctions, however, has not always been a factor that attorneys have seriously considered when drafting pleadings.\textsuperscript{23} Over time, a series of amendments to the rule have manipulated the firmness with which courts have applied it. In its original form, Rule 11 was little more than a wispy, rarely applied promise.\textsuperscript{24} But, it quickly evolved into a disruptive armament wielded by litigators after it was amended in 1983.\textsuperscript{25} This radical transformation incited the adoption of a safe harbor requirement\textsuperscript{26} which is still taking shape today.

A. Pre-1983 Amendments

The Federal Rules of Civil Procedure were enacted in 1938.\textsuperscript{27} Rule 11, in both its original and current form, requires attorneys to sign the pleadings, motions, and other filings they submit to the court on behalf of their clients.\textsuperscript{28} The signature is an act of “certification” that is meant to provide the court confidence that attorneys are pursuing legitimate, actionable claims.\textsuperscript{29} From the outset, Rule 11

\begin{itemize}
  \item \textsuperscript{22} Vairo, supra note 15, at 5-6.
  \item \textsuperscript{23} Northern Illinois Telecom, Inc. v. PNC Bank, N.A., 850 F.3d 880, 885 (7th Cir. 2017).
  \item \textsuperscript{24} Vairo, supra note 15, at 9-10.
  \item \textsuperscript{25} \textit{Id.} at 19-20.
  \item \textsuperscript{26} FED. R. CIV. P. 11 advisory committee’s note to 1993 Amendment.
  \item \textsuperscript{27} Vairo, supra note 15, at 5.
  \item \textsuperscript{28} \textit{Id.} at 5-6.
  \item \textsuperscript{29} \textit{Id.}
\end{itemize}
provided federal district courts considerable discretion to impose sanctions on attorneys that violated the rule’s mandate.\(^{30}\)

The debut of Rule 11 was not the first codified attempt to deter attorneys from pursuing frivolous claims.\(^{31}\) As early as the mid-nineteenth century, Judge Joseph Story championed a theory that the adoption of an attorney signing requirement would ensure that lawsuits were well-grounded in facts and the law.\(^{32}\) Rule 24 of the Federal Equity Rules of 1842 embraced Story’s recommendation by requiring pleadings to contain the signature of the presenting attorney.\(^{33}\) Similarly, Rule 11 was not the first attempt to sanction attorney conduct.\(^{34}\) 28 U.S.C. § 1927 allowed judges the discretion to penalize attorneys who were found to have “unreasonably” inflated the cost of litigation.\(^{35}\) Yet in comparison with its predecessors, Rule 11 promised a more direct path for judges to sanction attorneys who advanced claims that were frivolous or brought for another improper purpose, like delay or the inflation of expenses for the opposing party.\(^{36}\) The early supporters of Rule 11 had two goals: first, to create an environment that cultivated honest attorneys; and, second, to “streamline the litigation process.”\(^{37}\)

Rule 11 was ineffective at achieving the idealistic expectations that cultivated it. The primary issue underlying Rule 11’s initial ineffectiveness was that it held attorneys to a good-faith standard.\(^{38}\) Sanctions were only justified if, in the eyes of the judge, the targeted attorney could not muster a “good faith argument” in support of his or

\(^{30}\) Vairo, \textit{supra} note 15, at 5-6.
\(^{31}\) \textit{Id}.
\(^{33}\) \textit{Id}.
\(^{34}\) Vairo, \textit{supra} note 15, at 5-6.
\(^{35}\) \textit{Id}.
\(^{36}\) FED. R. CIV. P. 11 advisory committee’s note to 1983 Amendment.
\(^{37}\) \textit{Id}.
\(^{38}\) Vairo, \textit{supra} note 15, at 7.
her potentially infringing filing. 39 This standard was too subjective and proved to be too flimsy to function as an useful deterrent. 40 Instead, Rule 11 was a source of “considerable confusion” that failed to significantly curtail abuses. 41 There were “only a handful” of decisions that involved Rule 11 sanctions between its enactment in 1938 and 1983. 42

B. 1983 Amendments

Rule 11 was amended for the first time in 1983. 43 With the rule’s shortcomings in mind, the Advisory Committee set out to make the rule a more potent force in preventing litigation abuses by reducing “reluctance” to impose sanctions. 44 The drafters of the revisions took an aggressive stance against attorney misconduct. The Advisory Committee stressed that the courts needed to play a more active role in the “detection” of violations and explicitly encouraged “punishment” of infringing attorneys. 45

Perhaps the most impactful change to Rule 11 was the adoption of a new standard of conduct. 46 The rule, in its original form, was criticized as too “vague and subjective” because its “good-faith” standard tilted the benefit of doubt in favor of infringing parties and attorneys. 47 To cure this perceived flaw, the drafters of the amendment heightened the standard from mere good-faith to the more objective reasonableness under the circumstances standard. 48 The Advisory Committee intended this change to provide judges with a more

40 Vairo, supra note 15, at 7.
41 FED. R. CIV. P. 11 advisory committee’s note to 1983 Amendment.
42 Vairo, supra note 15, at 47.
43 FED. R. CIV. P. 11 advisory committee’s note to 1983 Amendment.
44 Id.
45 Id.
46 Id.
47 Vairo, supra note 15, at 7.
48 FED. R. CIV. P. 11 advisory committee’s note to 1983 Amendment.
objective lens through which to analyze attorney conduct and to broaden the “range of circumstances” that would trigger sanctions.\footnote{FED. R. CIV. P. 11 advisory committee’s note to 1983 Amendment.} Additionally, Rule 11 underwent a series of textual changes that sent the message to judges that they needed to impose sanctions more frequently.\footnote{Id.} First, the drafters included the word “sanctions” in the text of the rule for the first time.\footnote{Id.} The new rule “expressly allowed for the imposition of expenses, including . . . reasonable attorneys’ fees.”\footnote{Vairo, supra note 15, at 11.} This strategic addition solidified a new commitment to penalizing attorneys for violating Rule 11.\footnote{FED. R. CIV. P. 11 advisory committee’s note to 1983 Amendment.} Second, the drafters removed a provision that allowed judges to simply strike improper motions and pleadings.\footnote{Id.} This provision was “confusing” and rarely used.\footnote{Vairo, supra note 15, at 11.} Most importantly, the rule was redrafted to include the phrase “shall impose.”\footnote{Id.} The new version of Rule 11 tasked judges with an affirmative duty to impose sanctions for violations where they once had discretion.\footnote{Id.}

When the 1983 Amendments took effect, some feared that Rule 11 would continue to be ignored, while others argued that it was still too subjective.\footnote{Vairo, supra note 15, at 13.} Others feared that the drastic changes would lead the rule to be aggressively over-applied in unintended ways.\footnote{Id. at 12-15.} In 1990, the United States Supreme Court tackled concerns about Rule 11 sanctions in \textit{Cooter & Gell v. Hartmarx Corp.} In \textit{Cooter & Gell}, the Court considered whether a district court could rightfully impose sanctions on a plaintiff who voluntarily withdrew a frivolous
The Court held that judges were required to impose sanctions even where the filing at issue was voluntarily withdrawn or corrected. The Supreme Court clung to a “plain meaning” interpretation of Rule 11; judges, the Court held, did not have the discretion to waive sanctions. Though the court embraced a black-letter interpretation of Rule 11, it did not hesitate to identify the rule’s shortcomings, noting that it “must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy . . . .”

C. 1993 Amendments

The fear that Rule 11 would be “overused” following the 1983 revisions quickly became a reality. Over 650 Rule 11 hearings were held and recorded between the adoption of the 1983 amendments and December 1987, a substantial increase from the “handful” of decisions recorded in the previous era. The revisions were criticized as an “over-correction.” As Rule 11 began facing harsh criticism, momentum started to build for a new set of amendments. An interim report that highlighted the flaws of the 1983 revisions was compiled. According to the report, Rule 11 chilled attorney creativity, discouraged the pursuit of novel arguments, created substantial delays in proceedings, and was being applied inconsistently by judges. Most notably, Rule 11 was criticized for exacerbating the “contentious and uncooperative behavior” during litigation that the rule was originally intended to prevent.

61 Id. at 398.
62 Id. at 392.
63 Id. at 393.
64 Vairo, supra note 15, at 13.
65 Id. at 47.
66 Northern Illinois Telecom, Inc. v. PNC Bank, N.A., 850 F.3d 880, 885 (7th Cir. 2017).
67 Vairo, supra note 15, at 15.
68 Id. at 14.
69 Id. at 19-20.
enacted to prevent.\textsuperscript{70} The interim report made it clear that there was a need for further revisions.\textsuperscript{71} It showed that only 20\% of judges favored a retreat to the pre-1983 status quo.\textsuperscript{72} The Advisory Committee for the 1993 amendments needed to discover a middle ground. Rule 11 required balance.

The 1993 amendments “intended to remedy problems” that arose with the “interpretation and application of the 1983 revision . . . .”\textsuperscript{73} Specifically, the committee wanted to “place greater constraints on the imposition of sanctions” in order to “reduce the number of motions for sanctions” that were delaying proceedings.\textsuperscript{74} Accordingly, the committee set out to tighten the spigot on the gush of sanctions that were flooding the courts by retreating from the hard line approach it embraced only ten years prior.\textsuperscript{75} Judges were once again granted “significant discretion” in determining whether sanctions were warranted and, if so, how harsh they should be on a case by case basis.\textsuperscript{76} The mandate that judges “shall impose” sanctions was relaxed to an instruction that they “may impose” them.\textsuperscript{77} Ultimately, the committee settled on a softer, more lenient position.\textsuperscript{78} This, it was believed, signaled to judges and attorneys that they should be “less zealous in using Rule 11” during litigation, especially “where there were relatively minor infractions . . . .”\textsuperscript{79}

Further, the revised Rule 11 included a new provision that mandated advance notice of impending sanctions to attorneys that risked facing sanctions before they could be imposed.\textsuperscript{80} This

\textsuperscript{70} Vairo, supra note 15, at 19.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} FED. R. CIV. P. 11 advisory committee’s note to 1993 Amendment.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} FED. R. CIV. P. 11(c).
\textsuperscript{78} Vairo, supra note 15, at 32.
\textsuperscript{79} Id.
\textsuperscript{80} FED. R. CIV. P. 11 advisory committee’s note to 1993 Amendment.
procedural hurdle was added to provide at-risk attorneys an “opportunity to respond” to opposing parties that threatened sanctions.\textsuperscript{81} All “requests for sanctions” required a separate motion to be served on attorneys to warn them that sanctions were being threatened.\textsuperscript{82} This practice, the committee hoped, would provide potentially infringing attorneys a chance to correct or withdraw their pleadings and avoid triggering costly satellite litigation.\textsuperscript{83}

More precisely, the revised Rule 11 required attorneys who intended to pursue sanctions to wait at least 21 days after service before officially filing the motion with the court.\textsuperscript{84} This addition to the Rule was intended to provide a “warning shot” to attorneys who might be in violation of the rule a chance to seek safe harbor.\textsuperscript{85} It, in turn, provided lawyers security form sanctions by giving them an opportunity to re-certify their filings.\textsuperscript{86}

The safe harbor provision was adopted to fulfill the “streamlining purpose originally envisioned by the 1983 architects of Rule 11.”\textsuperscript{87} The new rule imposed a 21 day safe harbor period.\textsuperscript{88} Though this would cause minor delays, it would save time and costs in the aggregate because it allowed attorneys to abandon frivolous claims and avoid triggering even more time consuming and costly satellite litigation.\textsuperscript{89} The 1993 amendment refocused the purpose of Rule 11 as a mechanism for clarifying the issues and merits of the case rather than a mechanism to punish attorneys.\textsuperscript{90} By allowing safe harbor, Rule 11 finally found the appropriate balance needed to effectively combat frivolous motions and pleadings.

\textsuperscript{81} FED. R. CIV. P. 11 advisory committee’s note to 1993 Amendment.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Vairo, supra note 15, at 32.
\textsuperscript{88} FED. R. CIV. P. 11(c).
\textsuperscript{89} FED. R. CIV. P. 11 advisory committee’s note to 1993 Amendment.
\textsuperscript{90} Id.
II. HISTORY OF SUBSTANTIAL COMPLIANCE

The 1993 amendments drew back the “fangs” of Rule 11. After the changes took effect, district courts quickly aligned with the new rule’s “relax[ed]” standards of liability, and the circuit courts began to reinforce that sanctions were again discretionary, not mandatory. The adjustments to the rule were successful at placing new constraints on judge’s ability to impose sanctions. But, the new Rule 11 was not immune to criticism or confusion. Some judges reacted unfavorably to the new safeguards. This distaste materialized in the Seventh Circuit’s unique interpretation of the safe harbor provision.

A. Emergence of Substantial Compliance

In 2003, the Seventh Circuit adopted a novel interpretation of Rule 11 when resolving an appeal of a district court decision that denied sanctions. In *Nisenbaum v. Milwaukee County*, the plaintiff brought a 42 U.S.C.S. § 1983 claim against his government employer for allegedly violating his First and Fourteenth Amendment rights. Nisenbaum, a security supervisor for Milwaukee County, argued that he was improperly stripped of his job as retaliation because he ran for County Clerk. The magistrate judge and the Seventh Circuit agreed that Nisenbaum’s claims were patently frivolous because the county passed a budget that phased out Nisenbaum’s position before he began

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92 Vairo, supra note 15, at 77.
93 Knipe v. Skinner, 19 F.3d 72, 78 (2d Cir. 1994).
94 Vairo, supra note 15, at 77-80.
95 Knipe, 867 F. Supp. at 763 n. 12.
96 Nisenbaum v. Milwaukee County, 333 F.3d 804, 806 (7th Cir. 2003).
97 Id. at 806.
his candidacy.\textsuperscript{98} The Seventh Circuit, however, disagreed with the magistrate judge on whether sanctions were warranted.\textsuperscript{99}

The magistrate judge determined that Nisenbaum’s claim was “frivolous from the get-go” and was sanctionable under Rule 11(c),\textsuperscript{100} but refused to enforce sanctions because the defendants failed to adhere to the procedure required by Rule 11(c)(2) which states that a motion must be served on a party facing sanctions.\textsuperscript{101} Milwaukee County did not serve Nisenbaum with a motion nor did it file a motion with the district court.\textsuperscript{102} Instead, the county simply sent Nisenbaum’s attorney a letter in which it threatened sanctions.\textsuperscript{103} Despite the warning, Nisenbaum’s attorney proceeded with his plaintiff’s claims.\textsuperscript{104}

When explaining the denial of sanctions, the magistrate judge noted that his decision to do so was “technical” because if the defendant provided notice by service of a motion, then sanctions would have been warranted.\textsuperscript{105} The Seventh Circuit disagreed. “A serious request for sanctions is entitled to more than a brushoff,” wrote Circuit Judge Easterbrook.\textsuperscript{106} On review, the Seventh Circuit remanded the case to the court below with instruction that the defendants were “entitled to a decision on the merits of their request for sanctions.”\textsuperscript{107} The court reconciled the lack of procedural compliance with the safe harbor provision by finding that the defendants “complied substantially” with Rule 11(c)(2).\textsuperscript{108} By providing informal notice to Nisenbaum and giving him 21 days to

\textsuperscript{98} Nisenbaum, 333 F.3d at 807.
\textsuperscript{99} Id. at 808.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 811.
\textsuperscript{107} Id. at 808.
\textsuperscript{108} Id.
correct or withdraw his claim, Milwaukee County was compliant with Rule 11.109

The Seventh Circuit has consistently recognized substantial compliance with Rule 11(c) as sufficient grounds for sanctions.110 The court explained the merits of a substantial compliance approach in Matrix IV, Inc. v. American National Bank & Trust Co. of Chicago.111 In Matrix IV, the plaintiff brought a common law fraud claim against the defendant in district court even though a similar fraud claim had already failed in bankruptcy court.112 The district court found against Matrix IV, Inc. (“Matrix”) on the grounds of res judicata and collateral estoppel.113 On appeal, the Seventh Circuit confirmed that the suit was properly dismissed.114 The Seventh Circuit agreed with the district court that sanctions were not warranted in Matrix IV, but did so on different grounds.115

In district court, Matrix was spared the burden of sanctions because the defendant’s method of notice was “procedurally defective.”116 Notice was sent to Matrix in the form of a letter from opposing counsel explicitly threatening sanctions against Matrix if the claims against the defendant were not dismissed.117 The letter was sent almost two years prior to the eventual dismissal of the claim, and the defendants, in turn, moved for sanctions three weeks after the

109 Nisenbaum, 333 F.3d at 808.
110 Northern Illinois Telecom, Inc. v. PNC Bank, N.A., 850 F.3d 880, 886-87 (7th Cir. 2017); Matrix IV, Inc. v. Am. Nat’l Bank & Trust Co. of Chicago, 649 F.3d 539, 552 (7th Cir. 2011); Nisenbaum, 333 F.3d at 808.
111 Matrix IV, 649 F.3d at 552; see also Fabriko Acquisition Corp v. Prokos, 536 F.3d 605, 610 (7th Cir. 2003) (discussing that an informal letter is sufficient to start the “21-day window to withdraw or correct the claim” so long as a formal motion is submitted to the court to trigger sanctions).
112 Matrix IV, 649 F.3d at 541-42.
113 Id. at 542.
114 Id.
115 Id. at 552.
116 Id.
117 Id.
dismissal.\textsuperscript{118} Though the defendants did not serve Matrix with an official motion at least 21 days prior to filing for sanctions, the Seventh Circuit ruled for the defendants, stating “motions for sanctions are permissible so long as the moving party substantially complies with Rule 11’s safe harbor requirement.”\textsuperscript{119} In this case, like in \textit{Nisenbaum}, the Seventh Circuit held that the method of notice was sufficient to serve as proper notice and trigger sanctions.\textsuperscript{120} Though the court ultimately agreed with the district court that sanctions were not warranted, the decision turned on substantive rather than procedural grounds.\textsuperscript{121}

\textit{B. Opposition to Substantial Compliance}

The Seventh Circuit is currently the only circuit that recognizes substantial compliance with Rule 11(c)(2).\textsuperscript{122} It is the only circuit to recognize that proper notice can come in the form of an informal letter.\textsuperscript{123} Most other circuits require strict compliance based on the plain language of the rule, but some circuits have not yet addressed this question.\textsuperscript{124}

Substantial compliance has been met by other circuits with disapproval. In \textit{Roth v. Green}, 466 F.3d 1179 (2006), the Tenth Circuit explicitly rejected and openly criticized the substantial compliance test.\textsuperscript{125} There, the plaintiff alleged that a “stop and search” performed by police officers violated his Fourth Amendment rights.\textsuperscript{126} The court

\begin{thebibliography}{9}
\bibitem{118} Id.
\bibitem{119} Matrix IV, Inc. v. Am. Nat’l Bank & Trust Co. of Chicago, 649 F.3d 539, 552 (7th Cir. 2011).
\bibitem{120} Id.
\bibitem{121} Id.
\bibitem{122} Id.
\bibitem{123} Northern Illinois Telecom, Inc. v. PNC Bank, N.A., 850 F.3d 880, 881 (7th Cir. 2017).
\bibitem{124} Id.
\bibitem{125} Id.
\bibitem{126} Roth v. Green, 466 F.3d 1179, 1182 (10th Cir. 2006).
\end{thebibliography}
held that the plaintiff failed to establish a lawsuit under 42 U.S.C.S. § 1983.\textsuperscript{127} Defense counsel sent informal warning letters more than 21 days before filing for Rule 11 sanctions with the court,\textsuperscript{128} yet defense counsel never officially served the plaintiff’s with a motion in compliance with Rule 11(c)(2).\textsuperscript{129} In its decision, the \textit{Roth} court considered whether substantial compliance with Rule 11 could be enough to impose sanctions, but ultimately sided against the Seventh Circuit by determining that strict compliance with Rule 11(c)(2) was necessary.\textsuperscript{130} It found \textit{Nisenbaum} to be “unpersuasive . . . because it contain[ed] no analysis of the language of Rule 11(c)(1)(A) or the Advisory Committee Notes, cite[d] to no authority for its holding, and indeed [was] the only published circuit decision reaching such a conclusion.”\textsuperscript{131}

Similarly, \textit{Penn, LLC v. Prosper Bus. Dev. Corp.}, a Sixth Circuit case, also explicitly rejected and openly criticized the substantial compliance test, instead favoring strict compliance and a plain reading interpretation of Rule 11.\textsuperscript{132} It roundly criticized the Seventh Circuit’s decision in \textit{Nisenbaum} for its failure to “address any of the textual or policy concerns . . . and other circuits roundly criticize the decision’s cursory reasoning.”\textsuperscript{133}

III. \textsc{Northern Illinois Telecom, Inc. v. PNC Bank, N.A.}

Recently, the Seventh Circuit was presented an opportunity to review its stance on Rule 11(c)(2). \textit{Northern Illinois Telecom, Inc. v. PNC Bank, N.A.} presented the question whether informal letters that threaten sanctions can substantially comply with the safe harbor

\begin{align*}
\textsuperscript{127} & \textit{Id.} \\
\textsuperscript{128} & \textit{Roth}, 466 F.3d at 1185. \\
\textsuperscript{129} & \textit{Id.} \\
\textsuperscript{130} & \textit{Id.} at 1193. \\
\textsuperscript{131} & \textit{Id.} \\
\textsuperscript{132} & \textit{Penn, LLC v. Prosper Business Development Corp.}, 773 F.3d 764, 768 (6th Cir. 2014). \\
\textsuperscript{133} & \textit{Id.} at 768.
\end{align*}
provision when the letters do not explicitly specify that plaintiff’s counsel has 21 days to correct or withdraw the pleadings and when defense counsel neglects to serve the targeted party with a formal motion.\textsuperscript{134} Ultimately, the court held that letters threatening sanctions do not substantially comply with Rule 11(c)(2) if they do not expressly offer 21 days safe harbor to attorneys.\textsuperscript{135}

\textit{A. Facts of the Case}

In 2007, MidAmerica Bank merged with National City Bank.\textsuperscript{136} As part of the transition, Northern Illinois Telecom, Inc. (NITEL) was subcontracted to outfit four branches owned by these banks in the Chicagoland area with communications cabling.\textsuperscript{137} The contractor for the project, Nexxtworks, determined that there were “quality problems” with the installation at the four branches and withheld a portion of the payment promised to NITEL for failure to perform.\textsuperscript{138} As a result, other subcontractors needed to be hired to correct and complete NITEL’s work.\textsuperscript{139} In 2009, Nexxtworks filed for bankruptcy and listed the contested amount as disputed debt.\textsuperscript{140} NITEL sought to recover $115,000 in bankruptcy court, but the claim was dismissed because NITEL missed the deadline.\textsuperscript{141} In the interim, each of the bank branches where the work was performed was acquired by PNC Bank, N.A. (PNC Bank).\textsuperscript{142}

\textsuperscript{134} \textit{NITEL}, 850 F.3d at 881-82.
\textsuperscript{135} \textit{Id.} at 888.
\textsuperscript{136} Northern Illinois Telecom, Inc. v. PNC Bank, NA (NITEL I), No. 12 C 2372, 2014 WL 4244069 at *2 (N.D.Ill. Aug. 27, 2014).
\textsuperscript{137} \textit{Id.} at *1.
\textsuperscript{138} Northern Illinois Telecom, Inc. v. PNC Bank, N.A., 850 F.3d 880, 882 (7th Cir. 2017).
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.}
In 2012, NITEL filed a breach of contract claim against PNC Bank seeking to recover $81,300 for the work performed plus fees and costs. PNC Bank, as defendant, successfully removed the case from state court to the Northern District of Illinois, Eastern Division because there was complete diversity of citizenship between the parties and the amount in controversy was greater than $75,000. PNC Bank moved for summary judgment arguing that neither it, nor any of the bank branches it acquired, actually entered into a contract with NITEL. The contracts at issue, PNC Bank contended, were between NITEL and Nexxtworks. District Judge Amy J. St. Eve agreed finding that NITEL “failed to submit any evidence that a contract existed” with PNC Bank or its predecessors. Accordingly, summary judgment was granted for PNC Bank because NITEL failed to establish a “genuine issue of material fact.”

The district court’s grant of summary judgment did not conclude litigation, however. In a footnote, District Judge St. Eve noted that that defense counsel “might seek sanctions under Rule 11.” During discovery, PNC Bank’s attorney, Jim Crowley, threatened sanctions against NITEL and plaintiff’s counsel, Robert Riffner, twice. On July 31, 2012, Crowley wrote his first letter to Riffner. The letter explained that it was apparent that NITEL never contracted with PNC Bank or any of its predecessors and unless the complaint was dismissed the defendants would pursue “sanctions under Federal Rule

\[143\] Id.
\[144\] NITEL, 850 F.3d at 882.
\[146\] Id. at *4.
\[147\] Id. at *5.
\[148\] Id.
\[149\] Id.
\[150\] Id. at *5 n.3.
\[151\] Id. at *1-2.
\[152\] Id. at *1.
11 against NITEL and your firm . . . “ The defendant filed a motion to compel discovery. In March 2013, the magistrate judge who presided over the hearing determined that NITEL had the burden of proof to provide evidence that it entered into a contract with PNC Bank. On April 2, 2013, Crowley wrote a second letter warning Riffner that defense counsel intended to move for summary judgment and Rule 11 sanctions. The letter alleged that the claim was “frivolous” and, for that reason, Riffner never should have accepted the case. Riffner did not respond to either letter.

District Judge Robert Blakey of the Northern District of Illinois held that sanctions were warranted on both substantive and procedural grounds. First, on the merits, the claim was clearly frivolous. NITEL maintained throughout the litigation that they contracted with PNC, but failed to provide even a shred of useful evidence supporting the claim. Second, in terms of procedure, PNC gave sufficient notice to NITEL because it substantially complied with Rule 11(c)(2). Summary judgment was granted on August 27, 2014, and on October 21, 2014 PNC Bank filed a motion for Rule 11 sanctions against NITEL and Riffner. Crowley warned Riffner twice, first in 2012, and again on April 2, 2013, thereby providing Riffner far more time than the 21 days of safe harbor demanded under

153 Id.
154 Id. at *2.
156 Id. at *2.
157 Id.
158 Id. *1-2.
159 Id. at *5.
160 Id. at *6.
161 Id. at *9.
162 Id. at *6.
163 Id.
164 Id. at *4.
165 Id. at *3.
Rule 11(c)(2). Crowley, however, never served NITEL with a formal motion threatening sanctions. Further, Crowley did not specify in either letter how much time NITEL had to withdraw or correct its pleadings before he would seek to pursue sanctions. But according to Seventh Circuit precedent “substantial compliance may be enough.”

**B. Hamilton’s Majority**

On appeal, the Seventh Circuit reversed the district court’s decision imposing sanctions. According to Circuit Judge Hamilton, who wrote for the majority, the sanctions were improper even though the Seventh Circuit is uniquely lenient when assessing compliance with Rule 11(c)(2). The court held that the letters sent by PNC Bank’s counsel to Riffner fell “far short” of substantial compliance with the safe harbor requirement.

Riffner appealed on both substantive and procedural grounds. He needed to establish an abuse of discretion by the district court judge on either basis to reverse the district court’s decision. First, the court confidently affirmed that the sanctions were substantively justified. NITEL’s position that PNC Bank was liable for breach of contract was “objectively baseless” because no contract ever existed between the parties. The claim was frivolous and, thus, violated Rule 11(b)(2).

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166 Northern Illinois Telecom, Inc. v. PNC Bank, N.A., 850 F.3d 880, 886 (7th Cir. 2017).
167 Id. at 889.
169 NITEL, 850 F.3d at 888.
170 Id.
171 Id. at *883.
172 Id.
173 Id.
174 Id.
175 Id.
The court then probed the procedural merits of Riffner’s appeal. In the opinion, Hamilton first addressed whether PNC Bank strictly complied with Rule 11. The two letters sent from PNC Bank’s attorney to Riffner “simply did not comply” with Rule 11(c)(2). The rule requires the party seeking sanctions to serve the targeted party with a motion threatening sanctions. The threatening party then must wait at least 21 days after providing notice of impending sanctions before filing the motion with the court to allow the targeted party an opportunity to correct or withdraw the contested filing. PNC Bank never served NITEL or Riffner with a motion. In most circuits, the analysis would have ended here.

But, in accordance with circuit precedent, the court then analyzed whether the two letters that PNC Bank’s attorney sent to Riffner substantially complied with Rule 11’s safe harbor requirement. Though the district court ruled that PNC Bank’s two “settlement offers” sent to Riffner were “sufficient warning shots” to establish substantial compliance with Rule 11, the Seventh Circuit disagreed. According to Hamilton, “[t]he Rule 11 threats did not transform PNC Bank’s settlement offers into communications that substantially complied” with Rule 11’s safe harbor requirement. Though he did not provide detail, Hamilton indicated that to be substantially compliant with Rule 11, a letter that threatens sanctions must establish that the “opposing party is serious” and also specify “when the 21-day safe-harbor clock starts to run.”

Hamilton did not stop at reversing the district court’s decision to sanction Riffner. Though the court decided this case within the

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176 NITEL, 850 F.3d at 886.
177 Id.
178 Id. at 885.
179 Id.
180 Id. at 886.
181 Id. at 886-87.
182 Id.
183 Id. at 888.
184 Id., at 886.
framework of existing Seventh Circuit precedent, Hamilton was candid about his reservations against the substantial compliance interpretation of Rule 11(c)(2) moving forward. The final footnote of the decision warned that those who “rely on a theory of substantial compliance should understand that, at least in the present landscape, they are inviting possible en banc and/or Supreme Court review of the question.”

C. Posner’s Dissent

Former Circuit Judge Posner responded with a brief, scathing dissent that criticized the majority opinion and disparaged Riffner. Posner scorned at his colleague’s hesitancy to “punish misbehaving lawyers . . . .” Riffner was a “boor”, Posner accused. His pursuit of such a hopelessly frivolous claim, and his failure to respond to multiple settlement offers presented by PNC Bank justified the imposition of sanctions.

Posner felt that the case presented a “good example of substantial compliance” and, therefore, he would have affirmed the district court judge’s decision to impose sanctions. Posner argued that the letters sent by PNC Bank demanding withdrawal of the lawsuit were sufficient to provide Riffner notice of impending sanctions. Though PNC failed to serve Riffner with a motion as required by Rule 11(c)(2), the letters “were the equivalent of Rule 11 motions.”

185 NITEL, 850 F.3d at 889 n.5.
186 NITEL, 850 F.3d at 889 (Posner, J., dissenting).
187 Id.
188 Id.
189 Id.
190 Id.
IV. ANALYSIS AND COMMENTARY

In *NITEL*, the Seventh Circuit had the chance clear up the confusion surrounding its unique, controversial interpretation of the safe harbor provision. But, ultimately, it balked at the opportunity.

A. *NITEL*’s Shortcomings

The court could have overturned past precedent. The Seventh Circuit has subscribed to a substantial compliance interpretation of Rule 11 since *Nisenbaum*. A decision to overturn the court’s current commitment to substantial compliance would have aligned the Seventh Circuit with every other circuit that has addressed this issue. To do so, the court could have determined that the letters sent from Crowley to Riffner were in fact substantially compliant with Rule 11(c)(2), but that substantial compliance is, and always has been, an improper reading of the rule.

The letters at issue in *NITEL* seemed to be substantially compliant with Rule 11(c)(2). The first letter from Crowley to Riffner “offered to settle the matter in exchange for a dismissal order and a check to cover PNC’s attorney fees and costs...” A failure to comply, Crowley threatened, would prompt PNC to seek “sanctions under Federal Rule 11...” This letter was sent to Riffner on July 31, 2012. Crowley sent another letter that was functionally the same as the first one on April 2, 2013. The letters explicitly threatened that Rule 11 sanctions would be pursued if the NITEL did not withdraw or correct

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191 *NITEL*, 850 F.3d at 881.
192 Penn, LLC v. Prosper Business Development Corp. 773 F.3d 764, 768 (6th Cir. 2014).
194 Id.
195 Id.
196 Id. at *2.
its pleading. NITEL had more than 21 days to withdraw or correct its pleading. PNC Bank moved for summary judgment on September 8, 2013 and filed a motion for Rule 11 sanctions on October 21, 2014. More than two years elapsed between the first explicit, but informal, threat of sanctions and PNC Bank’s motion for summary judgment. Nonetheless, the court held that the procedure fell “far short” of substantial compliance.

Alternatively, the court could have doubled down on its commitment to substantial compliance. Based on the explicit threats for Rule 11 sanctions communicated in Crowley’s letters and the extensive time allowed by Crowley before moving for summary judgment and sanctions, the court could have affirmed the district court’s decision by holding that the letters were substantially compliant with Rule 11(c)(2). By specifically identifying why Crowley’s letters were substantially compliant with the Rule, the court could have provided the clarity that the substantial compliance interpretation has always lacked. Additionally, the court could have laid out its policy arguments supporting the merits of the substantial compliance interpretation. NITEL provided the Seventh Circuit an opportunity to supply the justification for substantial compliance it has always neglected to provide.

Instead, the court settled on a limited, narrow holding. The court reversed the district court’s ruling, holding that Crowley’s informal letters to Riffner were not substantially compliant with Rule 11(c)(2). By reversing, the court affirmed circuit precedent. Substantial compliance is still the controlling theory in the Seventh Circuit. Of course, providing narrow decisions is within the court’s right. But in this case, the Seventh Circuit missed an opportunity to explain the merits of substantial compliance.

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197 Id.
198 Id. at *3.
199 Northern Illinois Telecom, Inc. v. PNC Bank, N.A., 850 F.3d 880, 883 (7th Cir. 2017).
200 Id. at 888.
201 Id.
By neglecting to clarify why Crowley’s letters fell short of substantial compliance, it missed an important opportunity to provide guidance to litigating attorneys and district courts judges tasked with enforcing the standard. The court’s sheepishness in NITEL generated confusion for district court judges. Recently in Knapp v. Evgeros, Inc., Judge Feinerman of the Northern District of Illinois, Eastern Division highlighted the mixed message that the Seventh Circuit sent to the lower courts with NITEL. Citing Matrix IV, Judge Fienerman noted that “a letter informing the opposing party of the intent to seek sanctions and the basis for the imposition of sanctions . . . is sufficient for Rule 11 purposes.” But, the Seventh Circuit appeared to be “within a cat’s whisker of overruling [substantial compliance]” in NITEL. Since substantial compliance remains precedent, the judge concluded that he “must follow it until the Seventh Circuit says otherwise.”

Knapp proves that district courts within the Seventh Circuit are being held hostage by the Seventh Circuit’s reluctance to clarify its substantial compliance doctrine. There are no clear benchmarks that separate letters that are substantially compliant with Rule 11 from those that fall short. District courts have been left to piece together sparse decisions like Nisenbaum and NITEL and are struggling to find consistency. The district courts, as a result, seem to be creating their own tests. Knapp proposed that Rule 11 sanctions can be sought “only on the grounds set forth in the letter.” The court “may not consider any grounds set forth in the motion that were not articulated in the letter.” In Momo Enters., LLC v. Banco Popular of N. Am., the Northern District of Illinois decided that substantial compliance is met where parties are provided “an opportunity to correct their purported...

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203 Id. at *2.
204 Id.
205 Id. at *5.
206 Id. at *6.
errors. But the district court, much like the Seventh Circuit, struggled to provide any criteria for what an “opportunity to correct” involves.

Judge Hamilton’s warning that reliance on a substantial compliance is inviting “possible en banc and/or Supreme Court” review indicates that the issue is ripe for a deeper look. Between the slanted circuit split and the lack of guidance the Seventh Circuit has provided to the district courts on this issue, substantial compliance will likely come under review again.

B. The Future of Rule 11(c)(2) in the Seventh Circuit

If the Seventh Circuit is presented with a case that allows it to address the merits of substantial compliance in the future, it will need to consider a variety of factors in deciding the fate of the substantial compliance rule.

1. The Case for Strict Compliance

One factor tilting against substantial compliance is its failure to adhere to the plain language requirements of Rule 11. It is undeniable, as many circuits have pointed out, that Rule 11(c)(2) requires motion a motion to be served in order to trigger the 21 day safe harbor requirement.

207 Momo Enters., LLC v. Banco Popular of N. Am., No. 15-cv-11074, 2017 U.S. Dist. LEXIS 161827 at *8-9 (N.D.Ill. Sept. 30, 2017) (holding that a party’s motion for sanctions did not substantially comply with Rule 11 when it was served 10 months before moving for sanctions after summary judgment).

208 Id.

209 NITEL, 850 F.3d at 889 n.5.

210 See Penn, LLC v. Prosper Business Development Corp. 773 F.3d 764, 768 (6th Cir. 2014) (discussing the breadth of the circuit split against substantial compliance and identifying cases in the 2nd, 3rd, 4th, 5th, 8th, 9th, and 10th circuits that have held informal letters without a motion are insufficient to trigger the 21 day safe harbor period because they do not strictly comply with Rule 11).
Further, a commitment to substantial compliance, especially a poorly defined version of substantial compliance, can increase the use of abusive litigation tactics by attorneys. The dramatic increase in sanctions in the 1980’s highlighted the downside of a legal system that allowed frequent, burdensome sanctioning.\textsuperscript{211} The 1983 version of the Rule 11 allowed sanctions to become “a favorite weapon in litigators’ briefcases, often used and even more often brandished to threaten.”\textsuperscript{212} Attorneys are more likely to threaten sanctions as a litigation tactic if the threat can be executed at no cost through an informal letter.

Other reasons to overturn substantial compliance precedent align with the arguments that motivated the 1993 Amendments to Rule 11. Arguably, the substantial compliance rule is more likely to chill attorney creativity and zealousness in pursuing novel arguments.\textsuperscript{213} If the ease of triggering sanctions is increased, attorneys may be more hesitant to commit to some claims and be more cautious in pursuing to some arguments. This effect would be compounded if substantial compliance rests on uneasy footing with unclear criteria. Additionally, a commitment to substantial compliance could generate more satellite litigation than adherence to strict compliance of Rule 11. In the long term, informal notice of sanctions will likely generate more Rule 11 hearings which can be costly and time consuming.

A key argument against strict compliance is that it is unnecessarily formalistic and costly.\textsuperscript{214} Filing a motion to trigger the safe harbor requirement does increase the financial burden to the party at the wrong end of an improper filing. Arguably, there is a financial disincentive for aggrieved parties to move for sanctions. The court reserves the right, however, to demand a “for cause” showing of a proper purpose if it so wishes.\textsuperscript{215} On the court's own initiative, it may “order an attorney, law firm, or party to show cause why conduct . . .

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{211} \textit{Fed. R. Civ. P. 11} advisory committee’s note to 1993 Amendment.
\item \textsuperscript{212} \textit{NITEL}, 850 F.3d at 885.
\item \textsuperscript{213} Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990).
\item \textsuperscript{214} \textit{NITEL}, 850 F.3d at 887; Nisenbaum v. Milwaukee County, 333 F.3d 804, 808 (7th Cir. 2003).
\item \textsuperscript{215} \textit{Fed. R. Civ. P. 11(c)(3)}.
\end{itemize}
\end{footnotesize}
has not violated Rule 11(b).” The court can enact sanctions sua sponte if it so desires. Therefore, an aggrieved party may not need to pay the costs for a motion where a filing is particularly egregious. Additionally, an aggrieved party that is confident that an opposing party’s filing is improper will be reimbursed if sanctions are determined to be warranted by the district court judge. The court has the discretion to “award to the prevailing party the reasonable expenses, including attorney’s fees, incurred” for a Rule 11 hearing.

2. The Case for Substantial Compliance

There seems to be some merit behind substantial compliance once the plain meaning of Rule 11(c)(2) is set aside. According to the Rule 11(c)(1), “[i]f, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction. . . .” If looking simply at the general mandate of Rule 11, substantial compliance may be sufficient.

One of the most persuasive arguments against the strict compliance interpretation of Rule 11 is the inherent conflict it creates with Federal Rule of Civil Procedure 1. Rule 1 defines the scope and purpose of the Federal Rules of Civil Procedure. The rules, it sets forth, “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” Rule 11 contradicts

216 Id.
217 Douglas R. Richmond, Alternative Sanctions in Litigation, 47 N.M. L. Rev. 2019, 215-16 (2017) (discussing the court’s power to impose sanctions on its own initiative, which requires a higher standard for sanctions, but reduces the risk that attorneys will bring claims with an improper purpose knowing opposing party might be unwilling to undertake extra costs).
218 Id.
219 FED. R. CIV. P. 11(b)(3).
220 FED. R. CIV. P. 11(b)(3).
221 FED. R. CIV. P. 11(c)(1).
222 FED. R. CIV. P. 1.
223 Id.
Rule 1. The rules should be administered to ensure “speedy” proceedings.\textsuperscript{224} By requiring 21 days safe harbor before allowing a motion for sanctions to be filed, it artificially slows down the proceedings for at least three weeks. Another area of contradiction is the instruction that the rules should be construed to ensure that proceedings are “inexpensive.”\textsuperscript{225} Strict compliance with Rule 11 increases the financial demand on the threatening party. By requiring an official motion, Rule 11 increases attorney fees and filing costs for the party who is being wronged. Substantial compliance theory is consistent with Rule 1. In comparison, strict compliance is arguably unnecessarily formalistic and contrary to the scope and purpose of the Federal Rules of Civil Procedure.

Though the Rule 11(c)(2) is widely accepted and often celebrated, it is not without flaws. One of the main arguments against the safe harbor provision is that it increases short-term costs and burdens on the aggrieved party. The safe harbor provision provides attorneys a second chance at recertification that was previously unprecedented. Additionally, the security provided by the safe harbor requirement may reduce the quality of attorney pleadings and motions. Attorneys may be more cavalier when presenting filings to the court. They may be more willing to take a risk, knowing that they can retreat if the filing is challenged by the opposing party. By reducing the threat of sanctions, attorneys may be less likely to conduct reasonable inquiry into their clients’ claims, which is a core facet of Rule 11.

V. CONCLUSION

The outstanding question that remains for the Seventh Circuit to address is whether its substantial compliance interpretation can be crafted in a way that avoids the ills sought to be addressed by the 1983 Amendments. It is unclear whether there is a middle ground between the Seventh Circuit’s poorly supported substantial compliance interpretation and Rule 11(c)(2). Notably, substantial

\textsuperscript{224} Id.
\textsuperscript{225} Id.
compliance is not mere or minimal compliance. The outcomes in *Matrix* and *NTEL* show that not every party that moves for sanctions will be successful. Substantial compliance is still a relatively high bar.

But, all in all, it is important to remember that the key goal for Rule 11 is deterrence, not punishment.²²⁶ The evolution of Rule 11 conforms that sanctions are not meant to be punitive. The arguments in support of the Seventh Circuit’s substantial compliance interpretation of Rule 11(c)(2) are not persuasive enough to ignore the plain language of the rule that says a motion must be served on the opposing party. The emergence of a drastic circuit split and the Seventh Circuit’s hesitance to clearly define what exactly substantial compliance with Rule 11(c)(2) should look like do not bode well for substantial compliance’s future. The legal system does not often allow second chances, but Rule 11 is an important exception. Rule 11 sanctions exist to enhance the quality of pleadings, motions, and other papers. A softer, more flexible rule that allows for a warning shot and safe harbor is more consistent with the intent and purpose of the rule than the alternative.

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²²⁶ Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990); FED. R. CIV. P. 11 advisory committee’s note to 1993 Amendment.
THE “ANIMUS” BRIEFS:
ATTACKS ON THE SEVENTH CIRCUIT’S SOUND
ANALYSIS OF TRANSGENDER BATHROOM
RIGHTS IN PUBLIC SCHOOLS

BRENNAN B. HUTSON *


INTRODUCTION

The Seventh Circuit recently granted a preliminary injunction to permit a transgender high school student to use the bathroom in accordance with his gender identity, striking down the school district’s unwritten sex-based bathroom policy.1 In doing so, the Seventh Circuit has created the nation’s only firm sanctuary from bathroom discrimination for transgender students.

The school district petitioned for a writ of certiorari to the Supreme Court of the United States.2 The amicus briefs in support of

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2 Id.
3 In the intervening time between writing and publishing this Comment, Ashton graduated from high school and the Kenosha School District has settled the matter with Ashton Whitaker for $800,000.00. See Fortin, Jacey, Transgender Student’s Discrimination Suit is Settled for $800,000.00, NEW YORK TIMES (Jan 10, 2018) https://www.nytimes.com/2018/01/10/us/transgender-wisconsin-school-lawsuit.html.
the school district’s petition appeal to speculative fear and misrepresent the established law upon which the Seventh Circuit relied in reaching its pro-transgender decision. Likewise, the Supreme Court of the United States, the Department of Justice, and the Department of Education have all expressed early indications of hostility to transgender discrimination protections.\(^4\)

Part I of this Comment lays a foundation of necessary contextual information for understanding transgender rights. It also explains various terms essential to analysis of transgender issues and discusses problems transgender individuals face on a routine basis.\(^5\) Part II presents the legal context in which transgender bathroom rights in public schools arise, including relevant statutes and subsequent judicial precedent. Part III delves into the Seventh Circuit’s grant of injunction in favor of a transgender high school student in *Whitaker Ex. Rel. Whitaker v. Kenosha School District*, barring the school district from enforcing its unwritten sex-classification bathroom policy.\(^6\) Part IV discusses the movement against transgender rights,

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5 This Comment recognizes that gender and sexuality are fluid concepts that occur on a spectrum, and human beings often do not fit neatly into one category. See *The Kinsey Scale*, KINSEY INSTITUTE OF INDIANA UNIVERSITY, https://www.kinseyinstitute.org/research/publications/kinsey-scale.php (last accessed Nov. 21, 2017).

6 *Whitaker*, 858 F.3d at 1034.
specifically focusing on the amicus briefs submitted in favor of the Kenosha School District’s writ of certiorari to the Supreme Court of the United States. Finally, this Comment concludes by arguing that the Seventh Circuit’s analysis of transgender issues is the only appropriate analysis under existing law, urges the Supreme Court and other courts to adopt the Seventh Circuit’s reasoning, and further argues that the arguments levied in the amicus briefs are predominantly rooted in animus, not sound legal analysis.

I. WHAT IS A TRANSGENDER PERSON?

“Transgender” is “an umbrella term for person whose gender identity or expression (masculine, feminine, other) is different from their sex (male, female) at birth.” Understanding the distinction between “sex” and “gender identity” is essential to understanding transgendered people. “Sex” refers to the biological DNA makeup of a human being that determines that human’s reproductive organs. Over 99% of humans are born with chromosomes and sex organs that are either male or female. This binary is present in nearly all mammals. Essentially, sex is an objective measure of whether an individual has reproductive organs with sperm that can fertilize eggs during the reproductive process (male), or sex organs with eggs that can be fertilized during the reproductive process (female).

Gender, by contrast, refers to societal and cultural expectations of individuals based on his or her sex. This concept is succinctly illustrated by the history of clothing for young children in the United States. An 1884 photograph of President Franklin Delano Roosevelt as a toddler shows the young boy with: (1) long, curly locks of hair; (2) a knee-length pink dress; (3) an ornate frilly hat with a ribbon on it; and (4) Mary Jane shoes with calf-high socks. The social convention in 1884 expected young boys to wear dresses until age 6 or 7, which was the time of their first haircut. This trend lasted for some time; in June of 1918, an article from “Earnshaw’s Infants’ Department Store” explained that “the generally accepted rule is pink for the boys, and blue for the girls.” Over time, that trend switched. American culture now widely accepts that pink clothing and accessories are appropriate for female babies and blue for male babies. This assignment is so engrained in the culture that a 2017 Buick Encore commercial features a woman going to a baby shower with a pink cake and subsequently rushing around town trying to get a blue cake because she learned last-minute that the baby was a male.

This arbitrary switch in males’ baby clothing from pink to blue is a perfect example of how society’s own stereotypes about sex assignment are purely social in construction. Baby males and baby females do not choose their clothing and nothing about the two colors is innately tied to sex organs. Yet baby males are overwhelmingly dressed in blue while baby females are overwhelmingly dressed in pink. Thus, this color assignment exists purely because of external societal pressures.

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14 Id.
15 Id.
When children grow up, these stereotypes based on sex evolve: male children are often expected to wear short hair, play sports, wrestle with other males, or play with toy vehicles and army figures. By contrast, female children are expected to be dainty and gentle, wear dresses, or play with dolls. Adult males are often expected to be rough, strong, short-haired, independent, and aggressive; adult females are often expected to be submissive, gentle, small, friendly, and pretty. These expectations (or stereotypes) may aptly apply to many males and females, but of course society is full of females who are rough, strong, short-haired, independent and aggressive (and vice versa). The discrepancy between societal expectations on the basis of sex and each individual’s desire to embrace those expectations creates a vast, fluid gender identity scale.

“Gender identity” refers to an individual’s own internal understanding of one’s own gender. 17 “Gender expression” is a term “used to describe one’s outward presentation of their gender.”18 A male adult who internally feels more aligned with society’s expectations of female adults may take steps to transition from a man to a woman by wearing clothing, makeup, jewelry, shoes, hair products, undergarments, and fingernail accessories expected of female adults.

A transgender person is a person whose sex is different from their gender identity.19 Transgender people face a litany of daily struggles. In addition to society’s direct mistreatment of transgender people for being different, such as staring or harassing,20 transgender people are forced to wrestle with the decision about where to use the bathroom in public multiple times per day. Because buildings in the United States

18 Id.
are designed to have bathrooms segregated by sex, transgender individuals are routinely forced into choosing which bathroom is appropriate. A female who identifies as a man, who may have had breast reduction surgery and years of hormone therapy causing a lower voice and more body and facial hair, typically feels more comfortable in the bathroom with other low-voiced, bearded people without breasts. For transgender individuals, going to the bathroom in accordance with gender identity is a vital aspect of transition.

In 2016, North Carolina passed a law banning cities from allowing transgender individuals to use public bathrooms in accordance with gender identity.\(^{21}\) Sixteen other states considered legislation restricting bathroom access to transgender people.\(^{22}\) These efforts to prevent transgender individuals from using bathrooms in accordance with their gender identity is indicative of conservative social pressures against transgender rights. A petition to boycott Target retail stores gathered over 1.5 million signatures after the store announced that it would permit transgender individuals to use the bathroom of their gender identity.\(^{23}\) The petition argues that the rule allows men to “simply say he ‘feels like a woman today’ and enter the women’s restroom”; it goes on to assert that such a policy “is exactly how sexual predators get access to their victims.”\(^{24}\) This animus against transgender people attempting to use the bathroom of their gender identity, or perhaps merely wanton disregard for the rights of transgender people in lieu of defending from the specter of sexual predators, has trickled down into public schools. One of those public


\(^{23}\) Sign the Boycott Target Pledge! AMERICAN FAMILY ASSOCIATION April 20, 2016), https://www.afa.net/activism/action-alerts/2016/04/sign-the-boycott-target-pledge/

\(^{24}\) Id.
schools is in the Kenosha Unified School District in Wisconsin, where transgender student Ashton Whitaker was subjected to his school’s unwritten rule that students must use the bathroom of their sex organs and not their gender identity.25

II. THE EVOLUTION OF TRANSGENDER RIGHTS

Ashton Whitaker brought suit against the school district under Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681, et seq., (“Title IX”) and the Equal Protections Clause of the Fourteenth Amendment of the United States Constitution.26 While some states have laws that may protect or restrict transgender rights, this Comment limits discussion to Title IX and the Equal Protections Clause in the context of transgender discrimination.

A. Title IX Generally

Title IX of the Education Amendments Act of 1972 was enacted only eight years after the Civil Rights Act of 1964. The Civil Rights Act spurred unprecedented workforce participation by women, who subsequently faced a significant earnings gap compared to male counterparts.27 The public began to realize that equal opportunity in the workplace did little help to women who had unequal opportunity in the education system.28 To remedy this problem, Congress passed Title IX, which prohibited sex discrimination in any school receiving federal money.29

Title IX provides, in part, that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied

26 Id. at 1042.
27 Title IX Legislative History DEPARTMENT OF JUSTICE, (last visited Nov. 21, 2017), https://www.justice.gov/crt/title-ix#II.
28 Id.
the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Public schools, therefore, are prohibited from subjecting any person to separate or different rules, sanctions, or treatment on the basis of sex. Title IX has been used, among other things, to prevent discrimination against pregnant women, inequitable funding of women’s athletic programs, and improper policies regarding sexual harassment in schools.

Because both Title VII and Title IX prohibit sex discrimination in various realms of the public, the Seventh Circuit has turned to Title VII jurisprudence in deciding Title IX cases and vice versa. The Seventh Circuit first dealt with gender identity discrimination in the context of a Title VII employment case in *Ulane v. Eastern Airlines, Inc.* That 1984 decision held that transsexuals were not protected under Title VII. In so deciding, the court noted that both the Eighth and Ninth Circuits had already held that discrimination against transsexuals was not prohibited under Title VII. The *Ulane* court further reasoned that the plaintiff was discriminated against on the

31 See 34 C.F.R. § 106.31(b)(2)-(4).
33 See, e.g., Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005) (holding that a coach could bring suit on behalf of his girls’ basketball team inferior funding).
34 See, e.g., Rost ex rel. K.C. v. Steamboat Springs RE-2 School Dist., 511 F.3d 1114 (10th Cir. 2008).
36 742 F.2d 1081 (7th Cir. 1984).
37 *Ulane*, 742 F.2d at 1084. The word “transsexuals” refers to transgender individuals who have already undergone sex reassignment surgery.
38 Id. at 1087.
39 Id. at 1086, citing Sommers v. Budget Marketing, Inc., 667 F.2d 748, 750 (8th Cir. 1982) and Holloway v. Arthur Anderson & Co., 566 F.2d 659, 662-62 (9th Cir. 1977).
basis of being a transsexual, not on the basis of being a female or being a male.\textsuperscript{40} The court pointed to the lack of Congressional intent regarding transsexuals and determined that the plain language of the term “sex” did not allow for an interpretation that included discrimination on the basis of being a transsexual.\textsuperscript{41}

The Supreme Court brought sea change to Title VII sex discrimination analysis in \textit{Price Waterhouse v. Hopkins}.\textsuperscript{42} In \textit{Price Waterhouse}, a female former employee of an accounting firm sued the firm for sex discrimination, arguing that she was denied promotion because she did not fit the stereotypical expectations of a female.\textsuperscript{43} Her supervisors complained of her conduct being “macho,” expressed distaste with her profanity “only because it was a lady using foul language,” and advised that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”\textsuperscript{44} The Court declared: “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”\textsuperscript{45} This decision was the first to firmly establish that gender stereotyping is an actionable form of sex discrimination.\textsuperscript{46}

The Seventh Circuit applied the reasoning from \textit{Price Waterhouse} to conclude that employers could not discriminate on the basis of sexual orientation in \textit{Hively v. Ivy Tech Cmty. Coll. of Indiana}.\textsuperscript{47} The Seventh Circuit, sitting \textit{en banc}, reasoned that an employer discriminating against a woman for being in a relationship

\begin{itemize}
\item \textsuperscript{40} Id. at 1087.
\item \textsuperscript{41} Id.
\item \textsuperscript{42} 490 U.S. 228 (1989) \textit{superseded} by statute on other grounds, 42 U.S.C. § 2000e-5(g)(2)(B) (1991), as stated in Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994).
\item \textsuperscript{43} Id. at 235.
\item \textsuperscript{44} Id. at 235.
\item \textsuperscript{45} Id. at 231.
\item \textsuperscript{46} Id. at 258.
\item \textsuperscript{47} 853 F.3d 339 (7th Cir. 2017) \textit{(en banc)}. \textit{Hively} involved a professor at a college who was passed over for promotion on five occasions and alleged she was being discriminated against on the basis of her sexual orientation as a lesbian.
\end{itemize}
with a woman is engaging in sex discrimination because that employer would not discriminate against a man for being in a relationship with a woman.\footnote{Id.} The court also compared sexual orientation discrimination to anti-miscegenation statutes prohibiting marriage between white people and black people that were held unconstitutional in \textit{Loving v. Virginia}.
\footnote{388 U.S. 1 (1967).} In comparing the two cases, the \textit{Hively} court noted that the \\
\textit{Loving} Court outright rejected the argument that the anti-miscegenation statutes “punish equally both the white and the Negro participants in an interracial marriage.”\footnote{\textit{Hively}, 653 F.3d at 347 (citing \textit{Loving}, 388 U.S. at 8).} Likewise, the \textit{Hively} court rejected the argument that sexual orientation discrimination punished men and women equally for homosexuality.\footnote{Id. at 348.} The \textit{Hively} decision overruled a series of Seventh Circuit cases that held that sexual orientation discrimination was not prohibited under Title VII.
\footnote{See Doe v. City of Belleville, Ill., 119 F.3d 563 (7th Cir. 1997); Hamm v. Weyauwega Milk Prods., 332 F.3d 1058 (7th Cir. 2002); Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc., 224 F.3d 701 (7th Cir. 2000); Spearman v. Ford Motor Co., 231 F.3d 1080 (7th Cir. 2000).}

The Seventh Circuit is the only federal appellate court to apply the \textit{Price Waterhouse} Title VII gender stereotyping framework to discrimination on the basis of sexual orientation, while some lower district courts have embraced the analysis.\footnote{Sprain, Pueschel, & Heyen, \textit{Seventh Circuit Court Rules Sexual Orientation is Protected Class: Kimberliy Hively v. Ivy Tech Community College}, THE NATIONAL LAW REVIEW (April 6, 2017), https://www.natlawreview.com/article/seventh-circuit-court-rules-sexual-orientation-protected-class-kimberly-hively-v-ivy.} Less than a month before the Seventh Circuit decided \textit{Hively}, the Eleventh Circuit affirmed its decades of precedent that sexual orientation discrimination was not prohibited under Title VII.\footnote{Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017).} The Eleventh Circuit pointed out that the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits also held that Title VII does not include sexual orientation discrimination.
discrimination.\textsuperscript{55 56} In the context of transgender discrimination, however, the First, Sixth, Ninth, and Eleventh Circuits have recognized that the \textit{Price Waterhouse} reasoning applies.\textsuperscript{57}
B. Equal Protection Clause Generally

The Equal Protection Clause of the Fourteenth Amendment “is essentially a direction that all persons similarly situated should be treated alike.”\textsuperscript{58} This provision protects against “intentional and arbitrary” discrimination.\textsuperscript{59} When a statute draws classifications between groups of people or sects, it is generally presumed to be lawful if the discriminatory practice is “rationally related to a legitimate state interest.”\textsuperscript{60} This rational basis test does not apply when the statute’s classification is based on sex,\textsuperscript{61} however, as sex-based classifications are subject to “heightened scrutiny.”\textsuperscript{62} Courts reason that classifications on the basis of sex require heightened scrutiny because sex “frequently bears no relation to the ability to perform or contribute to society.”\textsuperscript{63}

In order to justify a classification on the basis of sex, the government must demonstrate that its justification for the classification is “exceedingly persuasive.”\textsuperscript{64} Therefore, this heightened standard requires the government to prove that its classification “serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”\textsuperscript{65} The difference between these two standards is significant. Determining whether to apply a rational basis test or heightened scrutiny to transgender discrimination cases essentially amounts to determining the winner of the case because the rational basis test is an extremely low bar for government actors to satisfy.\textsuperscript{66}

\textsuperscript{60} City of Cleburne, 473 U.S. at 440.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} United States v. Virginia, 518 U.S. 515, 533 (1996).
\textsuperscript{65} Id. at 524.
This burden for the government is so minimal that the Supreme Court has called rational basis “the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause.”67 By contrast, classifications analyzed under heightened scrutiny present a significantly bigger hurdle.

**C. Title VII and Equal Protections Applied to Transgender Bathroom Rights**

In 2016, the Fourth Circuit addressed transgender public school bathroom rights in *G.G. ex rel. Grimm v. Gloucester County School Bd.*68 In *Grimm*, a transgender high school student challenged his school’s biological sex-based bathroom policy under the Equal Protections Clause and Title IX, arguing that the policy discriminated against him on the basis of sex and seeking injunctive relief to be allowed to use the bathroom in accordance with his gender identity.69 The court reversed the district court’s dismissal of the student’s claims on procedural grounds and remanded the case to the district court to reconsider the injunction.70 In his concurrence, Senior Circuit Judge Andre Davis argued that the Fourth Circuit “would be on sound ground in granting the requested preliminary injunction on the undisputed facts in the record.”71 That concurrence laid out the elements of a preliminary injunction and determined that the transgender student was likely to succeed on the merits of his Title IX claim.72 Neither the majority nor the concurrence addressed the equal protection claim, focusing instead on the Title IX claim in light of the Obama-appointed Department of Education’s recommended

67 *Id.*
68 822 F.3d 709 (4th Cir.), cert. granted in part, 137 S. Ct. 369, (2016), and vacated and remanded, 137 S. Ct. 1239 (2017).
69 *Grimm*, 822 F.3d at 710.
70 *Id.*
71 *Id.* at 727 (Davis, J. concurring).
72 *Id.* (Davis, J. concurring).
interpretation of “sex.” On remand, the district court granted the preliminary injunction and simply stated: “Judge Davis explained why.” The Fourth Circuit denied the school district’s motion to stay the injunction pending appeal.

The school district applied to recall and stay the preliminary injunction in the Supreme Court of the United States. Then, on August 3, 2016, a few weeks before the student, who identified as a boy, began his senior year of high school, the Supreme Court granted the application and stayed the preliminary injunction, forcing the boy to use the girls’ restroom. Justice Stephen Breyer penned a concurrence explaining his decision to force a transgender boy to use the girls’ bathroom until the Supreme Court got around to hearing the case, stating, “I vote to grant the application as a courtesy.” The Supreme Court subsequently granted certiorari on October 28, 2016.

Before the Court could hear the case, however, the Justice Department and the Department of Education withdrew guidance to schools that interpreted Title IX to include transgender discrimination within the realm of sex discrimination. This revocation of regulatory guidance prompted the Court to vacate its grant of certiorari and remand the case to be considered in light of the new guidance. The student has since graduated from the high school, and his case has been remanded to the district court to determine whether his claim is moot.

73 Id. at 710 (majority opinion).
77 Gloucester, 136 S. Ct. at 2442.
78 Id. (Breyer, J. Concurring).
79 Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S.Ct. 369 (Mem)
81 Gloucester, 137 S.Ct. 1239 (Mem).
Accordingly, without guidance from regulatory bodies and without the Fourth Circuit’s determination, the issue was completely undecided before the Seventh Circuit heard Ash Whitaker’s case.

III.  **ASH WHITAKER V. KENOSHA UNIFIED SCHOOL DISTRICT**

   **A. Factual Background**

   Ashton Whitaker (“Ash”) is a high school student in the Kenosha Unified School District who was ultimately granted a preliminary injunction allowing him to use the bathroom of his gender identity.  

   Ash was born female, but he identifies as man. During his freshman and sophomore years of high school, Ash changed his name legally and began to wear masculine clothing, cut his hair, use male pronouns, and request that teachers use male pronouns when referring to him. His therapist diagnosed him with Gender Dysphoria, which is recognized by the American Psychiatric Association as a medical classification of sex and gender identity conflict. The school notified Ash that despite his identity as a man, he was only permitted to use the girls’ restroom or a gender-neutral restroom far from his classrooms. Ash feared that if he used the gender neutral bathroom and arrived late to the majority of his classes, he would draw more attention to his transition. Ash also noted that he felt using the girls’ bathroom undermined his gender identity. As a result, Ash resolved to avoid using the bathroom altogether and significantly reduced his water intake so that he could go all day without using the bathroom.

   This restriction on his water intake caused medical problems such as fainting and seizures because Ash was diagnosed with

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83 *Whitaker*, 858 F.3d at 1040-43.
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.*
vasovagal syncope. 91 Moreover, Ash suffered from stress-related migraines, depression, anxiety, and suicidal thoughts as a result of the bathroom policy. 92 Ash provided the school with a letter from his doctor recommending that Ash be allowed to use the boys’ restroom, but the school did not waver from its position. 93 Ash also submitted a letter from his counsel demanding that the school permit him to use the boys’ restroom, but the school responded by repeating its policy. 94 When these attempts to resolve the situation failed, Ash filed suit in the Eastern District of Wisconsin against the school district under Title IX, 20 U.S.C. § 1681, et seq, and the Equal Protection Clause of the Fourteenth Amendment. 95 On the same day of filing, Ash moved for a preliminary injunction to allow him to use the boys’ restroom, pending the outcome of the litigation. 96 The school district filed a motion to dismiss and a motion in opposition to the preliminary injunction. 97

The district court denied the school district’s motion to dismiss, finding that Ash alleged facts sufficient to support a claim of gender stereotyping under Price Waterhouse and that the school articulated “little in the way of a rational basis for the alleged discrimination” under Equal Protection Clause analysis. 98 Relying on

92 Whitaker, 858 F.3d at 1042-43.
93 Id.
94 Id.
95 Id.
96 Id.
97 Id.
that same reasoning, the district court granted Ash’s motion for a preliminary injunction, enjoining the school district from: (1) denying him to use the boys’ restroom; (2) enforcing any policy against him that would prevent him from using the boys’ restroom; (3) disciplining him for using the boys’ restroom; and (4) monitoring his bathroom use in any way.\(^9\) The school district appealed the injunction to the Seventh Circuit.\(^10\)

**B. Seventh Circuit Analysis**

The Seventh Circuit analyzed the district court’s injunction grant by beginning with the basic requirements of a preliminary injunction.\(^11\) A party seeking a preliminary injunction must show: (1) that he will suffer irreparable harm absent preliminary injunctive relief during the pendency of his action; (2) inadequate remedies at law exist; and (3) he has a reasonable likelihood of success on the merits of his claims.\(^12\) If all three can be demonstrated, the court balances the potential harm to the moving party against potential harm to other parties or the public.\(^13\)

The court in *Whitaker* determined that the evidence of Ash’s medical conditions, coupled with the bathroom policy’s exacerbation of those medical conditions, was a sufficient showing of likelihood of irreparable harm.\(^14\) The court further pointed out that the school district’s decision to force Ash into far-away bathrooms that caused him to be late for class would “further stigmatize him and cause him to miss class time, or avoid the use of the bathroom altogether at the expense of his health.”\(^15\) The court then rejected the school district’s argument that any harm Ash may suffer could be remedied with

\(^9\) Id.
\(^10\) Id.
\(^11\) *Whitaker*, 858 F.3d 1034 (7th Cir. 2017).
\(^12\) Id. at 1044.
\(^13\) Id.
\(^14\) Id. 1045.
\(^15\) Id.
monetary damages.\textsuperscript{106} Ash had alleged prospective self-harm, including suicide, which would preclude any remedy at law.\textsuperscript{107} After establishing that Ash satisfied the first two elements required of a preliminary injunction, the court turned to the merits of Ash’s claim and balanced prospective harm to the parties and the public in granting the preliminary injunction.\textsuperscript{108}

i. Title IX analysis

The \textit{Whitaker} court began its analysis by noting that courts in the Seventh Circuit look to Title VII in construing Title IX.\textsuperscript{109} The school district argued that the court should rely on \textit{Ulane}, where the Seventh Circuit held that transsexuals are not protected under Title VII.\textsuperscript{110} The court conceded that some other courts agreed with the school district’s argument, only to emphatically reject that argument, simply stating: “We disagree.”\textsuperscript{111} The court dismantled the school district’s \textit{Ulane} argument citing the Supreme Court’s decision in \textit{Price Waterhouse}, which came five years after the \textit{Ulane} decision: “this court and others have recognized a cause of action under Title VII when an adverse action is taken because of an employee’s failure to conform to sex stereotypes.”\textsuperscript{112} Moreover, the court reiterated that the Seventh Circuit, sitting \textit{en banc}, held that homosexuals discriminated against on the basis of their sexual orientation can state a Title VII claim on the basis of sex stereotyping.\textsuperscript{113}

\begin{flushleft}
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.} at 1047 (citing Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1023 (7th Cir. 1997) (noting that “it is helpful to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX.”)).
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.}
\end{flushleft}
The school district argued that Ash could not show a likelihood of success because its unwritten policy “is not based on whether the student behaves, walks, talks, or dresses in a manner that is inconsistent with any preconceived notions of sex stereotypes.”\footnote{Id.} In rebuttal, the court explained that transgender individuals do not conform to the sex-based stereotypes of their birth sex, adding that the Eleventh and Sixth Circuits have also recognized the transgender sex-stereotyping cause of action under Title VII.\footnote{Id. at 1048 (citing Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); and Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004)).} The court held that Ash could demonstrate a likelihood of success on the merits of his Title IX claim because he alleged that the school district denied him access to the boys’ bathroom based on stereotypes expected of his birth sex.\footnote{Whitaker, 858 F.3d at 1048.}

ii. Equal Protection Claim

Once the court determined a likelihood of success on the merits of the Title IX claim, it was unnecessary to even address the Equal Protection claim because the injunction would be permissibly granted under any likely successful theory of recovery.\footnote{Id.} However, the court addressed the Equal Protection claim nonetheless.\footnote{Id. at 1048} In this endeavor, the court deviated from the Fourth Circuit’s reasoning in 

\textit{Grimm}, where the injunction analysis was limited to a Title IX claim under the Department of Justice’s interpretation of the word “sex.”\footnote{Grimm, 822 F.3d at 710.} In analyzing the Equal Protection claim, the \textit{Whitaker} court refused to apply a rational basis test, reasoning that transgender individuals are a suspect class in light of the historical discrimination against them based on immutable characteristics of their gender identities.\footnote{Whitaker, 858 F.3d at 1052.} The court noted that because the bathroom policy could

\begin{itemize}
  \item \textit{Id.}\footnote{Id. at 1048 (citing Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); and Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004)).}
  \item \textit{Id.}\footnote{Whitaker, 858 F.3d at 1048.}
  \item \textit{Id.}\footnote{Id.}
  \item \textit{Id.}\footnote{Id. at 1052.}
  \item \textit{Grimm}, 822 F.3d at 710.
\end{itemize}
not even be articulated without mentioning sex, it was inherently based on a sex-classification triggering heightened scrutiny.\textsuperscript{121}

Under a heightened scrutiny standard, the school district had the burden of showing that its justification for its bathroom policy was both genuine and exceedingly persuasive.\textsuperscript{122} However, the school district had difficulty articulating why its bathroom policy justification was genuine and exceedingly persuasive. The court’s opinion borders on harsh in its continued outright rejection of each proffered reason.\textsuperscript{123} First, the court discussed the procedural requirements of the bathroom policy, which the court reiterated was an unwritten policy.\textsuperscript{124} The school district alleged that the unwritten policy required students to use the restroom of their birth certificate, but the court pointed out that Wisconsin birth certificates require sex-assignment surgery (a procedure only available to adults) to alter sex classification, ultimately precluding Ash from taking advantage of such an option.\textsuperscript{125}

Moreover, the court argued that a Minnesota student could have a birth certificate changed without any surgery, and that if a Minnesota student moved to the Kenosha school district with the appropriate birth certificate and not the appropriate genital organs for the bathroom policy, the entire policy would be undermined.\textsuperscript{126} This disconnect between policy and practice illustrated to the court that the policy was more arbitrary than it was reasonable.\textsuperscript{127} Finally, the court noted that the school district does not even require birth certificates for enrolment, and will accept a passport as identification.\textsuperscript{128} Because the State Department only requires a doctor’s note to alter sex classification, the court found that the school district’s requirements based on the birth certificate instead of the passport even further

\begin{enumerate}
  \item \textit{Id.} at 1051.
  \item \textit{Id.} at 1052.
  \item \textit{Id.}
  \item \textit{Id.} at 1051.
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
\end{enumerate}
demonstrated that the policy was more likely driven by arbitrary animus rather than genuine and exceedingly persuasive justification. 129

Another point the court offered involved no actual analysis of the specific facts of Whitaker, but instead focused on the practical use of bathrooms in general. 130 The court posited that a transgender student’s presence in the restroom “provides no more of a risk to other students’ privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his classmates.” 131 The school district’s only reasoning for its argument that transgender students invade the privacy of other students was that the transgender students possess physically different genitals than the other students in the bathroom of their choosing. 132 The court countered that the school makes no effort to provide separate restrooms for pre-pubescent boys and girls from those who have gone through puberty even though they have significantly different sex organs. 133 This point draws on the commonsense notion that most Americans never see anyone’s genitals in the bathroom. Without any commonsense, reasonable, or persuasive justifications for the regulation of bathroom use, the school district failed to demonstrate why its sex classification was permissible under the Equal Protection Clause.

iii. Balance of harms favor Ash

Having established the elements of a preliminary injunction, the court moved on to discussing the balance of harms between the public good and Ash Whitaker’s likely prospective harm. 134 Once a moving party has met its burden of establishing the threshold requirements for a preliminary injunction, the court must balance the

129 Id. at 1053.
130 Id.
131 Id. at 1052.
132 Id. at 1053.
133 Id.
134 Id.
harm faced by both parties and the public.\footnote{Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc., 549 F.3d 1079, 1100 (7th Cir. 2008); see also Turnell v. CentiMark Corp., 796 F.3d 656, 662 (7th Cir. 2015).} The court brought powerful and pragmatic reasoning to the table in finding that Ash was substantially more likely to suffer harm than the public.

The school district argued that the injunction’s harm would extend to a violation of the “privacy” of its 22,160 students in the district.\footnote{Whitaker, 858 F.3d at 1054.} It argued that allowing a transgender student to use a bathroom that did not conform with birth sex would disrupt the privacy of other students using the same bathroom.\footnote{Id.} The school district also levied the argument that the injunction harms the public as a whole because it would force other school districts to also risk being in violation of Title IX, thereby placing federal funding at risk.\footnote{Id.}

The Seventh Circuit emphatically disagreed. First, the court noted that Ash used the boys’ bathroom for six months without any incident, and that it was only when a teacher, not a student, reported Ash to school administrators that the school took notice.\footnote{Id.} In fact, the school district made no showing of any student complaint about Ash at any point before or during litigation, which effectively removed any possibility of arguing that Ash’s presence in the boys’ room bothered any students whatsoever.\footnote{Id.} In response to the school district’s argument that the preliminary injunction infringed upon the parents’ ability to direct the education of their children, the court simply stated that the school district offered “no evidence that a parent has ever asserted this right. These claims are all speculative.”\footnote{Id.}

Next, the court referenced the amici briefs of school administrators from twenty-one states, who together were responsible for educating
approximately 1.4 million students.\textsuperscript{142} The \textit{amici} statements emphatically and uniformly agreed that “the frequently-raised and hypothetical concerns about a policy that permits a student to utilize a bathroom consistent with his or her gender have simply not materialized.”\textsuperscript{143} This finding poked a major hole in the Kenosha School District’s argument that allowing Ash Whitaker to use the boys’ bathroom would harm the public.

These minor grievances based on hypothetical concerns that never tangibly materialized were scant justification for refusing to grant the injunction in the face of the overwhelming evidence that using the incorrect bathroom harmed Ash on a medical, emotional, social, and physical level. Accordingly, the court granted the preliminary injunction and signaled to school districts across the Seventh Circuit that transgender bathroom policies would not fare well in federal courts within the Seventh Circuit. The school district then petitioned for a writ of certiorari to the Supreme Court of the United States on August 27, 2017.\textsuperscript{144}

IV. SEVENTH CIRCUIT REASONING UNDER ATTACK

The Seventh Circuit has laid out a perfect roadmap for any court addressing transgender bathroom rights in public schools. Meanwhile, the Supreme Court’s stay of injunction in the Fourth Circuit case \textit{Grimm v. Gloucester County} is a concerning forecast of possible infringements on transgender rights. These threats to transgender rights go beyond the judiciary.\textsuperscript{145} The Trump administration mounts pressure against schools as the Department of

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{142}]
\item Id.
\item Id. at 1055.
\end{enumerate}
\end{footnotesize}
Education and Department of Justice retreat from the pro-transgender rights position of the Obama administration.\textsuperscript{146}

On February 22, 2017, the Department of Justice and the Department of Education revoked the Obama-era Title IX guidance on transgender student bathroom use that interpreted “sex discrimination” to include transgender discrimination.\textsuperscript{147} On July 26, 2017, the sitting President of the United States announced that transgender individuals would no longer be permitted in the military, a major departure from the status quo under the Obama administration.\textsuperscript{148} On October 5, 2017, the Attorney General Jeffrey Beauregard Sessions announced that the Department of Justice would reverse its guidance on Title VII, stating that Title VII also does not apply to gender identity discrimination.\textsuperscript{149}

As the executive branch shows its hand as hostile towards transgender rights, the Supreme Court has not made any rulings on the issue since its stay of injunction in \textit{Gloucester County}.\textsuperscript{150} Despite these forces opposing transgender rights, the Seventh Circuit is a guiding light for courts deciding this issue. The arguments levied against the Seventh Circuit in \textit{amicus} briefs submitted in favor of the school district’s petition for a writ of certiorari, however, pose an acute threat to transgender students across the country if heeded by the Supreme Court of the United States.


\textsuperscript{147} \textbf{STATEMENT BY ATTORNEY GENERAL JEFF SESSIONS ON THE WITHDRAWAL OF TITLE IX GUIDANCE, DOJ 17-214 (D.O.J.), 2017 WL 696633.}


\textsuperscript{150} \textit{Gloucester County}, 137 S. Ct. at 369.
A. The “Animus Briefs”

In its petition for a writ of certiorari, the Kenosha school district noted the *Grimm* decision and enticed the Court with an opportunity to address the case again:

This issue is not new to this Court. In *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm* this Court granted review to address, in part, the Department of Education’s interpretation of Title IX that funding recipients providing sex-separated facilities must generally treat transgender students consistent with their gender identity. When the Department of Education’s guidance was later withdrawn, this Court was deprived of an opportunity to address these issues and the case was remanded to the Fourth Circuit. This case provides the Court with a clean vehicle to decide the same underlying important issues without the additional, complicating layers related to addressing administrative review and deference.\(^{151}\)

In the intervening month, nine *amici curiae* briefs were filed by parties in opposition to the Seventh Circuit’s ruling.\(^{152}\) The

\(^{151}\) Petition for Writ of Certiorari, p. ii.

\(^{152}\) See generally Brief for Eagle Forum Education & Legal Defense Fund as Amicus Curiae Supporting Petitioners, Kenosha v. Whitaker (No. 17-301); Brief for the Michigan Association of Christian Law Schools et al. as Amici Curiae Supporting Petitioners, Kenosha v. Whitaker, (No. 17-301); Brief for the Foundation for Moral Law et al. as Amicus Curiae Supporting Petitioners, Kenosha v. Whitaker, (No. 17-301); Brief for the Concerned Women For America, et al. as Amicus Curiae Supporting Petitioners, Kenosha v. Whitaker, No. 17-301 (petition
organizations filing the briefs were notable conservative interest
groups, including The Family Research Council, the Eagle Forum
Education & Legal Defense Fund, Michigan Association of
Christian Schools, The Foundation for Moral Law, and
Concerned Women for America. Many of these briefs displayed
profound insensitivity or misunderstanding about transgender rights
issues. One amicus brief, submitted by Citizens United and more
aptly called an “animus brief,” referred to Ash Whitaker as “she” and
began its argument by stating that “Plaintiff Ash Whitaker is a girl
who currently self-identifies as a boy.” The Citizens United brief is a
picture-perfect example of animus towards transgender individuals.

The Citizens United brief justified its use of “she” in reference to Ash by stating, “[t]o do otherwise sacrifices the plain meaning of

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154 Brief for Eagle Forum Education & Legal Defense Fund, supra at n. 152.
155 Brief for the Michigan Association of Christian Law Schools, supra at n. 152.
156 The Foundation for Moral Law was founded by former Alabama state judge Roy S. Moore, who was twice removed from the Alabama Supreme Court for violating the Alabama Canons of Judicial Ethics. Judge Moore has been in the national spotlight for soliciting sex from underage girls. See Ruhle, Stephanie, Breaking Down the Nine Allegations Against Roy Moore, MSNBC, (Nov. 16, 2017) http://www.msnbc.com/velshi-ruhle/watch/breaking-down-the-9-allegations-against-roy-moore-1097428547965.
157 Brief for the Concerned Women For America, supra at n. 152.
158 Brief for the Concerned Women For America, supra at n. 152.
159 Citizens United is a conservative nonprofit organization. See generally, About, CITIZENS UNITED (last visited Nov. 21, 2017) http://www.citizensunited.org/index.aspx.
160 Citizens United is not alone in calling Ash “she” despite his gender identity. The Foundation for Moral Law submitted a brief calling Ash “she” throughout. See Brief for the Foundation for Moral Law, supra at n. 152.
161 Brief for Citizens United, supra at n. 152.
the English language on the altar of political correctness.”162 After establishing that it would refuse to call Ash “he,” the Citizens United brief went on to compare the plaintiff in *Gloucester County* to Ash Whitaker, cynically calling their suits against their schools “test cases.”163 More concerning, it stated: “it should not come as a surprise that a female plaintiff was selected in each case. A boy in his senior year of high school who would seek to spend time in the girls’ restroom would have presented the circuit court with a very different set of facts and concerns.”164 It did not explain what “different set of facts and concerns” would be at issue if Ash were born male and had a doctor’s diagnosis of gender dysphoria, and instead left the grim implications to the reader’s imagination.165

Another alarming argument Citizens United offered in its “animus brief” was that the Seventh Circuit “failed to consider the harm being done to Ash Whitaker by her mother, her counselors, and her physicians” by treating her with hormone therapy.166 It did not explain how the medical treatment Ash received was relevant to the restroom litigation.167 The brief went on for pages with subversive, malicious comments, including: “transgender persons are not suicidal because they are discriminated against, but because they suffer from a mental illness;”168 “in countless transgender cases across the country, the ‘suicide card’ is being played;”169 and “what is to stop the varsity boys’ lacrosse team from deciding en masse that they are all girls, and barging into the girls’ locker room while the cheerleading squad is changing clothes?”170

162 *Id.* at 4.
163 *Id.*
164 *Id.*
165 *Id.*
166 *Id.* at 9.
167 *Id.*
168 *Id.* at 18.
169 *Id.* at 15.
170 *Id.* at 11.
These stances frame the primary arguments brought against the Seventh Circuit in the “animus” briefs, which are essentially as follows: (1) the “plain meaning” or “plain text” of Title IX does not apply to transgender bathroom rights, which is illustrated in Citizens United’s refusal to even call Ash “he” in the name of “political correctness”; (2) gender dysphoria is a mental illness and should be treated as a disability by law, which is illustrated in Citizens United’s argument that Ash’s mother and doctors are doing him harm in treating him with hormone therapy; and (3) permitting transgender individuals to use the restroom of their gender identity will enable sexual predators to victimize women more often, which is illustrated in Citizens United’s cryptic warning that Ash’s case would contain a “different set of facts and concerns” if Ash were born male and transitioned to a woman.

i. The “plain meaning” argument

One common argument in the amici briefs was that the plain language of Title IX refers to discrimination on the basis of biological sex and not on the basis of gender identity. This argument is an attack on the way the Seventh Circuit applied Price Waterhouse Title VII sex-stereotyping framework to Title IX transgender bathroom rights. William J. Bennett, who the New York Times once named the “leading spokesman of the Traditional Values wing of the Republican Party,” argued in an amici brief he submitted in support of the school district that proscribing “on the basis of sex” is a question of statutory interpretation. In support of this argument, Bennett went through the standard cannons of construction, spanning fourteen pages, from dictionary definitions to legislative history, ultimately arriving at the conclusion that Congress intended the word “sex” to

171 Brief for William J. Bennett, supra at n. 152; Brief for Citizens United, supra at n. 152; Brief for the Michigan Association of Christian Law Schools supra at n. 152; Brief for Eagle Forum Education & Legal Defense Fund supra at n. 152.
173 Brief for William J. Bennett, supra at n. 152.
refer to biological and physiological sex.\textsuperscript{174} After firmly establishing that Congress intended to refer to biological and physiological sex instead of gender identity, Bennett never stated how or why this fact related to the matter of Ash Whitaker, foregoing any application of his conclusion.\textsuperscript{175}

The Eagle Forum Education & Legal Defense Fund\textsuperscript{176} also argued that the “plain meaning” of Title IX refers to biological sex.\textsuperscript{177} The Eagle Forum argued that in light of the fact that Title IX was intended to refer to biological sex and not gender identity, the “Seventh Circuit’s reliance on \textit{Price Waterhouse} and its progeny is also misplaced.”\textsuperscript{178} It went on to state that regulating “how boys and girls dress (\textit{e.g.} clothing, jewelry, hair length) differs fundamentally from segregating restrooms by sex.”\textsuperscript{179} Its analysis was limited to the facts of \textit{Price Waterhouse} itself,\textsuperscript{180} arguing that the plaintiff in \textit{Price Waterhouse} who employers thought too masculine for a woman “still used the women’s restroom.”\textsuperscript{181}

ii. The “transgender people are mentally ill” argument

Like the Citizens United “animus” brief, the Eagle Forum brief also argued that Ash Whitaker has a “disability.”\textsuperscript{182} Applying this

\textsuperscript{174} Id. at 5-19.
\textsuperscript{175} Id. at 19.
\textsuperscript{176} The Eagle Forum Education & Legal Defense Fund is a conservative interest group and states on its website, “we oppose liberal propaganda in the curriculum through global education and Political Correctness.” See \textit{Description}, EAGLE FORUM (last visited Nov. 21, 2017) http://eagleforum.org/misc/descript.html.
\textsuperscript{177} Brief for Eagle Forum Education & Legal Defense Fund, \textit{supra} at n. 152.
\textsuperscript{178} Id. at 14.
\textsuperscript{179} Id.
\textsuperscript{180} Eagle Forum curiously refers to the famous \textit{Price Waterhouse} case as “Hopkins,” even though most federal judges would recognize the well-known case as “\textit{Price Waterhouse}.” One can only speculate as to why Eagle Forum would seek to distance its discussion from the well-known \textit{Price Waterhouse} body of law.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
logic, it asserted that Ash should have to exhaust the remedies of the Individuals with Disabilities Education Act before filing suit.183 The Eagle Fund brief did not go as far as the Citizens United brief’s outright claim that all transgendered people are mentally ill,184 but instead posited, “whether or not [sic] transgenderism per se remains a disorder under current medical views, Whitaker’s condition – with migraines, depression, anxiety, and suicide ideation—nonetheless potentially could qualify [as a disability].”185 It did not analyze the definition of “disability” under the IDEA, nor how a transgender person may or may not fit that definition, despite the fact that the other federal legislation for disabled individuals, the ADAA, explicitly excludes transgender people.186

Applying this reasoning to the Equal Protection claim, the Eagle Forum argued that Ash was discriminated against on the basis of “disability,” which is not a suspect class under Equal Protection Clause jurisprudence.187 The Eagle Forum rejected the notion that Ash was discriminated against on the basis of sex and rejected the use of heightened scrutiny in analyzing the classification-based regulation of bathrooms.188 Under rational basis review nearly any regulation is permissible so long as it is merely rationally related to a legitimate government interest.189 The privacy of other students is a legitimate governmental interest, so a policy that is simply rationally related to

183 Id.
184 Brief for Citizens United, supra at n. 152 (“it appears to be the modus operandi of the transgender movement across the country – to claim suicidal feelings, brought on by various defendants”).
185 Brief for Eagle Forum Education & Legal Defense Fund, supra at n. 152.
187 Brief for Eagle Forum Education & Legal Defense Fund, supra at 16; see also Bd. of Trs. v. Garrett, 531 U.S. 356, 365-67 (2001) (holding that disability is not a suspect class and should be analyzed under rational basis review).
188 Brief for Eagle Forum Education & Legal Defense Fund, supra at n. 152.
such a goal would pass the rational basis test.\footnote{Skinner v. Ry. Labor Executives Ass’n, U.S. 602, 626 (1989) (holding that protecting privacy is a legitimate government interest).} A policy that demands sex-segregated bathrooms would almost certainly meet that criteria in most courts and would be permissible under the Equal Protection Clause.

iii. The scare-tactics argument

The most prevalent argument proffered in the “animus” briefs played to speculative fear of transgender people generally as well as policies involving transgender bathroom use.\footnote{Brief for William J. Bennett, \textit{supra} at n. 152; Brief for Citizens United, \textit{supra} at n. 152; Brief for the Concerned Women For America, \textit{supra} at n. 152; Brief for the Foundation for Moral Law, \textit{supra} at n. 152.} The Foundation for Moral Law brief’s entire first argument was that if schools implement such bathroom policies, “the number of students claiming such rights is likely to increase.”\footnote{\textit{Id.} at 3.} It cited several studies pointing to the gradual increase of openly transgender people, arguing that “[i]n earlier times, youths who felt such [transgender] impulses were possibly more likely to keep quiet about them.”\footnote{\textit{Id.} at 4.} It concluded, “[t]hus, the Seventh Circuit’s decision, if not reversed, could have the effect of encouraging students to question gender identity and to take steps to act on those thoughts.”\footnote{\textit{Id.} at 5-6.} It did not explain why encouraging students to ponder gender identity is inherently negative, but instead relied on the assumption that any reader would be able to infer that transgender people are somehow inferior.\footnote{\textit{Id.}}

In addition to the fear of transgenderism in general, these “animus” briefs make outlandish arguments that permitting transgender individuals to use the bathroom of their gender identity will enable sexual predators to more easily victimize women in
bathrooms, locker rooms, showers, and dressing rooms. This argument echoes that of the aforementioned petition to boycott Target retail stores when it implemented a pro-transgender bathroom policy nationwide. Even though Ash Whitaker’s case was explicitly about using the bathroom and the parties stipulated that Ash does not use the school’s locker rooms, showers, or dressing rooms, these briefs overwhelmingly analyzed the speculative danger of transgender bathroom policies specifically in the context of locker rooms and dressing rooms.

The Concerned Women for America animus brief unironically invoked its own gender identity by arguing that the Seventh Circuit’s ruling in favor of Ash’s gender identity is a safety concern: “[a]s the nation’s largest public policy women’s organization, your Amicus is vitally concerned that Title IX’s privacy and safety protections for female (and male) students not be stripped away.” Without ever explaining why a pro-transgender bathroom policy would affect bathroom safety, the Concern Women’s brief asserted that two of its leaders have been sexually assaulted (one of whom was videotaped in a women’s bathroom when she was a teenager, decades before any sort of transgender bathroom law) and proceeded to list three separate instances in which Target stores had problems of “peeping toms” after it implemented its transgender bathroom policy. It did not state whether these three instances were more than the usual amount of instances. Aside from this handful of anecdotes, the brief did not provide any statistical data to prove that transgender

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196 Brief for William J. Bennett, supra at n. 152; Brief for Citizens United, supra at n. 152; Brief for the Concerned Women For America, supra at n. 152; Brief for the Foundation for Moral Law, supra at n. 152.
197 Concerned Women for America is a conservative nonprofit “built on prayer and action.” See generally, https://concernedwomen.org/about/ (“We believe marriage is between one man and one woman, that sexual activity outside of that marriage is sin, and that God created the human race male and female.”).
198 Id. at 9.
199 Id. at 6-7.
200 Id. at 9.
bathroom policies could possibly lead to an increase in bathroom sexual assault, and instead relied on the reader’s inference.

William J. Bennett’s brief better articulated the fear-mongering offered in the Concerned Women brief and at least granted the concession that it is not transgender individuals themselves who pose a safety concern, but non-transgender sexual predators who would take advantage of the opportunity to enter a bathroom of the opposite sex.\footnote{201 Brief for William J. Bennett, supra at n. 152.} Bennett argued transgender bathroom policies could be “exploited by non-transgender sexual predators who falsely assert” that they are transgender.\footnote{202 Id.} Bennett then cited six occasions in which transgender bathroom policies were allegedly exploited by sexual deviants, including one where a man ran into the women’s locker room and stripped naked, screaming that he was allowed to be there in light of the new rule.\footnote{203 Id. at 21; see also Bult, Laura, Seattle Man Undresses in Women’s Locker Room at Local Pool To Test New Transgender Bathroom Rule, N.Y. DAILY NEWS (Feb. 17, 2016) http://www.nydailynews.com/news/national/wa-man-women-bathroom-test-transgender-ruling-article-1.2535150.} To magnify the horror of the handful of instances cited, Bennett points out that studies show two-thirds of sexual assault instances go unreported, bringing the speculative total to a mere eighteen.\footnote{204 Brief for William J. Bennett, supra at n. 152.} Yet, like the Concerned Women’s brief, Bennett’s brief did not point to any statistics, studies, or data that demonstrate that pro-transgender bathroom policies would have any effect on the number of sexual assaults in restrooms.

B. The Flawed Reasoning in the “Animus” Briefs

Each of the three primary arguments raised in the several “animus” briefs are fundamentally flawed. First, the plain language of Title IX referring to biological sex has no bearing on whether the school district relied on sex stereotyping in forcing Ash to use the restroom that his sex stereotypically uses. Second, gender dysphoria is not a mental illness, and even if it is, it certainly does not amount to a
disability because it does not impair any major life activity and it is explicitly excluded from federal disability legislation. Third, there is no evidence of transgender bathroom policies causing an increase in instances of sexual assault.

i. The “plain meaning” argument does not rebut the Seventh Circuit ruling

Even if one accepts at face value the notion that Title IX and Title VII apply only to sex-based discrimination, the sex-stereotyping cause of action recognized in Price Waterhouse nonetheless accommodates transgender discrimination claims. As the Seventh Circuit properly noted in Whitaker, the school district attempted to force Ash to use the restroom in accordance with the stereotype expected of his birth sex.\(^{205}\) Moreover, the school district explicitly used the word “sex” in its unwritten policy, which demonstrated that the policy was clearly sex-based.\(^{206}\)

Furthermore, arguing that the policy treats males and females equally is no more persuasive than the arguments for anti-miscegenation statutes in Loving v. Virginia, where Virginia argued that the law punished whites and blacks equally for interracial marriage.\(^{207}\) The Loving court outright rejected that argument.\(^{208}\) Likewise, the argument that is grounded in the idea that the bathroom policy punishes males and females equally for using the opposite bathroom should be rejected as a futile attempt to discriminate on the basis of gender identity.

Finally, although Citizens United argues that calling Ash “he” is to “sacrifice the plain meaning of the English Language at the altar of political correctness,”\(^{209}\) referring Ash as “he” is wholly within the confines of the plain meaning of English. Ash presents himself as a

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\(^{205}\) Whitaker, 858 F.3d at 1048.  
\(^{206}\) Id.  
\(^{207}\) 388 U.S. 1 (1967)  
\(^{208}\) Id.  
\(^{209}\) Brief for Citizens United, supra at n. 152.
man, dresses like a man, calls himself a man, and styles his hair like a man. Accordingly, he is a man, and calling him “he” is no sacrifice to anyone, let alone some grandiose hypothetical “altar of political correctness.”

ii. Gender dysphoria is not a mental illness and is not a disability under the law

Because gender roles are no more than social constructs, the refusal to conform to gender roles cannot logically be a mental illness. In fact, according to the American Psychiatric Association, “gender nonconformity is not in itself a mental disorder.” Therefore, gender dysphoria is not a mental disorder.

However, even if one assumes that gender nonconformity is a mental illness, it certainly does not fit the legal requirements of a disability. A disability, generally, is a physical or mental impairment that limits one or more life activities. Nothing about transitioning genders impairs anything about a transgender person’s life. If anything, it frees them from the constraints of society’s arbitrary stereotypes and expectations of their birth sex. The only impairment to a transgender person’s life from gender dysphoria is societal harassment, like that exhibited in the “animus” briefs. Therefore, because transgender people are not disabled, the argument that Ash should file under the IDEA also fails.

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210 Whitaker, 858 F.3d at 1038.
211 Brief for Citizens United, supra at n. 152.
212 See generally, Section II.
214 42 U.S.C §12102(1)(a).
iii. Pro-Transgender Bathroom Policies Are Not a Safety Threat.

The argument that transgender bathroom policies are likely to increase bathroom sexual assault is unconvincing because there is no evidence demonstrating the speculative fear whatsoever. The handful of anecdotes the various briefs cite are no more than anecdotes and do nothing to show a trend or correlation, much less causation. This fear-based argument should fail immediately with such a vacancy of evidence.

Finally, to answer the Citizen United question, “what is to stop the varsity boys’ lacrosse team from deciding en masse that they are all girls, and barging into the girls’ locker room while the cheerleading squad is changing clothes?”\textsuperscript{215} Simply put, the answer would be “a note from a doctor diagnosing gender dysphoria,” which is what Ash Whitaker immediately provided his school upon beginning his transition.\textsuperscript{216} But Citizens United appears too wrapped up in animus to parse legal issues in this submission to the highest court in the United States. The Seventh Circuit addressed this disingenuous argument in \textit{Whitaker}, which Citizens United must have missed: “[t]his is not a case where a student has merely announced that he is a different gender. Rather, Ash has a medically diagnosed and documented condition. Since his diagnosis, he has consistently lived in accordance with his gender identity.”\textsuperscript{217} For the Citizens United brief to simply toss Ash in with the hypothetical sexually predatory athletes “barging” in on unsuspecting and vulnerable cheerleaders is a gross mischaracterization of Ash’s simple request to go the bathroom with the other boys.

\textsuperscript{215} Brief for Citizens United, \textit{supra} at n. 152.
\textsuperscript{216} \textit{Whitaker}, 858 F.3d at 1053.
\textsuperscript{217} \textit{Id.}
CONCLUSION

The legal groundwork upon which the Seventh Circuit came to its decision in *Whitaker* is unassailable. In order to come to another conclusion, a court deciding these issues must deviate from that firm reasoning. As such, the Seventh Circuit’s analysis should serve as a guiding light to other courts presiding over transgender bathroom rights litigation. Regardless of the current political atmosphere, or of the ongoing animus against transgender individuals displayed in the “animus” briefs, the judicial branch must stand undeterred. The executive branch and the legislative branch may test the judiciary’s protections of transgender rights with statutes, regulatory interpretations, and executive orders, but the analysis should remain the same: forcing individuals to use certain bathrooms that violate their gender identity is no different than sex stereotyping in any other context. The Supreme Court of the United States should find the same.
SELLING THE FOOTLONG SHORT: HOW CONSUMERS INCH TOWARD SATISFACTION IN COSTLY FOOD CLASS ACTION LITIGATION

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INTRODUCTION

Chances are, if you have ever purchased an item, you are among the many unnamed members of a litigation class action lawsuit. According to a report published in March 2017 by the Perkins Coie Food Litigation Group, the food and beverage industry has become a top target for class actions and individual lawsuits, with nearly 10 class action filings in Illinois, and over 140 filings nationwide, in 2016 alone.¹ The uptick in consumer fraud lawsuits involving food and drink means more money for lawyers, but has left consumers with

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¹ David T. Biderman, Julie L. Hussey, Charles C. Sipos, Food Litigation 2016 Year in Review: A Look Back at Key Issues Facing Our Industry, at https://dpntax5jbd3l.cloudfront.net/images/content/1/7/v2/171826/2017-Food-Litigation-YIR-FINAL-2.pdf (Mar. 28, 2017) (finding the number of food class action lawsuits filed each year has significantly increased since 2008, with California remaining the favored jurisdiction with over 60 cases filed; however, Illinois remains popular with just under 10 actions filed in 2016).
little relief. In many states, lawyers have found that vague laws on unfair and deceptive practices are conducive to extracting large settlements from food companies. Whether plaintiffs are seeking monetary relief for being purposefully misled, or simply hoping to call out businesses for their puffery; attorneys are undoubtedly the real victors.

This Article evaluates the Seventh Circuit’s decision in In re Subway Footlong Sandwich Marketing and Sales Practice Litigation to explore the effects of excessive attorney fee awards on consumer fraud class actions, and to determine how, if at all, food litigation could be more equitable to consumers. Part I will explain the evolution of class actions, which eventually culminated in the passage of more defined fairness standards. Part II will discuss current trends in food and drink class action litigation. Part III will focus on In re Subway Footlong Sandwich Marketing and Sales Practice Litigation, highlighting how courts can underestimate the value of injunctive relief in light of exorbitant attorney’s fees. Part IV will suggest limitations and guidelines the legal community should consider in the wake of interminable food marketing class action lawsuits.

RISE OF THE CLASS ACTION LAWSUIT

The class action lawsuit as it exists today is mainly a product of statutes and rules. The origin can be traced to England’s courts of chancery. In the 12th century, England allowed litigation on behalf of

2 Settlement Agreement, Guoliang Ma, et al. v. Harmless Harvest, Inc., No. 2:16-cv-07102-JMA-SIL. Available at: https://www.foodlitigationnews.com/wp-content/uploads/sites/12/2017/05/Ma-et-al.-v.-Harmless-Harvest-Inc.-Settlement-Agreement.pdf. (proposing that while the makers of Harmless Coconut Water would engage in product label reviews, attorney’s fees would be awarded in the amount of $575,000); see also Birbrower v. Quorn Foods, Inc., No.2:16-cv-01326-DMG (C.D. Cal. dismissed Sept. 11, 2017) (proposing a settlement whereby Quorn would no longer market their products as being made from mushrooms or truffles but class counsel would receive over half the settlement fund, $1.35 million).

3 Raymond B. Marcin, Searching for the Origin of Class Action, 23 CATH. U.L. REV. 515, 517 (1974) (“All trace their origins, however to the unwritten practice of English Chancery at a time before the adoption of our own judicial system.”).
villages and parishes with an 1125 writ of Henry III to the archbishop of Canterbury, which stated, “according to our law and custom of the realm . . . villages and communities . . . ought to be able to prosecute their pleas and complaints in our courts and in those of others through three or four of their number.”

Early examples of group or class litigation include a 12th century case, Master Martin Rector of Barkway v. Parishioners of Nuthampstead. Nuthahampstead chapel was once an independent church, but it eventually became a member of the church of Barkway. After merging with the Barkway church, a dispute arose about the rector receiving a payment of tithes in return for his services. This dispute could be viewed as a religious class action, related to how much ministerial service could be bought with local tithes.

Furthermore, a 14th century case identified as Discart v. Otes is an example of a judicially created class action. In this case, which concerned currency used in the Channel Islands, the justices decided that instead of ruling, they would pass the matter on to the King’s Council, so that Discart and all others with similar claims could receive a single, binding judgment. This created a new type of suit, the “Bills of Peace,” whereby one person sued in the hopes of resolving the matter in favor of themselves and other similarly situated persons. Alas, the class action was born.

6 Id.
7 Id.
8 A tithe is one-tenth part of something, generally produce or personal income, set apart and paid as a contribution to a religious organization.
9 Marcin, supra note 3, at 521-23.
10 Id. at 521.
11 Zechariah Chafee, Jr., Bills of Peace with Multiple Parties, 45 HARV. L. REV. 1297, 1326 (1932) (noting that one concern about consolidating many suits into
A. Class Actions in the United States

In the mid 19th century, the Supreme Court promulgated Federal Equity Rule 48, which expressly provided for “group representative litigation.” While this new codification allowed cases involving numerous parties to proceed on a representative basis, the rule was clear that the judgment of the court had no binding effect on absent class members. Eleven years later, the Supreme Court ignored Rule 48’s closing remarks and held that a judgment in a representative suit did indeed bind absent class members.

Early in the 20th century, Congress enacted the Federal Rules of Civil Procedure. Included in these rules was Rule 23, which still regulates class action lawsuits today. It was not until 1966, however, that the Supreme Court advisory committee amended Rule 23 to explicitly provide that class action judgments would bind all members of the class who did not opt out of the suit.

Under Rule 23, plaintiffs seeking to proceed under a class action must plead and prove: (1) an adequate class definition, (2) ascertainability, (3) numerosity, (4) commonality, (5) typicality, and (6) adequacy. Additionally, plaintiffs must demonstrate that separate one hearing was the “crowding and confusion in the courtroom if each party had their own lawyer”).

13 Id. at 785 n.63.
14 See Smith v. Swormstedt, 57 U.S. 288, 303 (1853) (holding “[f]or convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court”).
17 For comparison of the old and new versions of Rule 23, see 39 F.R.D. 69, 94-98 (1966).
adjudications will create a risk of decisions that are inconsistent with or dispositive of other class members’ claims, declaratory or injunctive relief is appropriate based on the defendant’s acts with respect to the class generally, or that common questions predominate and a class action is superior to individual actions.¹⁹

As such, class actions were intended to do more than simply provide a manageable way to deal with numerous plaintiffs; the primary purpose was to increase the efficiency and economy of litigation.²⁰ Additionally, the Supreme Court noted that class actions provide an opportunity for people with individually insignificant claims to band together and seek relief.²¹ As civil rights leaders, environmentalists, and consumer advocates began utilizing this useful procedural litigation device, modern class action case law and Rule 23 became increasingly important.

**B. Protecting Consumers Under the Class Action Fairness Act of 2005**

After the 1980s and 1990s, the wave of mass litigation in asbestos, lead, and dangerous drugs began to wind down. Tort-reform laws capped the damages plaintiff could obtain, and new heightened pleading standards made it harder to bring deficient lawsuits.²² As such, plaintiff’s lawyers set their sights on a new profit-making target: consumer-fraud class action litigation. Consumer-fraud cases were relatively easy to file and class action lawyers had a plethora of plaintiffs at their disposal because millions of people purchase and consume products every day. However, class members have yet to

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²¹ See U.S. Parole Comm’n v. Geraghty, 445 U.S. 388, 402 (1980) (stating that class actions serve not only to protect the defendant from inconsistent obligations, but protect the interests of absentees while providing a convenient and efficient means of settling similar lawsuits).
recover grand sums through these lawsuits, even though the attorneys continue to receive big payouts.

Looking to cash in quick, class action lawyers began filing consumer-fraud suits in waves. In order to combat this uptick in filings, business groups and tort reform supporters lobbied for more legislation to restrict class action lawsuits. These actions led to the Class Action Fairness Act of 2005 ("CAFA"), which placed large class-action lawsuits in federal court, removing them from historically more receptive state courts. Interestingly, while business groups bogged down by excessive consumer-fraud cases urged this reform, CAFA itself claimed to protect consumer class members from excessive attorney’s fees. In part, CAFA intended to curtail attorneys’ abilities to tie their fee awards to the nominal value of coupons made available to a settlement class. Where coupons provided the only basis for relief, the portion of attorney’s fees awarded to class counsel would be based on the value that the class members receiving the coupons redeemed, rather than the face value of all coupons issued. Thus, attorney’s fees are not based on the recovery by the class, rather, they are “based upon the amount of time class counsel reasonably expended working on the action.”

25 Id.
26 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 stat. 4 (Feb. 18, 2005) §2. (finding that “Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value.”)
27 S. REP. NO. 109-14, at 14, 30 (2005)
29 28 U.S.C §1712(b)(1).
Despite this commendable language, neither federal nor state courts have changed the way they approach class action lawsuits. Many courts continue to approve coupon-based class action settlements, without a heightened level of scrutiny.\(^30\) Moreover, federal courts considering settlements post-CAFA have often assumed that the standards remained the same.\(^31\) Despite courts’ hesitancy to view class actions differently post-CAFA, courts have used it in evaluating requested attorney’s fees.\(^32\) Even still, while CAFA may have helped streamline a method for calculating attorney fee awards, the legislation did little to quell the number of consumer-fraud based class action cases. Instead, savvy class action lawyers have turned their attention toward less regulated areas, such as food and drink advertising.

**CURRENT TRENDS IN FOOD AND DRINK CLASS ACTION LITIGATION**

Over the last decade, the number of consumer fraud class actions filed has skyrocketed. The nationwide filings for 2016 were nearly forty-seven percent higher than in 2012.\(^33\) Undoubtedly, part of the increase is caused by consumers’ growing desire for transparency.\(^34\) For instance, the public has grown leery of food and other products

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\(^{30}\) *See* Radosti v. Envision EMI, LLC, 717 F. Supp. 2d 37, 55-64 (D.D.C. 2010) (holding that though coupon settlements “pose a particular risk of unfairness and unreasonableness,” no additional scrutiny is called for by §1712(e)).


\(^{32}\) *See* True v. American Honda Motor Co., 749 F. Supp. 2d 1052, 1077 (C.D. Cal. 2010) (finding that “while the lodestar method of awarding fees is permissible under CAFA, the Court . . . is particularly wary of using the lodestar . . . where the benefit achieved for the class is small and the lodestar award is large”).

\(^{33}\) *Supra* note 1.

\(^{34}\) *The 2016 Label Insight Transparency ROI Study*, LABEL INSIGHT (Oct. 18, 2017), https://www.labelinsight.com/Transparency-ROI-Study (A 2016 consumer study found that forty percent of consumers said they would switch to a new brand if it offered more product transparency.).
that are advertised as “natural.” As a result, plaintiffs’ attorneys have rushed in to aid disgruntled consumers. Although these consumer class action lawsuits were based upon a number of different issues, it was not until the Supreme Court’s decision in *AT&T Mobility LLC. v. Concepcion*, which upheld a company’s right to enforce contracts limiting consumers’ ability to band together in class actions lawsuits, that food-based class actions became even more appealing. 

**A. All Natural and Healthy Claims**

The first wave of food class action litigation focused on marketing that claimed food products were “natural,” “nutritious,” or contained “nothing artificial.” Generally, the claims argued that the products contained some synthetic ingredient or that the production process rendered the product no longer natural. In one notable case, a judicial panel in Missouri consolidated dozens of suits, all of which alleged that Coca-Cola Simply Orange, Minute Maid Pure Squeezed, and Premium orange juices deceived consumers into thinking that the juices were 100% pure. Despite labels touting that the juices were “100% Pure Squeezed,” plaintiffs claimed that the addition of added flavorings, including orange essence oils, made the labels deceptive to consumers. More specifically, plaintiffs sought to certify classes of purchasers of Coca-Cola orange juice products, asserting that Coca-Cola failed to disclose its use of added flavors in these products. Such omissions, plaintiffs claimed, deceived consumers into buying

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35 *Id.* (finding that more than half of the people surveyed felt they had to use their own definition of “healthy” rather than the label itself)
38 *Id.*
these products at premium prices.\textsuperscript{40} And while the court did certify the class, the outcome is still pending.\textsuperscript{41}

Disputes arising over broad, undefined nutritional claims provided another avenue for litigation. Even where the labels themselves did not assert nutritional claims, creative lawyers argued that the images in commercials and on product packaging could be interpreted as purposefully misleading and deceptive to consumers. In 2012, one California mother filed a lawsuit alleging that she was surprised to find that Nutella had little to no nutritional value, despite TV commercials touting quality ingredients.\textsuperscript{42} The commercial further claimed that moms could use Nutella “to get [the] kids to eat healthy foods.”\textsuperscript{43} Although the lawsuit was met with much ridicule, the judge ultimately sided with the mother, finding that Nutella would need to change its marketing campaign and also modify its front labels to indicate the fat and sugar content of each jar.\textsuperscript{44}

In 2016, consumers filed a false advertising lawsuit against Krispy Kreme, alleging that the company’s donut fillings lacked essential vitamins and nutrients because the filling did not contain real fruit.\textsuperscript{45} The case was voluntarily dismissed without prejudice; however, plaintiff’s counsel still maintained that Krispy Kreme did not provide an ingredient lists for its doughnuts and had they done so, consumers would have known that the products did not contain the premium ingredients Krispy Kreme led customers to believe were in

\begin{itemize}
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id.
\item \textsuperscript{43} Id.
\end{itemize}
the doughnuts. In yet another lawsuit, the plaintiff argued that Gerber Puffs’ labels were false and misleading because they depicted fruits and vegetables though the product itself contained no real fruits or vegetables.

The spike in outlandish claims is partially due to the Food and Drug Administration’s (“FDA”) inability to define “natural.” Current FDA policy states that “natural” means “nothing artificial or synthetic has been included in, or has been added to, a food that would not normally be expected to be in the food.” After a request from two federal judges and petitions from consumers and businesses, the FDA began accepting public comments on how to define “natural.” Initially, the closing period was May 10, 2016; however, the FDA extended the deadline for filing public comments to April 26, 2017. Consumers, food producers, and plaintiffs’ attorneys alike await a statement by the FDA, which could either fuel new litigation or lead to additional dismissals.

B. Slack Fill Claims

Many lawyers are claiming consumers are getting less than they bargained for when they get more packaging than product. These types
of claims are known as “slack fill” litigation.\textsuperscript{52} FDA regulations already restrict the use of useless slack-fill. Extra room in the packaging is allowed only when it serves a specific purpose, such as to protect the content of the package, a required component of the manufacturing process, or is the result of inevitable product settling.\textsuperscript{53} However, these guidelines have not prevented lawyers from actively seeking out packages that may contain unnecessarily unfilled space.

Courts have already dismissed many slack fill lawsuits.\textsuperscript{54} Judges determined that a consumer need only read the number of ounces or the quantity count on the packaging to determine the amount of product they are actually purchasing.\textsuperscript{55} Despite many courts’ view that the reasonable consumer should simply read the packaging, some food producers have acknowledged their customers’ dissatisfaction and have offered coupons or other incentives to appease the public.\textsuperscript{56}

\textbf{C. Deception Claims}

Apart from attacking the nutritional value or the slack fill of a product, lawyers are zeroing in on broader deceptions allegedly taking place. Coffee companies, like Starbucks, have been accused of tricking consumers into thinking they were getting more coffee than they were receiving because the cups were not filled to the brim.\textsuperscript{57} Another lawsuit against the maker of Tito’s Vodka alleged the brand’s


\textsuperscript{53} See 21 C.F.R. §100.100.


\textsuperscript{55} Id. at *3; see also Fermin v. Pfizer, Inc., 215 F. Supp. 3d 209 (E.D.N.Y. 2016).

\textsuperscript{56} See Complaint, Wurtzburger v. Kentucky Fried Chicken, No. 1:16-cv-08186 (S.D.N.Y.) (filed Sept. 29, 2016 and removed to federal court from the Supreme Court of the State of New York, Duchess County).

advertisements misled consumers into believing that the vodka was handmade in an “old fashioned pot.”

In 2016, lawyers filed dozens of class action lawsuits against Parmesan cheese producers and distributors. These cases were consolidated and transferred to the Northern District of Illinois. In In re 100% Grated Parmesan, the lawsuits did not assert any physical injury. Instead, plaintiffs argued they had been deceived by cheese packaging labels that claimed it contained “100% Grated Parmesan Cheese.” In reality, the products contained anywhere from 2% to 8% of the food additive cellulose; lawyers claimed the ads intentionally misled consumers into believing each product was made of nothing but cheese. As of August 24, 2017, District Court Judge Feinerman granted the defendants’ motions to dismiss, finding the descriptions on the labels were ambiguous, not deceptive. The court explained that a reasonable consumer should “still suspect that something other than cheese might be in the container.” Regardless of the specific claim being made, food and beverage class action litigation has continued to rise, and shows no signs of stopping.

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61 Id.

62 Id.


64 In re Parmesan, at *7.
EXPLORING THE RELATIONSHIP BETWEEN EXCESSIVE ATTORNEY’S FEES AND LACK OF CONSUMER TRUST IN IN RE SUBWAY FOOTLONG SANDWICH MARKETING AND SALES PRACTICE LITIGATION

Many food and beverage class action lawsuits are arguably insubstantial; however, many claims genuinely important to consumers end up getting dismissed because the benefit to class counsel is disproportionately high in comparison to the value provided to class members. But, even when courts dismiss cases or refuse to certify classes, many companies opt to privately settle, often securing hundreds of thousands of dollars for the attorneys.65 For instance, in In re Subway Footlong Sandwich Marketing and Sales Practice Litigation, the Seventh Circuit reversed the district court’s decision to certify the class, determining that these consolidated class actions should have been “dismissed out of hand.”66 The Seventh Circuit considered three claims in the case: a standing claim, a class certification claim, and a settlement approval claim.67 For the purposes of this Article, only the last two claims are discussed. Understanding the relationship between exorbitant class action attorney’s fees and consumer dissatisfaction requires a description of both the lower court and appellate court’s discussion of the issues.

66 In re Subway Footlong Sandwich Marketing and Sales Practices Litig., 869 F.3d 551, 557 (7th Cir. 2017) (quoting In re Walgreen Co. Stockholder Litig., 832 F.3d 718, ,724 (7th. Cir. 2016))
67 Id.
A. The District Court

In January 2013, an Australian teenager photographed his Subway Footlong sandwich and uploaded it to Facebook. 68 The image showed that his foot-long sandwich was only eleven inches long. 69 The post went viral, and shortly thereafter lawyers began investigating potential consumer protection claims against Doctor’s Associates, the parent company of Subway. 70 In the same year, the named plaintiffs and their counsel filed complaints in several different courts, each alleging that Subway unfairly and deceptively marketed its sandwiches resulting in each plaintiff receiving less food than he or she had bargained for. 71 Thereafter, Subway requested that the Judicial Panel on Multidistrict Litigation transfer the individual actions to a single district for consolidation. However, while waiting for the panel to agree to the request, the parties agreed to mediation. 72 During this time, the parties engaged in initial informal discovery which led the plaintiffs to recognize the difficulties of obtaining class certification on claims for monetary damages and as such, decided to seek only injunctive relief. 73 While the Panel had agreed to consolidate the cases in one district, the parties continued to attend mediation sessions; by March 2014 the parties had agreed to a settlement. 74

As part of the settlement, Subway agreed that for a period of four years, it would engage in a number of inspection measures designed to ensure that the Subway loaves were at least twelve inches long. 75 Additionally, Subway agreed to post notices in stores, and on its

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68 In re Subway Footlong Sandwich Marketing and Sales Practices Litig., 316 F.R.D. 240, 242 (E.D. Wis. 2016), rev’d 869 F.3d 551 (7th Cir. 2017) (hereafter referred to as “Subway I”).
69 Id.
70 Id.
71 Id.
72 Id.
73 Id. at 243.
74 Id.
75 Id.
website, informing consumers of the possibility of shorter loaves of bread.\textsuperscript{76}

Presented before the district court were the plaintiffs’ motion for final approval of a settlement, class counsel’s motion for attorneys’ fees, and an incentive award for the named plaintiffs.\textsuperscript{77} Though the court had preliminarily approved the settlement, unrepresented objector Theodore Frank, disputed the settlement’s benefit to the class.\textsuperscript{78}

The district court first considered whether the total value of the settlement, $525,000 plus the value of the injunction, was reasonable.\textsuperscript{79} The court found that it was, given that the plaintiffs could not likely recover more than that amount.\textsuperscript{80} Despite the reasonableness, the objector argued that the monetary component of the settlement should be allocated to the named and absent class members, rather than just to the named plaintiffs and the class counsel.\textsuperscript{81} However, the court determined that this was an impractical request, considering the costs of informing the class members of the settlement, processing the claims and opt-outs, and distribution of payment.\textsuperscript{82} As such, rather than leaving everyone out in the cold, the court found it reasonable to use the funds to compensate counsel and the named plaintiffs.\textsuperscript{83}

Additionally, the objector argued that the named plaintiffs and class counsel were inadequate representatives of the absent class because the injunctive relief would not actually benefit the class members.\textsuperscript{84} Because Subway had already pledged to ensure that all Subway Footlong sandwiches would be twelve inches, the objector

\textsuperscript{76} Id. at 244.
\textsuperscript{77} Id. at 242.
\textsuperscript{78} Id. at 245.
\textsuperscript{79} Id. at 247.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 248.
argued that the “new” practices would not provide class members with any benefit they do not already enjoy. The court disagreed, stating that the injunctive relief would now provide a mechanism for actual enforcement of best practices because class members could enforce violations by filing motions for contempt sanctions.

The court next considered whether the settlement only benefitted future Subway customers. Because many Subway patrons are often repeat customers, the court found that there is a strong likelihood of them purchasing a Subway sandwich again in the future. This, the court determined, meant that the injunctive relief did benefit the current class members as well as future customers. Next, the court disagreed with the objector’s argument that the settlement was unfair and the named plaintiffs were inadequate class representatives because the named plaintiffs would each receive a $500 incentive, while all the absent class member received no monetary relief. Instead, the court argued that because it was not practical to distribute damages to the class in the first place, awarding $5000 to the named plaintiffs would not diminish the amount of damages received by the class overall.

The district court was then left to determine whether the class counsel’s fees were reasonable. Typically, the reasonableness of attorneys’ fees is calculated by the “lodestar method”. Objector Frank however, did not actually contend that class counsel’s requested fee exceeded what was reasonable under the lodestar computation. Instead, he disputed the reasonableness of counsel appropriating the

85 Id. at 249.
86 Id.
87 Id.
88 Id.
89 Id. at 250.
90 Id.
91 Id. at 252.
92 Id.; the lodestar method calculates the hours reasonably expended on the case multiplied by a reasonable hour rate. The court may then adjust the fee up or down based on additional factors.
93 Id.
entire cash value of the settlement for themselves.\textsuperscript{94} In its analysis of the issue, the court determined that because the defendant had already agreed to the fee, the award was reasonable.\textsuperscript{95} Further, the court noted that given the modest value of the settlement, any remaining amount not given to the attorneys could not feasibly be distributed to the class members.\textsuperscript{96} As such, the court held that the reasonableness of the fee should be measured “by the value of the injunctive relief in relation to what the class members have given up in exchange for that relief.”\textsuperscript{97} Viewed in this way, the court found that by approving all aspects of the settlement, including the attorneys’ fees, the injunctive relief would end the alleged deceptive marketing practices and allow for consumer class members to hold Subway accountable were they to violate the settlement terms.\textsuperscript{98}

\textbf{B. The Seventh Circuit Discussion}

After having unsuccessfully objected to the settlement, class objector Theodore Frank, appealed to the Seventh Circuit.\textsuperscript{99} In the opinion, Judge Diane Sykes stated that even though the standard of review is deferential to the district court, in this case, the district judge is similar to a fiduciary of the class.\textsuperscript{100} As a fiduciary, the judge is held to a higher duty of care and must give the requirements of class certification “undiluted, even heightened, attention.”\textsuperscript{101} Because Rule 23(a) requires that class representatives “fairly and adequately protect the interests of the class,” it was essential for the court to consider the

\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} In re Subway Footlong Sandwich Marketing and Sales Practices Litig, 869 F. 3d 551 (7th Cir. 2017) (hereafter referred to as “Subway 2”).
\textsuperscript{100} Id. at 555 (citations omitted).
\textsuperscript{101} Id.
interests of the unnamed class members. Judge Sykes recognized, as many other judges have, that class action settlements often serve to benefit everyone but the actual class: class counsel seeks a settlement to get fees and the defendant, such as Subway, supports the settlement to avoid liability and negative press.

As such, the Seventh Circuit considered whether the settlement provided any meaningful benefit to the class. Judge Sykes decided that because the risk of a slightly shorter sandwich was the same before and after the settlement, the approved settlement was utterly worthless. The court ultimately held that when a class settlement results in fees for class counsel, but yields no meaningful benefits for the class, it is “no better than a racket.” Even class members’ ability to hold Subway in contempt of the settlement was deemed to be worthless.

Subway 2 is a clear illustration of the effect exorbitant attorneys’ fees have on class action lawsuits. Whether Subway truly engaged in misleading or deceptive advertising is almost entirely obfuscated by the fact that the settlement served only to line the pockets of class counsel. The Seventh Circuit held where a worthless settlement provides a worthless remedy, thus leaving “zero plus zero [to] equal [zero],” the case should be dismissed from its advent.

WHERE DOES THIS LEAVE THE REASONABLE CONSUMER?

The language of Rule 23 clearly states that a primary concern in class action lawsuits is the fair and adequate protection of the class interest. CAFA’s passage in 2005 was, at least in part, intended to
protect consumer class members from excessive attorneys’ fees. And, though the Seventh Circuit acknowledged as much in Subway 2, it did not provide guidance on what consumers and plaintiffs should do when class action litigation fails to serve as a proper path to resolution or when individual lawsuits prove too costly to bare.

A. Do Labels Really Matter?

One of the difficulties plaintiffs face in pursuing deception-based class action lawsuits is overcoming the “reasonable consumer” standard. In In re 100% Grated Parmesan, the plaintiffs alleged they had been deceived by the labels on grated parmesan cheese products. The court stated that the deceptiveness of a statement must be determined by the effect it has on a reasonable consumer. This standard “requires a probability that a significant portion of the general consuming public . . ., acting reasonably in the circumstances, could be misled.” Additionally, the allegedly deceptive act must be viewed in context with the entire packaging. As such, the issue centered on whether the allegedly misleading labels were ambiguous, and if so, would any other part of the label dispel a plaintiff’s confusion. If context cleared up the deception, the claim was defeated, if it did not, then the claim could proceed. The court determined that because the labels were ambiguous and the plaintiffs

110 See CAFA, supra note 26, at (b)(1).
112 In re 100% Parmesan, 2017 WL 3642076, at *1.
113 Id. at *5.
114 Id. (quoting Ebner v. Fresh, Inc., 838 F.3d 958, 965 (9th Cir. 2016)).
115 Id.
116 Id.
117 Id.
only had to read the ingredient list on the back of the product, the reasonable consumer was not likely to be misled.\textsuperscript{118}

What the court in \textit{In re 100\% Grated Parmesan} lost sight of was that every day, consumers are inundated with advertisements on billboards, in television commercials, and on grocery story displays. Each advertisement attempts to convince the public to purchase its product over another. Food and beverage producers know that successful marketing campaigns affect the average consumer’s purchases. In 2015, over $560 billion was spent on brand marketing, and that amount is expected to increase to over $740 billion by 2020.\textsuperscript{119} More specifically, companies spent roughly $67 billion dollars on packaging alone in 2015.\textsuperscript{120}

Viewed in this light, it is clear that businesses are heavily invested in what goes on their packaging. Companies carefully select the language to be put on their labels in order to distinguish their products from others. The intention is that the words will draw in the public and entice them to purchase the goods. The average shopper may have an idea about the products they are looking for, but often rely on packaging and branding to make a purchase decision.\textsuperscript{121} If consumers were persuaded to purchase products by what a label says, companies would not invest so much of their budget on packaging and marketing. As such, consumers “should [not] be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box.”\textsuperscript{122} To expect otherwise encourages companies to continue spending their marketing dollars on misleading and ambiguous advertisements.

\textsuperscript{118} \textit{Id.} at *6.

\textsuperscript{119} John Wolfe, \textit{Marketing Spend on Brand Activation will top $595 Billion in 2016}, ANA (April 19, 2016), http://www.ana.net/content/show/id/39647.

\textsuperscript{120} \textit{Id.}


\textsuperscript{122} William v. Gerber Products Co., 552 F.3d 934, 939 (9th Cir. 2008).
B. The Legal Community Can Make a Difference.

Whether the issue at hand involves food and beverage sales practices or some other matter, class action litigation is in need of reform. This Article proposes that, like the the district court in *Subway I*, other courts should reassess the value of injunctive relief as it pertains to food class action litigation. In *Subway 2*, the Seventh Circuit determined that the injunctive relief proposed by the settlement was worthless because despite new quality-control measures and the inclusion of disclaimers in their ads, Subway would never be able to guarantee that each loaf of bread would always be twelve inches long. Unlike the Seventh Circuit, the district court argued that the reasonableness of a class counsel’s fee award as well as the settlement itself cannot and should not always be measured by the size of the monetary relief to the class members. Courts should not be immediately dissuaded by the amount of class counsel fees but rather give pause to consider the value of injunctions. Injunctive relief can “preserve each class member’s right to bring a subsequent action for monetary damages, either individually or as part of a class action” should a defendant breach the terms of the agreement. By elevating the value of injunctions, plaintiff consumers will maintain at least one modest way of forcing food companies to examine their practices.

Currently, consumers and producers are still waiting for the FDA to issue further guidance on what the term “natural” means. Other regulatory agencies should follow suit and provide clarity on common labeling terms. The more direction provided to companies, the easier it will be for them to tailor their marketing and advertisements accordingly. Furthermore, the more narrowly defined the terms, the easier it will be to differentiate between frivolous and meritorious food-related claims. Additionally, in light of more recent cases such as

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123 *Subway I*, 316 F.R.D. at 252.
124 *In re Subway II*, 869 F.3d 551, 556-57 (7th Cir. 2017).
125 *Subway I*, 316 F.R.D. at 252.
126 *id.*
the Ninth Circuit’s Gerber Products Co., the FTC should consider issuing an updated letter of guidance on what it means to deceive a reasonable consumer. Because it is plausible “that a consumer might rely on the representation [on the label] . . . without looking at the ingredients,” the FTC should factor in what a reasonable consumer relies on in making their purchases.

Finally, Congress should pass the Fairness in Class Action Litigation Act, which would eliminate many of the no-injury class actions while also requiring that a majority of the settlement award go to class members, rather than class counsel. This legislation would “assure fair and prompt recoveries for class members . . . with legitimate claims” as well as “diminish abuses in class action . . . litigation that are undermining the integrity of the U.S. legal system.” On March 9, 2017, this bill was passed by the House and has since been sent to the Senate for review. Should this legislation be enacted, class action procedures would undergo several substantive changes.

In an effort to ease any concerns over unmeritorious complaints, under the new act, a court could not certify a class unless there is a “rigorous analysis of the evidence.” Additionally, the bill would address several issues relating to attorney’s fee awards. First, it would delay payment of class counsel’s fees until after the distribution of monetary recovery to the class. Second, rather than tying attorney’s fee awards to the total amount of the class settlement fund, the awards would be limited to “a reasonable percentage” of the payments actually distributed and received by class members. Finally, the bill

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128 See Gerber Products Co., 552 F.3d 934, 939 (9th Cir. 2008).
131 Id. at §102(1)-(2).
132 Id. at §1716(b).
133 Id. at §1718(b)(1).
134 Id. at §1718(b)(2).
would tie the calculation of fees in injunctive classes to the value of the injunctive relief provided to class members.  

There appears to be no end in sight for class action litigation based on food and beverage sales and marketing practices; however, rather than dismissing these cases out of hand, legislators, regulatory agencies, and courts should work together to develop better methods of ensuring that these types of lawsuits become more equitable for both plaintiffs and defendants.

135 Id. at §1718(b)(3).
MIRROR, MIRROR ON THE WALL, ARE THEY
TRAINEES AND NOT EMPLOYEES AT ALL? THE
LEGALITY AND “ECONOMIC REALITY” OF
UNPAID INTERNSHIPS

BEATRIZ CARRILLO

Cite as: Beatriz Carrillo, Mirror, Mirror on the Wall, Are They Trainees and Not Employees at All? The Legality and “Economic Reality” of Unpaid Internships, 13 SEVENTH CIRCUIT REV. 282 (2017), at https://www.kentlaw.iit.edu/sites/ck/files/public/academics/jd/7cr/v13/carrillo.pdf.

INTRODUCTION

The modern version of the United States internship system has changed over the years. It is believed internships descended from professional apprenticeships, which originated with the trade guilds of Europe in the eleventh and twelfth century.1 In the trade guilds, a person would pay to work alongside a “master,” who would teach him a skill.2 Apprentices could spend several years working alongside their “master,” and typically started their training at the age of sixteen.3

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3 Id.
Internships are recognized as a necessary experience for career development. Over time, they became an integral part of a person’s education and are sometimes required to earn a college degree. In today’s economy, many employers consider internship experience as one of the most significant factors in hiring decisions. However, if an intern is not considered an employee by law, they are not afforded the same protections under Title VII or the Fair Labor Standards Act (“FLSA”). Under the FLSA, employees are guaranteed a minimum wage for their work, but the Act does not provide a clear definition of the term “employee.” In addition, lack of Title VII protection exposes interns to discrimination and hostile work environments, such as sexual harassment.

Recently, there was been an increase in litigation involving unpaid internships. Unpaid interns argue that employers cannot avoid FLSA requirements simply by labeling employees as interns, contending that interns should be considered employees only when they successfully show an employer-employee relationship.

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4 Spradlin, supra note 1.
6 Human resources professionals recently ranked internship experience as one of the most important factors when hiring an applicant. See Joanna Venator & Richard V. Reeves, Unpaid Internships: Support Beams for the Glass Floor, Bookings Inst. (July 7, 2015), https://www.brookings.edu/blog/social-mobility-memos/2015/07/07/unpaid-internships-support-beams-for-the-glass-floor/
9 See Wang v. Phoenix Satellite Television US, Inc., 976 F. Supp. 2d 527, 529 (S.D.N.Y. 2013) (holding that an intern was not protected under Title VII although she was sexually harassed at her internship site).
10 See Ross Perlin, Unpaid Interns: Silent No More, N.Y. TIMES (July 20, 2013), http://www.nytimes.com/2013/07/21/jobs/unpaid-interns-silent-no-more.html (stating that over 15 unpaid internship lawsuits have been filed since summer of 2013).
Currently, there is no federally regulated definition of “intern.”12 The Supreme Court attempted to shed light on the subject in *Walling v. Portland Terminal Co.*,13 which provided guidance on how courts should determine the circumstances when an unpaid trainee may be considered an employee under the FLSA. Since that decision, the U.S Department of Labor14 (“DOL”) and various circuit courts have attempted to interpret the *Walling* factors as applied to modern day internship programs. As a result, four predominant tests have emerged:15 The Wage & Hour Division (“WHD”) factors,16 the “primary beneficiary” test,17 “the totality of the circumstances” test,18 and the *Glatt* test.19

Most recently, the Seventh Circuit analyzed this issue in *Hollins v. Regency Corp.*20 In *Hollins*, the Seventh Circuit held that cosmetology students, whom worked in a salon for school credit, were not employees covered by the FLSA.21 As a result, those students were

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15 All the four tests will be discussed in Section II of this note.


17 *See, e.g.*, McLaughing v. Ensley, 877 F.2d 1207 (4th Cir. 1989).

18 *See, e.g.*, Reich v. Parker Fire Prot. Dist., 992 F.2d 1023 (10th Cir. 1993); Donovan v. Am. Airlines, Inc., 686 F.2d 267 (5th Cir. 1982).

19 *See* Glatt v. Fox Searchlight Pictures, Inc., 803 F.3d 1199, 1212 (2d Cir. 2015).

20 867 F.3d 830 (7th Cir. 2017).

21 *Id.*
not entitled to compensation for the time they worked in the salon.\(^{22}\) The court also discussed the various established tests that have emerged from other circuits that have grappled with the distinction between an employee and an unpaid intern/trainee. It ultimately decided on a combination of the relevant tests, which it called the “economic reality test.”\(^{23}\)

This note unfolds in five parts. Part I gives a brief overview of the FLSA and the federal government’s involvement in trying to define the FLSA’s self-defining “employee” definition. Part II focuses on the different tests employed by the DOL and circuit courts across the nation when attempting to determine who constitutes an employee under the FLSA. Part III analyzes the recent Seventh Circuit decision of *Hollins v. Regency Corp.* and discusses the court’s hesitation to articulate a specific and definitive test to apply in cases in which it is necessary to first determine whether an employer is properly classifying employees as “interns” or “trainees,” or if those persons should be deemed “employees” by law. Part IV looks at the dangers unpaid interns face when they are not considered employees, specifically focusing on the issues that arise under Title VII in the context of sexual harassment in the workplace. Finally, Part V advocates for a clear, universal, two-question test to determine whether unpaid interns should be considered employees under the FLSA.

I. THE FLSA AND ITS SELF-DEFINING EMPLOYEE DEFINITION

A. Brief Overview of the FLSA

The Fair Labor Standards Act (“FLSA”) was enacted on June 25, 1938.\(^{24}\) The FLSA requires that all nonexempt employees\(^{25}\) receive

\(^{22}\) *Id.*

\(^{23}\) *Id.*

minimum wage and overtime pay. It sets a minimum wage of $.25 per hour (rising to $0.40/hr by 1945), fixed the maximum work hours to 44 (falling to 40 hr/week by 1940), and banned child labor. This act was part of a strong push, led by President Franklin D. Roosevelt, for government control over the hours and wages of all workers, specifically those of children.

When Congress enacted the FLSA, it declared that the “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers” created burdens and perils to the labor markets and interstate commerce. Thus, Congress believed enacting the FLSA and creating a federal minimum wage requirement improved a worker’s quality of life.

Section 6(a) of the FLSA established the federal minimum rate employers must pay their employees. The minimum wage requirement applies to every employment relationship that falls under

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29 Nordlund, supra. Note 24.


31 Id.

32 See 29 U.S.C §206.

33 FLSA 6(a), 29 U.S.C § 206.
the FLSA’s definition of “employee.” However, the FLSA broadly defines “employee” as “any individual employed by an employer” and defines “employed” as “to suffer or permit to work.” An employer, in turn, “includes any person acting . . . in the interest of an employer in relation to an employee.”

These definitions allow for broad interpretations and lead to uncertainty as to when interns are employees under the FLSA. Nevertheless, the courts have found it proper to reduce the breadth of the definitions by carving out certain exceptions. One of those exceptions was established in Walling v. Portland Terminal Co., as the “trainee” exception, which has formed the basis of unpaid intern law. Further, if an unpaid intern is found to be an employee then the FLSA standards apply, and the employer is forced by the DOL to pay that intern the federal minimum wage and any overtime compensation.

C. Walling v. Portland Terminal Co., The Supreme Court’s Attempt to Differentiate Employees from Unpaid Trainees

The Supreme Court has yet to decide if unpaid interns are considered employees under the FLSA, but it has provided some guidance for courts grappling with cases brought by unpaid trainees. In Walling v. Portland Terminal Co., the Supreme Court carved out a

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34 29 U.S.C § 203(e)(1)–(5).
39 See Walling, 330 U.S. at 152.
40 Id.
specific “trainee” exception under the FLSA.\textsuperscript{41} Portland Terminal was a railroad company that offered a course of practical training to prospective yard brakemen.\textsuperscript{42} The training was a necessary requisite; brakemen applicants were never accepted until they had taken the training course.\textsuperscript{43} However, the company did not pay the individuals for their training time.\textsuperscript{44} Thus, the plaintiff, a brakeman, argued he was an employee under the FLSA and was entitled to compensation for the time he spent in the training program.\textsuperscript{45}

The Portland Terminal training course consisted of working under the supervision of a yard crew.\textsuperscript{46} The trainee would first observe and then was gradually permitted to do actual work under close scrutiny and supervision.\textsuperscript{47} The Court noted there was “no question” that the trainees were doing the type of activities covered by the FLSA.\textsuperscript{48} However, the Court also stated that it would not interpret the FLSA to create an employment relationship when a person’s work was intended to serve only his or her own advantage, stating,

\textit{broad as [the definitions of employer and employee are], they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction. Had these trainees taken courses in railroading in a public or private vocational school, wholly disassociated from the railroad, it could not reasonably be suggested that they were employees of the school within the meaning of the Act.}\textsuperscript{49}

\begin{footnotes}
\footnotetext[41]{\textit{Id.}}\footnotetext[42]{\textit{Id.} at 149.} \footnotetext[43]{\textit{Id.}}\footnotetext[44]{\textit{Id.}} \footnotetext[45]{\textit{Id.}} \footnotetext[46]{\textit{Id.}} \footnotetext[47]{\textit{Id.}} \footnotetext[48]{\textit{Id.}} \footnotetext[49]{\textit{Id.} at 152–153. The Court also claimed that the FLSA “[did not] intended to stamp all persons as employees, who, without any express or implied compensation}
The Court ultimately held that the plaintiff was a trainee of the company and, therefore, did not fall within the FLSA’s definition of “employee.”\(^{50}\) In support of its holding, the Court looked to the intent of the legislature when enacting the statute.\(^{51}\) The Court noted that the FLSA’s purpose “was to ensure that every person whose employment contemplated compensation should not be compelled to sell his services for less than prescribed minimum wage.”\(^{52}\)

The Court also noted several factors and observations which helped it determine the trainee was not an employee.\(^{53}\) First, the Court noted the trainees’ work did not “displace” any of the company’s regular employees.\(^{54}\) Second, the Court looked at the fact that the trainees’ work was closely supervised, such that the “work [the trainees did] did not expedite the company’s business, but may [have] . . . actually impede[d] . . . it.”\(^{55}\) The Court further noted the importance of the training program in the trainee’s subsequent employment with the company.\(^{56}\) In addition, the Court also relied on the trainee’s lack of a guaranteed job following the completion of the program, and the trainee’s lack of expectation of compensation.\(^{57}\) Finally, the Supreme Court considered the educational benefit of Portland’s training course, as well as the instructional benefit for the trainee.\(^{58}\) Based on all of its observations, the Court determined Portland received “no immediate

\(^{50}\) Id. at 153.
\(^{51}\) Id. at 152.
\(^{52}\) Id.
\(^{53}\) Id. at 153.
\(^{54}\) Id. at 149–50.
\(^{55}\) Id. at 150.
\(^{56}\) Id. at 149–50. However, subsequent employment with the railroad company was not guaranteed upon completion of the training program. After the individuals completed the program they were then placed into a pool of people that the railroad could hire from when necessary. Id.
\(^{57}\) Id. at 150.
\(^{58}\) Id. at 152–53.
advantage from the trainees work, thus concluding the plaintiff was not an employee within the meaning of the FLSA.

D. The Department of Labor’s, Wage & Hour Division Six-Factor Test

In the aftermath of *Walling v. Portland Terminal Co.*, employers were faced with the question of whether the workers fell under the “trainee exception” or whether an employment relationship existed with their trainees. To provide a more direct approach and interpretation of *Walling*, the Department of Labor, under their Wage & Hour Division ("WHD"), devised a six-factor test. In April 2010, the DOL under WHD released these factors on Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act.

The WHD determined that for an employment relationship not to exist and federal protections to apply, all of the following factors must be met: (1) the internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment; (2) the internship experience is for the benefit of the intern; (3) the intern does not displace regular employees but works under close supervision of existing staff; (4) the employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its

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59 Id. at 153.
60 Id.
61 Id.
64 Id.
65 Id.
66 Id.
67 Id.
operations may actually be impeded;68 (5) the intern is not necessarily entitled to a job at the conclusion of the internship;69 and (6) the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.70 The WHD concluded that “[i]f all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the [FLSA’s] minimum wage and overtime provisions do not apply to the intern.”71

Although the DOL and WHD published this test as a Fact Sheet, they are opinion letters, and many courts have taken it upon themselves to interpret the Walling case and to develop their own factors.72 Fact sheets from the DOL do not hold the necessary force of law to bind the courts.73 Thus, all the DOL can do is strongly encourage that its test be followed, and that the courts give deference to its opinion.74 The WHD explained that the more an internship program resembles an educational experience and offers an

68 Id.
69 Id.
70 Id.
71 Id.
72 See discussion in Section II.
73 See Wage & Hour Div., supra note 63 (“This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations”); see also Matthew Tripp, Note, In the Defense of Unpaid Internships: Proposing a workable test for Eliminating Illegal Internships, 63 Drake L. Rev. 341, 354-66 (2015) (noting that some courts have denied the DOL fact sheet any deference, as it is subject to much criticism for its inconsistency with prior DOL interpretations).
74 See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that “the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance”). Furthermore, courts have also disagreed about the level of deference to give the DOL Fact Sheet. Compare Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011) (stating that the DOL Fact Sheet #71 should not be given deference under Skidmore), with some courts giving agency opinions great deference according to Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (creating a two-step test that affords deference to Congress if it has spoken directly to the issue in question).
educational benefit, the more likely the unpaid internship will fit into the “trainee exception.”

1. The Issue with the DOL Factors

Even though Fact Sheet #71 is not federally enforced, many jurisdictions have used the DOL’s six-factor test. Employers have also tried to navigate the landscape of internships by relying on the WHD’s educational benefit rationale. However, a key issue arises when employers follow the DOL factors and exploit the education benefit concept.

The issue is the test heavily focuses on student opportunities and class credit. Nevertheless, a growing number of interns in this country are no longer college students. Recently there has been a growing number of post-graduate and “career-changers” that have

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75 See Wage & Hour Div., supra note 63.
78 Such as in Hollins v. Regency Corp., where the court states one of the reasons that cosmetology interns are not employees is because they are getting educational credit to fulfill their certificate, which can be a type of compensation. 144 F.Supp.3d 990, 993 (2015). However, what happens to those students who are not aiming to get a certificate, they would not be working for certificate hours, so what would be their type of compensation?
80 See Amy Levin-Epstein, Why Internships Aren’t Just for College Students, CBS NEWS (Apr. 4, 2011), https://www.cbsnews.com/news/why-internships-arent-just-for-college-students/ (noting that there has been an increase in numbers of individuals searching for internships that are recent graduates or older: “We have noticed that 20 percent of the people searching … for internships are either recent graduates or older. So, it's clear that internship seekers are no longer undergrads alone”).
sought internships in today’s markets. Thus, when more and more employers require interns to be eligible to receive college credit as a pre-requisite for their internship program, the employer excludes those post-graduates and “career-changers”. A system is needed that addresses the growing number of individuals seeking unpaid internships, shifting the focus from educational benefit and focusing on the benefit the intern brings to the employer.

II. THE DIFFERENT CIRCUIT COURT APPROACHES

Recently, the courts have had an influx of individuals challenging their unpaid intern status. Numerous circuit courts have had to address whether various working relationships rise to a level of an employee-employer relationship under the FLSA. While the DOL offered a six-factor test, circuit courts, when faced with the question of determining an intern’s employment relationship, have applied and adopted various tests based on their individual interpretations of the Walling decision and the DOL’s six-factor test.

81 See id.
82 See id.
83 While Interns may seek paid internships, the number is limited, which is why many Interns end up in unpaid and often illegal internships. See Avik Roy, The Unhappy Rise of The Millennial Intern, FORBES (Apr. 22, 2014), https://www.forbes.com/sites/realspin/2014/04/22/the-unhappy-rise-of-the-millennial-intern/#7d73bb211328 (last accessed Dec. 1, 2017).
84 For example, the Second Circuit reasoned that the key issue in assessing whether an individual was truly an “unpaid intern,” versus a mislabeled and uncompensated employee, is determining which party—the individual or the employer—derives the most benefit from the relationship: in other words, whether the relationship is genuinely focused on the education and development of the individual, or whether the “economic reality” of the situation makes the relationship a type of “employment-in-disguise.” See Glatt v. Fox Searchlight Pictures, Inc. 811 F.3d 528, 536-37 (2d Cir. 2015) (developing the Glatt test to help determine the relationship).
85 Andrew Mark Bennett, Unpaid Internships & The Department of Labor: The Impact of Underenforcement of the Fair Labor Standard Act on Equal Opportunity, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 293, 302-06 (2011); See also Cody Elyse Brookhouser, Whaling on Walling: A Uniform Approach to
A. The Primary Beneficiary Test

1. The Fourth Circuit

In McLaughlin v. Ensley, the Fourth Circuit applied what is known as the primary beneficiary test. The Fourth Circuit developed this test upon a cursory analysis of Walling, stating a worker could not be an employee where “the principal purpose of the [work] was to benefit the person in the employee status.”

In McLaughlin, the employer Kirby Ensley was the owner of a snack food distribution service. The employer employed route men who drove his company trucks, restocked the vending machines, and sold snack foods to retailers on a commission basis. Before Ensley hired a new route man, the applicant was required to participate in a five-day orientation program. During the five-day orientation program, the prospective employee was exposed to the tasks they would be expected to perform. Over those five days, the trainees worked a total of fifty to sixty hours, loaded and unloaded delivery trucks, restocked Ensley’s vending machines, were given instructions on how to drive the trucks, introduced to retailers, taught basic

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86 The Fourth Circuit has repeatedly held “that the general test used to determine if an employee is entitled to the protections of the Act is whether the employee or the employer is the primary beneficiary of the trainees’ labor.” See Wirtz v. Wardlaw, 339 F.2d, 785 (4th Cir. 1964); Isaacson v. Penn Community Services, Inc., 450 F.2d 1306 (4th Cir. 1971); McLaughlin v. Ensley, 877 F.2d 1207 (4th Cir. 1989).

87 See Ensley, 877 F.2d at 1209.

88 See id. (quoting Isaacson v. Penn Cmty. Servs., Inc. 450 F.2d 1306, 1308 (4th Cir. 1971)).

89 See id. at 1208.

90 See id.

91 See id.

92 See id.
vending machine maintenance, and occasionally helped with preparing orders. Nevertheless, the trainees were not paid for their work in that five-day period.

The Fourth Circuit looked at who was receiving the benefit of the program. The court determined Ensley was the one receiving the primary benefit from the orientation program. It noted that through the program, Ensley had an opportunity to review if potential employees would be successful for free. The court also stated that one of the most important factors evaluated was the nature of the training and experience. The Fourth Circuit determined Ensley’s training program was very limited. The individuals did not receive training comparable to that which they would receive at a vocational school, and the skills they were learning were so job specific that they would be unable to transfer to other occupations. Thus, Ensley primarily benefitted from the training program, not the trainees.

2. The Sixth Circuit

Like the Fourth Circuit, the Sixth Circuit utilized the primary beneficiary test. In Solis v. Larelbrook Sanitarium & School, Inc., the central question focused on which standard was appropriate to determine if students were employees as defined by the FLSA. Here, the DOL sued the school alleging it had violated the FLSA’s child labor provisions. Solis involved students at a boarding school in Tennessee. At the boarding school, the students received both

93 See id.
94 See id.
95 See id. at 1210.
96 See id.
97 See id.
98 See id.
99 See id.
100 See id.
101 See 642 F.3d 518, 519 (6th Cir. 2011).
102 See id.
tangible and intangible benefits. 103 The students received hands-on training like that offered in trade and vocational school, while also attending academic courses. 104

The Sixth Circuit ultimately rejected the DOL’s argument that their six-factor test was the appropriate standard. 105 The court noted that the DOL’s six-factor test was rigid and inconsistent with the holding in Walling. 106 The Sixth Circuit called the six-factor test a “poor method for determining employee status in a training or educational setting. 107 Thus, the court chose to use the primary benefits test in determining if students were employees “since the test’s generality makes it applicable to many different employee-trainee relationships.” 108 However, the Sixth Circuit modified the primary benefit test by adding a factor that considered if the students displaced any regular employees and whether the program provided students with an educational experience. 109

Ultimately, the court concluded the boarding school students were the ones receiving the primary benefit of the school’s training. 110 The court determined that while the school did receive some benefit from the students’ work, the students were also gaining significant leadership skills and hands-on experience. 111 The court reasoned that those skills made them into competitive candidates for trade occupations after graduation, ultimately being the primary beneficiaries. 112 The Sixth Circuit also supported their conclusion by noting the students did not displace regular employees and, at times,

103 See id. at 520.
104 See id.
105 See id. at 525.
106 See id.
107 See id.
108 See id. at 529; see also Nicole M. Klinger, Will Work for Free: The Legality of Unpaid Internships, 10 BROOK. J. CORP. FIN & COM. L. 551 (2016).
109 See Solis, 642 F.3d 518, 529(6th Cir. 2011).
110 See id. at 520.
111 See id.
112 See id. at 532.
disrupted instructors’ time. Thus, the court concluded the students at the school were not employees under the FLSA.

**B. The Totality of the Circumstances Test**

The totality of the circumstances test, unlike the primary beneficiary test, looks not just at who is receiving the benefit, but at all the factors found in *Walling*. However, unlike the DOL’s test where all factors must be present, courts that use the totality of the circumstances test balance factors to determine the totality of the circumstances surrounding the individuals working relationship. The DOL’s approach of all-or-nothing has not been adopted by any circuit courts because courts prefer a more flexible standard. Nevertheless, courts have used the six factors in applying the totality of the circumstances test.

1. Fifth Circuit

The Fifth Circuit utilized the totality of the circumstances test when it determined whether trainees of American Airlines were employees under the FLSA. In *Donovan v. American Airlines*, American Airlines required potential employees to undergo training at American’s Learning Center in Dallas, Texas, in order to be eligible

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113 See id. at 530.
114 See id. at 532.
118 See Solis, 642 F.3d at 525 (rejecting the all-or-nothing approach as too rigid); Reich, 992 F.2d at 1026.
119 See Reich., 992 F.2d at 1026-29.
120 See Donovan v. American Airlines, 686 F.2d 267, 272 (5th Cir. 1982).
for certain positions at American.\textsuperscript{121} However, this training required that the trainees give up their other jobs and move to Dallas. Further, trainees were not paid for the time spent training, and they were not guaranteed employment after completion of the American Airlines training program.\textsuperscript{122} Thus, before beginning training, each trainee acknowledged, in writing, that he or she was not an employee during training and that being accepted for training was not an offer of employment.\textsuperscript{123}

For flight attendants, training was forty hours, five days a week.\textsuperscript{124} The training included learning the emergency and safety features of each aircraft, as well as learning American Airlines’ internal procedures and practices.\textsuperscript{125} However, the instruction was designed to teach employees to work for American and not for other airlines.\textsuperscript{126} In addition, the trainees did not assist in commercial flights nor displaced other employees.\textsuperscript{127} The court believed that the DOL and other tests were too stringent of a requirement, and it forced for-profit companies to not benefit at all from a training or internship program.\textsuperscript{128} Therefore, to determine whether the trainees of American Airlines were employees under the FLSA, the Fifth Circuit used the balancing test.\textsuperscript{129}

The court considered the benefits American Airlines received with those the trainee received.\textsuperscript{130} The court stated: “Although training benefits American by providing it with suitable personnel, the trainees attend school for their own benefit, to qualify for employment they

\begin{align*}
\textsuperscript{121} & \textit{Id. at 268.} \\
\textsuperscript{122} & \textit{Id.} \\
\textsuperscript{123} & \textit{Id. at 269.} \\
\textsuperscript{124} & \textit{Id.} \\
\textsuperscript{125} & \textit{Id.} \\
\textsuperscript{126} & \textit{Id.} \\
\textsuperscript{127} & \textit{Id.} \\
\textsuperscript{128} & \textit{See id. at 271–72 (the court analyzes Wirtz v. Wardlaw, 339 F.2d 785, 788 (4th Cir. 1964)).} \\
\textsuperscript{129} & \textit{Id. at 272.} \\
\textsuperscript{130} & \textit{Id. at 272.}
\end{align*}
could not otherwise obtain.”131 The fact that the trainees had to give up their jobs and move to Dallas for the training was considered an opportunity cost, which the court saw as “a [students] sacrifice to attend school. But [the sacrifices are made by] all who seek to learn a trade of profession.”132 Thus, through balancing the DOL’s factors and the primary benefits tests factors, the Fifth Circuit court was able to determine the trainees were not employees under the FLSA.133

2. Tenth Circuit

The Tenth Circuit has also used the totality of the circumstances test when determining if an individual qualified as an employee under the FLSA.134 The Tenth Circuit used the flexible version of the DOL’s six-factor test to determine if participants in a firefighter academy were entitled to compensation under the FLSA.135 According to the Tenth circuit, all six factors were relevant but not a single factor was dispositive.136

In Reich, trainees attended Parker Fire’s academy for classes, tours of the neighborhood, and simulations.137 In addition to the classes, the trainees also helped maintain fire trucks and other firehouse equipment.138 The Tenth Circuit court assessed the case under the totality of the circumstances test and looked at the economic reality of the relationship, using the DOL’s six-factors.139 The court noted that supporting the strict application of the DOL’s six-factors

131 Id.
132 Id.
133 See id. at 272.
134 Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026 (10th Cir. 1993).
135 Id. at 1023.
136 Id. at 1027–29.
137 Id. at 1025.
138 Id.
139 Id. at 1027.
would be inconsistent with the Walling Supreme Court analysis because Walling does not support an all or nothing approach.\textsuperscript{140}

The Tenth Circuit then weighed the DOL's six factors.\textsuperscript{141} First, the court determined that the curriculum taught at the academy was similar to the educational experience a trainee would receive at any firefighting academy.\textsuperscript{142} The court stated that “[a] training program that emphasizes the prospective employer’s particular policies is nonetheless comparable to vocational school if the program teaches skills that are fungible within the industry.”\textsuperscript{143} Second, the court also found that, while trainees were making “financial sacrifices,”\textsuperscript{144} the trainees benefited from the program because they were acquiring skills that were transferable within the industry and required to be career firefighters.\textsuperscript{145} Third, the trainees did not displace any current employees of the department.\textsuperscript{146} Fourth, the trainees did not immediately benefit the employer and any benefit was “de minimis.”\textsuperscript{147} Fifth, the court looked at the fact that “those who successfully completed the course had every reasonable expectation of being hired.”\textsuperscript{148} And lastly, the trainees understood that they would not be receiving pay during their training.\textsuperscript{149} After balancing the factors above, the court determined that five out of six factors favored that the trainees were not employees under the FLSA.\textsuperscript{150} The Fifth Circuit, unlike the DOL, required that most factors be present, but it did not require that all factors are met because a “single factor cannot carry

\[\text{\textsuperscript{140}} \text{Id.}\]
\[\text{\textsuperscript{141}} \text{See id. at 1027.}\]
\[\text{\textsuperscript{142}} \text{Id. at 1027–28.}\]
\[\text{\textsuperscript{143}} \text{Id. at 1028.}\]
\[\text{\textsuperscript{144}} \text{Id. (the court compared college students as making similar sacrifices).}\]
\[\text{\textsuperscript{145}} \text{Id.}\]
\[\text{\textsuperscript{146}} \text{Id. at 1029.}\]
\[\text{\textsuperscript{147}} \text{Id. at 1028–29.}\]
\[\text{\textsuperscript{148}} \text{Id. at 1029.}\]
\[\text{\textsuperscript{149}} \text{Id.}\]
\[\text{\textsuperscript{150}} \text{Id. at 1028.}\]
the entire weight of an inquiry into the totality of the circumstances . . .”151

C. The Glatt Test

1. Origin of the Glatt Test in the Second Circuit

Recently, in Glatt v. Fox Searchlight Pictures, the Second Circuit addressed the question of when a trainee is an employee.152 There, three interns who worked in a movie production filed a class action claiming they should have been categorized as employees and entitled to back pay wages under the FLSA.153 The interns worked for nine months and were not compensated nor did they receive academic credit.154 The interns did menial office tasks, which included things like buying a pillow for the director of the film and bringing him tea.155

The Second Circuit declined to use the DOL’s test because it was too rigid to be consistent with Second Circuit court precedent.156 The court stated: “the proper question is whether the intern or the employer is the primary beneficiary of the relationship.”157 Thus, the court chose to adopt a primary benefits test similar to those of the Fourth and Sixth Circuits.158 However, it delineated a list of nonexhaustive considerations to be used to determine if an individual is an employee under the FLSA.159

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151 Id. at 1029.
152 See 811 F.3d 528, 536–37 (2d Cir. 2015).
153 Id. at 530.
154 Id. at 532–33.
155 Id.
157 Id.
158 See discussion in Section II.A.
159 See Glatt, 811 F.3d at 536–37.
The court noted that primary benefits tests had three important features: (1) the tests focused on the interns and their work, (2) it gave the court the flexibility to examine the economic realities between the parties, and (3) the test acknowledged that interns’ relationships with their employers were analyzed in a different context than the typical employer-employee relationship.\textsuperscript{160} Thus, the non-exhaustive seven-factors to aid district courts in determining an employment status under the FLSA were:

(1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

(2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

(3) The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.

(4) The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.\textsuperscript{161}

(5) The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.

\textsuperscript{160} \textit{See id.} at 536.

\textsuperscript{161} The court did not mention what the academic calendar in this case was. As each educational institution can have different academic calendars, \textit{Academic Calendar}. \textit{OXFORD LIVING DICTIONARY} (2017), https://en.oxforddictionaries.com/definition/academic_calendar (last accessed Dec. 1, 2017).
(6) The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

(7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job when the internship concludes.\textsuperscript{162}

The seven factors were considerations, but no single factor was dispositive.\textsuperscript{163} The court stated that this test required “weighing and balancing all of the circumstances,” where no element was “dispositive.”\textsuperscript{164} The Second Circuit also noted that besides the seven factors, the courts were free to consider any relevant evidence they determined would be of aid when making a decision.\textsuperscript{165} The court believed that this approach was the most consistent with \textit{Portland Terminal}\textsuperscript{166} because the approach focused on “the relationship between the internship and the intern’s formal education.”\textsuperscript{167}

2. Adaptation of the \textit{Glatt} Test by the Eleventh Circuit

In \textit{Schumann v. Collier Anesthesia}, the Eleventh Circuit adopted the Second Circuit’s \textit{Glatt} test to determine if an intern was an employee under the FLSA.\textsuperscript{168} In \textit{Shumann}, twenty-five former nurse anesthetists were required to participate in 550 clinical cases in order to graduate.\textsuperscript{169} The nurses alleged that they were employees under the FLSA and were entitled to compensation because Collier Anesthesia

\textsuperscript{162} \textit{Glatt}, 811 F.3d at 536–37.  
\textsuperscript{163} \textit{Id.} at 537.  
\textsuperscript{164} \textit{Id.}  
\textsuperscript{165} \textit{Id.}  
\textsuperscript{167} \textit{Glatt}, 811 F.3d at 537.  
\textsuperscript{168} 803 F.3d 1199, 1203 (11th Cir. 2015).  
\textsuperscript{169} \textit{Id.}
benefited from their work by employing fewer registered nurses.\textsuperscript{170} In addition, the students were required to work longer hours than those required by their curriculum, and their services were billed by the college.\textsuperscript{171} The district court granted summary judgment for the defendants, finding that the student were not employees under the FLSA.\textsuperscript{172}

On appeal, the Eleventh Circuit found that the Second Circuit’s \textit{Glatt} test was the appropriate modern-day adaptation of the Supreme Court’s factors in \textit{Walling}.\textsuperscript{173} The Second Circuit’s approach effectively determined who was the “primary beneficiary” in an internship.\textsuperscript{174} The court noted that “the best way to [determine the primary beneficiary was] to focus on the benefits to the student while still considering whether the manner in which the employer implement[ed] the internship program [took] unfair advantage of or [was] abusive towards the student.”\textsuperscript{175}

Furthermore, the court added additional guidance on how the factors should be applied to the facts of the case, such as that employers must have a legitimate reason for scheduling training when school is not in session.\textsuperscript{176} In addition, the Eleventh Circuit stated that court “should consider whether the duration of the internship is grossly excessive in comparison to the beneficial learning. The court vacated the summary judgment for defendants and remanded to the district court consistent with the opinion on the use of the \textit{Glatt} test.

\begin{flushleft}
\textsuperscript{170} Id. at 1204.  \\
\textsuperscript{171} Id.  \\
\textsuperscript{172} Id.  \\
\textsuperscript{173} Id. at 1212.  \\
\textsuperscript{174} Id. at 1203.  \\
\textsuperscript{175} Id. at 1211.  \\
\textsuperscript{176} Id. at 1213.
\end{flushleft}
III. HOLLINS V. REGENCY CORP.

A. Case Background

Recently the Seventh Circuit was tasked with determining which test it would apply to the facts of Hollins v. Regency Corp.\(^{177}\) In January 2011, Venitia Hollins enrolled as a full-time cosmetology student at Regency.\(^{178}\) Regency operated a state licensed and accredited cosmetology school.\(^{179}\) Regency’s stated educational goals were “to prepare students to pass the required state cosmetology exams and teach them the entry-level skills needed to work in a professional salon.”\(^{180}\)

Regency was governed by state regulations and the National Accrediting Commission of Career Arts & Sciences.\(^{181}\) Indiana and Illinois state regulations required that Regency’s curriculum include at least 1,500 hours of “clock time” and cosmetology-related subjects, such as chemical treatment of hair, hair styling, shop management and nail technology.\(^{182}\) The regulations also required that the cosmetology student received instruction in proper sanitation techniques.\(^{183}\) The instruction of the cosmetology topics needed to take the form of both classroom and practical learning methods.\(^{184}\)

Thus, Regency divided its curriculum into three periods: (1) workshop phase, (2) rehearsal phase, and (3) performance phase.\(^{185}\) Regency provides 320 hours of introductory education on various

\(^{177}\) 867 F.3d 830, 830 (7th Cir. 2015).

\(^{178}\) Hollins v. Regency Corp., 144 F. Supp. 3d 990 (N.D. Ill. 2015), aff'd, 867 F.3d 830 (7th Cir. 2017).

\(^{179}\) Id. at 991.

\(^{180}\) Id. at 991.

\(^{181}\) Id.

\(^{182}\) Id.

\(^{183}\) Id. at 992.

\(^{184}\) Id.

\(^{185}\) Id.
cosmetology subjects.\textsuperscript{186} In order for students to move from the workshop phase to the rehearsal phase, they must pass various written and performance-based tests.\textsuperscript{187} After they pass the workshop phase, students are rotated in between the rehearsal and the performance base phase.\textsuperscript{188} For the performance phase, students participated on the “performance floor.”\textsuperscript{189} The performance floor is designed to replicate a modern salon, indistinguishable from a fully licensed commercial salon.\textsuperscript{190} Here, customers are charged a fee for student-provided services, at rates lower than those of licensed cosmetologist.\textsuperscript{191}

Venitia Hollins, alleged that since she spent time on the performance floor serving customers and doing administrative and cleaning duties, she was entitled to wages under the FLSA.\textsuperscript{192} Hollins claimed janitorial and administrative activities were not part of the cosmetology curriculum and did not amount to the experience she needed for her certification; therefore, she was entitled to compensation.\textsuperscript{193} The Seventh Circuit, using the Second Circuit’s \textit{Glatt} primary beneficiary test and the totality of the circumstances test together (referenced here as the “economic reality test”), determined that Venitia Hollins was not an employee under the FLSA.\textsuperscript{194} The Seventh Circuit agreed with the district court when it determined that “[t]he economic reality of the relationship between Regency and its students is that the students were engaged in their statutorily-mandated curriculum to become a licensed cosmetologist while [the students] were working on the performance floor.”\textsuperscript{195} The Seventh Circuit stated

\begin{itemize}
  \item \textsuperscript{186} Id.
  \item \textsuperscript{187} Id. at 993.
  \item \textsuperscript{188} Id. at 992.
  \item \textsuperscript{189} Id.
  \item \textsuperscript{190} Id.
  \item \textsuperscript{191} Id. at 993.
  \item \textsuperscript{192} Id.
  \item \textsuperscript{193} Id.
  \item \textsuperscript{194} Hollins v. Regency Corp., 867 F.3d 830, 830 (7th Cir. 2015).
  \item \textsuperscript{195} Hollins, 144 F. Supp. at 1007.
\end{itemize}
that “[this] require[d] us to [] examine[d] the ‘economic reality’ of the working relationship.”196

B. Court Analysis

Previously, in Vanskike v. Peters,197 the Seventh Circuit “had instructed district courts to assess the [‘] economic reality[’] of the relationship between the proffered employee and his alleged employer.”198 However, in Hollins the district court revisited the topic, and the Seventh Circuit affirmed its decisions.199 Thus, after the district court discussed Walling v. Portland Terminal,200 it determined that a flexible approach to the factors was consistent with the teachings of Walling, and it rejected the DOL’s Fact Sheet#71.201 Thus, the court found that a mixture of the Glatt factors, the “primary beneficiary” test and “the totality of the circumstances,” shed significant light on the economic reality of the relationship shared by Hollins and the school, Regency.202 The court also noted that no factor is determinative, and everything should be considered using the totality of the circumstances.203

Applying the Glatt factors, the court first determined if Hollins had an expectation of compensation when she was on the performance floor.204 The court stated that Hollins conceded she understood there would be no compensation for her time spent on the floor or she would get guaranteed employment.205 The court also looked at the

196 Id. at 993.
198 Hollins, 144 F. Supp. at 994.
199 Hollins, 867 F.3d at 837.
201 Hollins, 144 F. Supp. at 997.
202 Id. at 998.
203 Id.
204 Id. at 993.
205 Id. at 998.
similarities between the clinical/internship experience and that of classwork.\textsuperscript{206} If the work done in the unpaid position provided a learning experience similar to that be given in a formal-educational environment, the students were likely not employees.\textsuperscript{207} Here, the court said Hollins was practicing her cosmetology techniques on the performance floor, which were things she also did in the classroom.\textsuperscript{208} The court concluded that that fact supported the notion that Hollins was not an employee.\textsuperscript{209}

Another factor the court looked at was whether Hollins received educational credit. The court noted that a student receiving academic credit is a strong indicator that the individual is not an employee under the FLSA.\textsuperscript{210} In this instance, Hollins was receiving academic credit by working the performance floor.\textsuperscript{211} Hollins was obtaining the 1,500 hours required of practical instruction before taking the license exam, and there is no basis to infer Regency would offer salon services to the public absent the requirement of the practical instruction requirement hours.\textsuperscript{212} The court also considered if the work was tied to the academic calendar,\textsuperscript{213} and if the length of the internship was limited to a period that provide[d] the student with beneficial learning.\textsuperscript{214} Here the court noted that although Hollins had to work on Saturdays, when school is not in session, it furthered her educational goals and provided a more fulfilling experience.\textsuperscript{215} The court declared the school had a legitimate reason for requiring students to attend work on Saturdays.\textsuperscript{216} Saturdays were the busiest days, and they provided

\textsuperscript{206} Id. at 999.
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} Id.
\textsuperscript{210} Id. at 1000.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} The court did not explain Regency’s academic calendar.
\textsuperscript{214} Hollins, 144 F.Supp.3d at 1001–02.
\textsuperscript{215} Id. at 1001.
\textsuperscript{216} Id.
students with a greater supply of customers and a variety of experience. In addition, the time the students were required to work was limited to only the 1,500 hours required for the state certification exam.

The court also considered if the students’ work complemented, rather than displaced, the work of paid employees stating that “[i]f the students’ activities displace the trainer’s regular full-time employees, then the economic realities might indicate the existence of an employee-employer relationship.” Here, Hollins did not allege employees of Regency were displaced because Regency did not have paid cosmetologists. In fact, if Regency was not a school, there would be no Regency performance floor. Hollins also claimed that because Regency fees to the public were lower, the students were displacing licensed cosmetologists. However, the court noted that if it were to agree with Hollins, any clinical program in which students perform services might displace people operating in the same market. The court stated that Hollins argument is too “broad [a] swat,” and would effectively eliminate all student clinical services. Thus, looking at the evidence the court found that the cosmetology students were the primary beneficiaries of the program.

After the court considered all the factors, based on the totality of the circumstances, it found the economic reality of Hollins was that she was a student and was not an employee under the FLSA. Thus, Hollins was not entitled to compensation.

217 Id.
218 Id. at 1002.
219 Id.
220 Id.
221 Id. at 1002–03.
222 Id. at 993.
223 Id. at 1004.
224 Id.
225 Id.
226 See id. at 1007.
227 Id.
C. The Seventh Circuit’s Hesitation

The Seventh Circuit stated that “[t]he district court was rightly skeptical about the utility of this plethora of [’]factors.”228 And although the court ultimately found that Hollins was not an employee under the FLSA, the court declined to articulate a specific definitive test to determine whether an individual is an employee or an unpaid trainee.229 The Seventh Circuit could not make “a one-size-fits-all decision” about programs that include practical training or internships.230 Thus, the court explicitly stated that the decision in Hollins should not be read to mean that all internships/trainings involving practical skills are appropriate under the FLSA.231 Rather, evaluating such circumstances is on a case-by-case basis.232 Thus, even after Hollins, the Seventh Circuit has not established a clear-cut test to determine an employment relationship between unpaid interns/trainees and employers.233 Instead, the court has allowed flexibility depending on the relationship at issue, leaving unpaid interns and employers with many questions.234

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228 Hollins v. Regency Corp., 867 F.3d 830, 835 (7th Cir. 2017).
229 Id. at 837.
230 Id.
231 Id.
232 Id.
234 Id.
IV. THE UNPAID INTERNS’ EXPOSURE TO DANGER DUE TO LACK OF TITLE VII PROTECTION

A. Brief Title VII Background

Usually, if an intern is found not to be an employee under the FLSA, they also are not a qualified employee under Title VII. Congress created Title VII of the Civil Rights Act of 1964 for two main purposes: (1) to eliminate discrimination in the workplace, which has been fostered in the U.S for many years; and (2) to compensate the victims of workplace discrimination. With Title VII Congress sought to create equal employment opportunities for individuals, regardless of race, sex, color, religion, or national origin (“protected categories”). Title VII made it illegal for an employer to make hiring, firing, compensation, or conditions of employment decisions based on these protected categories.

In addition, Title VII is not limited to discrimination that leads to tangible or economic impact. The Supreme Court determined that Title VII “strikes at the entire spectrum of disparate treatment of men and women . . . [including when they must] work in a discriminatorily hostile or abusive environment.” Thus, the Court extended Title VII and made the creation and perpetuation of discrimination in a work environment an actionable harm. The Supreme Court intended to decrease workplaces that are “so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.”

238 See id.
242 Id.
directly liable for an employee’s unlawful discriminatory harassment and vicariously liable when the harasser is the victim’s supervisor.\footnote{243}{See Wang v. Phoenix Satellite Television US, Inc., 976 F. Supp. 2d 527, 529 (S.D.N.Y. 2013).}

Nevertheless, although Title VII is meant to protect employees from work environments that are hostile or discriminatory, it leaves unpaid interns without employment related federal protection.\footnote{244}{See id.} Congress circularly defined “employee” under Title VII to mean, “an individual employed by an employer.”\footnote{245}{42 U.S.C §2000e(f)(2012).} This is a similar definition used to define “employee” under the FLSA.\footnote{246}{29 U.S.C § 203(g).} Thus, if unpaid interns are found not to be employees under the FLSA it is likely that the courts will also find that students were not employees under Title VII.\footnote{247}{See Wang, 976 F. Supp. 2d at 529 (using a similar test as FLSA cases to determine if she was an employee).} As a result, unpaid interns are not shielded by Title VII’s protection of discrimination and hostile work environment based on sex, race, color, national origin, and religion.\footnote{248}{See id.} This lack of protection has led to interns having to face challenges in the workplace, like sexual harassment, without any way to seek legal relief, such as that faced by the intern the case discussed below.\footnote{249}{See id.}


A lack of Title VII protection for interns was evident in the federal New York case \textit{Wang v. Phoenix Satellite Television, US, Inc.}\footnote{250}{See id.} Lihuan Wang was a broadcast journalism master’s degree student for Syracuse University.\footnote{251}{Id.} Wang obtained an unpaid internship at
Phoenix Media Group, a Hong Kong-based media conglomerate that produces television news geared towards Chinese-language audiences.252 During her internship, Wang began to receive unwanted sexual attention from a supervisor, Mr. Zhengzhu Liu.253 The attention included making sexual comments, trying to forcefully kiss her, and asking her to go to his hotel room.254 Previous to this incident, Wang and Liu talked about a permanent position and the company’s help to obtain a work visa.255 However, after the hotel incident, Liu told Wang that the company would not be able to sponsor her.256 Thus, Wang sought protection under the New York States Human Rights Law257 and the New York City Human Rights law258 alleging that she was unlawfully subjected to a hostile work environment due to Mr. Liu's sexual advances. She further alleged that Phoenix discriminated against her based-on gender because Mr. Liu linked future employment opportunities based on her agreement to his sexual demands and withdrew the opportunity once Wang rejected Mr. Liu’s advancements.259

Ultimately, the district court for the Southern District of New York dismissed Wang’s case, claiming that Wang was an unpaid intern and not an employee under employment discrimination statutes.260 Thus, Wang was not entitled to

252 Id.
253 Id. at 530.
254 Id.
255 Id.
256 Id.
257 N.Y. Exec. Law §290 (McKinney 2013).
260 Although Wang only sued under state law claims the district court compared the language of Title VII to determine if an unpaid intern could be offered protection under the statutes. See Wang v. Phoenix Satellite Television US, Inc., 976 F. Supp. 2d 527, 537 (S.D.N.Y. 2013) (the court concluded that Title VII did not
protection under Title VII or any of New York’s employment protecting statutes.  

V. A Universal Clear Standard

To create a more effective test and protection for interns, the courts should narrow the number of tests they currently apply and choose a single clear standard. A clear standard would provide employers a clear legal standard when creating their internship program. Also, interns would know their rights and make decisions with a better understanding of what is required of them and the implications of being an intern. Thus, the courts should only look at two factors: (1) are all the tasks assigned to the intern associated in furtherance of their educational or career goals and is the intern aware of how it will further their goals; and (2) does the intern replace any of employer’s employees.

The first factor centers on whether the students are primarily benefiting from the relationship. This requirement was clearly established by Walling who stated that trainees were not employees because trainees are working to serve their own interest. Furthermore, while the courts look at the “totality of the circumstances” to determine who benefits, the real focus should be on

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261 See Wang v. Phoenix Satellite Television US, Inc., 976 F. Supp. 2d 527, 532 (S.D.N.Y. 2013). However, Wang’s lack of employment protection did not mean she did not have other causes of action. She was allowed to proceed with her failure-to-hire claim. Kaitlyn E. Fallon, Changes in the legal landscape Regarding Interns, VEDDER PRICE PC (June 10, 2015) https://www.lexology.com/library/detail.aspx?g=4489b6f9-e46a-49db-bfdd-791d8de1aff6 (last accessed Dec. 1, 2017). In addition, in response to Wang, New York Mayor Bill de Blasio signed an amendment to the New York City Human Rights Law on April 15, 2015, adding protections for both paid and unpaid interns. Id.

262 This would likely require a Supreme Court decision or an enactment by Congress.

whether the tasks the intern are doing give them the skills that would make him successful in their future career. Thus, although in Hollins, the court interpreted the benefit analysis correctly it erred in deciding that it should be a flexible approach. The court focused on the development of the intern’s skills based on their career of choice. However, it did not look at if all the tasks were meant to meet their educational and career goals or if the students were aware what skills each task was helping them develop. If Hollins had been labeled as a trainee, but only observed and took care of menial tasks, like cleaning, it would have been reasonable to consider her an employee because she would not have been practicing skills she expected would make her successful cosmetologist. In addition, the court’s emphasis in Hollins was on the fact that most of the student’s time was spent providing services to clients and not conducting menial tasks. If cosmetology schools treated students as in the example I referenced above, the students would not be providing any cosmetology services thus weakening the court’s analysis that students are trainees in cosmetology schools.

The second factor to consider is if the employer’s intention of having an internship program is to displace the employers’ regular full-time employees, whom they would be required by the FLSA to provide greater benefits. Walling noted that trainees were not supposed to “expedite the company business.” This can be determined by considering the amount of help, supervision, and internship that the employer receives. Thus, the Seventh Circuit ruled incorrectly that the students were not displacing employees. In Hollins, the trainees were doing what a licensed cosmetologist would do and where taking away the business and employment from them. The school should have hired licensed cosmetologist and paired them with a trainee, a

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265 See id.
266 See id.
267 See Walling, 330 U.S. at 152.
268 See Hollins, 144 F.Supp.3d at 991.
269 See id.
type of mentorship program. This would ensure the trainee was under constant supervision and receiving feedback on their performance. In addition, they would not have displaced employment opportunities with Regency from licensed cosmetologist. Regency would not be making money from the intern’s work. Rather, the money would come from the licensed cosmetologist supervision and training.

CONCLUSION

In recent years, there has been a bubble of litigation dealing with unpaid interns’ relationship with employers and the implications of not being labeled as “employees.” These issues include wage and hour, discrimination, and hostile work environments. Thus, courts have had to juggle with different tests to determine what individuals are employees and what individuals are unpaid interns. However, there is not any universal test or clear guidance as to what employers should do and what unpaid interns should expect. Legislators have started to see these issues and have tried to address them. Nevertheless, the best solution would be a clear two-question universal test focused on who primary benefits from the relationship. Therefore, when they ask: “Mirror, mirror on the wall are they interns and not employees at all?” The mirror can reflect clear guidance to the expectations of their relationship.


271 Note that the test would be evaluating an interns’ employment relationship with the employer not evaluating the employers’ internship program as a whole.
YOUR SUPERVISOR AS YOUR CHATTEL:
BROADENING THE SCOPE OF NEGLIGENT HIRING AND RETENTION IN ILLINOIS

PHILIP F. VIEIRA *


INTRODUCTION

The idea that an employer may be liable for simply hiring or retaining an employee who later causes an injury may seem like a nightmare for employers. The threat of potential punitive damages for an employee’s intentional acts outside the scope of employment may cause employers further grief. But this is exactly the kind of liability that negligent hiring and negligent retention claims create. While some employers may scoff at what may seem like yet another liability, various limiting principles help ensure that these torts do not have a wide scope. Employers, therefore, do not need to worry that they may become “an insurer of the safety of every person who happens to come into contact with [an] employee.”


Yet, despite these limiting principles, courts may be tempted to expand the scope of negligent hiring and retention when faced with sympathetic plaintiffs. Negligent hiring and negligent retention claims often involve plaintiffs who have been the victims of atrocious crimes at the hands of a defendant’s employee. The injuries occur under circumstances where ordinary theories of employer liability, such as respondeat superior or liability under civil rights statutes, do not apply. In such situations, a court may feel justified in pushing the boundaries of negligent hiring and retention claims so that the injured party can receive some remedy. This tendency, however, may create employer liability where traditionally there has been none.

As such, it is important for negligent hiring and retention claims to have some clear limitations. The Restatement (Second) of Torts sets out a bright line rule, limiting these claims to intentional acts that occur on an employer’s premises or using an employer’s chattels.\(^3\) This premises/chattel standard has the advantage of creating easily defined, clearly recognizable limits on employer liability for negligent hiring and retention. However, in practice, mechanical application of this standard can lead to seemingly unjust results.

The court in \textit{Anicich v. Home Depot} was faced with one such situation. In \textit{Anicich}, the plaintiff’s daughter was the victim of a brutal murder at the hands of a Home Depot employee who was the daughter’s supervisor. The murder occurred hundreds of miles from where they worked and did not involve any of Home Depot’s chattels.\(^4\) Yet, the crime seemed inextricably linked to the supervisor’s employment. In reversing the district court’s dismissal of the plaintiff’s complaint, the Seventh Circuit declined to apply a “formalistic adherence” to the Restatement’s premises/chattel standard.\(^5\) The court instead chose to modify the standard and determined that supervisory authority fell within the meaning of

\(^3\) \textit{Restatement (Second) of Torts} § 317 (1965).


\(^5\) \textit{Id.} at 651.
chattel. In doing so, the court may have avoided an “odd, even arbitrary result,” but it also may have inadvertently expanded negligent hiring and retention beyond traditionally accepted limits. What the court characterized as an “incremental shift,” may actually be an amorphous and wide-reaching standard if fully embraced by Illinois courts.

Furthermore, the Seventh Circuit may have created this standard unnecessarily. Illinois courts have never strictly adhered to the Restatement’s premises/chattel standard. Instead, they have used it as a guidepost along with other tort theories of foreseeability and proximate cause. If the Anicich court had simply applied a broad interpretation of foreseeability to the case, it could have reached the same result without modifying the Restatement’s standard. Thus, the court could have made a true “incremental shift” instead of creating a new, amorphous standard.

To put the Anicich court’s decision in context, Part I of this article discusses the elements of negligent hiring and negligent retention claims as well as the scope of employer liability under these torts. In Part II, the article then exam how the Seventh Circuit applied Illinois case law in Anicich v. Home Depot. That Part also discusses how the court formulated a novel interpretation of the Restatement’s premises/chattel standard. In Part III, this article examines how Illinois courts have traditionally applied negligent hiring standards and how the Anicich court’s approach differed from those standards. Finally, in Part IV, the article examines the broad purpose of negligent hiring and retention claims and comments on how the Anicich court may have extended their scope. That Part also examines alternative approaches the Anicich court could have taken to reach the same result without significantly expanding traditional negligent hiring and retention claims.

6 Id.
7 Id.
8 Id. at 654.
I. WHAT ARE NEGLIGENT HIRING AND NEGLIGENT RETENTION CLAIMS?

The torts of negligent hiring and negligent retention hold employers liable for the intentional actions of their employees which occur outside the scope of employment and which have some connection to the employment relationship. Under negligent hiring and retention, the employer is directly liable for negligence because the employer should have known that its employee was a danger to others.\(^9\) These claims are distinct from respondeat superior claims, which focus on the tortious acts of the employee acting within the scope of employment.

Under the familiar doctrine of respondeat superior, an employer is “subject to the liability for the torts of his servants committed while acting in the scope of their employment.”\(^10\) Tortious acts of employees are effectively imputed to the employer so long as the employee is acting within the scope of his employment.\(^11\) While there is no precise definition for “scope of employment,” the definition broadly includes conduct by the employee if: “(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master.”\(^12\) For liability to attach to the employer, the burden is on the plaintiff to show a “contemporaneous relationship between the tortious act and scope of employment.”\(^13\)

While respondeat superior focuses on the tortious conduct of the employee, negligent hiring and negligent retention are grounded in the idea that the employer itself is negligent. Unlike respondeat superior, it is the employer’s own negligence that is the proximate

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\(^9\) Van Horne v. Muller, 705 N.E.2d 898, 905 (Ill. 1999).

\(^10\) RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958); see, e.g., Pyne v. Witmer, 543 N.E.2d 1304, 1308 (Ill. 1989).


\(^12\) Pyne, 543. N.E.2d at 1308 (quoting RESTATEMENT (SECOND) OF AGENCY § 228 (1958)).

\(^13\) Id. at 1309.
cause of the plaintiff’s injury.\textsuperscript{14} Also unlike \textit{respondeat superior}, liability extends to employee actions that occur \textit{outside} the scope of employment.\textsuperscript{15}

\textit{A. Elements of Negligent Hiring and Negligent Retention}

Illinois recognizes a duty for employers to act reasonably in hiring, supervising, and retaining their employees.\textsuperscript{16} This duty holds an employer liable when it knew, or should have known, that an employee was “unfit for the job so as to create a danger of harm to third persons.”\textsuperscript{17} In Illinois, the elements of negligent hiring and negligent retention are:

(1) that the employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger of harm to third persons; (2) that such particular unfitness was known or should have been known at the time of the employee's hiring or retention; and (3) that this particular unfitness proximately caused the plaintiff's injury.\textsuperscript{18}

While use of the terms negligent hiring, negligent retention, and negligent supervision suggest three separate torts, Illinois courts do not make significant distinctions between the three, and all three generally follow this same analysis.\textsuperscript{19}

\textsuperscript{14} \textit{Van Horne}, 705 N.E.2d at 905.
\textsuperscript{16} \textit{Anicich v. Home Depot U.S.A., Inc.}, 852 F.3d 643, 649 (7th Cir. 2017); \textit{Van Horne}, 705 N.E.2d at 904.
\textsuperscript{17} \textit{Van Horne}, 705 N.E.2d at 904.
\textsuperscript{18} \textit{Id.}
Under the first element, the employee must have a “particular unfitness” that gives rise to a danger of harm to third parties.\textsuperscript{20} While this is a seemingly broad standard, particular unfitness typically only encompasses behaviors that exhibit violent or criminal tendencies. Illinois courts have not found non-threatening qualities, such as a physical impairment or learning defect, as forms of a particular unfitness for purposes of negligent hiring or retention. Some examples of a particular unfitness include a reputation or propensity for violence,\textsuperscript{21} moral turpitude that poses a danger to minors,\textsuperscript{22} and harassing behavior towards subordinates.\textsuperscript{23}

It is not enough for the employee to simply have a particular unfitness. The employer must know or should know of the employee’s particular unfitness.\textsuperscript{24} Often, courts will look to see if an employer should have conducted a background check and whether that background check would have discovered an employee’s particular unfitness.\textsuperscript{25} However, having actual notice of the particular unfitness will satisfy this element.\textsuperscript{26}

Finally, plaintiffs must show that there is a causal connection between the plaintiff’s injuries and the fact of employment.\textsuperscript{27} This proximate cause element limits employer liability only to situations

\begin{itemize}
  \item \textsuperscript{20} \textit{Van Horne}, 705 N.E.2d at 905.
  \item \textsuperscript{21} Gregor by Gregor v. Kleiser 443 N.E.2d 1162, 1164 (Ill. App. Ct. 1982).
  \item \textsuperscript{23} Anicich v. Home Depot U.S.A., Inc., 852 F.3d 643, 654 (7th Cir. 2017).
  \item \textsuperscript{24} \textit{Van Horne}, 702 N.E.2d at 905.
  \item \textsuperscript{25} See, e.g., Mueller 678 N.E.2d at 664 (criminal background check would have revealed danger to children); Strickland v. Communications and Cable of Chicago, Inc., 710 N.E.2d 55, 58 (Ill. App. Ct. 1999) (even if company had performed a background check, it would not uncovered a negative employment history or significant criminal record).
  \item \textsuperscript{26} See, e.g., Tatham v. Wabash R. Co., 107 N.E.2d 735, 735 (Ill. 1952) (employers knew an employee was a “vicious, contentious, pugnacious and ill-tempered person” at time of hiring); \textit{Gregor}, 443 N.E.2d at 1164 (Ill. App. Ct. 1983) (defendants knew the man they hired as a bouncer had extraordinary physical strength and “vicious propensities for violence”).
\end{itemize}
where the plaintiff’s injuries are “brought by reason of employment of
the unfit employee.”28 To determine proximate cause, “it is necessary
to inquire whether the injury occurred by virtue of the servant’s
employment.”29 The proximate cause requirement protects employers
from becoming “an insurer of the safety of every person who happens
to come into contact with his employee simply because of his status as
an employee.”30

Many (if not most) negligent hiring and retention claims fail at
the proximate cause element.31 Illinois courts have applied a “rigorous
standard” for the proximate cause requirement.32 Courts require that
the “employment itself must create the situation where the employee’s
violent propensities harm the third person.”33 While the existence of
proximate cause is generally a question of fact for the jury, a
defendant may be entitled to summary judgment if the evidence is
insufficient to establish an employer’s negligence as the proximate
cause of the plaintiff’s injuries.34

The proximate cause element requires some foreseeability to
the employer. It is satisfied when “the employee's particular unfitness
‘rendered the plaintiff's injury foreseeable to a person of ordinary
prudence in the employer's position.’”35 The foreseeability standard in

29 Bates, 502 N.E.2d at 459.
30 Id.
31 See, e.g., Van Horne v. Muller, 705 N.E.2d 898 (Ill. 1999); Doe v. Boy
Dist. 54, 678 N.E.2d 660, 664 (Ill. App. Ct. 1997); Carter, 628 N.E.2d 602; and
32 Doe v. Boy Scouts, 4 N.E.3d at 561.
33 Carter 628 N.E.2d at 604.
34 Id.
2001)).
negligent hiring and retention is similar to the standard in other torts.\textsuperscript{36} Defendants do not need to foresee the exact harm or injury, but rather reasonably foresee that some harm could occur.\textsuperscript{37}

\textit{B. Limiting Principles}

One could imagine that extending employer liability to employee actions outside the scope of employment could expose employers to a wide range of claims. However, Illinois courts have imposed a number of limiting principles on negligent hiring and retention claims to prevent this. First, courts have generally limited these claims to cases where the employee is on the employer’s premises or using an employer chattel at the time of injury.\textsuperscript{38} This follows the standard set forth in the Restatement (Second) of Torts Section 317.\textsuperscript{39} This rule helps to limit the employer’s liability to cases where the injury happened “by virtue of the [tortfeasor’s] employment,” rather than simply where “the tortfeasor and the victim knew each other through work.”\textsuperscript{40} In addition, while perhaps not required, negligent hiring and retention claims typically involve some form of physical injury to the plaintiff’s person or property.\textsuperscript{41}

Another limit is that certain causes of action foreclose claims of employer negligence. For example, employers who are found to have \textit{respondeat superior} liability cannot also be sued under negligent hiring.\textsuperscript{42} Thus, injuries that arise from an employee acting within the

\textsuperscript{36} \textit{RESTATEMENT (SECOND) OF TORTS} § 435(1) (1965) (“If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.”).
\textsuperscript{39} \textit{RESTATEMENT (SECOND) OF TORTS} § 317 (1965).
\textsuperscript{40} \textit{Anicich}, 852 F.3d at 650.
\textsuperscript{41} Van Horne v. Muller, 705 N.E.2d 898, 905 (Ill. 1999).
scope of his duties will typically fall under *respondeat superior* rather than negligent hiring or retention.

In addition, negligent hiring and retention claims may be preempted by state statutes governing civil rights violations. 43 The Illinois Human Rights Act (IHRA) prohibits employment discrimination based on sex, age, race, color, religion, arrest record, marital status, sexual orientation, physical and mental disability, citizenship status, national origin, ancestry, unfavorable military discharge, military status, sexual harassment, and orders of protection. 44 Illinois courts have found that tort claims are preempted by the IHRA when the underlying tort is “inextricably linked to a civil rights violation such that there is no independent basis for the action apart from the Human Rights Act itself.” 45 Thus, an injury that results from discrimination against a protected category would be preempted by the IHRA.

Finally, the Illinois Workers’ Compensation Act’s (IWCA) exclusivity provision bars common law claims for accidental injuries that occur during the course of employment. 46 The Act provides exceptions to this provision if “(1) the injury was not accidental; (2) the injury did not arise from [the employee’s] employment; (3) the injury was not received during the course of [the employee’s] employment; or (4) the injury was not compensable under the Act.” 47 Even with these exceptions, many potential negligent hiring and

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43 See Maksimovic v. Tsogalis, 687 N.E.2d 21 (Ill. 1997).
44 775 ILCS 5/2-102; 775 ILCS 5/2-103.
45 Welch v. Illinois Supreme Court, 751 N.E.2d 1187, 1196 (Ill. App. Ct. 2001); see also Gaughan v. Crawford, 2009 WL 631983 (N.D. Ill. 2009) (dismissing a negligent hiring and retention claim because it was so inextricably linked to an underlying sexual harassment claim and thus barred by the Illinois Human Rights Act).
46 820 ILCS 305/5(a).
retention claims are likely to be preempted by the IWCA’s exclusivity provisions. Thus, negligent hiring and retention claims only apply in a relatively narrow set of circumstances where the employee is acting outside the scope of his employment, there is some connection to the employment relationship, and civil rights or workers’ compensation statutes do not otherwise preempt the claims.

II. THE SEVENTH CIRCUIT’S APPLICATION OF NEGLIGENT HIRING AND RETENTION STANDARDS

In a factually gruesome case, the Seventh Circuit stretched Illinois’s negligent hiring and retention standards beyond their usual limits. Though the court labeled the plaintiff’s story “all too familiar,” the horrific nature of events that transpired perhaps led the court to allow a negligence claim where others may have failed.

A. Factual Background

The facts of Anicich are ghastly. Brian Cooper was the regional manager for the defendant-employers, Home Depot U.S.A., Inc., Grand Service, LLC, and Grand Flower Growers, Inc. Cooper had a history of sexually harassing his female subordinates. A prior female employee had complained of Cooper making comments about his genitals to her and of Cooper rubbing himself against her. Cooper became increasingly loud and abusive with her, ultimately leading her to quit.

50 Id. at 647.
51 Id.
52 Id.
53 Id.
Sometime after this, Alisha Bromfield began working at one of the Home Depots that Cooper managed.\textsuperscript{54} She was only a teenager when she began working at the store in 2006.\textsuperscript{55} Shortly after she started, Cooper exhibited similar behaviors towards Bromfield as he had with the prior female employee.\textsuperscript{56} He called Bromfield his girlfriend, swore and yelled at her, called her names like “bitch,” “slut,” and “whore” in front customers, and slammed things around her.\textsuperscript{57} As time went on, Cooper became increasingly controlling, monitoring Bromfield’s lunches, texting her outside of work, and pressuring her to spend time alone with him.\textsuperscript{58} He even required that she accompany him on business trips, one time insisting that they share a hotel room.\textsuperscript{59}

This pattern of abuse culminated when Cooper pressured Bromfield to accompany him to his sister’s wedding in Wisconsin.\textsuperscript{60} After Bromfield initially refused, Cooper compelled her to go by threatening to either fire her or reduce her hours.\textsuperscript{61} At their hotel room after the wedding, Cooper demanded that Bromfield enter into a relationship with him.\textsuperscript{62} When Bromfield refused, Cooper strangled Bromfield, killing her and her seven-month old fetus.\textsuperscript{63} He then proceeded to rape her corpse.\textsuperscript{64}

Prior to this crime, multiple senior managers at Home Depot were aware of Cooper’s behavior towards Bromfield and other female employees.\textsuperscript{65} Bromfield had complained repeatedly about Cooper to

\begin{footnotes}
\item[54] Id.
\item[55] Id.
\item[56] Id.
\item[57] Id.
\item[58] Id.
\item[59] Id.
\item[60] Id. at 648.
\item[61] Id.
\item[62] Id.
\item[63] Id.
\item[64] Id.
\item[65] Id. at 647.
\end{footnotes}
other supervisors and managers, and told her group leader that she did not want to be left alone with him.66 One time, Cooper was sent home after he called Bromfield a “slut” and “whore” in front of customers.67 Cooper was subsequently ordered to take anger management classes, though the defendant-employer never followed up to see that he did so.68 Despite the fact that senior management was aware of Cooper’s behavior, Cooper remained Bromfield’s supervisor until her death.69

B. How the Seventh Circuit Applied Illinois Negligent Hiring and Retention Standards

Perhaps tacitly acknowledging that they were aware of Cooper’s particular unfitness, the defendants focused their defense on duty and proximate causation. The defendants argued that they should not be liable under negligent hiring and retention theories because: (1) allowing the case to go forward would create “new and unjustifiable burdens for employers”; (2) these claims only apply “when the employee is on the employer’s premises or using the employer’s chattel”; and (3) Bromfield’s injury “was not foreseeable to a person of ordinary prudence in the employer’s position.”70

The court first turned its attention to whether the defendants had a duty to fire or demote employees because of their “usage of inappropriate language, or sexual misconduct.”71 The defendants claimed that such an obligation, and the resulting burdens, would be intolerable.72 However, the court noted that defendants already had these obligations under existing sexual harassment and sexual discrimination law.73 Citing a string of sexual harassment cases

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66 Id.
67 Id.
68 Id.
69 Id. at 647-48.
70 Id. at 649.
71 Id.
72 Id. at 649-50.
73 Id. at 650.
where employers were vicariously liable for failing to prevent and correct sexual harassment, the court reasoned that applying these principles to tort law would not impose any new obligations on employers.  

The court next turned to the thorny issue of whether liability would extend to Cooper’s actions which occurred off the employer’s premises and which did not involve the employer’s chattels. The rule in the Restatement (Second) of Torts, which the Illinois Supreme Court has cited in negligence claims, states that a master may be liable for the tortious conduct of its servants while acting outside the scope of his employment if:

(a) the servant
   (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
   (ii) is using a chattel of the master, and
(b) the master
   (i) knows or has reason to know that he has the ability to control his servant, and
   (ii) knows or should know of the necessity and opportunity for exercising such control.

In this case, Cooper murdered Bromfield while off duty, in a different state, after attending his sister’s wedding. Could the Restatement’s rule be extended to such actions?

The court first noted that the purpose of the rule was to limit the employer’s liability to injuries that “occurred by virtue of the

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74 Id.
76 RESTATEMENT (SECOND) OF TORTS § 317 (1965).
77 Anicich, 852 F.3d at 649.
servant’s employment.”78 In particular, the rule seeks to “avoid holding an employer liable simply because the tortfeasor and the victim knew each other through work.”79 Here, the court reasoned, Cooper did use something given to him by virtue of his employment: his supervisory authority over Bromfield.80

While not a chattel in the traditional sense, Cooper’s supervisory authority is analogous.81 Refusing to apply “[f]ormalistic adherence to the literal terms of § 317(a) [of the Restatement of Torts],”82 the court found “no principled reason to hold employers liable for the tortious abuse of their chattels but not for the tortious abuse of supervisory authority.”83 In effect, chattels and supervisory authority are both tools which the employer entrusts to the employee, both of which can enable tortious conduct, and both of which require monitoring by the employer.84 Injuries resulting from an abuse of supervisory authority do indeed occur “by virtue of the [tortfeasor’s] employment, and not because the tortfeasor and victim merely know each other through their work.”85

The court did not characterize this analogy between chattels and supervisory authority as a significant extension of tort liability. Rather, it relied on the Restatement (Second) of Agency to show that employer liability for an employee’s misuse of authority is, in fact, an established principle in law.86 Acknowledging that the Restatement (Second) of Agency generally limits liability only to when the servant is acting within the scope of employment or purporting to act on the

78 Id. 650 (quoting Doe v. Boy Scouts of America, 4 N.E.3d 550, 561 (Ill. App. Ct. 2014)).
79 Id.
80 Id. at 651.
81 Id.
82 Id.
83 Id.
84 Id. at 652.
85 Id. (quoting Doe v. Boy Scouts of America, 4 N.E.3d 550 (Ill. App. Ct. 2014)).
86 Id.
principal’s behalf, the court nonetheless found that employer liability can extend to intentional torts committed outside the scope of employment when a supervisory employee is abusing his authority.

In drawing this conclusion, the court relied on the United States Supreme Court’s decision in Burlington Industries, Inc. v. Ellerth which extended an employer’s vicarious liability under Title VII of the Civil Rights Act of 1964. One of the issues in Ellerth was “whether an employer has vicarious liability when a supervisor… mak[es] explicit threats to alter a subordinate’s terms or conditions of employment… but does not fulfill the threat.” Relying, in part, on Section 219(2)(d) of the Restatement (Second) of Agency, the Supreme Court held that an employer could indeed be vicariously liable for harm caused by the misuse of supervisory authority even when no tangible employment action is taken, subject to an affirmative defense.

The Restatement of Employment Law adopted this same position for causes of action beyond Title VII. Section 4.03 states that “an employer is subject to liability in tort to an employee for harm caused in the course of employment… by the tortious abuse or threatened abuse of a supervisory or managerial employee’s authority… even if the abuse or threatened abuse is not within the scope of employment.”

When Cooper threatened to cut Bromfield’s hours or fire her if she did not accompany him to his sister’s wedding, he abused his supervisory authority, even though he did not carry out his threats.

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87 Id. (citing RESTATEMENT (SECOND) OF AGENCY § 219 (1958)).
88 Id.
90 RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). (“(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.”).
92 RESTATEMENT OF EMPLOYMENT LAW § 4.03 (2015).
93 Anicich, 852 F.3d at 653.
These were precisely the kinds of threats that the Court in *Ellerth* and that the Restatement of Employment Law sought to address.\(^94\) Holding that the defendants could be liable for Cooper’s actions was not, the court reasoned, a radical departure from traditional principles of vicarious liability, but merely an “incremental shift.”\(^95\)

Finally, the court turned its attention to the foreseeability of the plaintiff’s injury. The issue was whether Cooper’s “harassing, controlling, and aggressive behavior toward his female subordinates,” would have rendered Bromfield’s injury foreseeable to a person of ordinary prudence.\(^96\) The defendants focused on the fact that Cooper’s actions were a “radical break from even his most offensive prior behavior” and that no reasonable employer could have predicted violence since Cooper had never made explicit threats to hit anyone.\(^97\) However, the court noted that it is not necessary to foresee “the precise nature of the harm or the exact manner of occurrence; it is sufficient if, at the time of the defendant’s action or inaction, some harm could have been reasonably foreseen.”\(^98\) Emphasizing that this question is a matter of fact, the court concluded, based on the complaint’s detailed allegations of Cooper’s escalating threats, that a reasonable jury could “easily find that the employers could and should have foreseen that Cooper would take the small further step to violence.”\(^99\)

**III. BROADENING THE SCOPE OF NEGLIGENT HIRING AND RETENTION?**

Because this case turned on state tort law, the Seventh Circuit had to follow Illinois state law, primarily by relying on decisions of

\(^{94}\) *Id.*  
\(^{95}\) *Id.*  
\(^{96}\) *Id.* at 654.  
\(^{97}\) *Id.*  
\(^{98}\) *Id.* (quoting Regions Bank v. Joyce Meyer Ministries, 15 N.E.3d 545, 552 (Ill. App. Ct. 2014)).  
\(^{99}\) *Id.* at 655.
the Illinois Supreme Court. Finding no other Illinois case “directly on point,” the court was left to determine how the Illinois Supreme Court would have ruled with these particularly disturbing facts. But does Illinois case law support this ruling on negligent hiring and retention? Was the Seventh Circuit accurate in its prediction that the Illinois Supreme Court would have moved in this direction? The somewhat uneven application of negligent hiring and retention standards makes this a difficult assessment.

Again, the defense in this case relied on three main arguments: (1) that they had no duty to fire or demote Cooper because of his behavior; (2) that negligent hiring only applies “when the employee is on the employer’s premises or using the employer’s chattel”; and (3) that Bromfield’s injury was not foreseeable. While the Seventh Circuit may have found strong support in Illinois case law for its conclusions on duty and foreseeability, its extension of employer negligence in a case off the employer’s premises and not using the employer’s chattels is much more tenuous.

A. Duty Cases

Illinois has long recognized that employers have a duty to refrain from hiring or retaining employees who pose a harm to third parties. In a 1952 case, Tatham v. Wabash, the Illinois Supreme Court explicitly recognized that an employer could be held liable for a negligent breach of duty even for intentional or criminal misconduct by one of its employees. In Tatham, the plaintiff was severely beaten by the defendant’s employee, Davis, a “vicious, contentious, pugnacious and ill-tempered person who was quarrelsome and frequently engaged in physical combats.”

100 Id. at 648-49.
101 Id. at 648.
102 Id. at 653.
103 Id. at 649.
104 Tatham v. Wabash, 107 N.E.2d 735, 739 (Ill. 1952).
105 Id. at 735.
alleged that the defendant was aware of Davis’ “vicious and dangerous character.” 106 Reversing a lower court’s dismissal, the Illinois Supreme Court held that when an employer is aware of “conditions creating a likelihood of injury,” the employer has a “duty to make reasonable provision against a foreseeable danger involving the intentional misconduct of a third person.” 107

Illinois courts have consistently recognized this duty. In Bates v. Doria, for example, an off-duty county sheriff attacked and raped a woman who was walking her dog in a public park. 108 Even though the sheriff acted outside the scope of his employment, the court explicitly recognized that an employer has a “duty to refrain from hiring or retaining an employee who is a threat to third persons to whom the employee is exposed.” 109 In Kigin v. Woodmen, a mother brought claim on behalf of her daughter who was molested by a camp counselor. 110 Citing the Restatement (Second) of Torts section 317, the court found the camp had a duty to exercise reasonable care and control over the counselor even though the counselor was acting outside the scope of his employment. 111 Though acting outside the scope of his employment, the court paid particular attention to the fact that the counselor committed the crime on the camp grounds and while acting in a supervisory capacity. 112

In Anicich, the Seventh Circuit also recognized this duty, albeit with a slightly different rationale. Home Depot argued that imposing a duty in this case would create an obligation for employers to fire or demote employees simply because of the use of inappropriate language or sexual misconduct. 113 Rather than pointing to tort cases

106 Id. at 739.
107 Id. at 739-40.
109 See id. (summary judgment for the defendants upheld on other grounds).
111 Id. at 736.
112 Id. at 736-37.
that recognize a general duty for employers to refrain from hiring or retaining employees who are threats to third persons, the Seventh Circuit pointed to sexual harassment cases to find that Home Depot had a duty “even independent of Illinois tort law.” The court did not impose any new obligations on employers, but simply decided that employer duties under Title VII of the Civil Rights Act and the Illinois Human Rights Act also applied to tort law.

B. Foreseeability Cases

Interestingly, the 7th Circuit did not rely on negligent hiring or retention cases for its foreseeability analysis. Rather, the court relied on traditional tort theories of foreseeability. While Cooper’s actions were a “radical break” from his prior behavior, this was not enough to destroy foreseeability. Quoting a wrongful death case, the court found that it was sufficient that Home Depot was aware that “some harm could have been reasonably foreseen.”

Though this analysis was based on general Illinois tort law, it is in line with the foreseeability analysis usually employed in negligent hiring and retention cases.

In Gregor v. Kleiser, for example, the defendants hired a bouncer for a house party for approximately 200 teenagers. The bouncer struck and seriously injured the plaintiff. The defendants’ knowledge of the bouncer’s “vicious propensity for physical violence upon others, as well as his body building and weight lifting achievements and extraordinary strength” was sufficient for the

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114 Id.
115 Id.
116 Id. at 654.
117 Id. at 654-55.
118 Id. at 654 (quoting Regions Bank v. Joyce Meyer Ministries, Inc., 15 N.E.3d 545, 552 (Ill. App. Ct. 2014)).
120 Id. at 1166.
plaintiffs to state a claim for negligent hiring.\textsuperscript{121} In fact, the court found that this supported a theory of “reckless or willful and wanton conduct” in the hiring of the bouncer.\textsuperscript{122}

In \textit{Mueller v. Community Consolidated School District 54}, a wrestling coach molested a student after offering to drive her home.\textsuperscript{123} Had the school conducted a background check, they would have discovered a “criminal background exhibiting moral turpitude which made him unfit for a position dealing with minors,”\textsuperscript{124} The defendants argued that this investigation would not have revealed that the coach was unfit for his job or that it would have rendered the plaintiff’s injury foreseeable.\textsuperscript{125} In rejecting this argument, the court noted that the coach’s unfitness for the job was not in question, but rather that he had some unfitness that made it inappropriate for him to be alone with minors.\textsuperscript{126}

The \textit{Anicich} court cited a negligent supervision case which followed a similar rationale. In \textit{Platson v. NSM America, Inc.}, a 16-year-old plaintiff’s supervisor repeatedly touched the plaintiff, rubbed her shoulders, and rubbed himself up against her.\textsuperscript{127} He engaged in this conduct “in full view of supervisors and other employees.”\textsuperscript{128} This culminated in an episode where the supervisor blocked the plaintiff in her office, grabbed her by the waist, pressed himself against her, and tried to force himself on her.\textsuperscript{129} Though the plaintiff never made any complaints, the supervisor’s prior conduct permitted the reasonable

\textsuperscript{121} \textit{Id.}.
\textsuperscript{122} \textit{Id.}.
\textsuperscript{124} \textit{Id.} at 664.
\textsuperscript{125} \textit{Id.}.
\textsuperscript{126} \textit{Id.}.
\textsuperscript{128} \textit{Id.} at 1285.
\textsuperscript{129} \textit{Id.} at 1282.
inference that the defendants should have known the supervisor “was capable of worse if left alone with plaintiff.”

In negligent hiring cases, courts typically find that injuries are not foreseeable when the employer would not have turned up any evidence of past violent behavior even if the employer had done a reasonable investigation. For example, in *Strickland v. Communications and Cable of Chicago*, a cable company failed to do a background check on one of its home-installation subcontractors who, while on duty, entered a customer’s apartment and raped her at gunpoint. However, the plaintiffs could not show that company would have discovered information warning them of the subcontractors’ violent behavior even if it had conducted a background check. Had the company conducted a background check, it would have discovered nothing more than traffic offenses. This was insufficient to put the defendants on notice that the subcontractor could potentially be a danger to customers.

As another example, in *Montgomery v. Petty Management Corporation*, a 72-year-old plaintiff got into a fistfight with an off-duty McDonald’s cook inside the restaurant. The plaintiff pointed to the cook’s prior gang affiliation and an arrest record for loitering as evidence showing that the cook would be a danger to the public. However, the Illinois Appellate Court found this information insufficient to put the employer on notice that the cook, who worked primarily in the kitchen, could be a potential danger to customers.

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130 *Id.* at 1285.
132 *Id.*
133 *Id.* at 57.
134 *Id.* at 58.
136 *Id.* at 600.
137 *Id.* at 601.
Strickland and Montgomery differ from Anicich, where the plaintiff’s complaint alleged that the employer had actual notice of Cooper’s violent and aggressive behavior. As in Platson, Cooper’s behavior was in full view of other supervisors and employees. Whatever Home Depot may have discovered on a background check was irrelevant when faced with the fact that its senior management had actual notice of Cooper’s increasingly abusive behavior towards Bromfield.

C. Illinois’ Application of the Restatement’s Premises/Chattel Requirement

While the Anicich court’s analysis of duty and foreseeability was in line with other Illinois negligent hiring and retention cases, its break from the premises/chattel requirement of the Restatement of Torts is not entirely supported by Illinois case law. In fact, the court acknowledged that it was just predicting that the Illinois Supreme Court would have agreed with its interpretation. However, no other Illinois case has extended negligent hiring or retention liability where the plaintiff’s injury neither happened on the employer’s premises nor with the employer chattels. At the same time, though, the Illinois Supreme Court has never explicitly held that negligent hiring and retention claims should be limited in this way.

The premises/chattel requirement of the Restatement of Torts is part of the proximate cause analysis for negligent hiring and retention. Illinois courts have followed two lines of reasoning for proximate causation in negligent hiring and retention cases. They have either stuck to the premises/chattel requirement of the Restatement of

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139 Id. at 647.
140 Id.
141 Id. at 651.
Tort, or they have used a broader standard to see if the plaintiff’s injury happened by “virtue of the servant’s employment.”

*Escobar v. Madsen Const. Co.* explicitly rejected a negligent hiring claim when a hostile, drug-abusing employee shot a coworker off the employer’s premises and not using an employer’s chattels. There, the Illinois Appellate Court reasoned that the employee’s drug abuse, threats, and general “orneriness” were not enough to make the coworker’s injury foreseeable and establish proximate cause for the injury. Instead, the court noted that the employee was not on the employer’s job site, not doing the employer’s work, and not using the employer’s gun. The plaintiff therefore could not present sufficient evidence to establish a negligent hiring claim.

*Doe v. Boy Scouts* was even stricter in following the Restatement’s premises/chattel requirement. In *Doe*, a Boy Scouts executive sexually assaulted the plaintiff’s son after the executive’s employment had been voluntarily terminated. The court noted that there was little support for extending negligent hiring and retention to post-termination acts. It also pointed to a “rigorous standard of proximate causation” in which liability “will rest only where the employee is on the employer's premises or using the chattel of the employer.”

Other cases, however, have been less rigorous. In *Carter v. Skokie Valley*, an off-duty security guard kidnapped, raped, and

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143 See, e.g., *Escobar*, 589 N.E.2d.
146 Id. at 640.
147 Id.
148 Id.
150 Id. at 561.
151 Id. at 561 (internal quotations omitted).
murdered a woman he knew through work.\textsuperscript{152} There, the Illinois Appellate Court did not rely on the premises/chattel requirement of the Restatement, but rather examined whether the plaintiff’s injury was caused “by virtue of the servant’s employment.”\textsuperscript{153} This requires that the “employment itself must create the situation where the employee’s violent propensities harm the third person.”\textsuperscript{154} However, the court still found that the plaintiff could not establish proximate causation for conduct of the off-duty guard.\textsuperscript{155}

\textit{Bates v. Doria} followed the same “virtue of employment” standard.\textsuperscript{156} There, an off-duty sheriff wearing army fatigues, shot a passerby with a stun gun, accused her of trespassing on army property, and took her to the woods to rape her at gunpoint.\textsuperscript{157} While not expressly following the Restatement, the court noted that the sheriff was “not on duty, not issued departmental weapons or uniform, nor engaged in conducting any of his duties as a sheriff’s deputy.”\textsuperscript{158} Even with the looser standard, the court could not find “some connection between the plaintiff’s injuries and the fact of employment.”\textsuperscript{159} There, too, the plaintiff’s claim failed the proximate cause element.\textsuperscript{160}

Thus, while the Seventh Circuit was in line with Illinois case law for its holdings on duty and foreseeability, it strayed from Illinois doctrines on proximate causation. Although Illinois courts do not strictly follow the premises/chattel requirement of the Restatement, they do apply a fairly rigorous standard to proximate causation. The Seventh Circuit seems to have loosened that standard a bit.

\begin{itemize}
\item \textsuperscript{153} \textit{Id.} at 604.
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{Id.} at 605-06.
\item \textsuperscript{157} \textit{Id.} at 455-56.
\item \textsuperscript{158} \textit{Id.} at 459.
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id.}
\end{itemize}
IV. COMMENTARY

Negligent hiring and retention claims can provide a remedy to people injured by employees whom employers should have known were dangerous. These torts fill a gap when other employment-related claims, such as respondeat superior or civil rights violations, do not apply. Thus, employers are not just responsible for injuries caused by employees acting within the scope of employment or for injuries inflicted on protected classes of people. Instead, they are generally responsible for ensuring that their employees do not pose a danger to the public at large, even if the employee is acting intentionally. As the Illinois Supreme Court in Tatham noted, when an employer is aware of “conditions creating a likelihood of injury, he has a duty to make provisions against this foreseeable danger, even though the threatened hazard is from the intentional misconduct of third persons.”

These torts can incentivize employers to be vigilant in the hiring and retaining of their employees. At the same time, they expose employers to liabilities that may cause some reluctance in hiring, particularly for high-risk employees. Courts face the difficult task of striking a proper balance between these competing interests. The Seventh Circuit attempted to strike that balance by modifying the Restatement’s premises/chattel requirement. However, the court probably could have accomplished the same goal without significantly modifying existing law.

A. Background and Purpose of Negligent Hiring and Negligent Retention

In the negligent hiring context, many courts have imposed special duties on employers when their jobs involve a special risk to
third parties.  

This typically involves a duty to perform a background investigation. For example, courts have found heightened duties to investigate for jobs that have a special duty to the public (such as taxi drivers), when there is a landlord-tenant relationship, or when an instrumentality of employment creates an opportunity for tortious conduct (such as cable installers who are required to enter customers’ homes).

In Illinois, an employer’s duty does not vanish if the job in question does not fit into one of these special categories. Indeed, in Anicich, Cooper was an ordinary regional manager whose position presumably did not pose a special danger to third parties. Even in positions that pose no special danger to the public, Illinois still consider the results or potential results of background investigations. Often, these cases turn on whether the employer discovered or would have discovered information showing that its employee posed a special danger to third parties.

Despite the fact that courts consider what employers would have found had they done a background check, Illinois does not impose any general requirement for employers to conduct background checks except for certain statutorily defined classes of workers. In fact, many Illinois laws limit the use of information obtained from background checks for hiring decisions. For example, the Illinois

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163 Michael Silver, Negligent Hiring Claims Take Off, 73-May A.B.A. J. 72, 74-76 (1987) (discussing various cases where courts have found a heightened duty to investigate).
164 Id.
168 See, e.g., Illinois Health Care Worker Background Check Act, 225 ILCS 46.
Human Rights Act prohibits employers from using “the fact of an arrest or criminal history record information ordered expunged, sealed or impounded” in its employment decisions.\textsuperscript{169} Similarly, under the Job Opportunities for Qualified Applicants Act, employers may not “inquire about or into, consider, or require disclosure of the criminal record or criminal history of an applicant until the applicant has been deemed qualified for [a] position.”\textsuperscript{170}

To help strike a balance, many commentators have developed guidelines for all employers to follow to help avoid negligent hiring liability. These guidelines include interviewing all applicants, diligently checking applicant references, investigating prior employment history, and maintaining accurate records of investigations.\textsuperscript{171}

As far as negligent retention and supervision, the burden on employers tends to focus on monitoring employees and taking corrective actions when employees behave inappropriately.\textsuperscript{172} This duty is not new and is already in the employer’s interest. As the Anicich court noted, employers already have a duty of promptly investigating and correcting civil rights violations, such as sexual harassment in the workplace.\textsuperscript{173} In addition, employers presumably want their workplaces to be free of harassment and violence. Thus, employers already have incentives to take corrective actions that limit their liability for negligent retention and supervision claims.

A valid concern from employers is that a general duty to ensure employees do not pose a danger to others would chill hiring, particularly for classes of people who present a special risk. However, the limited scope of negligent hiring and retention should not chill the

\textsuperscript{169} 775 ILCS 5/2-103(A).
\textsuperscript{170} 775 ILCS 75/15(a).
hiring of protected classes of people or “high-risk” applicants. People with physical and mental disabilities, for example, enjoy substantial protections in hiring under the Americans with Disabilities Act and the Illinois Human Rights Act. These statutes serve to discourage employers from discrimination against disabled individuals. Moreover, the statutes only prohibit discrimination against disabled individuals who are qualified for the position. Employers therefore do not need to hire individuals with a physical or mental disability if their disability foreseeably poses a danger to third parties. In any event, Illinois courts have never found a person’s physical or mental disability to qualify as a “particular unfitness” for purposes of negligent hiring or retention. As noted above, “particular unfitness” typically involves behaviors that exhibit violent or criminal tendencies.

Applicants with criminal backgrounds already face significant barriers to employment, but potential liability for negligent hiring and retention claims should not be an additional one. Illinois courts have been reluctant to extrapolate too much from an employee’s criminal background, particularly for positions that impose no special duty to the public. In addition, the proximate cause requirement for negligent hiring and retention claims limits employer liability based on foreseeability and connection to employment. Thus, the mere fact of a criminal background is likely insufficient to satisfy the proximate cause element. Rather, the criminal background must show some

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175 “No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, [and] hiring.” 42 U.S.C § 12112(a) (emphasis added); Under the Illinois Human Rights Act, disability is defined as a physical or mental characteristic of a person “unrelated to the person's ability to perform the duties of a particular job or position.” 775 ILCS 5/1-103(I).
particular unfitness, and that particular unfitness must pose some danger created by the position.\footnote{See, e.g., Strickland v. Communications and Cable of Chicago, Inc., 710 N.E.2d 55, 58 (Ill. App. Ct. 1999).} For example, an applicant’s prior history of sexual misconduct with minors is a particular unfitness that poses danger in a position that requires the employee to be alone with minors.\footnote{See, e.g., Mueller v. Cmty. Consol. Sch. Dist. 54, 678 N.E.2d 660 (Ill. App. Ct. 1997).} However, this same applicant likely does not pose a danger in a position that has limited social interactions and no contact with children. Thus, employers need not screen out every applicant with a criminal background. Instead, they must evaluate the requirements of the position at hand and determine whether the applicant would pose a danger in the position in light of the applicant’s particular background.\footnote{Shattuck, supra note 171, at 4-5.}

\section*{B. Striking a Proper Balance}

Admittedly, employers must walk a fine line. If employers are overzealous in investigating their employees, they face potential liability for civil rights violations.\footnote{See, e.g., Murillo v. City of Chicago, 61 N.E.3d 152 (Ill. App. Ct. 2016) (finding a police sergeant’s use of a janitor’s prior arrest record to deny a security clearance a violation of the Illinois Human Rights Act).} On the other hand, if they are not cautious enough, they face liability under negligent hiring and retention, to say nothing of the non-legal consequences associated with injuries inflicted on the public and other employees.\footnote{Not only did Home Depot have to deal with the horrific murder of one of its employees, the sensational case was widely reported in local, national, and international media outlets, often with Home Depot in the title. See, Jennifer Smith, \textit{Court backs family’s lawsuit blaming Home Depot for death of pregnant employee, 21, who was strangled then raped by her supervisor}, THE DAILY MAIL (Mar. 28, 2017); Jonathan Stempel, \textit{Home Depot must again face lawsuit over employee’s murder – US court}, REUTERS (Mar. 24, 2017); Michael Tarm, \textit{Court restores Plainfield woman’s suit accusing Home Depot of negligence in daughter’s slaying}, CHICAGO TRIBUNE (Mar. 28, 2017).} Given this...
tightrope employers must walk, it is important for courts to apply consistent standards with negligent hiring and retention claims. Consistent standards can help employers determine how far they need to go in both background investigations of applicants and disciplinary measures for current employees. Consistent standards could also help disadvantaged groups, such as former felons, because employers may be less reluctant to hire “risky” employees if they had a clear, straightforward understanding of their duties under negligent hiring and retention.

In many ways, the premises/chattel standard of the Restatement of Torts provides this clear standard. Limiting employer liability to intentional acts of its employees committed on employer premises or using employer chattels limits negligent hiring and retention claims to situations that are presumably under the employer’s control. After all, the employer is responsible for overseeing what happens on its own premises and how its chattels are used. Extending liability beyond premises and chattels extends employer liability to situations that are further and further removed from the employer’s control.

In Anicich, however, this standard caused a dilemma. Bromfield’s murder happened at a private wedding hundreds of miles from where she worked. Cooper did not use any of Home Depot’s chattels in committing his crime. Yet, there was an inescapable connection between Cooper’s employment and Bromfield’s murder. Cooper met Bromfield through work. He was her supervisor and continued to be her supervisor despite berating her and threatening her in full view of other employees. Finally, he used his supervisory authority to pressure her to go to the wedding. All of this suggests that the murder could not have happened but for Cooper’s employment with Home Depot. The premises/chattel standard, therefore, seemed unfitting.

Certainly, the court felt that attaching liability to Home Depot was justified. In a dramatic conclusion to his opinion, Judge Hamilton wrote:

Every life lost to brutality is unique, each family's hell a private one. We do not diminish that truth when we repeat that Alisha’s story is an old story that has been told too many times. Its ending is both shocking and predictable. Alisha’s family is entitled to try to prove its truth.\textsuperscript{184}

This quote suggests that the court was perhaps persuaded not only by the shocking facts of this case, but also by a desire to create a new deterrent for employers. After all, if this horrifying story has been told “too many times,” the court was likely inclined to use its power to prevent it from being told again, particularly given the fact that the case involved a common law tort.

But in creating an additional deterrent, the court warped the Restatement’s premises/chattel standard. By analogizing supervisory authority to chattels, the court paved a new avenue for employer liability without establishing any clear limits.\textsuperscript{185} For example, what exactly constitutes abuse of supervisory authority? Would this somehow be limited to egregious abuses, such as threatening to cut hours or fire an employee? Or would more subtle forms of abuse qualify, such as playing favorites among subordinates? One can imagine that even subtle forms of abuse could be used to manipulate or coerce employees.

Next, how exactly does one establish the connection between abuse of supervisory authority and the plaintiff’s injury? When an injury happens on the employer’s premises or with an employer’s chattel, the connection is clear. If an employee strangles a customer in the employer’s store, the employee is clearly on the employer’s premises. Similarly, if a maintenance worker uses an employer-issued key to illegally enter a victim’s apartment, he is using an employer chattel. But supervisory authority is much more amorphous. It is not a tangible place or object. There are innumerable ways a supervisor can abuse authority to manipulate or coerce employees. And there are

\textsuperscript{184} Id. at 656.
\textsuperscript{185} Id. at 654.
countless injuries that could flow from this abuse, from bribery or extortion to murder. If Illinois were to fully embrace the supervisory authority as chattel analogy, employers may face liability for a wide range of injuries where they traditionally have not been liable.

Instead of extending the Restatement’s premises/chattel requirement to include supervisory authority, the court could have taken a broader view of the “virtue of employment” standard applied by some Illinois courts. As noted above, no Illinois case has found negligent hiring or retention liability when an injury did not happen on the employer’s premises or using the employer’s chattels. At the same time, Illinois courts have never strictly followed the premises/chattel requirement of the Restatement. Several Illinois decisions simply used a “virtue of employment” standard without invoking the Restatement.186 This looser standard could have been extended in the Anicich case without warping the premises/chattel requirement of the Restatement.

Using the “virtue of employment” standard, the court could have simply focused on the foreseeability analysis. In Anicich, Cooper exhibited some shocking behavior at work which, the court noted, a reasonable jury could easily have found would lead to “the small further step to violence.”187 Discarding the premises/chattel requirement and focusing instead on foreseeability would have had the benefit of extending negligent hiring and retention liability in cases like Anicich without confining courts to the “formalistic” approach of the Restatement. This would provide plaintiffs with a remedy in cases like Anicich, where the injury occurred outside the scope of employment, but where there is a strong connection to the employment relationship.

Illinois courts already engage in this foreseeability analysis when evaluating proximate cause in negligent hiring and retention claims. Extending it a bit would simply require employers to be more vigilant when their employees exhibit alarming behaviors. If an

187 Id. at 655.
employee exhibits particularly violent behavior, as Cooper did in *Anicich*, employers should bear a heavier burden. They should have a stronger duty to take corrective action. And in these situations, liability could extend further off-duty as the employee’s on-duty behavior becomes more outrageous. On the other hand, if the employee exhibits nothing but ordinary behavior, then commits some heinous act, the employer would not be liable, perhaps even if the act occurs on the employer’s premises or using the employer’s chattels. While certainly not a bright-line rule, focusing on foreseeability would serve the dual purpose of providing injured third parties a remedy while also incentivizing employers to be more vigilant in taking corrective actions against their aberrant employees.

This approach would not necessarily chill the hiring of “high risk” applicants, such as felons or applicants with past criminal backgrounds. Assuming a position has limited contact with the public and poses no special opportunity for tortious conduct, even applicants with serious criminal backgrounds would not create significant liability for employers. For example, an employee formerly convicted of armed robbery working in a warehouse who exhibits no unusual behaviors at work would not create any additional liability if he robs one of his coworkers in the parking lot. While the employer may have notice of his prior criminal conviction, without anything more it could not be reasonably foreseen that he would rob again on the employer’s premises. In addition, this hypothetical robbery could not be said to have happened by “virtue of employment.” After all, nothing about his employment, aside from his mere presence in the parking lot, could be said to have created the opportunity for the crime. At the same time, if this same employee began exhibiting violent or abusive behavior at work, the employer would be on a heightened duty to take corrective action. Knowledge of the past criminal conviction combined with the threatening on-duty behavior could put the employer on notice, and make the employer potentially liable even if the employee commits a crime off the employer’s premises and not using the employer’s chattels, so long as there is some connection between the crime and the fact of employment.
The limiting devices that Illinois courts already have in place would prevent this approach from opening the flood gates of employer liability. Illinois courts have consistently held that simply knowing someone through work is not enough to find employer liability for negligent hiring and retention claims.\textsuperscript{188} The proximate cause analysis has always required more. In addition, this approach would only expand liability in the relatively few instances where \textit{respondeat superior} would not apply and where civil rights statutes do not preempt negligent hiring and retention claims. Thus, taking a broader view of foreseeability with the “virtue of employment” standard would not greatly expand the scope of employer liability while, at the same time, providing victims like Bromfield some form of remedy.

\section*{CONCLUSION}

Employers are confronted with liabilities from many fronts. For employers, negligent hiring and retention may seem to be yet another liability which they could face despite all reasonable precautions. And, without proper limits on these torts that indeed could be the case. However, negligent hiring and retention claims can provide an important remedy for plaintiffs who are injured by employees the employer should have known were dangerous. Illinois case law is rife with examples of plaintiffs who suffered horrific injuries that were somehow connected to their employment. Unfortunately, \textit{Anicich} provides yet another such example.

For negligent hiring and retention claims to retain their viability, courts must apply consistent standards that are just for both injured parties and employers. While the Restatement’s premises/chattel standard may have created a bright line, cases like \textit{Anicich} reveal the impracticality of its approach. However, the \textit{Anicich} court’s expansion of Restatement standard may prove to be equally unworkable. Instead, a broader view of foreseeability with the “virtue of employment” standard could help to remedy victims such as

Bromfield while incentivizing employers to be more vigilant in monitoring employees that pose a danger to others. Given the numerous limiting principles Illinois courts already place on negligent hiring and retention claims, a broader view of foreseeability would truly be an “incremental shift” as opposed to the potentially far-reaching expansion of the Restatement’s doctrine taken by the Seventh Circuit in *Anicich*. 
OUTGROWING ITS USEFULNESS: SEVENTH CIRCUIT LIMITS THE APPLICATION OF THE COMMON ACTOR INFERENCE IN TITLE VII DISCRIMINATION CASES

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INTRODUCTION

Can a person harbor discriminatory views toward protected minority groups, yet still hire a member of that minority group as an employee? That is the question at the heart of the common actor inference in Title VII employment discrimination jurisprudence. The common actor inference holds if the same supervisor hires an employee from a protected minority group, and then fires that employee a short period of time later, there is a strong inference that discrimination did not factor in the employment decision.\(^1\) Because the burden for proving Title VII discrimination on the basis of race, color, religion, sex, or national origin lies with the plaintiff, the common actor inference is a tool employer-defendants can use to defeat Title VII discrimination claims. However, in the Seventh Circuit’s recent decision in McKinney v. Sheriff of Whitley County, the court not only critiqued the district court’s reliance on the common actor inference,

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1. Perez v. Thornton’s, Inc., 731 F.3d 699, 710 (7th Cir. 2013).
but also questioned the utility of the inference in Title VII discrimination cases.\(^2\) This comment will argue that the Seventh Circuit was correct in rejecting the defendant’s use of the common actor inference in *McKinney*, and that other circuit courts should follow the Seventh Circuit’s lead in limiting the common actor inference to an evidentiary issue that can only be argued to the ultimate trier of fact at the trial stage of litigation.

The common actor inference is not codified in Title VII nor any other federal civil rights statute.\(^3\) The first mention of a common actor inference was in the Fourth Circuit decision *Proud v. Stone*, which stated, “in cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.”\(^4\) In *Proud*, the Fourth Circuit endorsed the use of the common actor inference at the pleading stage, and upheld the district court’s decision to dismiss the plaintiff’s complaint alleging age discrimination.\(^5\)

The common actor inference has been adopted across all U.S. Circuit Courts, but its application is not uniform. Some circuits, including the First, Second, Third, Ninth, and Tenth, have adopted the Fourth Circuit’s use of the common actor inference and apply it to discrimination claims at the pleading and summary judgment stage.\(^6\) Other circuits have limited the scope of the common inference to cases

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\(^4\) Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991).

\(^5\) *Id.* at 797-98.

\(^6\) See LeBlanc v. Great American Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993); Cordell v. Verizon Commc’n, Inc., 331 F.App’x. 56, 58 (2d Cir. 2009); Waldron v. SL Industries Inc., 56 F.3d 491, 496 n.6 (3d Cir. 1995); Coghlan v. Am. Seafoods Co. LLC., 413 F.3d 1090, 1096-97 (9th Cir. 2005); Antonio v. Sygma Network Inc., 458 F.3d 1177, 1183 (10th Cir. 2006).
where there are genuine issues of material fact. The Seventh Circuit has adopted the most narrow application of the common actor inference, holding that the inference should only be considered by the ultimate trier of fact and should not be applied in motions to dismiss or motions for summary judgment. The Eleventh Circuit has taken a similar approach to the Seventh Circuit.

Section I of this comment will discuss the background that preceded the passage of Title VII, employees’ protections under Title VII, and how a plaintiff brings a Title VII discrimination suit. Section II will discuss the background of McKinney v. Office of Sheriff of Whitley County, and how the Seventh Circuit reached its decision to limit the application of the common actor inference. Section III will explain why the Seventh Circuit made the right decision and will argue that other circuits should adopt the Seventh Circuit’s approach.

I. TITLE VII HISTORY AND DEVELOPMENT

A. Title VII Protects Members of Protected Classes from Employment Discrimination

Federal protections against employment discrimination, known as the Title VII protections, emerge from the Civil Rights Act of 1964. The Civil Rights Act was landmark legislation that emerged after a long, often bloody struggle to achieve equal rights for minorities in the

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7 See, e.g., Brown v. CSC Logic Inc., 82 F.3d 651, 658 (5th Cir. 1996); Wexler v. White’s Fine Furniture, Inc., 317 F.3d 564, 573 (6th Cir. 2003); Kells v. Sinclair Buick-GMC Truck, Inc., 210 F.3d 827, 835 (8th Cir. 2000) (abrogated on other grounds by Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011)).
9 Williams v. Vitro Serv. Corp., 144 F.3d 1438, 1443 (11th Cir. 1998).
United States. The 1963 Civil Rights March in Birmingham, Alabama, and the horrifically violent response that accompanied it, is often credited with finally spurring Congress to act to protect certain employees from discrimination based on race, color, sex, religion, or national origin. Despite fierce debate in Congress, the Act was politically popular enough to pass by well over 100 votes in the House of Representatives and with over two-thirds of the members in the U.S. Senate, enough to defeat a filibuster.

Title VII of the Civil Rights Act specifically prohibits “employers,” as defined by the Act, “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” The Act also states an employer cannot “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”

Title VII protects employees before and during their relationship with the employer. Before the employment relationship officially exists, employers may not advertise for a position by indicating they

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12 Id. at 21-22.
13 Id. at 22.
14 With some exception, Title VII defines an employer as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.” 42 U.S.C. § 2000e(b) (2012).
16 Id.
prefer to hire employers of a certain class, or that the employer will
not hire a member of a protected class. Second, employers cannot
refuse to hire employees for a job because of their status as a member
of a protected class. Third, employers may not institute employment
tests or training programs that are designed to discriminate against a
protected class of employees or potential employees. Title VII
therefore provides remedies to any person who faces employment
discrimination before the employer-employee relationship begins.

Title VII also protects employees once their official relationship
with an employer begins. An employer is prohibited from firing an
employee solely because of their race, color, religion, sex, or national
origin. Employers cannot refuse to assign an employee to certain
duties solely because of their membership in a protected class.
Employers cannot unfairly segregate or classify their employees at
work because of the employee’s membership in a protected class.
Employers also cannot promote or refuse to promote an employee
based on their, race, color, sex, religion, or national origin.

Title VII protects employees who oppose unlawful employment
practices or file a complaint against their employer for discriminatory
practices. This includes protections that allow employees to
participate in investigations of their employer for discriminatory
employment practices. Title VII prohibits an employer from retaliating “against any of his employees or applicants for employment
. . . because he has opposed any practice made an unlawful

18 42 U.S.C § 2000e-3(b) (“class” as used in this sentence means race, color,
sex, religion, or national origin).
19 Greene, supra note 17, at 95.
23 Id.
24 Greene, supra note 17, at 94
26 Greene, supra note 17, at 95.
27 Id.
employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”

Title VII goes beyond merely providing employees with protection from employment discrimination. It also provides employees with enforcement provisions and remedies for any discrimination they may face. Title VII created the Equal Employment Opportunity Commission (EEOC) which has the power to investigate, study, intervene, and assist employees who believe they have been victims of prohibited discrimination by their employer or potential employer. The EEOC is designed to work with state and local employment enforcement agencies to ensure all claims are investigated thoroughly. The EEOC serves as an enforcement, investigatory, and regulatory body.

Title VII also specifically allows the Attorney General to bring an action against employers for discriminatory employment practices in United States District Courts. Notably, Title VII also contains a fee-shifting provision that awards a prevailing plaintiff attorney fees if he or she can prove employment discrimination under § 2000e-2(m). Awards of attorney fees are not the norm in U.S. civil cases, and

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30 42 U.S.C. § 2000e-5 (“[i]n the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials.”)
31 Id.
33 42 U.S.C. 2000-e-5(k) (“[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney’s fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.”); 42 U.S.C. § 2000e-2(m).
special fee provisions in legislation are a sign that Congress wished to encourage private lawyers to bring a certain type of litigation.\textsuperscript{34}

\textit{B. Bringing a Title VII Claim as a Plaintiff}

Based on the preceding section, it would be easy to conclude that Title VII’s employment protections make it easy for a plaintiff to prevail on an employment discrimination claim. Title VII defines forbidden acts employers may not engage in, creates an investigative and enforcement agency to examine Title VII claims, and provides incentives to pursue Title VII actions. However, Title VII’s broad provisions and years of judicial interpretation have made it very difficult for a plaintiff to prevail on a Title VII claim.

Title VII was never intended to protect an employee from being discharged or passed over for any reason other than prohibited discrimination. Title VII does not protect an employee from being discharged for poor performance, inappropriate work activity, poor judgment, or disputes with management.\textsuperscript{35} Title VII’s protections are thus limited only to cases where the plaintiffs can prove they suffered an adverse employment action \textit{because of} their race, religion, color, sex, or national origin. A Title VII discrimination case over unlawful termination is thus decided on the limited scope of whether “the evidence would permit a reasonable factfinder to conclude that the plaintiff’s race [religion, color, sex or national origin] . . . caused the discharge.”\textsuperscript{36}

A plaintiff may prove race discrimination by either direct or indirect proof, relying on direct or circumstantial evidence.\textsuperscript{37} Because direct proof of discrimination is usually present in only the most blatant cases, most Title VII cases require indirect proof of

\textsuperscript{35} Hill v. St. Louis University, 123 F.3d 1114, 1120 (8th Cir. 1997).
\textsuperscript{36} Ortiz v. Werner Enter. Inc., 834 F.3d 760, 765 (7th Cir. 2016).
\textsuperscript{37} Coleman v. Donahue, 667 F.3d 835, 845 (7th Cir. 2012).
discrimination. In order to “sharpen the inquiry into the elusive factual question of intentional discrimination” the United States Supreme Court and the Seventh Circuit have developed a distinct framework demonstrating what a plaintiff needs to prove to prevail on a Title VII discrimination claim. The United States Supreme Court established a framework, for plaintiffs who are bringing indirect proof of discrimination, in McDonnell Douglas Corp. v. Green.

C. The McDonnell Douglas Framework

In McDonnell Douglas, the plaintiff, an African-American man, was laid off as part of general workforce reduction by the McDonnell Douglas Corporation. The plaintiff and other workers protested these firings as racially motivated and staged protests at the McDonnell Douglas job site. After the protests ended, plaintiff noticed McDonnell Douglas was advertising for open positions, including the position the plaintiff used to hold. McDonnell Douglas declined to rehire the plaintiff, citing his participation in the protest activities, and the plaintiff filed a complaint with the EEOC. The EEOC found some cause that McDonnell Douglas had violated Title VII by refusing to rehire the plaintiff, and the plaintiff then brought an action in the district court. The district court dismissed the plaintiff’s claims, stating that McDonnell Douglas’s “refusal to rehire respondent was based solely on his participation in the illegal demonstrations and not on his legitimate civil rights activities” or his race or color.

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38 Id.
41 Id. at 794.
42 Id. at 795.
43 Id. at 796.
44 Id.
45 Id. at 797.
46 Id.
Plaintiff appealed the district court’s decision to the Eight Circuit Court of Appeals. The Eight Circuit upheld some of the district court’s decision, but reversed the district court’s decision to dismiss the plaintiff’s complaint for discriminatory hiring practices against McDonnell Douglas. In explaining its decision to remand, the Eight Circuit attempted to create a framework for examining Title VII employment discrimination claims. The Eight Circuit stated that when the district court considered the evidence offered by the plaintiff and McDonnell Douglas, the district court relied on subjective criteria which carried little weight in rebutting charges of discrimination. The court explained that the plaintiff should be given the opportunity to demonstrate that McDonnell Douglas’s reasons for refusing to rehire him were mere pretext for discriminatory purposes. The Supreme Court granted certiorari to better clarify the Eight Circuit’s standards for evaluating a plaintiff’s Title VII employment discrimination claim.

The Supreme Court created a four-element test for a plaintiff to establish a prima facie case of Title VII prohibited discrimination. The Supreme Court held that for a plaintiff to establish a prima facie case of racial discrimination in his hiring, the plaintiff must demonstrate: 1) he is a member of a racial minority; 2) he applied and was qualified for a position for which the employer was seeking applicants; 3) despite his qualifications for the position, he was rejected; and 4) after his rejection, the position remained open and the employer continued to seek applications from persons of plaintiff’s qualifications. The McDonnell-Douglas framework is now used for any Title VII claim where discrimination is alleged, including race, religion, color, sex, or national origin. See Triston K. Green, Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII, 87 CALIF. L. R. 983, 985 (1999).
Supreme Court agreed with the Eight Circuit that the plaintiff did demonstrate a prima facie case of race discrimination.  

After the plaintiff demonstrates a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for not hiring the plaintiff. The Supreme Court stated it is not necessary for an employer to delineate every legitimate reason why an employer chose to fire or not hire an employee, but makes clear that any legitimate, nondiscriminatory reason for the employment decision relieves the employer from this burden. The inquiry does not end if the employer demonstrates a legitimate, nondiscriminatory reason for the hiring decision. The burden then shifts back to the plaintiff to demonstrate through evidence that the employer’s stated legitimate, nondiscriminatory reason for its hiring decision is mere “pretext” to hide or overshadow a discriminatory reason. The Supreme Court then remanded the case to the district court with the instructions that the plaintiff’s case should be evaluated with the tests stated in this decision, in what came to be known as the *McDonnell Douglas* burden-shifting framework.

*McDonnell Douglas* is an example of the Supreme Court creating a test that the district courts and circuit courts can follow when interpreting and applying legislation from Congress. It also demonstrated the burdens a plaintiff carries in proving a Title VII discrimination case. The plaintiff not only carries the initial burden of proving a prima facie case, the plaintiff must also have sufficient evidence to prove that any legitimate, nondiscriminatory reason the employer offers for its decision is mere pretext for a discriminatory purpose.

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54 *McDonnell Douglas*, 411 U.S. at 802.
55 *Id.* at 802-803.
56 *Id.*
57 *Id.* at 807.
58 *Id.*
D. Introduction of Common Actor Inference as an additional hurdle to a Title VII claim

The common actor inference is a judicially-created inference that weighs against the plaintiff in a Title VII case. The common actor inference developed after the Supreme Court established the *McDonnell Douglas* framework and is a way to help the judge or jury better apply the framework in a case. It is important to understand at what point in a Title VII case the common actor inference is considered, as it varies from circuit to circuit, and the inference can have a more substantial impact on a Title VII case based on when it is considered.

The first appearance of the common actor inference was in the Fourth Circuit Court of Appeals. The Fourth Circuit articulated the test, which is “in cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.” The Fourth Circuit analyzed the common actor inference in the context of the *McDonnell Douglas* framework, and stated “[t]he relevance of the fact that the employee was hired and fired by the same person within a relatively short time span comes at the third stage of the analysis,” when the plaintiff must demonstrate that the employer’s stated reason for the employment action is mere pretext for a discriminatory purpose. The court explained that if the same employer hired and fired the employee in a relatively short time span, this then “creates a strong inference that the employer’s stated reason for acting against the employee is not pretextual.”

U.S. Courts of Appeals vary on what stage of litigation is appropriate to consider the common actor inference. There are

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59 Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991).
60 *Id.*
61 *Id.* at 798.
62 *Id.*
typically three ways a Title VII race discrimination case can reach a final judgment: 1) an order dismissing the complaint; 2) summary judgment before the case reaches the ultimate trier of fact; or 3) a final judgment rendered after trial to a judge or jury. In *Proud v. Stone*, the Fourth Circuit considered evidence of the common actor inference when considering a motion to dismiss the plaintiff’s Title VII complaint. Because a motion to dismiss is based solely on the pleadings, the Fourth Circuit established that the common actor inference can apply before the litigation moves to the fact-finding stage. A majority of the other circuit courts have followed the Fourth Circuit’s precedent and allow courts to consider the common actor inference when evaluating a plaintiff’s claim in a motion to dismiss or in a summary judgment motion. Other circuits have limited the application of the common actor inference to only when discrimination has been alleged and there are genuine issues of material fact. However, in *McKinney v. Office of Sheriff of Whitley County*, the Seventh Circuit limited the application of the common actor inference to the narrowest of circumstances, and stated its concern that the common actor inference may be “outgrow[ing] its usefulness” in Title VII jurisprudence.

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64 Stone, 945 F.2d at 798.
65 See Cordell v. Verizon Commc’n, Inc., 331 F.App’x. 56, 58 (2d Cir. 2009); Waldron v. SL Industries Inc., 56 F.3d 491, 496 n.6 (3d Cir. 1995); Coghlan v. Am. Seafoods Co. LLC., 413 F.3d 1090, 1096-97 (9th Cir. 2005); Antonio v. Sygma Network Inc., 458 F.3d 1177, 1183 (10th Cir. 2006).
66 See, e.g., Wexler v. White’s Fine Furniture, Inc., 317 F.3d 564, 573 (6th Cir. 2003); Kells v. Sinclair Buick-GMC Truck, Inc., 210 F.3d 827, 835 (8th Cir. 2000) (abrogated on other grounds by Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011)).
67 McKinney v. Office of Sheriff of Whitley Cnty, 866 F.3d 803, 815 (7th Cir. 2017).
II. **McKinney v. Office of Sheriff of Whitley County**

A. **Factual Background and District Court Decision**

Sheriff Mark Hodges of Whitley County, Indiana, hired Terrance McKinney as a full-time merit officer on August 5, 2013. McKinney was the first-ever black officer in Whitley County. The merit officer position carries a one-year “probationary period” where the officer can be fired at the sole discretion of the Sheriff, without input from the county merit review board. The purpose of the probationary period is to allow a sheriff to determine if a new officer is capable of performing his or her duties before he or she benefits from state law that requires “good cause” for termination, as well as the law’s procedural protections.

Because McKinney would have been the first black officer in Whitley County history, Sheriff Hodges and McKinney discussed McKinney’s race during the interview. McKinney stated that he did not expect that he would experience racial discrimination at the Sheriff’s Office. However, throughout his employment, McKinney was able to point to specific instances when he was subjected to racist or discriminatory words and actions by his fellow officers. McKinney related that one officer used the “n-word” in front of him, that officers joked about ordering their coffee “like him,” and that certain officers would not train him or even speak to him. Sheriff Hodges recommended that McKinney watch the movie 42, which depicts Jackie Robinson’s battle to break the color barrier in baseball, and told him the movie would “help him out.”

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68 Id. at 805.
69 Id.
70 Id.
71 Id.
72 Id.
73 Id.
74 Id.
75 Id.
On May 15, 2014, Sheriff Hodges fired McKinney, invoking the power he had as Sheriff under the “probationary period.”76 Sheriff Hodges’ termination letter listed three reasons for firing McKinney: 1) submitting false work hours while attending the Indiana Law Enforcement Academy; 2) violating standard operating procedure for filing complete monthly reports; and 3) violating standard operating procedure for fueling county vehicles.77 The Whitley County Board of Commissioners added more reasons for McKinney’s firing in a termination letter sent four days after McKinney’s firing, including damaging a county vehicle, failing to complete a transport, and failing to follow verbal instructions.78

After McKinney was terminated, he brought suit against the Office of the Sheriff of Whitley County and Deputy Sheriff Tony Helfrich in the District Court, alleging several theories, including race discrimination in violation of Title VII.79 In the course of the defense, counsel for the Sheriff’s office offered even more reasons for McKinney’s firing, including texting while driving, crashing a county vehicle, and being late while transporting a juvenile to court.80 After pleadings were filed and discovery was completed, the Sheriff’s office moved for summary judgment, arguing that under the McDonnell Douglas framework, McKinney had failed to allege a prima facie case of discrimination in order to successfully meet the burden-shifting requirement.81 The defense relied on an affidavit from Sheriff Hodges, which stated the reasons why McKinney was fired, and did not include any mention of McKinney’s race.82

The district court ultimately ruled for the defense and granted summary judgment for the Sheriff’s Office.83 The court ruled that

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76 Id.
77 Id.
78 Id.
79 Id. at 806.
80 Id.
81 Id.
82 Id.
83 Id.
McKinney failed to present any direct evidence of discrimination.\textsuperscript{84} The court also stated McKinney could not point to any direct evidence that would constitute a genuine issue of material fact.\textsuperscript{85} The court further determined that McKinney failed to meet the Sheriff’s legitimate employment expectations, based largely upon the Sheriff’s affidavit.\textsuperscript{86} The court also based its decision upon the “strong presumption against finding discrimination when the same person hires and fires a plaintiff-employee.”\textsuperscript{87} The district court stated “[i]f Sheriff Hodges wanted to discriminate against McKinney based on his race, he could have refused to hire him in the first place.”\textsuperscript{88}

B. 7\textsuperscript{th} Circuit Decision in McKinney v. Office of Sheriff of Whitley County

McKinney appealed the district court’s decision to the Seventh Circuit Court of Appeals. A panel consisting of Judges Bauer, Posner, and Hamilton unanimously reversed the district court’s decision.\textsuperscript{89} After a review of the factual and procedural background of the case, the Seventh Circuit began its analysis by examining McKinney’s presentation of evidence and the Sheriff’s stated reasons for firing McKinney.\textsuperscript{90} The Seventh Circuit utilized the elements of prima facie case of race discrimination and the \textit{McDonnell Douglas} framework in analyzing the district court’s decision.\textsuperscript{91}

First, the court examined whether McKinney had met the elements for a prima facie case of race discrimination, whether: 1) he is a member of a racial minority; 2) his job performance met the employer’s legitimate expectations; 3) he suffered an adverse

\begin{footnotesize}
\textsuperscript{84} Id.  \\
\textsuperscript{85} Id.  \\
\textsuperscript{86} Id.  \\
\textsuperscript{87} Id.  \\
\textsuperscript{88} Id.  \\
\textsuperscript{89} Id. at 815.  \\
\textsuperscript{90} Id. at 808.  \\
\textsuperscript{91} Id. at 807.
\end{footnotesize}
employment action; and 4) another similarly situated individual who was not in the protected class was treated more favorably than him. The court noted that it was undisputed that McKinney is a member of a protected class and that he suffered an adverse employment action. The court stated that for McKinney to prevail under the McDonnell Douglas framework, he must present sufficient evidence to show that his performance met the Sheriff’s legitimate employment expectations and that other similarly situated employees who are not in the protected class were treated more favorably.

The court evaluated the weight of the evidence presented by both sides, noting that the Sheriff’s Office offered plausible rationales for why McKinney did not meet the Sheriff’s legitimate employment expectations. However, the Seventh Circuit ruled that the district court did not give sufficient weight to McKinney’s evidence. The Seventh Circuit ruled the district court failed to properly consider McKinney’s legal memorandum, the genuine issues of material fact he raised, and the supporting evidence that he offered to show he met the Sherriff’s legitimate employment expectations. The Seventh Circuit particularly focused on “the sheer number of rationales the defense has offered for firing plaintiff and the quality and volume of the evidence plaintiff has collected to undermine the accuracy and even the honesty of those rationales.”

The court examined the Sheriff’s stated reasons for the firing: 1) falsifying hours; 2) missing his monthly reports; 3) and misusing the gasoline credit card. After a very thorough review of the Sheriff’s evidence and McKinney’s evidence, the court found that McKinney had presented sufficient evidence to at least raise a genuine issue of material fact as to whether the Sheriff’s stated reasons for his
termination were “pretext” for discriminatory actions. The court then pointed out that the Sheriff’s office had offered even more explanations for McKinney’s termination after it became clear that McKinney intended to sue for discriminatory employment practices. The Seventh Circuit examined each of these additional reasons, and also found that the plaintiff had offered sufficient evidence in response to satisfy the McDonnell Douglas framework and avoid summary judgment.

The Seventh Circuit reminded the district court that when evaluating McKinney’s evidence under the McDonnell Douglas framework on a summary judgment motion, the question is “simply whether McKinney’s evidence would permit a reasonable factfinder to conclude that the plaintiff’s race . . . caused the discharge.” The court concluded that after evaluating McKinney’s testimony, interrogatory answers, internal department documents, and other evidence, McKinney more than satisfied his burden under McDonnell Douglas, and that McKinney had presented enough evidence to permit a reasonable factfinder to question whether the Sheriff’s stated reasons for firing were pretext for discriminatory actions. As a result, the Seventh Circuit reversed the district court’s grant of summary judgment to the Sheriff’s Office, and remanded the case for further proceedings.

The Seventh Circuit also took time to criticize the district court for “overestimat[ing] the strength of the ‘common actor’ inference.” The district court cited the common actor inference as further proof of its decision, holding that if the Sherriff had wanted to discriminate against McKinney, the Sherriff would have refused to hire him in the

99 Id. at 813.
100 Id. at 812.
101 Id. at 814.
102 Id. at 813.
103 Id. at 813-14.
104 Id. at 815.
105 Id. at 814.
first place.106 The district court relied on the Seventh Circuit’s explanation of the common actor inference in previous cases such as EEOC v. Our Lady of Resurrection Medical Center, which led the district court to believe that the common actor inference applied at the pleading or summary judgment stage of a Title VII case.107 In McKinney, however, the court seemed to walk back some of its position in Our Lady of Resurrection, stating that “this inference is not a conclusive presumption and . . . it should be considered by the ultimate trier of fact rather than on summary judgment or the pleadings.”108 The common actor inference may be argued to a jury or judge in a fact-finding endeavor, but it is not a conclusive presumption that applies as a matter of law.109 The inference is “just something for the trier of fact to consider.”110

The court further stated “[w]e have tried to impose limits on the common actor inference to ensure it does not outgrow its usefulness.”111 While the court acknowledged that it may be helpful to let the jury hear evidence of the common actor inference and weigh the inference in the case before it, the court stated the inference is helpful only “in some limited situations.”112 Yet, the court continued that “[t]here are many other occasions, however, where it is unsound to infer the absence of discrimination simply because the same person hired and fired the plaintiff-employee.”113

As an example of such a situation, the court pointed out that an employer may need to quickly fill a position, and as a result hire an individual from a protected class because the supervisor had no other

106 Id.
107 77 F.3d 145, 151-52 (7th Cir. 1996).
108 McKinney, 866 F.3d at 814.
109 Id.
110 Id (citing Herrnreiter v. Chicago Housing Authority, 315 F.3d 742, 747 (7th Cir. 2002)).
111 Id. at 815.
112 Id.
113 Id.
choice. Once other candidates for that position are available, especially non-minority candidates, the employer could then fire the minority employee for discriminatory reasons and hire a different employee from a non-protected class. In this circumstance, it would not be appropriate to assume that the employer did not act in a discriminatory manner just because he or she hired and fired an employee from a protected class. Similarly, the court imagined how an employer could hire a woman, but then refuse to give her a promotion or a raise for discriminatory purposes. The court also pointed out that an employer could hire a woman, but later fire her once she became pregnant, which would certainly qualify as a discriminatory action.

In the closing paragraph of its analysis, the Seventh Circuit stated that “examples abound” for why the same employer could hire an employee with a nondiscriminatory purpose, but then later fire that same employee with a discriminatory purpose. The court asked the district court to imagine a scenario where:

The same supervisor could hire a county’s first black police officer, hoping there would be no racial friction in the workplace. But after it became clear that other officers would not fully accept their new black colleague, that same supervisor could fire the black officer because of his race based on a mistaken notion of the “greater good” of the department.

Without expressly stating this is what happened in the case of Officer McKinney, the Seventh Circuit, at a minimum, demonstrated why the common actor inference should not be considered in a motion for

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114 Id.
115 Id.
116 Id.
117 Id.
118 Id.
summary judgment. There are simply too many plausible scenarios for why a supervisor may hire, and then later fire, an employee from a protected class for discriminatory reasons to accord the inference a significant amount of weight at the pleading or summary judgment stage of litigation.

*McKinney* is thus a stark limitation on the common actor inference in the Seventh Circuit. Although the court presented its holding in *McKinney* as a logical extension of its previous Title VII discrimination and common actor jurisprudence, this is the clearest the Seventh Circuit has been about the application of the common actor inference. The court definitively stated that the common actor inference is not a conclusive presumption that applies as a matter of law.\(^{119}\) Therefore, the inference cannot be considered in a motion to dismiss or a summary judgment motion.\(^{120}\) The inference is merely a consideration that the ultimate fact-finder, whether a judge or a jury, may weigh when making a decision. The Seventh Circuit thus presented a very narrow definition and use of the common actor inference.

### III. Analyzing the Seventh Circuit’s Decision and Its Impact on the Legitimacy of the Common Actor Inference

#### A. Seventh Circuit exposes logical flaws and uses negative tones when addressing the common actor inference

The Seventh Circuit’s *McKinney* decision is notable for both the ease with which the Seventh Circuit found logical flaws in the common actor inference and the almost dismissive tone the court used when discussing the inference. After evaluating the approach other U.S. Circuit Courts of Appeals have taken toward the common actor inference, it is clear that the Seventh Circuit took the lead in criticizing the use of the common actor inference in Title VII cases. This becomes

\(^{119}\) *Id.* at 814.

\(^{120}\) *Id.*
abundantly clear upon a close reading of the court’s legal analysis and the language it used when discussing the common actor inference.

The Seventh Circuit could have invalidated the district court’s ruling in *McKinney* based solely the plaintiff’s evidence, without addressing the district court’s reliance on the common actor inference. McKinney appealed the district court’s grant of summary judgment; all the Seventh Circuit needed to find to reverse the district court’s decision was find a genuine issue of material fact that would require final adjudication by a judge or jury.\(^{121}\) The court went through the facts presented to the district court in long and painstaking detail, and it found many issues of material fact that would be sufficient to reverse the grant of summary judgment.\(^{122}\) However, the Seventh Circuit went beyond just invalidating the circuit court’s decision based on genuine issues of material fact; it devoted an entire section to exposing the logical flaws in the common actor inference.\(^{123}\)

The Seventh Circuit stated that “examples abound” of scenarios where it would be unsound to infer that the same supervisor hiring and firing an employee in a short time period did not have a discriminatory purpose for doing so.\(^{124}\) Although the court stated that examples abound, it listed only four examples: 1) a supervisor hires an employee from a protected class out of necessity, then later fires that employee when members of a nonprotected class are available; 2) a supervisor who hires a woman, but refuses to promote her because of her gender; 3) a supervisor who hires a woman, but later fires her when she becomes pregnant; and 4) when a supervisor hires the county’s first black police officer and then fires him because of racial friction in the department.\(^{125}\) These are all very clear and easy-to-follow examples of how the common actor inference can be unsound, and unfairly slanted toward the supervisor who fires an employee from a protected class.

\(^{121}\) Fed. R. Civ. P. 56.

\(^{122}\) *McKinney*, 866 F.3d at 807-13.

\(^{123}\) *Id.* at 814-15.

\(^{124}\) *Id.* at 815.

\(^{125}\) *Id.*
However, as the Seventh Circuit suggested, these three examples are far from the only ones that expose flaws in the common actor inference. Imagine a supervisor who feels compelled to hire an employee from a protected class out of a company-wide push to increase diversity, only to later fire that employee for discriminatory reasons. Or, consider an all-male law firm who hires female partner to attract new female clients, only to later fire the female partner because she does not “fit-in” with the boy’s club culture. One can also think of a scenario where a supervisor hires a Muslim man or woman, but then later fires him or her after a domestic terrorist attack because the supervisor does not want to associate with people of that religion. These are just a few of a multitude of “examples,” as the Seventh Circuit said, that demonstrate the inherent flaws of the common actor inference, and cast doubt on its usefulness or probative value in Title VII discrimination cases.

It is also important to note the tone the court uses in discussing the common actor inference in McKinney. The Seventh Circuit opened its discussion of the common actor inference by stating “the district court seems to have overestimated the strength of the common actor inference” in reaching its decision. In its very first sentence on the common actor inference, the Seventh Circuit signaled that the common actor inference is not an especially strong one because it has been “overestimated” by the district court. The Seventh Circuit then explained its interpretation of the common actor inference and took the time to clearly explain to the district court how it improperly applied the Seventh Circuit’s analysis. The Seventh Circuit stated that the district court may have gone astray by relying on older Seventh Circuit cases such as EEOC v. Our Lady of Resurrection Medical Center, a 1996 case in which the Seventh Circuit implied the common actor inference could be used in summary judgment motions. However, in McKinney, the Seventh Circuit pointed out that its decisions since Our

126 Id. at 814.
127 Id.
128 Id.
129 Id.
Lady of Resurrection have “clarified that this inference is not a conclusive presumption and that it should be considered by the ultimate trier of fact rather than on summary judgment or the pleadings.”

The court then stated that it has tried to “impose limits on the common actor inference to ensure it does not outgrow its usefulness.” It referred to inference as “just something for the trier of fact to consider.” It stated that the inference may be helpful “in some limited situations.” The court then provided four clear examples of when the inference is illogical. The combination of the court’s tone and the narrow application it assigned to the common actor inference cannot help but leave the reader with the impression the court does not look upon the inference with great favor. In the Seventh Circuit’s own words, the inference is in danger of “outgrowing its usefulness,” “just” something to be considered, and is only in helpful in “limited circumstances.” These are not words or phrases that convey a positive connotation.

B. Circuit Courts should limit the application of the common actor inference to an evidentiary inference at the trial stage

Despite the Seventh Circuit’s critique of the common actor inference and its logical flaws, the court did not completely scrap the use of the common actor inference in the Seventh Circuit. Rather, the Seventh Circuit clearly stated limits on the inference and proscribes when the inference can be considered. The Seventh Circuit framed the common actor inference as an evidentiary issue, and it

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130 Id.
131 Id. at 815.
132 Id. at 814.
133 Id. at 815.
134 Id.
135 Id. (“[t]he inference may be helpful in some limited situations, which is why we allow the jury to hear such evidence and weigh it for what it is worth” (internal quotations omitted)).
stated the inference can only be considered by the ultimate trier of fact at the trial stage of litigation.\textsuperscript{136}

There are definite practical implications of the Seventh Court’s decision in \textit{McKinney} as it pertains to the common actor inference. A defendant may not assert the common actor inference as an affirmative defense; it can only be argued at trial as probative evidence. Therefore, when a plaintiff brings a Title VII complaint against a defendant-employer, even if the relationship between the plaintiff and supervisor would implicate the common actor inference, the defendant cannot use the inference to defeat a complaint in a motion to dismiss or in a summary judgment motion in the Seventh Circuit.

The court’s decision removed one hurdle a plaintiff must overcome to successfully plead Title VII discrimination in the Seventh Circuit. A hypothetical Title VII plaintiff in the Seventh Circuit must first plead a prima facie case of discrimination: that he or she is a member of a protected class; that he or she was qualified for the position; and that he or she suffered an adverse employment action.\textsuperscript{137} If the plaintiff can successfully plead a prima facie case, then pursuant to \textit{McDonnell Douglas}, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employment action.\textsuperscript{138} At this stage in the litigation, there would be no reason for the defendant to assert a common actor inference (even if they could) because discriminatory acts by the defendant are not considered at this stage.\textsuperscript{139} If the defendant articulates a legitimate, nondiscriminatory reason for the employment action, the burden shifts back to the plaintiff to demonstrate through evidence that the employer’s reasons were “pretext” for a discriminatory purpose.\textsuperscript{140} It is at this stage that the plaintiff begins presenting his or her evidence of the employer’s discriminatory actions.

\textsuperscript{136} \textit{id.} at 814.
\textsuperscript{138} \textit{id.} at 802-03.
\textsuperscript{139} \textit{id.}
\textsuperscript{140} \textit{id.} at 807.
Once the plaintiff has offered evidence of the defendant’s discriminatory acts, other circuit courts will allow the defendant to introduce the common actor inference to weigh against the plaintiff’s evidence. In Proud v. Stone, the Fourth Circuit stated the fact that the same supervisor hired and fired an employee “creates a strong inference that the employer's stated reason for acting against the employee is not pretextual.” The Fourth Circuit recognized the strong impact this inference has on a plaintiff’s case, and stated “[t]he plaintiff still has the opportunity to present countervailing evidence of pretext, but in most cases involving this situation, such evidence will not be forthcoming. In short, employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing.”

The Fourth Circuit’s approach is very favorable to defendants, and assists defendant-employers in defeating Title VII discrimination claims before those claims ever reach an ultimate trier of fact. This scenario occurred in the Indiana district court’s decision, where McKinney’s complaint was defeated at the summary judgment stage based in part on the Sheriff invoking the common actor inference. However, as the Seventh Circuit demonstrated in its opinion, there are simply too many flaws in the common actor inference to accord it so much power at the pleadings or summary judgment stage.

The Seventh Circuit’s awareness of how the common actor inference can result in illogical conclusions or too strong of an advantage for employers led the court to limit the use of the inference.

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141 See Proud v. Stone, 945 F.2d 796, 798 (4th Cir. 1991); LeBlanc v. Great American Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993); Cordell v. Verizon Commc’n, Inc., 331 F.App’x. 56, 58 (2d Cir. 2009); Waldron v. SL Industries Inc., 56 F.3d 491, 496 n.6 (3d Cir. 1995); Coghlan v. Am. Seafoods Co. LLC., 413 F.3d 1090, 1096-97 (9th Cir. 2005); Antonio v. Sygma Network Inc., 458 F.3d 1177, 1183 (10th Cir. 2006).
142 Proud, 945 F.2d at 798.
143 Id.
144 McKinney v. Sheriff of Whitley County, 866 F.3d 803, 805 (7th Cir. 2017).
145 Id. at 815.
to only the trial stage of litigation. The court stated that “the common actor inference is a reasonable inference that may be argued to the jury, but it is not a conclusive presumption that applies as a matter of law.” The court continued that the defendant may argue the inference to the jury, who may then “weigh it for what it is worth.” The court acknowledged the flaws of the inference when it is applied as a matter of law at the pleadings or summary judgment stages, stating “[i]t is misleading to suggest (as some cases do) that the inference creates a ‘presumption’ of nondiscrimination, as that would imply that the employee must meet it or lose his case.” Thus in the Seventh Circuit, any employer who wishes to use the common actor inference as a way to overcome a Title VII discrimination claim may only do so when arguing to the ultimate trier of fact.

CONCLUSION

The Seventh Circuit presented the most logical use of the common actor inference, if it is to be used at all. As this comment has demonstrated, Congress created Title VII to protect certain American workers from discriminatory employment actions. The subsequent judicial interpretations of Title VII created the very rigorous *McDonnell Douglas* framework that specifies exactly what a plaintiff must allege, and eventually prove, in order to succeed on a claim. The text of Title VII and the *McDonnell Douglas* framework already provide defendants with a number of protections against frivolous claims. Plaintiffs must plead a prima facie case of discrimination before defendants even need to respond to charges of discrimination. Defendants then have an opportunity to articulate legitimate, nondiscriminatory reasons for their employment action. Plaintiffs then

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146 *Id.* at 814.
147 *Id.*
148 *Id.* at 815.
149 *Id.* at 814 (quoting Herrnreiter v. Chicago Housing Authority, 315 F.3d 742, 747 (7th Cir. 2002)).
150 *Id.* at 815.
must produce actual evidence of discrimination to show that the defendant’s reasons are merely pretextual. These steps help ensure that only serious and credible Title VII claims can even advance to the summary judgment or trial stage.

The inclusion of the common actor inference in pleadings and summary judgment is an example of how a powerful yet ultimately flawed judicially-created inference places a significant burden on Title VII plaintiffs. The Fourth Circuit, and those other circuits who have followed the Fourth Circuit’s lead, have acknowledged that the common actor inference is a nearly fatal blow to a plaintiff’s claim. A plaintiff who has met the prima facie elements of Title VII discrimination and demonstrated discrimination through evidence should be able to advance to a trial without having to overcome a defendant-friendly inference that the Seventh Circuit so easily critiqued.

While the common actor inference can be logical when applied to the right scenario, it contains too many easily-identifiable flaws that tip the scales towards a defendant. Therefore, the inference should not be considered before reaching the ultimate trier of fact. At the trial stage, the ultimate trier of fact will have the chance to survey all of the evidence presented, including the common actor inference, and will be able to weigh the evidence as the he or she sees fit. Applying the common actor inference before the trial robs the plaintiff of the chance to argue all of its evidence, and ultimately can lead to judgment for the defendant for less than solid reasons.

U.S. Circuit Courts should follow the Seventh Circuit’s lead and limit the application of the common actor inference only to the trial stage. McKinney’s guidance on the common actor inference will achieve Congress’ goal of protecting Americans from discrimination based on their race, sex, religion, color, or national origin, while also protecting defendants from frivolous claims by plaintiffs. The framework for a Title VII claim is well-established and fair, and protects both plaintiffs and defendants equally with a rigid burden-shifting test. The common actor inference disrupts this framework by shifting the scales too far toward the defendant, and as a result it
should be limited in accordance with the Seventh Circuit’s decision in *McKinney*. 