# SEVENTH CIRCUIT REVIEW

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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

The SEVENTH CIRCUIT REVIEW provides an in-depth analysis of the Seventh Circuit’s most pressing, controversial cases and issues. As part of a dynamic team of honors seminar students, authors collaborate to edit and publish their work. Each student is both an author and an editor for the REVIEW. The executive editor and teaching assistant facilitates and provides final editing. Each student also defends their case analysis at a semester-end roundtable-style audio synopsis available alongside the comment or note.

Regards,

Samuel Dixon
Executive Editor, SEVENTH CIRCUIT REVIEW
“TRADITIONAL PRINCIPLES OF EQUITY?” HOW SEVENTH CIRCUIT FALSE ADVERTISING PRECEDENT MINIMIZES THE BURDEN ON PLAINTIFFS WHO MOVE FOR PRELIMINARY INJUNCTIONS

JOSEPH P. TRUNK*


INTRODUCTION

Imagine you are the advertising executive at a dairy production company who just spent $30 million on a new advertising campaign,¹ a campaign that includes both print and digital media advertisements.² You created your campaign to market your additive-free cheese, and

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you incorporated into the advertisements what children think of food additives. Advertising critics have called the campaign “adorable” and have said that it “communicates [your] message clearly,” precisely your goal. However, the manufacturer of the artificial food additive you proudly proclaim is absent from your food is not pleased. The food-additive manufacturer sues you, and before reaching the merits of your case, a federal judge stops from using your “adorable” advertisements that you invested millions of dollars in. Exactly one year later, a panel of federal appeals judges upholds this decision. How will you recover?

Unfortunately, this is reality for one company. The Seventh Circuit recently upheld a preliminary injunction in *Eli Lilly & Co. v. Arla Foods, Inc.*, a Lanham Act false advertising case. The plaintiff, Elanco, a subsidiary of Eli Lilly, is the sole producer of the hormone recombinant bovine somatotropin (‘rbST’), the food additive discussed above, which it sells under the registered trademark Posilac®. The defendant, Arla Foods, a Danish dairy conglomerate, started an advertising campaign titled “Live Unprocessed™” by which it advertised its cheeses made from rbST-free milk. Elanco took issue, among other things, with the way in which Arla was portraying rbST and subsequently filed a false advertising suit under 15 U.S.C. § 1125(a)(1)(B), or § 43(a) of the Lanham Act. The district court

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3 *Id.*
4 *Id.*
7 *Id.* at 384.
8 *Id.* at 379.
9 *Id.*
10 *Id.*
granted Elanco’s motion for a preliminary injunction, and Arla appealed. The Lanham Act explicitly provides injunctive relief as a remedy in trademark and unfair competition actions. Courts have the power to restrict the content of advertisements that are allegedly false or misleading. For a court to grant a preliminary injunction, the plaintiff “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”

While considered an equitable remedy, there is room to view the preliminary injunction through an economic lens. Judge Richard Posner, with inspiration from Professor John Leubsdorf, proposed an alternative method of determining when a court should grant a preliminary injunction. Judge Posner’s preliminary injunction standard does not rid the court of the traditional preliminary injunction factors; instead, it offers a way for courts to better understand the

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12 Arla also argued that Elanco had not made a proper showing of causation. Eli Lilly & Co. v. Arla Foods, Inc., 893 F.3d 375, 383 (2018). The Seventh Circuit upheld the district court’s decision on this issue. Id. at 384. Further, Arla also argued that the injunction was “vague and overbroad” and that it did “not meet various formal requirements of [Federal Rule of Civil Procedure 65(d)].” Id. at 381. The court affirmed the district court with respect to these arguments. Id. at 385.

13 15 U.S.C. § 1116(a) (West 2018) (“The several courts vested with jurisdiction of civil actions arising under this chapter shall have the power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable . . . to prevent a violation under subsection (a), (c), or (d) of section 1125 of this title.”). This portion of the Lanham Act is also referred to as § 43.

14 See generally 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §30:30 (5th ed. 2018).


relationship between the factors, leading to more economically efficient outcomes for both parties.\textsuperscript{17} As noted by Judge Posner, a district court judge’s job is to “minimize the costs” of mistakenly granting or denying preliminary injunctive relief.\textsuperscript{18} This is especially important in false advertising and unfair competition cases, where advertisers and media personnel need to make strategic decisions so as to avoid litigation. To minimize these costs, the Seventh Circuit should reverse its prior precedent in Lanham Act cases at the preliminary injunction stage. First, it should no longer presume the plaintiff has suffered irreparable harm. Second, the Seventh Circuit should require Lanham Act plaintiffs to show proof of actual consumer confusion or deception at the preliminary injunction stage.

This Comment includes three parts. Part I provides a broad overview of the preliminary injunction standards as applied across the circuits. Further, it provides an analysis of Judge Posner and Professor John Leubsdorf’s economic model, which can be used as a vessel toward economically efficient outcomes. Part II will provide an analysis of the Eastern District of Wisconsin and Seventh Circuit decisions in \textit{Eli Lilly & Co. v. Arla Foods, Inc.} Finally, Part III will provide commentary on \textit{Eli Lilly}, arguing that Seventh Circuit precedent may be inhibiting economically efficient outcomes at the preliminary injunction stage in false advertising cases.

\textsuperscript{17} \textit{Id.} “[The formula] is not offered as a new legal standard; it is intended not to force analysis into a quantitative straitjacket but to assist analysis by presenting succinctly the factors that the court must consider in making its decision and by articulating the relationship among the factors.”) (emphasis added).

\textsuperscript{18} \textit{Id.}
BACKGROUND

A. The Preliminary Injunction Standard


The Supreme Court has said that a preliminary injunction is an “extraordinary remedy” that is “never awarded as of right.” In an effort to create unity among the circuits, the Court announced factors courts should apply: “[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest.” In Winter, the Natural Resources Defense Council filed suit under numerous environmental acts, seeking to enjoin the United States Navy from using “mid-frequency active” sonar because the waves from that sonar allegedly injured marine mammals. The Navy was testing the sonar off the coast of Southern California, where various species of dolphins, whales, and other marine mammals reside.

The district court granted the Natural Resources Defense Council’s motion for a preliminary injunction, and the Ninth Circuit affirmed. The Supreme Court reversed, finding that, contrary to Ninth Circuit law, which only requires a possibility of irreparable injury, “[o]ur frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the

19 Winter, 555 U.S. at 24 (“In each case, courts ‘must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.’”) (quoting Amoco Prod. Co. v. Vill. of Gambell, Ala., 480 U.S. 531, 542 (1987)).


21 Winter, 555 U.S. at 13-14.

22 Id.

23 Id. at 17.
absence of an injunction.”24 The Court found the preliminary injunction burdened the Navy by restricting its ability to train with mid-frequency action sonar.25 Moreover, the preliminary injunction had an adverse impact on the “public interest in national defense.”26

Winter had a direct impact on the preliminary injunction standard as it was applied in the Ninth Circuit. Thus, although the Court was applying its “frequently reiterated standard,” more than one circuit interpreted the factor language differently.27 It is puzzling, then that circuits are still using different language post-Winter, despite the binding Court precedent.

2. Overview of Preliminary Injunction Standards Used by the United States Courts of Appeals28

In theory, Winter made clear the standard federal courts should apply when a plaintiff moves for a preliminary injunction.29 Yet, there is still confusion and uncertainty amongst litigants; “[e]ach circuit has developed its own test for deciding whether or not to grant preliminary injunctive relief.”30 Commentators have pointed to these inconsistencies for some time. For example, Professor John Leubsdorf noted the “dizzying diversity of formulations,” and he argued that

24 Id. at 22 (“We agree with the Navy that the Ninth Circuit’s ‘possibility’ standard is too lenient.”) (emphasis in original).
25 Id. at 24.
26 Id.
27 Id. 22.
28 While not discussed in the Comment, the Federal Circuit “defer[s] to the law of the regional circuit when addressing substantive legal issues over which [it] [does] not have exclusive subject matter jurisdiction.” Payless Shoesource, Inc. v. Reebok Int’l, Ltd., 988 F.2d 985, 987-88 (Fed. Cir. 1993) (applying preliminary injunction standard from the Tenth Circuit).
30 3 ANNE GILSON LA LonDE, GILSON ON TRADEMARKS §14.02(3)(b)(0i) (2018).
courts do not provide “any explanation for choosing one [standard] instead of another.”

Moreover, U.S. Magistrate Judge Morton Denlow has gone even further, arguing that even though the courts use a common set of factors, the courts apply the factors differently: “[w]hile courts may disagree on a uniform standard, possibly due to varying degrees of risk and urgency of the injunction, most courts have agreed on the underlying factors that govern the decision whether to grant or deny a preliminary injunction. It is the discord in applying those factors that generates an unclear standard.” It is one thing to say a standard is uniform; it is another thing to say the same standard is applied uniformly.

Most of the circuits apply some variation of the Winter factors, including the First, Third, Fourth, Fifth, Sixth, Eighth.

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34 See Groupe SEB U.S., Inc. v. Euro-Pro Operating LLC, 774 F.3d 192, 197 (3d Cir. 2014) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”) (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)).

35 See Metro. Reg’l Infor. Sys. v. Am. Home Realty Network, Inc., 722 F.3d 591, 595 (4th Cir. 2013) (“Parties seeking a preliminary injunction must demonstrate that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm, (3) the balance of hardships tips in their favor, and (4) the injunction is in the public interest.”) (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)).
Ninth,39 Tenth,40 Eleventh,41 and D.C. Circuits.42 These circuits use language similar to, if not identical to, language used by the Winter

36 See Anderson v. Jackson, 556 F.3d 351, 360 (5th Cir. 2009) (Plaintiff moving for a preliminary injunction must show “(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to the defendant, and (4) that granting the preliminary injunction will not disserve the public interest.”) (quoting Canal Auth. v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974)).

37 See Southern Glazer’s Distribs. of Ohio, LLC v. Great Lakes Brewing Co., 860 F.3d 844, 849 (6th Cir. 2017) (“Four factors guide the decision to grant a preliminary injunction: ‘(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable harm absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction.’”) (quoting Bays v. City of Fairborn, 668 F.3d 814, 818-19 (6th Cir. 2012)).

38 See Coyne’s & Co. Inc. v. Enesco, LLC, 553 F.3d 1128, 1131 (8th Cir. 2009) (“Whether a preliminary injunction should issue turns upon: (1) the probability of the movant succeeding on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury in granting the injunction will conflict on the non-movant; and (4) the public interest.”) (citing Dataphase Sys. Inc., v. CL Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981) (en banc)).

39 See Network Automation, Inc. v. Advanced Sys. Concepts, Inc., 638 F.3d 1137, 1144 (9th Cir. 2011) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”) (quoting Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008)).

40 See Fish v. Kobach, 840 F.3d 710, 723 (10th Cir. 2016) (“Four factors must be shown by the movant to obtain a preliminary injunction: (1) the movant ‘is substantially likely to success on the merits; (2) [[the movant]] will suffer irreparable injury if the injunction is denied; (3) [[the movant’s]] threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest.’”) (quoting Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC, 562 F.3d 1067, 1070 (10th Cir. 2009)).

41 See Osmose, Inc. v. Viance, LLC, 612 F.3d 1298, 1307-308 (11th Cir. 2010) (“[[A]] district court may grant a preliminary injunction only if the movant establishes the following: (1) a substantial likelihood of success on the merits of the underlying case, (2) the movant will suffer irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction issued, and
Court. This is important, as there appears to be a trend by some circuits to embrace the Winter decision. There are some differences in the language used\textsuperscript{43} as well as other nuances particular to each circuit.\textsuperscript{44} The confusion across the circuits arises not only because of the varying language, but because of inconsistent application of the preliminary injunction factors.\textsuperscript{45} All courts should employ and use the factors in the exact same way because the Court announced the factors in Winter.

The Second Circuit’s view, while clearly incorporating the factors from Winter, is a more complex, involved standard when compared to the traditional four-factor standards discussed above. In order for a court in the Second Circuit to grant a motion for a preliminary injunction, the plaintiff must establish “(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation

\begin{quote}
(4) an injunction would not disserve the public interest.”” (quoting N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1217 (11th Cir. 2008)).
\end{quote}

\textsuperscript{42} See Archdiocese of Wash. V. Wash. Metro. Area Transit Auth., 897 F.3d 314, 321 (D.C. Cir. 2018) (“The moving party musts make a ‘clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest.’”) (quoting League of Women Voters v. Newby, 838 F.3d 1, 6 (D.C. Cir. 2016)).

\textsuperscript{43} For example, as to the likelihood of success factor, the Fifth Circuit requires a “substantial likelihood of success on the merits,” see Paulsson Geophysical Servs. Inc. v. Axel M. Sigmar, 529 F.3d 303, 309 (5th Cir. 2008), while the Sixth Circuit looks to whether the moving party has a “strong likelihood of success on the merits,” see Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross and Blue Shield Ass’n, 110 F.3d 318, 322 (6th Cir. 1997).

\textsuperscript{44} This is not a Comment about preliminary injunctions, nor will it provide an in-depth analysis on the varying standards used by the circuits. See McCarthy, supra note 14, at § 30:32 for a more nuanced analysis of these standards in the context of Lanham Act cases.

\textsuperscript{45} See Denlow, supra note 32, at 508.

Like the Second Circuit, the Seventh Circuit has described the standard in different ways. For example, the Seventh Circuit in Abbot Laboratories v. Mead Johnson & Co. described the preliminary injunction standard using the following language:

As a threshold matter, a party seeking a preliminary injunction must demonstrate (1) some likelihood of succeeding on the merits, and (2) that it has “no adequate remedy at law” and will suffer “irreparable harm” if preliminary relief is denied. If the moving party cannot establish either of these prerequisites, a court’s inquiry is over, and the injunction must be denied. If, however, the moving party clears both thresholds, the court must then consider: (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties.\footnote{971 F.2d 6, 11-12 (7th Cir. 1992) (citing Lawson Prods. V. Avnet, Inc., 782 F.2d 1429, 1433 (7th Cir. 1986); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 387-88 (7th Cir. 1984)).}

The Seventh Circuit referred to this as a “‘sliding scale approach’: the more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side; the less likely it is the plaintiff will succeed, the more the balance need weigh towards its side.”\footnote{Abbott Labs., 971 F.2d at 12 (citing Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388, 1393 (7th Cir. 1992); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 387 (7th Cir. 1984)).} Moreover, one reading this standard is likely to interpret it as a two-step approach; if the moving party does not
meet the first two “threshold” requirements, the inquiry will end, a test contrary to Winter. The Winter Court made no reference to a two-step or threshold style approach. The Seventh Circuit phrased its preliminary injunction standard in simpler terms in Eli Lilly & Co. v. Arla Foods, Inc.:

To win a preliminary injunction, the moving party must establish that (1) without preliminary relief, it will suffer irreparable harm before final resolution of its claims; (2) legal remedies are inadequate; and (3) its claim has some likelihood of success on the merits. If the moving party makes this showing, the court balances the harms to the moving party, other parties, and the public.

The preliminary injunction standard should be described and applied uniformly as set out by the Court in Winter and not in the apparent threshold way the Seventh Circuit describes it. The Court tried to clarify the standard in Winter, but the circuits, especially the Seventh Circuit, still have internal inconsistencies. Also, the Seventh Circuit only requires “some” likelihood of success on the merits. The Seventh Circuit has further defined this threshold as a “greater than negligible chance of winning.” This intra-circuit inconsistency is troublesome and there does not appear to be a reason why the Seventh Circuit uses different language for the same standard, especially in light of Winter.

Regardless of the way the factors are phrased, specific Seventh Circuit Lanham Act precedent prevents district courts from making all the necessary considerations under that Act. This begs the question as to whether there is a more effective way to evaluate the merits of a case when the plaintiff moves for a preliminary injunction, while still

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49 Abbott Labs., 971 F.2d at 11.
50 893 F.3d 375, 381 (7th Cir. 2018) (citing BBL, Inc. v. City of Angola, 809 F.3d 317, 323-24 (7th Cir. 2015)).
51 Abbott Labs., 971 F.2d at 11.
52 AM Gen. Corp. v. DaimlerChrysler Corp., 311 F.3d 796, 804 (7th Cir. 2002).
considering the traditional factors, especially in false advertising cases. The Court’s preliminary injunction jurisprudence sheds an important light on the troublesome nature of the Seventh Circuit’s Lanham Act precedent.

3. The Economic View

Judge Richard Posner has been at the forefront of incorporating economic principles into legal analysis, especially due to his extensive writing on the subject. Thus, it is not surprising that Judge Posner created his own economic model by which a court could evaluate a case at the preliminary injunction stage. While Judge Posner presented the economic theory, the analysis has roots in a law review article authored by Professor John Leubsdorf of Rutgers Law School.

Professor Leubsdorf argued that “preliminary injunction standards should aim to minimize the probable irreparable loss of rights caused by errors incident to hasty decision.” He stressed that the analysis should focus on the respective parties’ loss of rights should the court issue an injunction. Thus, Professor Leubsdorf proposed the following economic view of preliminary injunctions to guide courts to


54 See, e.g., RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (9TH ED. 2014); WILLIAM A. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003).


56 See Leubsdorf, supra note 31, at 541 (emphasis added).

57 Id. (“If [a court] does not grant prompt relief, the plaintiff may suffer a loss of his lawful rights that no later remedy can restore. But if the court does not grant immediate relief, the defendant may sustain precisely the same loss of his rights.”)
the decision that “inflict[s] the smallest probable irreparable loss of rights.”\textsuperscript{58}

The court, in theory, should assess the probable irreparable loss of rights an injunction would cause by multiplying the probability that the defendant will prevail by the amount of the irreparable loss that the defendant would suffer if enjoined from exercising what turns out to be his legal right. It should then make a similar calculation of the probable irreparable loss of rights to the plaintiff from denying the injunction. Whichever course promises the smaller probable loss should be adopted.\textsuperscript{59}

Importantly, Professor Leubsdorf stressed that his model “provides a coherent analysis” for deciding when to issue a preliminary injunction, and that “[t]he model goes beyond the current approach by specifying the relationship between [irreparable injury, probability of success, and the balance of convenience] and the goal of minimizing unavoidable legal injuries.”\textsuperscript{60}

Judge Posner was certainly influenced by Professor Leubsdorf’s viewpoint on the economic rationale of minimizing losses associated with granting and denying motions for preliminary injunctions. Judge Posner adopted the view created by Professor Leubsdorf in one of his Seventh Circuit opinions.\textsuperscript{61} There, Judge Posner offered the following formula: “grant the preliminary injunction if but only if $P \times H_p > (1-P) \times H_d$.\textsuperscript{62} This means that a district court would grant an injunction:

Only if the harm to the plaintiff if the injunction is denied [$H_p$], multiplied by the probability that the denial would be in

\textsuperscript{58} Id.
\textsuperscript{59} Id. at 542.
\textsuperscript{60} Id. at 544.
\textsuperscript{61} Am. Hosp. Supply Corp. v. Hosp. Prods., Ltd., 780 F.2d 589, 593 (7th Cir. 1986).
\textsuperscript{62} Id.
error (that the plaintiff, in other words, will win at trial) \[P\], exceeds the harm to the defendant if the injunction is granted \[H_d\], multiplied by the probability that granting the injunction would be an error \[1-P\].^63

Contrary to some critics,^64 Judge Posner’s view “is intended not to force the analysis into a quantitative straightjacket but to assist by presenting succinctly the factors that the court must consider in making its decision and by articulating the relationship among the factors.”^65 Further, “[t]he formula is new; the analysis it capsulizes is standard.”^66 While the viewpoints of Professor Leubsdorf and Judge Posner are unique and understandably not widely-adopted, they shed an important light on the qualitative economic impact that a preliminary injunction may have on a Lanham Act litigant in the Seventh Circuit.

^63 Id. In simpler terms, “[t]he left side of the formula is simply the probability of an erroneous denial weighted by the cost of denial to the plaintiff, and the right side simply the probability of an erroneous grant weighted by the cost of grant to the defendant.” Id.

^64 Id. at 610 (Swygert, J., dissenting) (“Moreover, the majority’s formula invites members of the Bar to dust of their calculators and dress their arguments in quantitative clothing.”).

^65 Id. at 593.

^66 Id. at 594 (emphasis added). It should be noted that Judge Posner himself never fully articulated and incorporated the formula in his analysis in American Hospital Supply Corp. To the contrary, he used the variables as part of the analysis. The formula does not and would not assume the role of the preliminary injunction factors. Judge Swygert is therefore correct that “the majority never attempts to assign a numerical value to the variables of its own formula.” Id. at 610 (Swygert, J., dissenting). The “value” of each variable depends on the unique facts of each case. See id. at 596-99 (“We conclude that there was a threat of irreparable harm to the plaintiff; and although the dollar amount of that harm is not known with any precision and we hesitate to call it great, it seems substantial.”) (“The district judge was persuaded that Hospital Products, not American Hospital Supply had broken the contract, thus implying a very high \(P\).”).
ELI LILLY & CO. v. ARLA FOODS, INC.

A. Facts

The plaintiff in this case, Eli Lilly and Company and its subsidiary Elanco ("Elanco") sell rbST, the genetically engineered version of the naturally occurring bovine somatotropin ("bST") hormone, under the brand name Posilac®. Posilac® is the only FDA-approved artificial bST hormone. bST is "a naturally occurring hormone in the pituitary glands of cattle which funnels nutrients toward the production of milk." rbST "has been designed to prolong the lactation period of dairy cows and increase milk production." Elanco has the exclusive right to sell rbST to dairy farmers and producers, who administer the hormone to their cows, collect milk, and sell it to manufacturers who make dairy products found on the shelves of grocery stores across the country.

The defendant, Arla Foods, Inc. ("Arla"), is a Danish dairy conglomerate owned by at least twelve-thousand farmers across seven countries. Arla manufactures and markets its cheese and cream cheese in the United States at various stores, including Costco, Sam’s Club, and Kroger. Arla began a new advertising campaign in the United States on April 25, 2017 titled “Live Unprocessed.” This advertising campaign “feature[d] a television buy across more than 20 national cable networks, advertisements in print and digital media, in-

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68 Id.
69 Id.
70 Id.
71 Id.
72 Id. at *2.
73 Id.
74 Id.
store advertising, social media outreach, promotional videos, and a website.\textsuperscript{75}

Part of Arla’s business model involves food safety and milk composition.\textsuperscript{76} Thus, it was not surprising the company asked children to explain what they thought rbST was.\textsuperscript{77} In one of Arla’s thirty-second commercials,\textsuperscript{78} a seven-year-old girl described rbST as a “large six-eyed monster” with “razor sharp teeth and is so tall it can eat clouds.”\textsuperscript{79} Moreover, this rbST monster has electric fur.\textsuperscript{80} A narrator then makes the following statement: “Actually rbST is an artificial growth hormone given to some cows, but not the cows that make Arla cheese. No added hormones. No weird stuff.”\textsuperscript{81} Notably, the following message appeared toward the end of the commercial: “Made with milk from cows not treated with rbST. No significant difference has been shown between milk derived from rbST-treated cows.”\textsuperscript{82} This commercial appeared on Arla’s Twitter, Facebook, Instagram, and YouTube pages, and at the time it was running, consumers could have seen the advertisement on the Food Network, the Hallmark Channel, and Bravo, among other channels.\textsuperscript{83}

Elanco sued Arla Foods, alleging, among other things, that Arla violated 15 U.S.C. § 1125(a)(1) because Arla made “false or misleading descriptions of fact” in its commercial, a key part of Arla’s “Live Unprocessed\textsuperscript{TM}” campaign.\textsuperscript{84} Shortly thereafter, Elanco moved for a preliminary injunction and asked the court to “order corrective

\begin{footnotesize}
\begin{itemize}
\item[75] Id.
\item[76] Id. (‘Arla asserts that its business model is based in part on ‘Arlagården®,’ a farm quality assurance program with four cornerstones: 1) milk composition, 2) food safety, 3) animal welfare, and 4) environmental considerations.’).
\item[77] Id.
\item[78] See Jardine, supra note 2 to view the advertisement.
\item[79] Eli Lilly, 2017 WL 4570547, at *2.
\item[80] Id.
\item[81] Id.
\item[82] Id.
\item[83] Id.
\item[84] Id. at *3.
\end{itemize}
\end{footnotesize}
advertising to address more than a month’s worth of false advertising.”

**B. False and Deceptive Statements**

1. The Law

The Lanham Act prohibits a party from making a “false or misleading description of fact” or a “false or misleading representation of fact” which “in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities . . . of another person’s goods.” To prevail on a false or deceptive advertising claim under § 43(a) of the Lanham Act, plaintiffs in the Seventh Circuit must show that: “(1) the defendant made a false statement of material fact in a commercial advertisement; (2) the false statement actually deceived or had the tendency to deceive a substantial segment of its audience; and (3) the plaintiff has been or is likely to be injured as a result of the false statement.”

These false or misleading statements are typically part of one of the following categories: “(1) commercial claims that are literally false as a factual matter; or (2) claims that may be literally true or ambiguous, but which implicitly convey a false impression, are misleading in context, or likely to deceive consumers.”

When the statement in question is actually false, the plaintiff need not show that the statement either actually deceived customers or was likely to do so. In contrast, when the statement is literally true or ambiguous, the plaintiff must

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85 Id.
88 Eli Lilly & Co. v. Arla Foods, Inc., 893 F.3d 375, 381-82 (7th Cir. 2018) (citing Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 819 (7th Cir. 1999)).
89 Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 820 (7th Cir. 1999) (emphasis added).
prove that the statement is misleading in context by demonstrated actual consumer confusion.\textsuperscript{90}

Litterally false statements are “bold-faced, egregious, undeniable, [and] over the top.”\textsuperscript{91} Hence, no evidence of consumer confusion is necessary.\textsuperscript{92} On the other hand, proof of consumer confusion is necessary for true but misleading statements; at trial, plaintiffs typically present the court with consumer surveys.\textsuperscript{93} However, when a defendant is making true but misleading statements in an advertisement, plaintiffs \textit{need not} produce consumer surveys \textit{potentially} showing actual confusion at the preliminary injunction stage.\textsuperscript{94} This rule is advantageous to plaintiffs in the Seventh Circuit.

C. District Court Decision

Elanco moved for a preliminary injunction, arguing that Arla, through its “Live Unprocessed\textsuperscript{TM}” campaign, made false or misleading statements about rbST and its brand-name drug Posilac\textsuperscript{®}.\textsuperscript{95} The district court applied the “sliding-scale” standard in considering whether to grant the preliminary injunction, akin to that in \textit{Abbott}.\textsuperscript{96}

\textsuperscript{90} \textit{Id.}
\textsuperscript{91} Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc., 586 F.3d 500, 513 (7th Cir. 2009).
\textsuperscript{92} \textit{Eli Lilly}, 893 F.3d at 382 (citing Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc., 586 F.3d 500, 513 (7th Cir. 2009)).
\textsuperscript{93} \textit{Eli Lilly}, 893 F.3d at 382.
\textsuperscript{94} \textit{Abbott Labs.} v. \textit{Mead Johnson & Co.}, 971 F.2d 6, 15 (“The fact that Abbot did not conduct any full-blown consumer surveys to prove actual consumer confusion does not help Mead, for such proofs are not required the preliminary injunction stage.”) (citing Vaughan Mfg. Co. v. Brikam Int’l, Inc. 814 F.2d 346, 349 (7th Cir. 1987); A.J. Canfield Co. v. Vess Beverages, Inc., 796 F.2d 903, 908 (7th Cir. 1986)).
\textsuperscript{95} \textit{Eli Lilly} & Co. v. \textit{Arla Foods Inc.}, No. 17-C-703, 2017 WL 4570547, at *1 (E.D. Wis. June 15, 2017).
\textsuperscript{96} \textit{Id.} at *5 (“To obtain a preliminary injunction, the moving party must show that it has (1) no adequate remedy at law and it will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits.”)
First, the district court had to make a finding as to whether rbST was actually safe for humans before it could decide whether preliminary injunctive relief was appropriate because “[i]f milk from rbST-treated cows is less safe than milk from non-rbST-treated cows, it would not necessarily be false or misleading to imply this in fact . . . in a television commercial.” The district court answered this question with relative ease, as the United States Food and Drug Administration (“FDA”) has on multiple occasions determined that there is no harmful impact on human health when milk from cows given rbST is consumed by humans.

With the safety issue resolved, the district court went on to evaluate the case using the preliminary injunction factors. First, the court found that Elanco had shown a likelihood of success on the merits because Arla made “misleading misrepresentations of fact” in its commercial. The court noted that “[w]hen the entire commercial is watched in context, it first creates the false impression that rbST is something foreign and dangerous, and then repeatedly emphasizes the notice that consumers should buy Arla cheese precisely because it

(quoting Ezell v. City of Chicago, 651 F.3d 684, 694 (7th Cir 2011) (“If this showing is made, ‘the court weighs the competing harms to the parties if an injunction is granted or denied and also considers the public interest.’”) (quoting Korte v. Sebelius, 735 F.3d 654, 665 (7th Cir. 2013)).


98 See Interim Guidance on the Voluntary Labeling of Milk Products from Cows that Have Not Been Treated with Recombinant Bovine Somatotropin, 59 Fed. Reg. 6279-04, 6279-80 (Feb. 10, 1994) (finding “that milk from rbST-treated cows is safe for human consumption”). This finding was confirmed by the FDA in 2016. See Bernadette M. Dunham, D.V.M., Ph.D., Citizen Petition Denial Response from FDA CDER to the Cancer Prevention Coalition et al, 16 (Mar. 21, 2016), https://www.regulations.gov/document?D=FDA-2007-P-0119-0007, (rejecting petition to suspend Posilac® or require placing a warning label on dairy products manufactured with milk from cows given Posilac® because “the drug is safe and effective for its intended uses and there is no significant difference between milk from cows treated with [rbST] and untreated cows.”). The district court also considered expert opinions from both Arla and Elanco but found that “there is no quantifiable difference between milk from cows treated with rbST and those that have not been treated with rbST.” Eli Lilly, 2017 WL 4570547, at *8.

comes from cows untreated with rbST and does not contain any ‘weird stuff.’”

The court only briefly analyzed the remaining preliminary injunction factors. As to irreparable harm, the Seventh Circuit noted and applied the presumption of irreparable harm in Lanham Act cases. Although Arla’s commercial never mentioned Posilac®, “Elanco is the only FDA-approved producer of rbST, thus, a reputational attack on rbST is necessarily a reputational attack on Posilac®.” Moreover, Elanco produced evidence that one cheese producer decided to stop buying milk from cows given the rbST hormone, and that the public interest favored weighing an injunction, given the stance of the FDA. Finally, even though Arla claimed it would lose $6.5 million in media commitments and $9.9 million to create new advertisements, the court found that balance of the hardships tipped in Elanco’s favor. Consequently, the court issued the preliminary injunction, restricting the content of Arla’s advertisements.

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100 Id. at *9. The court rejected Arla’s position that the claims it made in the commercial were “puffery” and therefore not in violation of § 43(a) of the Lanham Act. See McCarthy, supra note 14, at § 27:38 (“Puffing can consist of grossly exaggerated advertising claims such as blustering and boasting which no reasonable buyer would believe was true.”); see also Clorox Co. P.R. v. Procter & Gamble Commercial Co., 228 F.3d 24, 38 (2d Cir. 2000) (finding “vague, unspecified boasting” statements in promotional advertising to be puffery).

101 Eli Lilly, 2017 WL 4570547, at *10 (citing Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 16 (7th Cir. 1992)).

102 Id. at *10.

103 Id.

104 Id. (“While continued scientific research as to the safety of rbST certainly benefits the public, fear-mongering does not.”).

106 Id. The court required Elanco to pay a security bond worth $500,000. See Fed. R. Civ. P. 65(c). Per the court’s order, Arla was prohibited from any of the following: 1. Disseminating the advertisements attached to the plaintiffs’ Amended Complaint (ECF No. 10), and any other advertisement substantially similar thereto; 2. Claiming, either directly or by implication, in any advertising, website, social media, or any other type of public communication that: (a) rbST or Posilac®,
D. Seventh Circuit Decision

Arla’s main argument on appeal was that Elanco had failed to produce enough evidence showing it had a likelihood of success on the merits of its § 43(a) claim. Since Arla made no literally false statements in its advertisement, the Seventh Circuit did not address the arguments on that category of statements. The court thus analyzed whether Arla had made true but misleading statements in its commercial. To do this, the court looked at the evidence presented by Elanco: (1) the advertisement itself; (2) opinions of the FDA regarding the safety of rbST; and (3) the evidence that one cheese producer stopped buying rbST milk. The court looked at this evidence but actually relied on the law in the Seventh Circuit; consumer surveys “are not required at the preliminary injunction stage.”

As to the content of the advertisement itself, the Seventh Circuit agreed with the district court: “[t]he ad draws a clear contrast between Arla cheese (high quality, nutritious) and cheese made from rbST-

dairy products made from milk of cows supplemented with rbST or Posilac®, are dangerous or unsafe; (b) dairy products made from milk of cows supplemented with rbST or Posilac® are of lesser quality or less wholesome than, or substantially compositionally different from, other dairy products; (c) rbST or Posilac® is an ingredient added to some dairy products or milk; (d) rbST or Posilac® is “weird” and/or dairy products made from milk of cows supplemented with rbST or Posilac® contain “weird stuff”; and (e) consumers should not feel “good about eating” or “serving to [their] friends and family” dairy products made from milk of cows supplemented with rbST or Posilac®. Id. at *1.

107 Eli Lilly & Co. v. Arla Foods, Inc., 893 F.3d 375, 381 (7th Cir. 2018). The Seventh Circuit reviews the district court’s decision to issue an injunction for abuse of discretion. See BBL, Inc. v. City of Angola, 809 F.3d 317, 324 (7th Cir. 2005).

108 Eli Lilly, 893 F.3d at 382.

109 Id.

110 Id.

111 Id. (quoting Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 15 (7th Cir. 1992)).
treated cows (impure, unwholesome).” The court found that Arla’s statements were misleading in part because of the monster depiction and the “[n]o weird stuff” language. It appears the court wanted to make some connection to consumers, but this was its only means of making such a connection. The Seventh Circuit also agreed that the science behind the safety of rbST milk was well-settled.

Finally, the Seventh Circuit found that Elanco had shown a likelihood of success on the merits in part because of the evidence that one cheese producer stopped using milk from cows treated with rbST. The court noted this was not evidence of actual consumer confusion, but found that the cheese producer has an “economic incentive to accurately predict consumer demand.” After taking all the evidence under consideration, the Seventh Circuit agreed with the district court that Elanco had shown a likelihood of success on the merits, or a “greater than negligible chance,” of its Lanham Act claim.

ARGUMENT AND COMMENTARY

The Seventh Circuit reached the right conclusion in Eli Lilly & Co. v. Arla Foods, Inc. given the state of the court’s precedent in Lanham Act cases. Nevertheless, if the court reversed this precedent, it might reach different outcomes in false advertising cases in the future. The Seventh Circuit should adopt the preliminary injunction factors

112 Id. at 383.
113 Id.
114 Id. The court noted that Arla included the FDA-recommended disclaimer in the advertisement. However, it found that the disclaimer did resolve the fact that parts of the advertisement were misleading.
115 Id.
116 Id. (“[The cheese producer’s] concern about the ad campaign’s impact on consumers supports the judge’s conclusion that the ads convey a misleading message about rbST.”).
117 AM Gen. Corp. v. Daimlerchrysler Corp., 311 F.3d 796, 804 (7th Cir. 2002).
118 Id.
from Winter. Also, it should incorporate the considerations expressed above by Professor John Leubsdorf and Judge Richard Posner; it need not rely on mathematical formulae. Their approach was not meant to assume the role of the factors. To make more economically-informed decisions at the preliminary injunction stage and in an effort to minimize losses among the parties from the granting or denial of a motion for preliminary injunction, the Seventh Circuit should no longer presume irreparable harm in Lanham Act cases. Furthermore, it should require proof of actual consumer confusion or deception at the preliminary injunction stage.

A. The Seventh Circuit Should Not Presume Irreparable Harm in Lanham Act Cases

1. The Seventh Circuit

The Seventh Circuit recognizes a presumption of irreparable harm in Lanham Act cases.\textsuperscript{119} \textit{Abbott Laboratories v. Mead Johnson & Co.} was a false advertising case between two competing oral electrolyte maintenance solution (“OES”) producers.\textsuperscript{120} Mead, the manufacturer of the Ricelyte OES solution, started an advertising campaign “designed to convince physicians and nurses to recommend Ricelyte over Pedialyte,” Abbot’s product.\textsuperscript{121} Mead stated the carbohydrates in its products came from rice, while the carbohydrates in Abbott’s product were from glucose.\textsuperscript{122} However, Mead’s campaign “[played] up Ricelyte’s association with rice” by “[forging] a direct link between Ricelyte and rice” and “at times directly [stating] that Ricelyte’s link

\begin{footnotesize}
\begin{enumerate}
\item Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 18 (7th Cir. 1992).
\item \textit{Id.} at 9 (“Oral electrolyte maintenance solutions are over-the-counter medical products used to prevent dehydration in infants suffering from acute diarrhea or vomiting.”).
\item \textit{Id.} at 10.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
to rice makes it superior to Pedialyte.”123 As a result, Abbott filed suit under § 43(a)(2) of the Lanham Act and sought injunctive relief.124

The court went on to address the preliminary injunction factors. Notably, the court struggled with the preliminary injunction standard: “[d]espite our recent efforts to clarify the law of preliminary injunctions . . . confusion persists, as demonstrated by the contrasting spins both parties place upon the four-part preliminary injunction standard.”125 While the court analyzed the other factors, of notable importance was its analysis on the presumption of irreparable harm. Irreparable harm is often presumed in Lanham Act cases because intangible harms, “such as damage to reputation and loss of goodwill,” are hard to calculate.126

The district court found that the presumption of irreparable harm had been rebutted in this case in part because, without Ricelyte on the market, Pedialyte had a monopoly.127 Further, the district court reasoned that “Abbott’s reputational damage will have no tangible economic impact because Pedialyte will have regained its monopoly, leaving those who need OES products with no other choice.”128 The Seventh Circuit disagreed with the district court’s finding because the district court did not “address the possibility of ordering [other] intermediate forms of relief after a full trial on the merits.”129 Despite its lengthy analysis of the presumption in the context of the facts of this case, the court still found the presumption to be “well-

123 Id.
124 Id. at 11. Like Eli Lilly, Abbot sought “modifications in Mead’s advertising and promotional materials.” Id.
125 Id.
126 Id. at 16.
127 Id. at 16 (“Any injunction, entered after a full trial, would remove Ricelyte from the market, thereby restoring Pedialyte’s monopoly and lost market share.”).
128 Id.
129 Id. at 17-18. The Seventh Circuit found the district court failed to consider other forms of relief, including “an order prohibiting Mead from purveying the false ‘rice claims’ and directing it to issue corrective advertisements and brochures.” Id. at 17 (“These less severe remedies would leave Ricelyte a viable, albeit somewhat discredited, competitor with at least part of its current market share.”).
established,” that it applies “absent a showing of business loss,” and was “in this case unchallenged.” Thus, the presumption of irreparable harm has and continues to be the law of the Seventh Circuit.

2. Shifting Away from the Presumption:
eBay v. MercExchange, L.L.C.

eBay v. MercExchange, L.L.C. involved patent law, another area of intellectual property law. eBay is the owner of a website where sellers can list and sell their goods. MercExchange holds “a business method patent for an electronic market designed to facilitate the sale of goods between private individuals by establishing a central authority to promote trust among participants.” After failed attempts to license its patent to eBay, MercExchange sued eBay, alleging patent infringement. A jury returned a verdict for MercExchange, finding that its patent was valid and infringed by eBay. The jury awarded money damages.

MercExchange moved for a permanent injunction; the district court denied this motion. The Federal Circuit disagreed with the district court’s decision, citing that circuit’s “general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.” Specifically, the Federal Circuit stated “that a permanent injunction will issue once infringement and validity have been adjudged.”

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130 Id. at 18.
132 Id.
133 Id.
134 Id. at 390-91.
135 Id. at 391.
136 Id.
137 Id. (quoting MercExchange, L.L.C. v. eBay, Inc., 401 F.3d 1323, 1339 (Fed. Cir. 2005)).
138 eBay, 547 U.S. at 393-394 (quoting MercExchange, 401 F.3d at 1338).
decision, began its analysis by reciting the four-factor test district courts use in determining whether to grant a permanent injunction.\textsuperscript{139}

The Court noted that injunctive relief is available under the patent laws.\textsuperscript{140} The Court ultimately vacated the decision below, finding that “neither court below correctly applied the traditional four-factor framework that governs the award of injunctive relief.”\textsuperscript{141} The Court found that the Federal Circuit’s rule was a “categorical rule” that “cannot be squared with the principles of equity adopted by Congress.”\textsuperscript{142} In criticizing both the district court and the Federal Circuit, the Supreme Court clearly stressed the importance of equity and rejected the application of general rules in the decision to grant injunctive relief.\textsuperscript{143}

3. Post-\textit{eBay}: The Third Circuit

The Seventh Circuit can rid itself of the presumption of irreparable harm by following the reasoning and holding of the Third Circuit in \textit{Ferring Pharmaceuticals Inc., v. Watson Pharmaceuticals},

\textsuperscript{139} \textit{eBay}, 547 U.S. at 391 (“According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”) (citations omitted). Note the minor differences in this standard compared to that used by district courts when hearing motions for preliminary injunctions.

\textsuperscript{140} \textit{Id.} at 392 (citing 35 U.S.C. § 283) (West 2018) (“The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.”) (emphasis added).

\textsuperscript{141} \textit{eBay}, 547 U.S. at 394.

\textsuperscript{142} \textit{Id.} at 393.

\textsuperscript{143} \textit{Id.} at 394. (“We hold only that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards.”) (emphasis added).

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In *Ferring*, the Third Circuit held that “a party seeking a preliminary injunction in a Lanham Act case is not entitled to a presumption of irreparable harm but rather is required to demonstrate that she is likely to suffer irreparable harm if an injunction is not granted.” An analysis of the facts and reasoning of *Ferring* will show that the court’s reasoning is equally applicable to the facts of *Eli Lilly & Co. v. Arla Foods, Inc.*

Ferring and Watson, two pharmaceutical companies, produce rival prescription progesterone products. Women produce progesterone, “a hormone that plays a key role in helping women become pregnant and maintain their pregnancies,” naturally. Women who pursue assisted reproductive technology (“ART”) often need progesterone supplementation. Ferring manufactures Endometrin; Watson manufactures Crinone.

Ferring filed a Lanham Act suit under § 43(a) and moved for a preliminary injunction, arguing that Watson made false and misleading statements about Endometrin at a presentation by a consultant Watson hired to present to doctors and other healthcare professionals at two presentations. Watson hired this consultant to give presentations on its progesterone supplement, Crinone. Ferring alleged that its § 43(a) claim arose out of three statements made by the consultant: “(1)
he referenced a ‘Black Box’ warning on Endometrin’s package insert; (2) he discussed a patient preference survey comparing Crinone and Endometrin; and (3) he mischaracterized the results of certain studies of Endometrin’s effectiveness in women over the age of thirty-five.”

Ferring moved for a preliminary injunction. The district court denied this motion, finding that “Ferring was not entitled to a presumption of irreparable harm in seeking a preliminary injunction.” The district court then looked at the evidence available to it at the preliminary injunction stage, and the district court found that there was not enough evidence of irreparable injury to justify granting a preliminary injunction. Ferring appealed, arguing that the presumption should apply to Lanham Act cases in the Third Circuit.

The Third Circuit began its analysis by noting that “it has never held that a plaintiff seeking a preliminary injunction pursuant to a Lanham Act false advertising claim is entitled to a presumption of irreparable harm.” The Third Circuit ultimately decided that there was no presumption of irreparable harm when a plaintiff moves for a preliminary injunction in false advertising cases filed under the Lanham Act. Two Supreme Court decisions helped the court reach this conclusion: Winter and eBay. The Ferring court relied on Winter, where the Court found that “issuing a preliminary injunction based solely on a possibility of irreparable harm is inconsistent with our

151 Id.
152 Id. at 209.
153 Id.
154 Id. at 210.
155 Id. at 210-11 (“The justification for applying this presumption, therefore, is twofold: (1) a misleading or false comparison to a specific competing product necessarily causes that product harm by diminishing its value in the mind of the consumer, similar to trademark infringement cases; and (2) the harm necessarily caused to reputation and goodwill is irreparable because it is virtually impossible to quantify in terms of monetary damages.”).
156 Id. at 216 (“Because a presumption of irreparable harm deviates from the traditional principles of equity, which require a movant to demonstrate irreparable harm, we hold that there is no presumption of irreparable harm afforded to parties seeking injunctive relief in Lanham Act cases.”).
characterization of injunctive relief as an *extraordinary remedy* that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”

It is hard to reconcile the Court’s decision with the Seventh Circuit’s continued reliance on the presumption of irreparable harm in Lanham Act cases. If a *possibility* of irreparable harm was no longer possible after *Winter*, it stands to reason that a blanket “general rule” presuming irreparable harm should certainly not be possible either.

Further, the *Ferring* court considered the *eBay* decision, a case where the Court found that lower courts cannot adopt categorical rules and should consider “traditional principles of equity” in deciding whether or not to grant a motion for injunctive relief. Even though *eBay* involved patents, the Court’s “rationale is easily applicable . . . in cases arising under the Lanham Act.” First, the court compared the language of the relevant injunction sections of both the Lanham Act and the Patent Act; both require courts to consider principles of equity when deciding to grant the relief. Second, the Third Circuit noted that the *eBay* Court explicitly stated that its holding was applicable to areas of law outside of patent law.

The majority in *eBay* also stressed, and the Third Circuit recognized, that “the decision whether to grant or deny injunctive

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159 *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, 765 F.3d 205, 214 (3d Cir. 2014).
160 *Id.; see also 15 U.S.C. § 1116(a) (West 2018)* (“The courts vested with jurisdiction of civil actions arising under this chapter shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right . . . or to prevent a violation under subsection (a) . . . of section 1125 of this title.”); *35 U.S.C. § 283 (West 2018)* (“The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.”).
161 *Ferring*, 765 F.3d at 215-216 (“In addition . . . we believe the logic of *eBay* is not limited to patent cases but rather is widely applicable to various different types of cases.”).
relief rests within the equitable discretion of the district courts, and
that such discretion must be exercised consistent with traditional
principles of equity.”162 Taking all of this into consideration, including
the Court’s binding preliminary injunction jurisprudence, the Ferring
court found that there was no presumption of irreparable harm in
Lanham Act cases.163


The Court in eBay rejected categorical, general rules applied by
lower courts in deciding to issue preliminary injunctions and held that
district courts should use “traditional principles of equity” in deciding
motions for injunctive relief.164 Shortly after that decision, the Winter
court explicitly rejected a more lenient interpretation of the
preliminary injunction factors, stating that this more lenient standard
“is inconsistent with our characterization of injunctive relief as an
extraordinary remedy that may only be awarded upon a clear showing
that the plaintiff is entitled to such relief.”165

In the words of the Ferring court, “[p]resuming irreparable harm
would relieve the plaintiff of her burden to make such a [clear]
showing.”166 Thus, unless the Seventh Circuit reverses its prior
precedent and requires a Lanham Act plaintiff to meet her burden and
show irreparable harm, it will not be able to accurately consider the
“irreparable loss of rights to the plaintiff from denying the injunction,”
thereby raising questions of whether the court effectively minimized
the potential costs of making the wrong decision.167

162 Id. at 215 (quoting eBay, 547 U.S. at 394).
163 Ferring, 765 F.3d at 217. The court also analyzed the facts of the case
without the presumption, but still found that “the District Court did not clearly err in
finding that Ferring dialed to demonstrate that it would likely suffer irreparable harm
in the absence of preliminary injunctive relief” Id. at 219.
164 eBay, 547 U.S. at 394.
Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam)).
166 Ferring, 765 F.3d at 217.
167 See Leubsdorf, supra note 31, at 542.
The *Eli Lilly* district court recognized the presumption of irreparable harm.\(^{168}\) Despite applying the presumption, the court found that Elanco would “continue to suffer *unquantifiable reputational and financial damage* for the length of [Arla’s advertising] campaign.”\(^{169}\) Even though Arla never mentioned Eli Lilly, Elanco, or Posliac® in the advertisements themselves, “Elanco is the only FDA-approved producer of rbST in the United States, thus, a reputational attack on rbST is necessarily a reputational attack on Posliac®.”\(^{170}\)

Moreover, the district court emphasized that a single cheese producer no longer sourced milk from cows that were given rbST, partly because of the way the Arla portrayed the rbST hormone in its advertisements.\(^{171}\) Thus, despite the presumption, the district court found that Elanco had suffered irreparable harm.\(^{172}\) Notably, the Seventh Circuit did not even address the irreparable harm factor in its opinion, focusing its analysis solely on the likelihood of success on the merits factor.

It is possible that the presumption of irreparable harm hurt Arla in this case, thus, according to Judge Posner, increasing the value of \(H_d\), the harm to the defendant if the injunction is granted.\(^{173}\) The presumption almost certainly gives plaintiffs an edge and weakens their burden when moving for a preliminary injunction. There appears to be an apparent dichotomy in that, in order to “win a preliminary injunction, [the plaintiff] *must establish* . . . it will suffer irreparable harm [without preliminary relief] before final resolution of its claims,” but this burden disappears in Lanham Act cases.\(^{174}\)


\(^{170}\) *Id.*

\(^{171}\) *Id.*

\(^{172}\) *Id.*


\(^{174}\) *Id.* (emphasis added).
It is hard to tell if, given the record before it, the Seventh Circuit would have reached the same decision even without the presumption of irreparable harm. According to the court, the harm is easily traceable to Elanco given the fact that it is the sole producer of the FDA-approved rbST hormone Posliac®. This point certainly weighs in Elanco’s favor. The fact that one cheese producer stopped purchasing milk from cows given rbST is also telling. But the mere fact that Elanco is the only FDA-approved manufacturer of rbST should not carry the day. It is possible consumers do not even know that fact, nor would they know it, after seeing the advertisement.

Without the injunction, there is a strong argument that more dairy-product producers would also stop purchasing rbST milk out of fear that consumers themselves would be turned away by the hormone and no longer purchase dairy products made with milk from cows given rbST. But the question remains whether, given this one piece of evidence, Elanco suffered harm that was in fact irreparable. If there is little to no irreparable harm but the injunction is still granted, the value of (1-P), “the probability that granting the injunction would be an error,” also increases.\(^\text{175}\) Thus, the district court judge might be making the wrong decision.

This erroneous decision making is exactly the problem Judge Posner and Professor Leubsdorf set out to resolve.\(^\text{176}\) Without actually showing what irreparable harm, if any, a plaintiff like Elanco suffered, it is possible a district court judge would mistakenly make the wrong decision in granting a preliminary injunction.\(^\text{177}\) Mistakenly granting a preliminary injunction can be especially costly for a defendant like

\(^{175}\) Id. As Judge Posner puts it, another way to thinks about “P” is that it is the probability the “plaintiff . . . will win at trial.” Id.

\(^{176}\) See Leubsdorf, supra note 31, at 541 (“preliminary injunction standards should aim to minimize the probable irreparable loss of rights caused by errors incident to hasty decision.”) (emphasis added).

\(^{177}\) Am. Hosp. Supply Corp., 780 F.2d at 593 (“A district judge is asked to decide whether to grant or deny a preliminary injunction must choose the course of action that will minimize the costs of being mistaken. Because he is forced to act on an incomplete record, the danger of a mistake is substantial. And a mistake can be costly.”).
Arla, who already spent upwards of $30 million dollars on its advertising campaign.\(^{178}\) Further, Arla likely lost $6.5 million in media commitments and would need to spend $9.9 million to create new advertisements.\(^{179}\)

If this injunction was mistakenly granted, “the judge commits a mistake whose gravity is measured by the irreparable harm, if any, that the injunction causes the defendant while it is in effect.”\(^{180}\) Therefore, the Seventh Circuit should no longer presume irreparable harm in false advertising cases. Without the presumption, the district courts can make an efficient inquiry into the facts of each case.

**B. The Seventh Circuit Should Require Proof Of Actual Consumer Confusion or Deception at the Preliminary Injunction Stage**

The Seventh Circuit should reverse prior precedent and require plaintiffs who make false advertising claims under the Lanham Act and move for preliminary injunctions to present evidence of actual consumer confusion or deception. For some statements, this type of evidence is not necessary. But for other statements, whether or not plaintiffs must show evidence of actual consumer confusion or deception depends on what stage the litigation is in. For *literally false* statements, the plaintiff need not ever show evidence of consumer confusion because “[a] literally false statement will necessarily deceive consumers.”\(^{181}\) On the other hand, when a defendant makes *literally true but misleading* statements about a plaintiff’s product, the plaintiff need only present such evidence of consumer confusion or

\(^{178}\) See Watson, *supra* note 1.


\(^{180}\) *Am. Hosp. Supply Corp.*, 780 F.2d at 593.

\(^{181}\) Eli Lilly & Co. v. Arla Foods, Inc., 893 F.3d 375, 382 (7th Cir. 2018) (citing Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc., 586 F.3d 500, 513 (7th Cir. 2009)).
deception at trial.¹⁸² Most plaintiffs obtain this information from responses to consumer surveys.¹⁸³

However, plaintiffs who move for a preliminary injunction need not present proof of actual consumer confusion.¹⁸⁴ The Seventh Circuit has justified this rule in part because “[i]t is not feasible to require a Lanham Act plaintiff to conduct full-blown consumer surveys in the truncated timeframe between filing suit and seeking a preliminary injunction.”¹⁸⁵ Again, this broad categorical rule is inhibiting the district courts from thoroughly analyzing the unique facts of each false advertising case that comes before them. *Eli Lilly & Co. v. Arla Foods, Inc.* is one such case. The Court in *eBay* made clear that the decision to issue a preliminary injunction should conform to the “traditional principles of equity” and not according to broad rules.¹⁸⁶ If a Lanham Act plaintiff must show evidence of consumer confusion at trial, she too should have to show the same evidence at the preliminary injunction stage in order to show that she has a *likelihood* of success on the merits, an arguably low standard in the Seventh Circuit.¹⁸⁷

Courts have said that “[t]he purpose of the false-advertising provisions of the Lanham Act is to protect sellers from having their consumers lured away from them by deceptive ads.”¹⁸⁸ The court should then want to have feedback from consumers at any stage of

¹⁸² *Eli Lilly*, 893 F.3d at 375.
¹⁸³ *Id.*
¹⁸⁴ *Abbott Labs., Inc. v. Mead Johnson & Co.*, 971 F.2d 6, 15 (7th Cir. 1992) (“The fact that [Plaintiff] did not conduct any full-blown consumer surveys to prove actual consumer confusion does not help [Defendant], for such proofs are not required at the preliminary injunction stage.”) (citing * Vaughan Mfg. Co. v. Brikam Int’l, Inc.* 814 F.2d 346, 349 (7th Cir. 1987); *A.J. Canfield Co. v. Vess Beverages, Inc.*, 796 F.2d 903, 908 (7th Cir. 1986)).
¹⁸⁵ *Eli Lilly*, 893 F.3d at 382.
¹⁸⁷ The Seventh Circuit requires “some” likelihood of success, *Abbott*, 971 F.2d at 11, which is a “greater than negligible chance of winning.” *AM Gen. Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 804 (7th Cir. 2002).
¹⁸⁸ *Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 512 (7th Cir. 2009).
litigation, because the consumers are the ones who are important. If they are not deceived or mislead by the statements made in the advertisements, and this evidence was shown at trial, a plaintiff would likely lose, as their claims would have no merit.

If the consumers would have the same opinion at the preliminary injunction stage, there is no way a plaintiff could show a likelihood of success on the merits, thereby rendering her unable to meet her burden. This in turn reinforces the point of the economic view that “preliminary injunction standards should aim to minimize the probable irreparable loss of rights caused by errors incident to hasty decision.”

A review of the facts of Eli Lilly & Co. v. Arla Foods, Inc. reinforces this point. Arla’s commercial was narrated by a seven-year-old. The commercial featured an animated monster with “razor sharp teeth” that is “so tall it can eat clouds.” Moreover, the monster is depicted as having electric fur. Additionally, Arla included the required FDA disclosure at the end of its advertisement. Both the district court and the Seventh Circuit noted that, since Arla’s statements were true but misleading, Elanco did not have to show evidence of actual consumer confusion or deception since Elanco was moving for a preliminary injunction. If the rule were otherwise, there is a strong argument that no reasonable consumer would be misled by the juvenile and comical way in which Arla depicted rbST.

The district court noted Arla’s argument that “the fantastical elements make clear to a reasonable cheese consumer that he should not take any of the statements about rbST seriously.” This argument

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189 See Leubsdorf, supra note 31, at 541.
191 Id.
192 Id.
195 Eli Lilly, 893 F.3d at 382.
196 Id.
goes precisely to the point of why the court should require evidence of actual consumer confusion or deception at the preliminary injunction stage. If this evidence is the key to succeed at trial, it should be required at the preliminary injunction stage as a way to show a likelihood of success on the merits.

The Seventh Circuit concluded that “[c]onsumer surveys were unnecessary” because “rbST-derived dairy products are no different than other dairy products . . . the ads themselves, the FDA’s regulatory guidance, and the evidence of decreased demand” all show that Elanco would succeed at trial.\textsuperscript{197} The court did not consider any consumer feedback. There remains the possibility that consumers would have watched Arla’s ads, not taken them seriously, and continued to buy whatever cheese products they purchased prior to seeing a thirty-second, animated commercial where they are told that the FDA finds no difference in milk from cows given the rbST hormone and milk from those that are not given the hormone. The evidence cited by the Seventh Circuit appears to only reach a “possibility” of success on the merits threshold, a threshold that was explicitly rejected by the Court in Winter.\textsuperscript{198}

The Seventh Circuit justified the rule in part because of the “truncated timeframe between filing a lawsuit and seeking a preliminary injunction.”\textsuperscript{199} But its these unsubstantiated “hasty” decisions and the resulting errors which Professor Leubsdorf warned against.\textsuperscript{200} Further, “[a] district judge is asked to decide whether to grant or deny a preliminary injunction must choose the course of action that will minimize the costs of being mistaken.”\textsuperscript{201} It is impossible to even remotely calculate “the probability that [denying the preliminary injunction] would be in error,” thus hurting the

\begin{footnotesize}
\begin{enumerate}
\item[197] Id. at 383.
\item[199] Eli Lilly, 893 F.3d at 382.
\item[200] See Leubsdorf, supra note 31, at 541.
\end{enumerate}
\end{footnotesize}
defendant, without any evidence of what consumers think of the advertisements.\textsuperscript{202}

The Seventh Circuit’s broad rule whereby a plaintiff need not show evidence of actual consumer confusion or deception at the preliminary injunction stage is preventing it from even considering the economic consequences of its decision. If the consumer’s feedback is important at trial, it should be important at other stages of litigation as well. The consumers should have their voices heard, as they are the ones protected by the Lanham Act’s false advertising provisions.

CONCLUSION

Despite binding Court precedent, courts still apply various versions of the preliminary injunction factors, particularly in the Seventh Circuit. Scholars proposed a supplementary approach, whereby a court could consider the economic impact of the decision to grant or deny preliminary injunctive relief. Those defending Lanham Act false advertising claims in the Seventh Circuit have an even steeper hill to climb. Seventh Circuit precedent makes it easier for plaintiffs in these cases to get injunctions issued in their favor. This precedent prevents the court from taking into consideration the economic impact of these decisions, thereby increasing the chances that the court erroneously issues preliminary injunctions.

\textsuperscript{202} Id.
INTRODUCTION

At the core of rights in the United States is the right to vote, and while this right has long been held to be fundamental it is not equal among all U.S. Citizens.1 The right to vote is not granted to some U.S. Citizens depending upon what U.S. territory they reside in. This distinction is based on the definition of United States in the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), which arbitrarily includes some U.S. territories while excluding others.

In Segovia v. United States, the Seventh Circuit upheld the exclusion of former Illinois citizens residing in U.S. territories from voting in federal elections. In Segovia, the court held that U.S. citizens residing in U.S. territories do not have a fundamental right to vote in federal elections.2 Here, the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) and the Illinois Military Overseas Absentee Voting Act ("IMOV Act") provide a legal basis for the right to vote in federal elections.

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2 Segovia v. U.S., 880 F.3d 384, 387 (7th Cir. 2018).
Voter Empowerment Act ("Illinois MOVE") did not equally protect voting rights for six former Illinois residents. This decision led to the disenfranchisement of former military members, and further limited the right to vote for citizens living in U.S. territories like Puerto Rico. In doing so the court used a rational basis analysis to uphold an underinclusive distinction between citizens of similarly situated U.S. territories that did not allow the Plaintiffs to receive absentee ballots.

This comment discusses the issues in Segovia and how the Plaintiffs could have established that they had a fundamental right to vote. The article first discusses voting throughout American history and how it has expanded since over time. The discussion then focuses on determining state citizenship, and how it relates to the right to vote. Lastly, the comment focuses on how the Plaintiffs could have established their right to vote as fundamental by arguing that they were Illinois citizens.

**History of the Right to Vote: Fundamental Voting Rights, Strict Scrutiny, and Absentee Ballots**

Voting has long been a fundamental right in America. A U.S. citizen must also be a citizen of a state in order to have a fundamental right to vote. The Framers created a government where voting is a vital aspect of the system, and the Supreme Court has a long held that the right to vote is fundamental. The fundamental aspect of voting is inherent in the way the Framers formed the government. James Madison stated that “[t]he right of suffrage is a fundamental Article in

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3 Id.
4 Id.
8 Wesberry v. Sanders, 376 U.S. 1, 17 (1964).
Republican Constitutions.”9 And without the right to vote other fundamental rights we hold dear are “illusory” because “the right to vote freely [ . . . is] the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”10 Therefore, every person is granted one equal vote “without regard to race, sex, economic status, or place of residence within a State.”11

A. Expansion Through Legislation and Amendments

The right to vote was not as thoroughly protected as it is today. In the past, the right to vote worked as a privilege bestowed upon the upper-class rather than a right belonging to the many. Accordingly, throughout United States history there has been a continuous expansion of the scope of the right to vote.12 For instance, initially the right to vote was limited to white property owners and based on a tax payment requirement.13 But over time, the several states, Congress, and the Supreme Court have consistently sought to prevent the narrowing of the right the right to vote.14 As a result, we have seen the vast expansion of the scope of the right to vote over the past three centuries.15 The first step in the expansion of voting rights was the

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11 Id.
12 Id. at 555 n.28 (explaining “The Fifteenth, Seventeenth, Nineteenth, Twenty-third and Twenty-fourth Amendments to the Federal Constitution all involve expansions of the right of suffrage. Also relevant, in this regard, is the civil rights legislation enacted by Congress in 1957 and 1960.”).
14 Id. at 1508-1509.
15 Id. at 1508.
abolition of laws that limited voting to property owners. This process was accomplished by each state individually eliminating property ownership requirements.

Likewise, the U.S. Congress has consistently expanded voting rights. Passing constitutional amendments in America is a difficult process because “[a] proposed amendment must be passed by two-thirds of both houses of Congress, then ratified by the legislatures of three-fourths of the states.” Consequently, when an amendment is passed it reflects a consensus view of the importance of the enumerated right. And the United States has seven amendments that concern the right to vote, illustrating that the right is uniformly valued across the nation.

In 1868, this nation uniformly demonstrated the value of voting rights by passing the Fifteenth Amendment which states that “the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” Congress again expanded the right to vote by passing the Nineteenth Amendment which states that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.” The U.S. again expanded the right to vote in 1971 by passing the 26th Amendment which lowered the legal voting age from 21 to 18.

Additionally, Congress has passed an abundance of legislation protecting the right to vote. Much of this legislation is meant to

17 Stanley L. Engerman Et Al., supra, note 16.
18 Stanley L. Engerman Et Al., supra, note 16.
19 U.S. CONST. art. V.
20 U.S. CONST. amend. XV, XIX, XXI, XXIII, XXIV, AND XXVII.
21 U.S. CONST. amend. XV.
22 U.S. CONST. amend. XIX.
23 U.S. CONST. amend. XXVI.
prevent the infringement of the amendments illustrated in the
Constitution. For example, Congress ratified the Voting Rights Act
of 1965 by preventing states from enacting discriminatory voting
legislation. Congress has not simply protected the right to vote but
has also made voting as easily accessible as possible. For example, the
National Voter Registration Act of 1993 allows voters to register to
vote when receiving and renewing their driver’s license. Similarly,
Congress intended the UOCAVA to protect the right to vote for
citizens living abroad.

B. Voting and Court Decisions

The Supreme Court has also stringently protected the right to vote, recognizing that the right to vote is precious to the American
legal system and society. The Court consistently holds that the right
to vote is fundamental and that any infringement is subject to strict
scrutiny. The Court has adopted the Framers view that voting was to
be a central aspect of the United States. After all, “no right is more
precious in a free country than that of having a voice in [an] election,”
and “other rights, even the most basic, are illusory if the right to vote
is undermined.” The United States Constitution does not permit any
“classification of people in a way that unnecessarily abridges this
right.” And the Supreme Court has consistently held that “any
alleged infringement of the right of citizens to vote must be carefully
and meticulously scrutinized.” This is especially true with regards to
Equal Protection claims, as the Court has held that “because of the

28 Segovia v. U.S., 880 F.3d 384, 387 (7th Cir. 2018).
32 Id.
overriding importance of voting rights, classifications which might invade or restrain them must be closely scrutinized and carefully confined where those rights are asserted under the Equal Protection Clause.”

Therefore, a court should subject any infringement of a fundamental right to vote to strict scrutiny. However, the right to vote is not fundamental for all U.S. citizens, and a significant deviation from the strict scrutiny analysis occurs in voting cases when claims are brought by U.S. citizens who are not citizens of a state. For instance, in *Igartúa v. U.S.*, citizens of Puerto Rico sought the right to vote in the House of Representatives to establish a Puerto Rican Congressman. Even though citizens of Puerto Rico are U.S. citizens, the court held that they do not have a fundamental right to vote “since Puerto Rico is not a state and cannot be treated as a state under the Constitution.” In effect, the right to vote is only fundamental for U.S. citizens who are also citizens of a state.

The Second Circuit also examined a variation of this issue. In *Romeu v. Cohen*, a plaintiff alleged that New York’s enforcement of the UOCAVA violated the Equal Protection Clause when the state refused to send him an absentee ballot in Puerto Rico. In *Romeu*, the plaintiff, a former citizen of New York, felt that U.S. citizens living in U.S. territories were not receiving the equal protection of their voting rights compared to U.S. citizens living overseas. The court held that

35 *Igartúa v. United States*, 626 F.3d 592, 594 (1st Cir. 2010).
37 *See also* U.S. Const. amend. 23 (stating that “For purposes of representation in the Congress, election of the President and Vice President, and article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State.”)
38 *Romeu v. Cohen*, 265 F.3d 118, 126 (2d Cir. 2001).
39 *Id.* at 125.
40 *Id.*
there was not an equal protection violation, but rather it was simply part of the cost of a person moving their permanent residence outside of a state.41

Notably, the mere failure to receive an absentee ballot is not subject to strict scrutiny because the right to receive absentee ballots is not fundamental, the right to vote is.42 For instance, in McDonald v. Board of Election Comm’rs., the Court analyzed the constitutionality of a statute that did not send inmates awaiting trial absentee ballots.43 The Court however decided not to use a heightened scrutiny analysis because the petitioner did not allege an infringement of the right to vote, but rather alleged an infringement of right to receive absentee ballots. The Court held that there was nothing in the record alleging that the “Illinois statutory scheme ha[d] an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots.”44 The Court reasoned that it was possible the state would allow the inmates to vote through other means.45 As a result, the Court did not consider the issue as a violation of the fundamental right to vote and used a rational basis analysis.46

Since McDonald, the Court has dealt with a similar issue twice.47 However, the McDonald decision simply evolved into a requirement that the infringed party allege that their failure to receive absentee

41 Id.
43 Id. at 806.
44 Id.
45 McDonald v. Bd. of Election Comm’rs, 394 U.S. 802, 808 n.6 (1969). (“the record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own.”)
46 Id.
ballots actually infringes on their right to vote. For example, in *Goosby v. Osser* the Court used a strict scrutiny test to consider the constitutionality of a statute that refused to supply prisoners awaiting trial with absentee ballots. The Court chose to use a strict scrutiny analysis because the petitioners stated that their requests to register and vote by other means were denied. In *O'Brien v. Skinner*, the Court again used a strict scrutiny analysis to deal with New York’s refusal to supply certain inmates awaiting trial absentee ballots. The statute did not specifically deal with inmates but rather stated that individuals could only vote via absentee ballot if they were “unavoidably absent” from their county of residence. Consequently, those held in jail awaiting trial in a county other than their residence” were able to vote by absentee ballot, but “persons confined for the same reason in the county of their residence [were] completely denied the ballot.” This violated the well settled principal that "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." Consequently, the *O'Brien* Court applied a strict scrutiny analysis when holding that the New York statute unconstitutionally infringed upon the right to vote.

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48 *McDonald*, 394 U.S. at 808.
49 *Goosby*, 409 U.S. at 513.
50 *Id.* at 522 ("Requests by members of petitioners' class to register and to vote either by absentee ballot, or by personal or proxy appearance at polling places outside the prison, or at polling booths and registration facilities set up at the prisons, or generally by any means satisfactory to the election officials, had been denied.").
51 *O'Brien*, 414 U.S. at 528-29.
52 *Id.* (citing N. Y. Election Law § 117 (1)(b) 1964).
53 *Id.*
55 *Id.*
Federalism & the Right to Vote: Domicile versus Residence

An individual residing in a U.S. territory may not have a fundamental right to vote because a U.S. citizen’s relationship to a state may present a constitutional difference of whether the right is fundamental. As stated, the right to vote in federal elections is not fundamental for all U.S. Citizens. The fundamental aspect of the right to vote is reserved for U.S. citizens who are citizens of a State, even if they reside in a U.S. territory. After all, the definition of ‘reside’ in the Citizenship Clause aligns with the definition of domicile, and that is the context in which courts use it. For this reason, if an individual is domiciled in a state they are a citizen of that state and their right to vote is fundamental.

This is inherent in the U.S. federalist system that reserves rights to the states and the federal government; a system that protects individuals’ fundamental rights against both State and Federal conduct. This assertion is plainly supported by the U.S. Constitution. The Federalist system was designed to place power in the hands of the people in each state. The Tenth Amendment states that the powers not given to the federal government “are reserved to the states respectively, or to the people.” And the Declaration of Independence states that the power to govern derives from the people giving their “consent to be governed.” The predominate way that people give this consent is by voting, and the Constitution clearly places this right in the hands of State citizens as well as U.S. citizens. In fact, the only jurisdiction that is permitted to vote in federal

56 See Igartúa v. United States, 626 F.3d 592, 594 (1st Cir. 2010).
57 Igartúa v. United States, 626 F.3d 592, 594 (1st Cir. 2010).
58 See e.g., Robertson v. Cease, 97 U.S. 646, 649 (1878).
59 See U.S. CONST. amend. XIV.
60 See U.S. CONST. amend. XV, XIX, XXI, XXIII, XXIV, and XXVII.
61 U.S. CONST. amend. X.
62 U.S. CONST. amend. X.
63 THE DECLARATION OF INDEPENDENCE, 1 stat. 1 (U.S. 1776).
64 See U.S. CONST. amend. XV, XIX, and XXI.
elections that is not a state is Washington D.C., and even this required the ratification of the Twenty-Third Amendment.\textsuperscript{65} Above all, the right to vote was a state matter, before it was an aspect of national citizenship.\textsuperscript{66}

The fundamental nature of the right to vote for citizens of a state is inherent in the U.S. Constitution, by allowing the people of each state to vote for their own representatives.\textsuperscript{67} Article One of the U.S. Constitution states that “[t]he House of Representatives shall be composed of Members chosen . . . by the People of the several States.”\textsuperscript{68} And the Seventeenth Amendment further placed the right to vote in the hands of State citizens by giving them the right to vote for U.S. Senators opposed to electors.\textsuperscript{69} Thus, pursuant to the Constitution the right to vote is fundamental for U.S. Citizens and State Citizens.

Yet, determining State citizenship is a more complex matter than expected. The Fourteenth Amendment’s Citizenship Clause states that “[a]ll persons born or naturalized in the United States . . . are citizens of . . . the State wherein they reside.”\textsuperscript{70} This text seems to assert that State citizenship is granted based an individual’s residency, but that is not the case. Within the judicial system the terms “domicile,” “resident,” and “citizen” have become so intertwined that their meaning within the context of the Fourteenth Amendment is difficult to ascertain.\textsuperscript{71} This is due to several factors, but generally the term reside refers to domicile as opposed to residence.

Firstly, the common definition of “reside” either explicitly refers to domicile or coincides with its definition. For instance Webster’s Dictionary defines reside as, “to dwell permanently or continuously[,

\textsuperscript{65} U.S. CONST. amend. 23.
\textsuperscript{66} Briffault, \textit{supra}, note 13 at 1511.
\textsuperscript{67} U.S. CONST. Art. I, § 2, Cl 1.
\textsuperscript{68} U.S. CONST. Art. I, § 2, Cl 1.
\textsuperscript{69} U.S. CONST. amend. XV.
\textsuperscript{70} U.S. CONST. amend. XIV, § 1 (1870).
\textsuperscript{71} See O.R. Clark, \textit{Elections: Student Voting}, \textsc{Cornell Law Quarterly}, Volume II, 223, 228 (1917).
or] occupy a place as one's legal domicile.”72 The legal definitions of these terms similarly relate residence with the definition of domicile.73 Black’s Law Dictionary does not define reside but rather distinguishes the terms “residence” and “legal residence.”74 In Black’s Law Dictionary the term residence coincides with the common definition in Webster’s Dictionary.75 At any rate the definition of “legal residence” directs the reader to “domicile,” which Black’s Law Dictionary defines as “a person's true, fixed, principal, and permanent home [. . . or] the residence of a person or corporation for legal purposes.”76 Accordingly, within the legal context the term reside refers to domicile.

Even more, the meaning of reside is so convoluted because courts often use the terms “residence” and “domicile” interchangeably.77 “Residence may or may not demonstrate citizenship, which depends on domicile.”78 But above all “the underlying distinction between the concepts of domicile and residence remains: while a person may have only one domicile, he or she may have more than one residence.”79

Within the context of the Citizenship Clause, courts may use the terms interchangeably, but both terms use and meaning are consistent

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73 See Domicile, BLACK’S LAW DICTIONARY (10th ed. 2014).
74 See Residence; & Legal Residence, BLACK’S LAW DICTIONARY (10th ed. 2014).
75 Residence, BLACK'S LAW DICTIONARY (10th ed. 2014) (defines residence as “The act or fact of living in a given place for some time”); “Residence”. (2018). In: Merriam-Webster Online Dictionary. [online] Available at: http://www.merriam-webster.com [Accessed 12 Nov. 2018] (defined as “the act or fact of dwelling in a place for some time[, or] the act or fact of living or regularly staying at or in some place for the discharge of a duty or the enjoyment of a benefit”).
76 Domicile, BLACK'S LAW DICTIONARY (10th ed. 2014).
78 Heinen v. Northrop Grumman Corp., 671 F.3d 669, 670 (7th Cir. 2012); see also id.
with the definition of domicile.\textsuperscript{80} This has been the Supreme Court’s interpretation since it decided a diversity jurisdiction issue in \textit{Robertson v. Cease} just a decade after the ratification of the Citizenship Clause.\textsuperscript{81} In \textit{Robertson}, the Court, for the first time since the passing of the Fourteenth Amendment dealt with determining State citizenship for diversity jurisdiction.\textsuperscript{82} The Court held that there was nothing in the “language or policy” of the Citizenship Clause that conferred jurisdiction based on mere residence in a state.\textsuperscript{83} And the Court stated that a Defendant’s residence was “insufficient to show his citizenship in [a] State.”\textsuperscript{84} This is because residence alone cannot confer that an individual had a fixed “permanent domicile in that state.”\textsuperscript{85}

When dealing with diversity issues courts look to domicile instead of residence because domicile is akin to citizenship.\textsuperscript{86} The main reason for this distinction is that residence can be temporary, and domicile is a fixed location. Generally, domicile can “only be changed through a person’s intention to acquire a new domicile, a person never intending to make a permanent home elsewhere never loses his or her original domicile, in spite of absence from a jurisdiction that can stretch for years at a time.”\textsuperscript{87} Courts analyze several factors when determining domicile, such as: intent of an individual to return or remain, property owned in the state, voting practices, and tax records.\textsuperscript{88} And the Supreme Court has frowned on the use of residence

\textsuperscript{80} Id.
\textsuperscript{81} Id. at 650.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} \textit{E.g.}, Williamson v. Osenton, 232 U.S. 619, 624 (1914).
\textsuperscript{88} Galva Foundry Co. v. Heiden, 924 F.2d 729, 730 (7th Cir. 1991).
alone because it makes it easier to manipulate jurisdiction. For example, in *Morris v. Gilmer* a creditor changed his residence to Tennessee in order to obtain diversity jurisdiction. The Court held that “a citizen of the United States can instantly transfer his citizenship from one State to another, and that his right to sue in the courts of the United States is none the less because his change of domicil[e] was induced by the purpose.” However, the Court also held that for the change in domicile to “constitute a change of citizenship” the change in residence had to be accompanied with the intention to make it a permanent residence. As a result, the Court did not grant jurisdiction as the creditor “had no purpose to acquire a domicil[e] or settled home in Tennessee.”

Domicile allows individuals who move around or have multiple residences to decide their own citizenship. In *Carrington v. Rash*, the Court struck down a statute that did not permit servicemen to vote in Texas if they were not domiciled there before enlisting. The Court stated that Texas would only be permitted to implement reasonable policies for “determining whether servicemen have actually acquired a new domicile in a State for franchise purposes.” Similarly, in *Saenz v. Roe* the Court struck down a minimum residency requirement to vote. The Court held that the Citizenship Clause allows people to choose to be citizens of a state, not for states to choose its citizens. And the Seventh Circuit has also supported this key aspect of domicile.

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90 Id. at 329.
91 Id. at 328.
92 Id.
93 Id. at 329.
95 Id. at 96.
97 Id. at 511.
98 See Galva Foundry Co. v. Heiden, 924 F.2d 729, 730 (7th Cir. 1991).
Segovia: Standing Issue

In deciding Segovia, the Seventh Circuit considered three issues. The first issue was whether the Plaintiffs, six former residents of Illinois, had standing to bring their equal protection claim against the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”).99 The Court recognized that the UOCAVA was enacted by Congress to “protect the voting rights of United States citizens who move overseas but retain their American citizenship.”100 The Act reserves the right of these citizens to receive absentee ballots to vote in “general, special, primary, and runoff elections for Federal office.”101 Under UOCAVA a U.S. citizen is permitted to receive an absentee ballot from the last state they were domiciled, and they do not need to have any intention to return to that state.102 The Seventh Circuit held that the Plaintiffs, do not have standing because their injury is not “fairly traceable” to the government’s enforcement under the UOCAVA.103

There are two aspects of standing.104 First, to confer federal jurisdiction in relation to Article III of the U.S. Constitution the Plaintiff must allege an injury that would be remedied by the court ruling in their favor.105 Second, the court must determine whether the plaintiff’s injury is “fairly traceable” to “the challenged conduct.”106 The Plaintiff will not have standing if the injury “results from the independent action of some third party not before the court.”107

99 Id.
100 Id.
102 Id. at 388-389; see also Hollingsworth v. Perry, 570 U.S. 693, 704 (2013).
103 Segovia v. United States, 880 F.3d 384, 388-89 (7th Cir. 2018).
105 Hollingsworth, 570 U.S. 693 at 700.
Traceability does not need to be direct, but rather must have a causal showing.\textsuperscript{108}

In Segovia, the Seventh Circuit disagreed with the district court and held that the Plaintiff’s injury was not traceable to the government’s enforcement of UOCAVA.\textsuperscript{109} This decision was based on the definition of “United States” in the UOCAVA.\textsuperscript{110} The UOCAVA defines United States as “the States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa.”\textsuperscript{111} The court held that the UOCAVA does not prohibit Illinois from providing residents of Puerto Rico, Guam, and the Virgin Islands absentee ballots, but rather the Illinois statute does that unilaterally.\textsuperscript{112}

However, the court’s opinion lacks an in-depth discussion of traceability. The court analogizes the standing issue in Segovia with the Supreme Court’s decision in Simon v. E. Ky. Welfare Rights Org.\textsuperscript{113} But the facts presented in Simon present constitutionally different causality issues.\textsuperscript{114} In Simon the Court held that the injury-in-fact was not fairly traceable to the government enforcement of an IRS ruling.\textsuperscript{115} The plaintiff alleged that the injury resulted from an IRS rule that offered hospitals a tax incentive for giving indigent patients limited services.\textsuperscript{116} The Supreme Court held that there was no standing because there was a lack of a causal relationship.\textsuperscript{117} The Court expressed that whether a hospital denied indigent patients could stem from a number of factors that did not include the tax incentive.\textsuperscript{118} As a

\textsuperscript{108} Id. at 44.
\textsuperscript{109} Segovia, 880 F.3d at 387.
\textsuperscript{110} Id.
\textsuperscript{112} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
result, “there was [not] substantial likelihood that victory in the suit would result in respondents' receiving the hospital treatment they desire[d].”

But, the Seventh Circuit’s use of Simon was in error because the facts and issues presented in relation to standing were slightly outside the scope of those in Segovia. The court attempted to compare the third-party decision of local hospitals to Illinois refusing to send absentee ballots to non-resident citizens. This analysis is improper for several reasons. First, in Simon, part of the reason the Court held there was no causal connection was because a hospital could make the decision to turn away indigent patients absent any consideration of the tax incentive. Unlike the scenario in Simon, the decision not to send absentee ballots to U.S. citizens residing in Puerto Rico directly stems from the government’s enforcement of the UOCAVA, as the Illinois statute must correspond to the federal one. Also, there are over 5,000 hospitals in this country, and the causal aspect of the individual decisions of each hospital is much more attenuated than the decision of Illinois to enact Illinois Military Overseas Voter Empowerment Act (“Illinois MOVE”). Second, unlike in Simon if the Plaintiffs in Segovia won their claim they would have an immediate remedy to their issue.

Further, not allowing standing under the UOCAVA is inconsistent with the doctrine of expressio unius, which asserts that omissions should be understood as exclusions. It is not always the

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119 Id.
120 See Segovia v. United States, 880 F.3d 384, 389 (7th Cir. 2018); see also id.
121 Segovia, 880 F.3d at 389; see also Simon, 426 U.S. at 39.
122 Simon, 426 U.S. at 44.
125 Segovia, 880 F.3d at 389.
case that omissions are exclusions, but that is the case here.\textsuperscript{127} The UOCAVA does not mention equivalent U.S. territories such as the Northern Mariana islands in the definition of the United States, and as a result they have been permitted to receive absentee ballots.\textsuperscript{128} The UOCAVA not mentioning these similarly situated territories has resulted in certain U.S. citizens arbitrarily not being protected by the UOCAVA.\textsuperscript{129} The result is that the UOCAVA does not provide non-resident U.S. citizens equal protection of their voting rights depending on the territory they reside in. Consequently, the UOCAVA confers standing because if there were changes to the UOCAVA the Plaintiffs injury would be remedied.\textsuperscript{130}

In consideration of the above-mentioned issues, the causal connection between the injury and the UOCAVA is enough to confer standing. Non-resident U.S. Citizens are unable to vote in federal elections because the governments enforcement of the UOCAVA allows Illinois to refuse them absentee ballots.\textsuperscript{131} The District Court was correct that “Illinois is bound by the floor that the federal defendants stress that the UOCAVA provides.”\textsuperscript{132} And that if the UOCAVA excluded “Puerto Rico, Guam, and the U.S. Virgin Islands” Illinois would be required to provide the Plaintiffs with absentee ballots, or if the UOCAVA specifically addressed American territories the Plaintiffs would be able to obtain absentee ballots.\textsuperscript{133} Therefore, the Plaintiffs injuries are indeed traceable to the UOCAVA.

\textsuperscript{127} See Dahlstrom v. Sun-Times Media, LLC, 777 F.3d 937, 945 n.6 (7th Cir. 2015).
\textsuperscript{131} Id.
\textsuperscript{132} Segovia v. Bd. of Election Comm’rs for Chi., 201 F. Supp. 3d 924, 937 (N.D. Ill. 2016)
\textsuperscript{133} Id.
The Plaintiffs Should Have Argued that their Domicile is Illinois So Their Right to Vote Would Be Fundamental

The second issue decided by the Seventh Circuit in Segovia involved the narrowing of the fundamental right to vote. The court held that the right to vote is not fundamental for non-resident U.S. citizens. As a result, the court used a rational basis test instead of a strict scrutiny analysis. The Seventh Circuit is correct that non-resident U.S. citizens do not have a fundamental right to vote because that right is reserved to citizens of a state. However, whether that right is fundamental depends on whether the individual is also a citizen of a State. So, if the Plaintiffs were able to establish that they were domiciled in Illinois they would have a fundamental right to vote, and the Court’s decision of standing would have been of little consequence.

Here the plaintiffs were “six United States citizens who are former residents of Illinois and who now reside in Puerto Rico, Guam, or the U.S. Virgin Islands, plus two organizations that promote voting rights in United States Territories.” The individuals were also former military servicemembers. The Plaintiffs contended that their denial of absentee ballots is a due process violation of Equal Protection under the UOCAVA and Illinois Move Statute. The Due Process Clause protects life, liberty, and property. “Liberty . . . extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.” State legislation violates Equal Protection when “the rights allegedly impaired are individual and personal in nature.”

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134 Segovia, 880 F.3d at 389.
135 Id.
136 Id.
137 Segovia, 218 F. Supp. 3d at 652.
138 Id.
139 Id. at 339.
Equal protection claims only require a strict scrutiny analysis when the legislation in question “impermissibly interferes with the exercise of a fundamental right.”\textsuperscript{143} Under a strict scrutiny analysis a law which infringes upon a fundamental right “is permissible only if it is narrowly tailored to address a compelling state interest.”\textsuperscript{144}

The UOCAVA and Illinois MOVE affect a fundamental right, but not in the manner the Plaintiffs alleged.\textsuperscript{145} The Plaintiffs were not receiving the same protection of voting rights as those similarly situated in territories like the Northern Mariana Islands.\textsuperscript{146} Illinois citizens have a fundamental right to vote regardless of their current residence.\textsuperscript{147} It is within the plain meaning of the Fifteenth and Nineteenth Amendment that “the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State.”\textsuperscript{148} These amendments expressly specify the right in relation Federal and State conduct. At the time of enacting these amendments Congress did not consider the right to vote in respect to U.S. territories, but rather just in regard to U.S. State citizens. And the right to vote in federal elections is enumerated in the constitution relating to States.\textsuperscript{149} For instance, the President of the United States is elected by the electors from the several States, not U.S. Territories.\textsuperscript{150} Even more, Senators and members of the House of Representatives are both voted upon “by the People of the several States.”\textsuperscript{151} “Article I of the U.S. Constitution alone “uses the term ‘State’ or ‘States’ eight times when defining and outlining the House of Representatives.”\textsuperscript{152} The right to vote for citizens of U.S. territories cannot be read into any of these

\textsuperscript{144} Id.
\textsuperscript{145} Segovia v. United States, 880 F.3d 384, 389 (7th Cir. 2018).
\textsuperscript{146} Id.
\textsuperscript{147} See U.S. Const. amend. XIV § 1
\textsuperscript{148} U.S. Const. amend. XIV § 1.
\textsuperscript{149} U.S. Const. art. II, § 1, Cl 2.
\textsuperscript{150} U.S. Const. art. II, § 1, Cl 2.
\textsuperscript{151} U.S. Const. art. I, § 2; U.S. Const. Amend. 17.
\textsuperscript{152} Igartúa v. United States, 626 F.3d 592, 595 (1st Cir. 2010).
constitutional provisions or amendments, as they specifically place limits upon the federal government and the states. Thus, if this right was further reserved to citizens in U.S. territories it would have to be stated within the U.S. Constitution.

The Seventh Circuit held that although the right to vote is fundamental that right is not fundamental for U.S. citizens who are currently residing in U.S. territories.153 The court cited one case to support its assertion.154 That case was a First Circuit case which is part of a long line of cases that have consistently held that Puerto Rican citizens and residents could not vote in federal elections because they do not have a fundamental right to vote.155 In Igartúa I, the plaintiffs alleged that the UOCAVA did not equally protect the right to vote for Puerto Rican residents because those who formally resided in a state were given the right to vote in federal elections while other Puerto Rican citizens were not.156 The First Circuit used a rational basis test in this case because Puerto Rican citizens do not have a fundamental right to vote.157 Through this series of cases the plaintiffs sought the right to vote in federal elections based on a number of different arguments, but the conclusion is always the same.158 Each Igartúa court basis its decision on two keys reasons; (1) Puerto Rican citizens do not have a fundamental right to vote, and (2) the right to vote in federal elections is reserved to states and Puerto Rico cannot be

153 *Id.*
154 See Segovia, 880 F.3d at 389; see also Igartúa v. U.S., 626 F.3d 592, 595 (1st Cir. 2010).
155 *Id.*; see also Igartúa v. United States, 626 F.3d 592, 595 (1st Cir. 2010); Igartúa-de la Rosa v. U.S., 417 F.3d 145, 147 (1st Cir. 2005) (Igartúa IV); Igartúa-de la Rosa v. U.S., 417 F.3d 145 (1st Cir. 2005) (Igartúa III); De La Rosa v. U.S., 229 F.3d 80 (1st Cir. 2000) (Igartúa II); Igartúa de la Rosa v. U.S., 32 F.3d 80 (1st Cir. 1994) (Igartúa I) (Igartúa is a series of cases in which individuals brought several claims and arguments attempting to establish their right to vote in Presidential Elections and for a member of the House of Representatives as Puerto Rican citizens).
156 Igartúa de la Rosa v. U.S., 32 F.3d 8 (1st Cir. 1994).
157 *Id.* at 83.
158 See e.g., *id.* at 85.
considered a state under the U.S. Constitution. But, these cases differ from the facts in Segovia for multiple reasons.

First, Puerto Rican citizens were attempting to establish their own representatives in congress, and the right to vote for the President of the United States, which is a right reserved only to states. The First Circuit stated that “since Puerto Rico is not a state, and cannot be treated as a state under the Constitution . . . its citizens do not have a constitutional right to vote for members of the House of Representatives.” This presented a constitutionally different question than the one presented by the Plaintiffs, as the plaintiffs were exercising their right to vote as former Illinois residents, not citizens of Puerto Rico. Second, in Igartúa I, the court plainly stated that former state residents residing in Puerto Rico have the right vote in federal elections.

The issue in Segovia more closely aligns with the above-mentioned case of Romeu because like in Segovia, the plaintiff in Romeu claimed that as former state citizen the UOCAVA did not equally protection his right to vote. “Romeu [could not] vote for the President [of the United States] in Puerto Rico because the existing laws do not confer such a voting right on U.S. citizens domiciled in Puerto Rico.” Yet, the Segovia court’s only mention of Romeu is a
quote stating that granting the Plaintiffs voting rights under the UOCAVA “would have created a distinction of questionable fairness among Puerto Rican U.S. citizens, some of whom would be able to vote for President and others not, depending whether they had previously resided in a State.”

But this fairness is embedded in the system created by the U.S. Constitution. It may not be fair that states have significantly greater rights than U.S. territories, but that is the system created by the U.S. Constitution.

In turn, if the Plaintiffs in Segovia could have established that they had a fundamental right to vote by presenting a constitutionally different issue, that the UOCAVA and Illinois MOVE statute did not equally protect the right to vote for Illinois citizens. The Plaintiffs being former Illinois residents, while significant, did not award them a fundamental right to vote. However, the Plaintiffs should have placed stock in their former residency in Illinois and argued that although they reside in Puerto Rico they consider Illinois their domicile, and are therefore Illinois citizens. “[S]ince the adoption of the Fourteenth Amendment to the Federal Constitution the mere allegation of residence in Illinois did not make such a prima facie case of citizenship in that State.”

The Segovia Court bases nearly its entire decision on the fact that non-resident U.S. citizens do not have a fundamental right to vote. But if the Plaintiffs could have established that their domicile was Illinois it would negate the fact that residents of U.S. territories do not have a fundamental right to vote.

Along those lines, the Seventh Circuit has proved to be quite lenient when considering whether an individual has an actual domicile in a state. Take for example Galva Foundry Co. v. Heiden. In Galva, the Defendant, Heiden, alleged there was no diversity jurisdiction because he and the Plaintiff were both citizens of Illinois. But Heiden also had significant ties to Florida. “Heiden had

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166 Id. at 125.
168 Segovia v. U.S., 880 F.3d 384, 390 (7th Cir. 2018).
169 Galva Foundry Co. v. Heiden, 924 F.2d 729, 730 (7th Cir. 1991).
170 Id.
registered to vote in Florida, had taken out a Florida driver's license, had stated in an application for a Florida tax exemption that he had become [ . . . ] a permanent resident of Florida, and had listed his Florida address as his permanent address on both his federal and Illinois income tax returns.”  

However, while Heiden split time between Illinois and Florida he only took these actions to shield himself from Illinois tax law. In the end the court held that “this is shady business but it cannot convert” the suit against Heiden, who is a citizen of Illinois, into “a suit against a Floridian.”  

Most individuals may lack the financial means to keep multiple residences in different states, but as stated domicile is based on several factors, and intent is the focal point. Even if individuals like the Plaintiffs vote and pay taxes in Puerto Rico, Guam, or the U.S. Virgin Islands they can still prove that their domicile is Illinois. They must establish that they never intended to change their domicile and they have an intent to return. The UOCAVA does not require an intent to return but this will be necessary in order to argue that they have a fundamental right to vote. These facts will be specific to each plaintiff. This article does not attempt to establish exactly how a person can reside in a U.S. territory and be a State citizen, but rather provide that if they are able to do so they have a fundamental right to vote.  

If a plaintiff is able to establish state citizenship then the UOCAVA would permit Illinois citizens residing in certain territories the right to vote, but deny that right to the those residing in Puerto Rico, Guam, or the U.S. Virgin Islands. This is a violation of the Equal Protection Clause that would be subject to strict scrutiny because the plaintiffs would be an Illinois Citizens with the fundamental right to vote. And this arbitrary distinction would almost certainly fail a strict scrutiny analysis.

171 Id.
172 Id. at 731.
173 Id.
175 See Galva Foundry Co., 924 F.2d at 730.
Although the concept of domicile is generally used in the context of diversity jurisdiction the Supreme Court has also used domicile when considering voting rights cases. As well, the point of a diversity jurisdiction inquiry is determining which state an individual belongs to, and that would be the same determination for considering if a person has a fundamental right to vote as a State Citizen.

Since the Plaintiffs reside in Puerto Rico, the fact that they are not permitted to vote in federal elections is because Puerto Rico does not have any rights under the Constitution to participate in federal elections since it is not a state. But an Illinois citizen would not be participating in elections on behalf of Puerto Rico, they would be participating in federal elections based on their fundamental right as an Illinois Citizens. This issue must be seen on its face not analyzed based on decisions that present constitutionally different issues. The Plaintiffs in Segovia are qualified voters as Illinois citizens. The UOCAVA protects the fundamental right to vote for Illinois Citizens who reside in the American Samoa but does not equally protect that right for Illinois citizens residing in Puerto Rico. The reason for their exclusion is not justified by a “narrowly tailored” compelling government interest.

The UOCAVA may have been enacted before there was a change in the status of certain U.S. territories but these changes have resulted in an unconstitutional enforcement. Therefor the UOCAVA would not satisfy the strict scrutiny test as its

176 *Saenz*, 526 U.S. at 508.
177 I am aware that in the future there may be issues with domicile for jurisdiction and domicile for voting. But diversity jurisdiction has evolved to mainly determine whether an individual purposefully availed themselves in the state. See J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 889 (2011).
178 *See* Igartúa v. United States, 626 F.3d 592, 594 (1st Cir. 2010).
179 *See* Segovia v. United States, 880 F.3d 384, 391 (7th Cir. 2018).
181 The Seventh Circuit held that when UOCAVA and Illinois MOVE were passed the Northern Marianas was a “Trust Territory” with less integration than other U.S. territories, but now the Northern Marianas further resemble other US territories and even have a non-voting delegate to the House of Representatives. See Segovia v. U.S., 880 F.3d 384, 391 (7th Cir. 2018).
enforcement permits the unconstitutional infringement of the Illinois Citizens fundamental voting rights.

**Segovia: The Distinction Between American Territories is Not Rational**

The third issue the *Segovia* court considered was whether Illinois MOVE was rational. The court erred in its rational basis analysis of Illinois MOVE by placing more significance on potential political ramifications opposed to the actual rationality of the statute. The court in *Segovia* held that the rationality for Illinois MOVE is arbitrary now but was not when it was enacted nearly 40 years ago.\(^{182}\)

The court reasoned that “while the distinction among United States territories may seem strange to an observer today, it made more sense when Illinois enacted the challenged definition.”\(^{183}\) The court then discussed that when Illinois’ MOVE was enacted the distinction that is now arbitrary was logical.\(^ {184}\) The court held that it is irrelevant if the distinction between the Northern Marianas/American Samoa and other U.S. territories is arbitrary because Illinois defines living in the other territories as residing within the United States.\(^ {185}\) The court reasoned that if it were to hold the statute unconstitutional residents of the Northern Mariana Islands would lose their voting rights, and some Puerto Rican residents would be able to vote while others would not.\(^ {186}\) And therefore it is rational “for Illinois to retain the same definition it enacted nearly 40 years ago.”\(^ {187}\)

The court should not have based its decision on these ramifications. The rational basis test asks whether “there is a rational relationship between the disparity of treatment and some legitimate

\(^{182}\) *Segovia*, 880 F.3d at 390.
\(^{183}\) *Id.*
\(^{184}\) *Id.*
\(^{185}\) *Id.*
\(^{186}\) *Id.*
\(^{187}\) *Id.*
governmental purpose.” The Supreme Court has already held that during a rational basis analysis "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." For instance, recently in Shelby County v. Holder, the Supreme Court held that the coverage formula of the 1965 Civil Rights Act was unconstitutional because of changed conditions. Shelby County alleged that the coverage formula in the Voting Rights Act of 1965 was facially unconstitutional. When the coverage formula was enacted it required jurisdictions that had “tests or devices as prerequisites to voting, and had lower voter registration and turnout, in the 1960s and early 1970s” to “obtain federal permission before enacting any law related to voting.” The Supreme Court previously upheld the coverage formula as rational in 1966 because it “was a legitimate response to the problem” of voter discrimination, and it was initially only meant to last for five years. However, it had been consistently reauthorized with no changes coverage to the coverage formula. But in 2013, the Court used a rational basis test when it held the coverage formula was unconstitutional because the legislation did not make sense “in light of current conditions.” The Court stated that the use of the formula was irrational because it was based on “40 year old data,” and Congress needed to “draft another formula based current conditions.”

Similarly, the rationality analysis of Illinois MOVE should be concerned with the current operation of the statute not just whether it

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191 Id.
192 Id. at 539.
195 Id. at 553-556.
196 Id. at 556-557.
was reasonable when enacted forty years ago. “There is no valid reason to insulate” Illinois MOVE “merely because it was previously enacted 40 years ago.”

When Illinois MOVE was enacted the Northern Mariana Islands was a trust territory, a significant distinction from U.S. territories like Puerto Rico because trust territories are less intertwined with the U.S. government. But the Northern Mariana Islands has been a fully incorporated U.S. Territory since 1986. The changed status of the Northern Mariana Islands has resulted in Illinois MOVE violating Puerto Rican residents Equal Protection rights. And since this Equal Protection violation is based on changed conditions that led to the statute arbitrarily distinguishing between U.S. Territories the Seventh Circuit should have held that Illinois MOVE was irrational and unconstitutional.

Also, the court should not have placed such significance on the potential ramifications that may have been accompanied by granting the Plaintiffs voting rights because the logic was circular. The Seventh Circuit held that holding the statute unconstitutional would take away the right to vote for American residents living in the American Samoa. This conclusion makes little sense in terms of an Equal Protection Claim. Simply put, the court held that it is rational for a statute to limit voting rights for U.S. citizens living in Puerto Rico because to overturn the statute would limit the voting rights of

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197 See id. at 556.
199 Segovia v. U.S., 880 F.3d 384, 391 (7th Cir. 2018).
200 Id.
201 See id.
202 See id; see also Shelby Cty. v. Holder, 570 U.S. 529, 557 (2013).
203 See id.
204 (The American Samoa is not only included in the definition of United States in UOCAVA but in the definition of United States in Illinois because in 1979 it was more similar to a foreign nation than an incorporated U.S. territory)
U.S. citizens living in the American Samoa.\textsuperscript{205} Put differently, the court could not remedy the Equal Protection violation of U.S. citizens living in Puerto Rico because it may result in U.S. citizens living in the American Samoa not being equally protected. The proper conclusion to such a dilemma is that Illinois MOVE violates the Equal Protection Clause and the legislature needs to remedy the issue based on “current conditions.”\textsuperscript{206}

**Consequences: The Potential Issues of Voting in Puerto Rico**

The *Segovia* Court was correct that the potential ramifications from granting the Plaintiffs voting rights could lead to future issues regarding voting and Equal Protection Claims.\textsuperscript{207} Once some residents of Puerto Rico have voting rights and others do not, the door is opened for Puerto Rican citizens to bring an Equal Protection claim of their own. And Puerto Rico is in a sort of purgatory when it comes to rights in America: Puerto Rico wants the right to vote, but that right is reserved to states; Puerto Rico also wants to be a state but does not have any voting power to bring forth legislation in the U.S. Congress.\textsuperscript{208} For the longest time Puerto Rico wanted its cake and to eat it too: it did not want to be a state, but they still wanted voting rights.\textsuperscript{209} But those rights are reserved to states, and Puerto Rico is not.\textsuperscript{210} However, largely due to its 123-billion-dollar debt, Puerto Rico now would like become America’s 51st state.\textsuperscript{211} This is an issue President Trump and Congress have not considered, likely due to

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\textsuperscript{205} Segovia v. U.S., 880 F.3d 384, 391 (7th Cir. 2018).
\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{210} Igartúa v. United States, 626 F.3d 592, 594 (1st Cir. 2010).
\textsuperscript{211} Campbell, *supra*, note 209.
Puerto Rico’s mounting monetary issues.\textsuperscript{212} There is also no clear procedure for how a U.S. territory becomes a state.\textsuperscript{213} And while Puerto Rico’s leaders have asked Congress for a process to statehood they have largely been ignored.\textsuperscript{214} So, if the \textit{Segovia} court did grant the Plaintiff’s the right to vote, the potential issues that the court would have been faced with in the future would go far beyond just the scope of voting rights. That said, the Seventh Circuit may not have considered all these issues when deciding \textit{Segovia}, but the potential ramifications of the decision were much more substantial than simply granting voting rights. Yet, if a plaintiff is able to base their Equal Protection claim on the distinction that they are a citizen of a State it may prevent these issues because it would still uphold the general principle that the right to vote in federal elections is one reserved to the states.\textsuperscript{215}

\textbf{Conclusion}

Voting in America is an integral part of our governmental system and it is a cherished right among citizens.\textsuperscript{216} The right to vote has seen a continuous expansion since the ratification of the Constitution.\textsuperscript{217} It is also a fundamental right for most U.S. citizens.\textsuperscript{218} Since the U.S. Constitution clearly places the right to vote in the hands of the states, a U.S. citizen only has a fundamental right to vote if they are also a citizen of a state.\textsuperscript{219} As a fundamental right any infringement of the

\textsuperscript{213} Campbell, supra, note 209; see also U.S. Const. Art. IV, § 3, Cl 1 (merely stating that “new States may be admitted by the Congress into this Union”).
\textsuperscript{214} Campbell, supra, note 209.
\textsuperscript{215} Igartúa v. United States, 626 F.3d 592, 594 (1st Cir. 2010).
\textsuperscript{217} Id. at 555 n.28.
\textsuperscript{218} Id.; Igartúa v. United States, 626 F.3d 592, 594 (1st Cir. 2010).
\textsuperscript{219} See Igartúa v. United States, 626 F.3d 592, 594 (1st Cir. 2010); U.S. Const article I, § 2; U.S. Const. Amend. 15, 17, 19, and 23.
right to vote is subject to strict scrutiny.\footnote{220} For those individuals who are not citizens of a state that right is not fundamental, and it may be subject to a less stringent standard of review when infringed upon.\footnote{221} And despite the phrasing of the Fourteenth Amendment’s Citizenship Clause, state citizenship is based on domicile opposed to residency.\footnote{222} Consequently, if U.S. Citizens residing in a Puerto Rico, Guam, or the U.S. Virgin Island would like to challenge the UOCAVA they should allege an Equal Protection violation based on the assertion that they are domiciled in Illinois, and as Illinois Citizens they have a fundamental right to vote.\footnote{223} The argument that the UOCAVA does not equally protect the right to vote of non-resident U.S. citizens has been, and likely will continue to be struck down because only state citizens have a fundamental right to vote.\footnote{224} The remedy may be finding a suitable plaintiff who can allege domicile within a state, and argue that as a State citizen they have a fundamental right to vote. And since legislation like the UOCAVA and Illinois Move arbitrarily grant the right to vote to an Illinois citizen living in the American Samoa it would likely not pass strict scrutiny.\footnote{225} This could result in an improved statute that properly addresses American territories. And it would prevent courts from getting involved in the complicated business of Puerto Rico statehood and voting rights.\footnote{226}

\footnote{221} See Igartúa v. United States, 626 F.3d 592, 594 (1st Cir. 2010).
\footnote{222} See e.g., Robertson v. Cease, 97 U.S. 646, 649 (1878).
\footnote{223} See Segovia v. United States, 880 F.3d 384, 391 (7th Cir. 2018); Igartúa v. United States, 626 F.3d 592, 594 (1st Cir. 2010).
\footnote{224} See Segovia v. United States, 880 F.3d 384, 391 (7th Cir. 2018); Igartúa v. United States, 626 F.3d 592, 594 (1st Cir. 2010).
\footnote{225} See Reynolds v. Sims, 377 U.S. 533, 560-61 (1964); Segovia v. United States, 880 F.3d 384, 391 (7th Cir. 2018)
\footnote{226} See Campbell, supra, note 209.
ANYTHING BUT ESTABLISHED: THE SEVENTH CIRCUIT’S MISAPPLICATION OF SUPREME COURT ESTABLISHMENT CLAUSE JURISPRUDENCE

SAMANTHA M. RUBEN


INTRODUCTION

When deciding whether a challenged governmental practice violates the Establishment Clause, courts must first ask whether the practice has been historically accepted throughout United States history. If looking to the historical background of the practice cannot resolve the question, only then may courts look to other Establishment Clause tests set forth by the Supreme Court, such as the endorsement, coercion, and purpose tests. In Freedom from Religion Foundation,

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2 Smith, 788 F.3d at 602-3.
Inc. v. Concord Community Schools, the Seventh Circuit skipped this first step and did not use the historical approach set forth in Town of Greece. By sidestepping this recent Supreme Court precedent, the Seventh Circuit misapplied important Establishment Clause jurisprudence. Because Town of Greece signaled a “sea change in constitutional law,” in the future, the Seventh Circuit should use the historical approach when analyzing whether the Establishment Clause is violated.

The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion.” To interpret this clause, the Supreme Court has “employed at least three ways to assess whether a local governmental body, such as a school, violates the Establishment Clause: the endorsement, coercion, and purpose tests.” Establishment Clause jurisprudence is widely criticized by Justices, judges, and academics. The Lemon test is one

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3 885 F.3d 1038 (7th Cir. 2018).
4 Smith, 788 F.3d at 602 (Batchelder, J., concurring in part and concurring in the result) (stating that “[w]hen the Supreme Court signals a sea change in constitutional law, I do not believe that we can lightly set it aside in a case implicating the same constitutional provision…Therefore…Town of Greece should inform our analysis here.”).
5 U.S. CONST. amend. I, cl. 1.
6 Lee v. Weisman, 505 U.S. 577 (1992) (stating that “the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’” (emphasis added)); Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (O’Connor, J., concurring) (“What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.” (emphasis added)); Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971) (setting forth the purpose test and stating that “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an ‘excessive government entanglement with religion.’” (emphasis added)).
7 Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J., concurring) (declining to apply the Lemon and endorsement tests and stating that “I see no test-
of the most widely used but highly criticized tests.\footnote{Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (citing Everson v. Board of Ed. of Ewing Tp., 330 U.S. 1, 18 (1947) (describing the \textit{Lemon} test as “blurred, indistinct and variable”)); William P. Marshall, \textit{"We Know It When We See It" The Supreme Court and Establishment}, 59 S. CAL. L. REV. 495, 497 (the role of the \textit{Lemon} test to resolve any establishment inquiry “is ambiguous. At times the Court has described the test as a helpful signpost, at other times the Court has suggested that it can be discarded in certain circumstances, at still other times the Court has held that it must be rigorously applied.”).} Federal circuit courts have struggled to consistently apply the \textit{Lemon} test, and one circuit court has recently abandoned the test all together.\footnote{New Doe Child #1 v. U.S., 901 F.3d 1015 (8th Cir. 2018).} The Supreme Court itself departed from its use of the \textit{Lemon} test in \textit{Town of Greece v. Galloway}.\footnote{See generally Town of Greece N.Y. v. Galloway, 572 U.S. 565 (2014); Karthik Ravishankar, \textit{The Establishment Clause’s Hydra: The Lemon Test in the Circuit Courts}, 41 U. DAYTON L. REV. 261, 266 (2016) (explaining that “in Town of Greece v. Galloway, a divided Court affirmed another town’s legislative prayer practice without invoking Lemon, again applying the reasoning from Marsh by analyzing the setting of the prayer and its intended audience.”).} In its place, the Court used a historical approach along with the coercion test to determine whether the Town

of Greece could allow volunteer chaplains to open each legislative session with a prayer.\footnote{11} 

In \textit{Freedom from Religion Foundation, Inc. v. Concord Community Schools}, the Seventh Circuit did not explicitly use the historical approach set forth in \textit{Town of Greece}, the Supreme Court’s most recent Establishment Clause case.\footnote{12} Chief Judge Wood wrote the majority opinion and used three other Establishment Clause tests to find there was no Establishment Clause violation.\footnote{13} The Court concluded under all three tests that a holiday program at issue was not impermissibly coercive, did not have an unlawful religious purpose, and a reasonable observer would not have viewed the program as a religious endorsement.\footnote{14} However, not all the judges on the Seventh Circuit agreed with which Establishment Clause test or tests should be applied. In \textit{Concord}, Judge Frank Easterbrook concurred in the judgment, but disagreed with the use and application of coercion test.\footnote{15}

The Supreme Court has given inconsistent guidance and has not explicitly overruled any Establishment Clause tests. The Seventh Circuit’s decision in \textit{Concord} highlights the confusion among courts the Establishment Clause has created. The Eighth Circuit recently broke free from the \textit{Lemon} test, becoming the first court of appeals to use the Supreme Court’s historical approach set forth in \textit{Town of Greece v. Galloway}.\footnote{16} Now that the Eighth Circuit has left the \textit{Lemon} test behind, a shift in the federal courts Establishment Clause jurisprudence may occur. As the Eighth Circuit noted, \textit{Town of Greece} is a “major doctrinal shift in Establishment Clause jurisprudence.”\footnote{17} While the Supreme Court has developed multiple tests for analyzing

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\footnote{11} \textit{Town of Greece}, 572 U.S. at 575-576. \footnote{12} 885 F.3d 1038, 1045-46 (7th Cir. 2018). \footnote{13} \textit{Id}. \footnote{14} \textit{Id} at 1053. \footnote{15} \textit{Id}. at 1038. \footnote{16} New Doe Child #1 v. United States, 901 F.3d 1015 (8th Cir. 2018). \footnote{17} \textit{Id}. at 1028 (internal quotations omitted).
the Establishment Clause, it has never adopted one clear test.\textsuperscript{18} Whether the circuit courts will continue to use the coercion, purpose, and endorsement tests, or resort to the reasoning of the Supreme Court in \textit{Town of Greece}, is uncertain. However, until the Supreme Court clearly defines Establishment Clause jurisprudence by mandating one specific test, it is unlikely the Seventh Circuit will completely abandon any of the three older tests.

This note argues that federal circuit courts must follow the Supreme Court’s most recent guidance in \textit{Town of Greece}. Courts must look to historical meaning, when applicable, to determine whether a challenged governmental action violates the Establishment Clause. Only then can courts look to other Establishment Clause tests, such as the endorsement, purpose, and coercion tests. This note will first explain the history of Establishment Clause jurisprudence and the various tests the Supreme Court has set forth. Second, this note will survey the different circuit court approaches to the Establishment Clause tests, in particular the Seventh Circuit and Eighth Circuit. Last, this note will analyze the benefits of using the historical method and suggest that courts should look to history, coupled with another Establishment Clause test if necessary, to evaluate whether a constitutional violation has occurred.

\textsuperscript{18} See Mitchell v. Helms, 530 U.S. 793, 869 (2000) (Souter, J., dissenting) (explaining that “[i]n all the years of its effort, the Court has isolated no single test of constitutional sufficiency”).
A. The History of the Establishment Clause

1. Early Establishment Clause History

When looking at a challenged governmental practice, the Supreme Court’s early Establishment Clause jurisprudence analyzed the history of disputed practices to determine whether a constitutional violation had occurred.\(^\text{19}\) In *Everson v. Board of Education*, the majority stated that the Establishment Clause should be interpreted in “light of its history.”\(^\text{20}\) Even the dissent agreed with this approach, commenting that “[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment.”\(^\text{21}\) For the following two decades, the Supreme Court based its Establishment Clause findings on historical practices and understandings.\(^\text{22}\)

For example, in 1961, the Supreme Court considered whether a Maryland criminal statute which proscribed labor, business, and other commercial activities on Sundays violated the Establishment Clause.\(^\text{23}\) Appellants argued that “Sunday is the Sabbath day of the predominant Christian sects [and] the purpose of the enforced stoppage of labor on

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19 *Everson v. Board of Education*, 330 U.S. 1, 10-11 (1947) (discussing the importance of the separation between church and state).

20 *Id.* at 14-15.

21 *Id.* at 33. (Rutledge, J., dissenting).


23 *Id.* at 422.
that day is to facilitate and encourage church attendance.”\textsuperscript{24} In its analysis, the Supreme Court stated that the history of Sunday Closing Laws in the United States was relevant to whether the statutes respect an establishment of religion.\textsuperscript{25} The Court looked as far back as colonial and English legislation, and observed that “English Sunday legislation was in aid of the established church.”\textsuperscript{26} However, the Court acknowledged that in recent times, there were “secular justifications [that] have been advanced for making Sunday a day of rest.”\textsuperscript{27} The Court held that the Sunday Closing Laws did not violate the Establishment Clause because “most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.”\textsuperscript{28}

In 1963, the Court in \textit{Abington School District v. Schempp} stated that the line between “the permissible and impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.”\textsuperscript{29} In \textit{Abington}, two state statutes providing for Bible reading in public schools were held unconstitutional under the Establishment Clause.\textsuperscript{30} Seven years later, the Supreme Court analyzed the Establishment Clause under a historical approach again in \textit{Walz v. Tax Commission of City of New York}.\textsuperscript{31} The issue in \textit{Walz} was whether property tax exemptions to religious organizations for property used for religious worship violated the Establishment Clause.\textsuperscript{32} Finding that there was “no genuine nexus between tax exemption and establishment of religion,” the Court looked to an earlier case, which stated that “a page of history is worth a volume of

\begin{itemize}
\item \textsuperscript{24} \textit{Id.} at 431.
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{Id.} at 432-33.
\item \textsuperscript{27} \textit{Id.} at 434.
\item \textsuperscript{28} \textit{Id.} at 444.
\item \textsuperscript{29} 374 U.S. 203, 294 (1963).
\item \textsuperscript{30} \textit{Id.} at 223.
\item \textsuperscript{31} 397 U.S. 664 (1970).
\item \textsuperscript{32} \textit{Id.} at 666-68.
\end{itemize}
logic. The Court examined the governmental purpose for granting tax exemptions to religious institutions, and found that there was no strong case for finding this “historic practice” unconstitutional. As evidenced by McGowan and Abington, the Supreme Court’s mid to late twentieth century approach to the Establishment Clause was historical.

2. The Lemon Test

In Lemon v. Kurtzman, the Supreme Court broke from its traditional, historical approach and created a new Establishment Clause test. In Lemon, the issue was whether two statutes that provided state funding for non-public, religious schools violated the Establishment Clause. A Rhode Island Program allowed the state to provide a fifteen percent salary supplement to teachers who taught secular subjects at religious schools. The Pennsylvania statute had a similar reimbursement and also provided partial reimbursement for secular materials in the religious schools. In an 8-1 decision, the Court found the two Pennsylvania and Rhode Island statutes at issue were unconstitutional.

Striking down both statutes, the Court looked to its previous Establishment Clause jurisprudence in Board of Education v. Allen and Walz v. Tax Commission to develop the three prongs now known

33 Id. at 675-76. (citing New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.)).
34 Id. at 686-87.
35 403 U.S. 602 (1971).
36 Id. at 606 (finding both statutes “unconstitutional under the Religion Clauses of the First Amendment, as the cumulative impact of the entire relationship arising under the statutes involves excessive entanglement between government and religion”).
37 Id. at 607.
38 Id.
39 Id. at 603.
as the Lemon test.\textsuperscript{40} The Lemon test asks whether the government’s action (1) has a religious “purpose,” (2) has the “primary effect” of “advancing” or “endorsing” religion; and (3) fosters “excessive government entanglement with religion.”\textsuperscript{41} In Lemon, the Court focused its analysis on the third prong, finding that the “cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.”\textsuperscript{42}

The Lemon test has been highly criticized for its malleability and self-contradiction by courts and commentators.\textsuperscript{43} Many Supreme Court Justices, past and present, are stark critics of the test.\textsuperscript{44} One of the Lemon tests biggest critics was Justice Scalia. In his concurrence in Lamb’s Chapel, Justice Scalia explained that “no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature’s heart [the Lemon test], and a sixth has joined an opinion doing so.”\textsuperscript{45} Justice Scalia refused to join
the majority opinion in *Lamb’s Chapel* because of the use of the *Lemon* test. While the *Lemon* test might first appear to be a simple three-part test, the problem is that the Court itself is wishy washy about how much deference it should be given. For example, in *Hunt v. McNair*, the Court stated that the three-part test was “no more than helpful signposts.” While the *Lemon* test was once the leading method for challenges to the Establishment Clause, the test has caused greater division than unity. Until five Justices of the Supreme Court specifically abrogate the rule, the circuit courts will continue to use the test.

3. Revisiting the Historical Approach:
   *Marsh* and *Town of Greece*

   In *Marsh v. Chambers* and *Town of Greece v. Galloway*, the Supreme Court returned to looking to history and traditional understandings of challenged governmental practices in analyzing whether legislative prayer violated the Establishment Clause. The

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48 Marsh v. Chambers, 463 U.S. 783 (1983) (upholding the Nebraska legislature’s practice of offering opening prayers); Town of Greece, N.Y. v. Galloway, 572 U.S. 565 (2014) (finding there was insufficient evidence that the town had “intentionally excluded non-Christians from giving prayers at Town Board meetings.”).
question in *Marsh* was whether the Nebraska Legislature’s practice of opening each session with a prayer led by a chaplain, who was paid by the state, violated the Establishment Clause.\(^{49}\) Writing for the majority, Justice Berger held the Nebraska Legislature’s practice did not violate the Establishment Clause.\(^{50}\) Instead of using the *Lemon* test, Justice Burger relied on history and the intent of the Framers of the United States Constitution. Looking to the “unambiguous and unbroken history of more than 200 years,” he stated that “the practice of opening legislative sessions with prayer has become part of the fabric of our society.”\(^ {51}\)

In 2014, the Supreme Court in *Town of Greece, N.Y. v. Galloway* again moved away from *Lemon*’s ahistorical analysis of the Establishment Clause.\(^ {52}\) Breaking free from the *Lemon* test, the Court engaged in a historical analysis of legislative prayer, which dated back to the time the Framers drafted the First Amendment.\(^ {53}\) Citizens in Greece, New York held town board meetings where a local clergyman would give an invocation.\(^ {54}\) A town employee would call local religious institutions until she found a minister available for the monthly meeting.\(^ {55}\) The town did not exclude or deny any prospective prayer-givers the opportunity, allowing ministers, laypersons, or even atheists to give the invocation.\(^ {56}\) However, all prayer-givers were Christian.\(^ {57}\) Two women, Susan Galloway and Linda Stephens, sued the town, saying that the prayer practice preferred Christian prayer over other religious and sponsored sectarian prayers.\(^ {58}\)

\(^{49}\) *Id.* at 784.

\(^{50}\) *Id.* at 787.

\(^{51}\) *Id.* at 792.

\(^{52}\) 572 U.S. 565 (2014) (abrogating Alleghany v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989)).

\(^{53}\) *Id.*

\(^{54}\) *Id.* at 570.

\(^{55}\) *Id.*

\(^{56}\) *Id.*

\(^{57}\) *Id.*

\(^{58}\) *Id.* at 572-3.
The question was whether the practice of opening town board meetings with a prayer violated the Establishment Clause. The Supreme Court looked to the history of legislative prayer and recognized that “while religious in nature, [legislative prayer] has long been understood as compatible with the Establishment Clause.” The appropriate test to be used, the Court said, “must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.” Justice Kennedy also used the coercion test and evaluated whether a reasonable observer would think the prayers had a coercive tone or message. He recognized that “the reasonable observer is acquainted with this tradition and understand that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews.”

In making its decision, the Court stated that “there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society.” The Court stated “that the Establishment Clause must be interpreted by reference to historical practices and understandings.” Essentially, under Town of Greece, any test under the Establishment Clause must look to history. In his concurrence, Justice Alito further explained that the practice of delivering a prayer at the beginning of each legislative session “was

59 Id. at 570.
60 Id. at 576; see also Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O’Connor, J., concurring).
62 Id. at 586-87. (citing County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989)) (Kennedy, J., dissenting in part).
63 Id.
64 Id. at 577 (Kennedy, J., concurring in judgment in part and dissenting in part) (citing Marsh v. Chambers, 463 U.S. 783, 792 (1983)).
65 Id. at 565. (emphasis added).
66 Id.
well established and undoubtedly well known.”

67 Any inconsistency between Establishment Clause tests and the historic practice of legislative prayer, “calls into question the validity of the test, not the historic practice.”

Ultimately, the Court decided that opening a town meeting with a prayer comported with tradition and was not coercive. Notably, the Court did not analyze the case using the Lemon test. Justice Breyer’s dissent was the only part of the case to cite Lemon. In doing so, the Court did not explicitly overrule the Lemon test or any other Establishment Clause test.

Town of Greece created a two-pronged test. First, “[t]he Establishment Clause must be interpreted by reference to historical practices and understandings . . . Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and change.”

Second, “[i]t is an elemental First Amendment principle that government may not coerce its citizens to support or participate in any religion or its exercise.”

4. The Endorsement Test

Justice O’Connor first proposed the Endorsement Test in her

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67 Id. at 603.
68 Id.
69 Id. at 591-92.
70 Id. at 614-15 (Breyer, S., dissenting) (citing to Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) and stating that “[t]he question in this case is whether the prayer practice of the town of Greece, by doing too little to reflect the religious diversity of its citizens, did too much, even if unintentionally, to promote the “political division along religious lines” that “was one of the principal evils against which the First Amendment was intended to protect.”).
71 Id. at 577 (Kennedy, J., concurring in the judgment in part and dissenting in part) (internal citations omitted).
72 Id. at 586 (plurality opinion).
concurring opinion in *County of Allegheny v. ACLU* and was approved by a majority of the Court five years later in *Lynch v. Donnelly*. Justice O’Connor acknowledged that it is unclear “how the three parts of the [Lemon] test relate to the principles enshrined in the Establishment Clause.” Recognizing this, Justice O’Connor set forth a method to analyze the Establishment Clause – the Endorsement Test – which asks whether “a government practice is perceived as an endorsement of religion.” Said a different way, the question is whether “the challenged governmental practice has . . . the purpose or effect of ‘endorsing’ religion.”

In *County of Allegheny*, the majority found that the display of a menorah and a Christmas tree on public property was not an impermissible governmental endorsement of Christianity and Judaism. While the government “may celebrate Christmas in some manner and form,” it may not endorse the Christian religion. While the endorsement test has been used and accepted, like the *Lemon* test, the endorsement test has not been without criticism. The Court in *Town of Greece* did not use the endorsement test, but at the same time

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75 *Id*. at 689.

76 *Cty. of Allegheny*, 492 U.S. at 592 (citing Engel v. Vitale, 370 U.S. 421, 436 (1962)); *see also* Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (using the endorsement test to find a moment-of-silence statute was an endorsement of prayer activities).

77 *Cty. of Allegheny*, 492 U.S. at 574.

78 *Id*. 601-602.

79 *Id*. at 574 (Kennedy, J., dissenting) (discussing the endorsement test and stating that “[t]his Court's decisions, however, impose no such burden on demonstrating that the government has favored a particular sect or creed, but, to the contrary, have required strict scrutiny of practices suggesting a denominational preference”).
did not abrogate endorsement test.\footnote{80} Therefore, circuit courts continue to apply the endorsement test.\footnote{81}

5. The Coercion Test

Justice Kennedy formulated what is now known as the coercion test.\footnote{82} In \textit{Lee}, public high schools and middle schools invited clergy to give invocations and benedictions at graduation ceremonies.\footnote{83} Writing for the majority, Justice Kennedy found that the prayers conducted at the graduations violated the Establishment Clause because they effectively coerced students to support or participate in religion.\footnote{84}

The Court recognized that in elementary and secondary schools, prayer exercises “carry a particular risk of indirect coercion.”\footnote{85} Focusing on the indirect and peer pressure put on students to stand as a group or be silent during the ceremony, the Court stated that “[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.”\footnote{86}

\footnote{81} \textit{Id} (explaining that “Town of Greece gives no indication that the court intended to completely displace the endorsement test. The opinion does not address the general validity of the endorsement test at all; it simply explains why a historical view was more appropriate in the case at hand. We therefore apply the endorsement analysis here.”); \textit{see also} Freedom From Religion Foundation, Inc. v. Concord Community Schools, 885 F.3d 1038, n.1 (7th Cir. 2018) (“Indeed, there is debate among the Justices about the continuing validity of the endorsement test . . . at least the dissenting Justices in \textit{Trinity Lutheran Church of Columbia, Inc. v. Comer}, 137 S.Ct. 2012 n.4 (2017), suggested that the endorsement test is still with us.” (internal citations omitted)).
\footnote{83} \textit{Id}.
\footnote{84} \textit{Id} at 577-78.
\footnote{86} \textit{Lee}, 505 U.S. at 587.
In his dissent, Justice Scalia criticized the coercion test. He stated that “[t]he coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.” He gave an example of the Colony of Virginia, where the Church of England forced ministers to deliver the doctrine and rites of the Church and all persons were required to go to church and observe the Sabbath. Justice Scalia did not disagree with the general idea that the government cannot coerce anyone to participate in religion, but he stated that the concept of coercion must be coupled with a “threat of penalty.” There was no specific threat of penalty at issue in Lee, according to Justice Scalia. While the coercion test is not without its critics, the Court’s use of the test in Town of Greece indicates that the coercion test is still well and alive in the Court.

B. Varying Circuit Court Applications of Establishment Clause Tests

What makes Establishment Clause jurisprudence different from other constitutional issues is the open criticism of the area of law by Supreme Court Justices and the courts of appeals. Because the

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87 Id. at 640-41.
88 Id. 640. (emphasis in original).
89 Id. 641.
90 Id. at 642. (Easterbrook, J., dissenting) (citing American Jewish Congress v. Chicago, 827 F.2d 120, 132 (7th Cir. 1987)).
91 Id.
92 572 U.S. 565, 584-87 (2014) (“The town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents.” (emphasis added)).
93 Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J., concurring) (declining to apply the Lemon and endorsement tests and stating that “I see no test-related substitute for the exercise of legal judgment”); id. at 694 (Thomas, J. concurring) (“[T]he incoherence of the Court’s decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application.”); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 768 n.3 (1995) (plurality opinion, Scalia, J., joined by Rehnquist, C.J., Kennedy and Thomas, JJ.) (“[The endorsement test] supplies no standard whatsoever . . . It is
Supreme Court has set forth so many different tests, lower courts are tasked with sifting through the weeds of Supreme Court decisions to figure out which test to use. The Seventh Circuit in Concord applied three prominent tests, the purpose (Lemon test), endorsement, and coercion tests, to determine whether an Establishment Clause violation occurred. But, the court failed to follow the Supreme Court’s recent decision in Town of Greece, which says that courts must apply a historical analysis in deciding Establishment Clause cases. On the other hand, the Eighth Circuit in New Doe Child #1 v. U.S. declined to use the Lemon test entirely and opted for the Town of Greece historical approach. With the Seventh Circuit departing from recent Supreme Court precedent, and the Eighth Circuit leaving many of the old tests behind, Establishment Clause jurisprudence is more unclear than ever.


94 Freedom From Religion Foundation, Inc. v. Concord Community Schools, 885 F.3d 1038 (7th Cir. 2018).
96 New Doe Child #1 v. U.S., 901 F.3d 1015 (8th Cir. 2018).
1. The Seventh Circuit’s Approach

The most significant problem with the modern state of the Supreme Court’s interpretation of the Establishment Clause is how it leaves lower courts to decide which test to use.97 Because of the wide variety of applicable tests, different results are reached using different tests. The Seventh Circuit has not been immune from this problem. Judges on the Seventh Circuit have recognized this juggling act – with multiple tests, comes multiple choices and outcomes.

As the Seventh Circuit noted in Freedom from Religion Foundation, Inc. v. Concord Community Schools, Supreme Court Justices have also been critical of Establishment Clause jurisprudence.98 In Concord, Chief Judge Wood analyzed whether the Establishment Clause was violated under all three of the Supreme Court’s approaches: the endorsement, coercion, and purpose tests.99

The issue in Concord was whether a public high school’s holiday show violated the Establishment Clause.100 Through the Freedom From Religion Foundation, Inc., a high school student and his father brought a suit against a public school corporation.101 Concord High School’s “Christmas Spectacular,” was a holiday show that had “a particular focus on Christmas.”102 There were two parts to the show.103 The first half varied from year to year, but showcased non-religious

97 Mitchell v. Helms, 530 U.S. 793, 857 (2000) (O’Connor, J., concurring) (noting how “there remains the question of which of the two irreconcilable strands of our Establishment Clause jurisprudence we should now follow.”).
98 Concord, 885 F.3d at 1045 (citing Elmbrook Sch. Dist. v. Doe, 134 S. Ct. 2283 (2014) and noting that in their dissents, Justices Scalia and Thomas expressed the view that the Supreme Court has rejected the endorsement test) (citing Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2031 n.4 (2017) and stating that the dissenting Justices in Trinity suggested that the endorsement test is still relevant).
99 Concord, 885 F.3d at 1045.
100 Id.
101 Id. at 1041-42.
102 Id. at 1041.
103 Id.
songs and dances, which were tied to an annual theme. The second half, the section which was disputed, involved a 20-minute section called “The Story of Christmas.” In this segment, there were “religious songs interspersed with a narrator reading passages from the New Testament.” At the end of the act, students posed in a nativity scene.

Because they took issue with the second half of the show, Plaintiffs brought suit against the school, asking for declaratory and injunctive relief. Plaintiffs also asked for a preliminary injunction to prevent the school from showcasing the second half of the 2014 show in the upcoming December 2015 show. In response, Concord offered to make two changes to the proposed version of the 2015 show: it would remove the scriptural reading from the nativity scene, and add two songs, “Ani Ma’amin” and “Harambee,” to represent Hanukkah and Kwanzaa. The district court judge held that these changes were not enough to “address the Establishment Clause problems,” and granted the preliminary injunction. After, Concord adopted further changes to the show. They added Hanukkah and Kwanzaa songs, showed a two minute nativity scene with mannequins as opposed to students, and cut out the New Testament readings. Both parties moved for summary judgment, and the district court held that the 2015 show did not violate the Establishment Clause, granting partial summary judgment in favor of Concord.

104 Id.
105 Id.
106 Id.
107 Id. at 1042.
108 Id.
109 Id.
110 Id.
111 Id.
112 Id.
113 Id. at 1044.
114 Id. at 1045.
On appeal, Plaintiffs argued that even with the changes to the second half of the Christmas Spectacular, the show still violated the Establishment Clause of the First Amendment. The Court walked through each of the three Supreme Court’s tests to determine whether there had been a violation of the Establishment Clause. The Court analyzed the Christmas Spectacular under the endorsement, coercion, and purpose tests. Ultimately, the Court found that under any of the tests, Concord’s 2015 show did not violate the Establishment Clause.

When analyzing the Christmas Spectacular under the “purpose” test, the Seventh Circuit looked to the test’s root: Lemon v. Kurtzman. Interestingly, the Seventh Circuit did not explicitly call its method the Lemon test, but it did reference the case. Under the Seventh Circuit’s purpose test, the “practice is unconstitutional if it lacks a secular objective.” Ultimately, the Seventh Circuit concluded that the primary purposes of the holiday program were entertainment and pedagogy, not religion.

Concurring in the judgment, Judge Easterbrook stated that while he agreed the performance should be upheld, the court should have done so on other grounds. He explained that “as a matter of history or constitutional text” a government does not establish “a religion through an artistic performance that favorably depicts one or more aspects of that religion’s theology or iconography.” Judge Easterbrook further stated that “as both Lemon and the no-endorsement approach are judicial creations rather than restatements

115 Id.
116 Id. at 1045-46.
117 Id.
118 Id. at 1053.
119 Id. at 1049.
120 Id.
121 Id.
122 Id. at 1050.
123 Id. at 1053.
124 Id.
of the first amendment's meaning, they do not justify a claim by judges to have the final word. I have made this point elsewhere, so I do not present an extended argument here.”

In Concord, the Seventh Circuit indicated in a few different ways that it was refusing to use the Town of Greece historical test. First, under the purpose test, the test does not require the court to “evaluate the quality or sufficiency of the historical analysis at issue.” The Court in Town of Greece mandated that courts use a historical analysis to determine whether the challenged practice violated the Establishment Clause. In defiance of sorts, Concord explicitly stated that the purpose test is unrelated to challenged historical practices. Second, and more importantly, the Concord court did not apply the Town of Greece historical approach as one of its three methods in analyzing an Establishment Clause challenge. Third, while using the endorsement test, the Seventh Circuit did mention that a “reasonable observer is aware of a situation’s history and context.” However, merely mentioning that a practice’s history should be considered is not enough to satisfy Town of Greece. Courts must actually engage in a historical analysis according to Town of Greece.

In sum, the court in Concord disagreed about the validity of the Lemon test and failed to use the most recently proposed Supreme Court test set forth in Town of Greece at all. This indicates that there is disagreement on the use of Supreme Court Establishment Clause jurisprudence and reluctance to use the historical approach. Because of the hodgepodge of Establishment Clause tests and questionability of which tests are “live,” Judge Wood used the endorsement, purpose, and coercion tests in her analysis. However, the court failed to cover

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125 Id. (citing Doe ex rel. Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 869 (7th Cir. 2012)).
126 Id. (citing Books v. Elkhart Cty., Ind., 401 F.3d 857, 866 (7th Cir. 2005)) (explaining that “[t]he purpose prong of the Lemon test does not require us to evaluate the quality or sufficiency of the historical analysis embodied in the County’s display.”).
128 Freedom From Religion Foundation, Inc. v. Concord Community Schools, 885 F.3d 1038, 1046 (7th Cir. 2018).
all the bases when it did not use the historical approach set forth in *Town of Greece*.

2. The Eighth Circuit’s Approach

In *New Doe Child #1 v. U.S.*, the Eighth Circuit became the first circuit court to decline to use the *Lemon* test entirely.\(^{129}\) In *New Doe*, the Court recognized that this was the first time the circuit had analyzed an Establishment Clause issue since “the guidance of new Supreme Court precedent” in *Town of Greece*.\(^{130}\) The Eighth Circuit acknowledged that the Supreme Court had set forth numerous Establishment Clause tests, but had failed to commit to any specific one.\(^{131}\)

The issue in *New Doe Child #1* was whether placing the national motto on money violated the Establishment Clause.\(^{132}\) Looking to the Supreme Court’s most recent Establishment Clause jurisprudence, the Eighth Circuit noted *Town of Greece*’s “unequivocal directive: ‘[T]he Establishment Clause must be interpreted by reference to historical practices and understandings.’”\(^{133}\) In deciding which test to use, the *New Doe Child #1* court acknowledged the major doctrinal shift since *Town of Greece*.\(^{134}\) The court stated that “[g]iven (1) Galloway’s unqualified directive that the Establishment Clause “must” be interpreted according to historical practices and understandings, (2) its emphasis that this historical approach is not limited to a particular factual context; and (3) the absence of any reference to other tests in

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\(^{129}\) 901 F.3d 1015 (8th Cir. 2018).

\(^{130}\) *Id.* at 1019 (citing *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014)).


\(^{132}\) *Id.* at 1018-19.

\(^{133}\) *Id.* at 1020 (citing *Town of Greece, N.Y., v. Galloway*, 572 U.S. 565, 566 (2014)).

\(^{134}\) *Id.* (citing *Felix v. City of Bloomfield*, 847 F.3d 1214, 1219 (10th Cir. 2017) (Kelly, J., dissenting from the denial of rehearing en banc) and *Smith v. Jefferson Cty. Bd. of Sch. Comm’rs*, 788 F.3d 580, 602 (6th Cir. 2015) (Batchelder, J., concurring in part and concurring in the result)).
the Court’s opinion, we agree” that there has been a “major doctrinal shift in Establishment Clause jurisprudence.”\textsuperscript{135}

In using \textit{Town of Greece}’s historical approach, the Eighth Circuit asked two questions. First, what do the historical practices at hand “indicate about the constitutionality of placing the national motto on money?”\textsuperscript{136} And second, is the placement of the national motto on money impermissibly coercive?\textsuperscript{137} The court looked to the history of placing “In God We Trust” on U.S. money, which began in 1864.\textsuperscript{138} The court noted that the history of this practice was “unbroken” and that the government is not required to purge itself “of all religious reflection.”\textsuperscript{139} Ultimately, the court found that putting “In God We Trust” on U.S. coins comported with historical practices.\textsuperscript{140}

The court also supplemented it’s historical analysis by using the coercion test.\textsuperscript{141} But, the court stated that it was unnecessary to “probe the bounds of the coercion analysis in this case because it is even more apparent than in \textit{Galloway} that the Government does not compel citizens to engage in a religious observance when it places the national motto on money.”\textsuperscript{142} The Eighth Circuit further clarified that historical analysis is not the only test, but one of the most important ones: “In other words, even when history indicates that a practice does not offend the Establishment Clause, but the Court’s other Establishment Clause tests suggest that it does, history alone cannot carry the day . . . [and] history is now the single most important criterion when evaluating Establishment Clause claims.”\textsuperscript{143}

\begin{flushright}
\textsuperscript{135} \textit{Id.} (internal citations omitted).
\textsuperscript{136} \textit{Id.} at 1021.
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.} at 1022. (citing ACLU Neb. Found. v. City of Plattsmouth, 419 F.3d 772, 778 (8th Cir. 2005).
\textsuperscript{140} \textit{Id.} at 1023.
\textsuperscript{141} \textit{Id.} (questioning “whether the appearance of ‘In God We Trust’ on U.S. money is coercive.”).
\textsuperscript{142} \textit{Id.} (citing \textit{Mayle v. U.S.}, 891 F.3d 680, 684 (7th Cir. 2018)).
\textsuperscript{143} \textit{Id.} at 1028 (Kelly, J., concurring) (internal citations omitted).
\end{flushright}
C. The Future of the Historical Approach

Town of Greece set forth a new approach to the Establishment Clause: first analyze the practice under history, and if that still leaves the constitutionality of the practice unresolved, then turn to the other tests, most preferably the coercion test. Despite this guidance, Establishment Clause jurisprudence continues to be a mishmash of tests. While some courts still use the Lemon test, its continuing applicability is questionable. As Judge Easterbrook of the Seventh Circuit noted, the Lemon test was “made up by the Justices during recent decades.” The Eighth Circuit left behind the Lemon test in favor of the historical approach and the coercion test. On the other hand, the Seventh Circuit continues to use the Lemon test and fails to use the historical approach. This begs the question, what is the future of Establishment Clause jurisprudence and in particular, the historical approach?

In Concord, Judge Wood used a variety of Establishment Clause tests. Using three tests, the court arrived at one conclusion: the holiday show did not violate the Establishment Clause of the First Amendment. To sufficiently expound the point that the holiday show did not violate the Establishment Clause, it was a smart tactic to employ multiple tests. Judge Wood recognized that there is considerable disagreement about which test to employ, even among

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144 Doe ex rel. Doe v. Elmbrook School Dist., 687 F.3d 840, 869 (Easterbrook, J., dissenting) (noting that the Lemon test is open-ended, lacks support in the text of the First Amendment, and has no historical derivation); see also Card v. City of Everett, 520 F.3d 1009, 1023-24 (9th Cir. 2008) (Fernandez, J., concurring) (“The still stalking Lemon test and the other tests and factors, which have floated to the top of this chaotic ocean from time to time in order to answer specific questions, are so indefinite and unhelpful that Establishment Clause jurisprudence has not been more fathomable.”).

145 Freedom from Religion Foundation, Inc. v. Concord Community Schools, 885 F.3d 1038, 1045-46 (7th Cir. 2018) (examining “the Spectacular as performed in 2015 under each of the Court’s approaches.”).
the Supreme Court Justices. Using three tests was an attempt to leave no doubt that no Establishment Clause violation had taken place.

However, the court in Concord did leave one puzzle piece unsolved. Although Town of Greece marked a “major inflection point” in Establishment Clause jurisprudence, the Seventh Circuit failed to use the historical approach. Town of Greece was decided in 2014, making it one of the most recent Supreme Court cases examining the First Amendment’s Establishment Clause. There are various reasons why the Seventh Circuit may not have used the Town of Greece historical approach. Nevertheless, the court should have applied the most recent Supreme Court precedent, especially since Town of Greece marked a strong departure from previous cases.

If one looks closely at the Concord opinion, the Seventh Circuit used the word “history” on multiple occasions, potentially for the purpose of superficially following Town of Greece. Looking to the first paragraph of the opinion, Chief Judge Wood noted the history of Christmas. She stated “[s]ince ancient times, people have been celebrating the winter solstice.” Further, students have performed the “Christmas Spectacular,” the holiday show at issue, for decades.

The only significant time the court mentioned Town of Greece was in a footnote concerning the validity of the endorsement test. The Seventh Circuit noted that Town of Greece did not make it explicit...
whether the endorsement test should still be used. But, a dissent in *Trinity v. Lutheran Church of Columbia v. Comer* “suggested that the endorsement test is still with us.” Semi-acknowledging the historical method is not enough, the Seventh Circuit unmistakably refrained from using the historical method.

It is unclear from the *Concord* opinion exactly why the Seventh Circuit failed to use the historical method in *Town of Greece*. One reason could be that court thought the holiday show at issue was not a “historical” practice per se, unlike the custom of beginning legislative sessions with prayer. The show in *Concord* had a lot of moving parts, including a nativity scene, Bible readings, and Christmas songs. There was not one historical practice for the court to analyze. However, the court could have looked to the history of Christmas and celebrating holidays in the public sphere. For instance, Christmas is a national holiday where the whole country takes the day off, and the Seventh Circuit referred to it as a secular event.

The *Town of Greece* decision mandates courts to look to history when analyzing whether a violation of the Establishment Clause has occurred. Was the Seventh Circuit’s brief mentioning of the history of the winter solstice and the decades old holiday show enough to satisfy *Town of Greece*’s historical requirement? Likely not. The Christmas Spectacular in *Concord* may not perfectly be a “historical practice,” such as opening a legislative session with a prayer. This does not offer the Seventh Circuit an excuse to ignore recent Supreme Court precedent. At the very least, the Seventh Circuit should have acknowledged the historical approach explained why the court was not using it.

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154 *Id.*
155 *Id.* (citing Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012, 2031 n.4 (2017)).
156 *Town of Greece*, 572 U.S. 565 (2014)
D. Why the Seventh Circuit Should (and Must) Employ the Historical Approach

As a preliminary matter, it is important to recognize that the Supreme Court’s language surrounding the historical approach in Town of Greece is mandatory. The Court was clear that the Establishment Clause must be interpreted according to historical practices and understandings. Further, the Supreme Court emphasized that the historical approach is not limited to any particular factual context. Therefore, any Establishment Clause case that does not use a historical approach violates the Supreme Court’s rule.

The historical approach can help re-establish the Establishment Clause. The historical approach is not without its critics, and certainly is not a perfect test. The concurrence in Town of Greece noted that “history alone cannot carry the day,” suggesting that the historical approach should be combined with other Establishment Clause tests. But, the benefit of using the historical method in Town of Greece, in addition to other Establishment Clause tests, outweighs the consistent problems with the Lemon test. History can serve as a source of information and authority in Establishment Clause cases.

Looking to the use of history generally in American law, our system is a precedent-based system and the Constitution, a 231-year-old document, is the root of the Establishment Clause. The history of a practice can offer objectivity and authority. Using a historical method can also support the idea that some aspects of religion in government are acceptable. To some extent, it is impossible to remove all religion from politics. Further, a historical approach offers an external constraint on judicial subjectivity. As Erwin Chemerinsky

157 Id. at 566.
158 Id.
159 Id. at 566-67.
160 Id.
stated, judges “want very much to make it appear that their decisions are not based on their personal opinions, but instead are derived from an external source.”

Other jurisprudence surrounding constitutional amendments demonstrates the trend that the Court looks to history in evaluating constitutionality of practices. As the Court noted in United States v. Jones, to analyze the meaning of the Fourth Amendment, the Court must “assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.”¹⁶³ In evaluating the scope of the Sixth Amendment, the Court in Apprendi v. New Jersey looked to “the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.”¹⁶⁴ In the landmark Second Amendment case District of Columbia v. Heller, both the majority and the dissent of the Court used a historical approach in their opinions. Justice Scalia looked to “the history that the founding generation knew” when interpreting the meaning of the Second Amendment.¹⁶⁵ This trend towards reliance on the Bill of Rights’ history demonstrates that analysis on history is defined by what the Framers thought. Because the Court uses history in evaluating other constitutional amendments, it follows that the Court should do the same in analyzing the Establishment Clause.

But on the other hand, history cannot resolve all problems. New practices may not have a specific history for a court to analyze. For instance, the Sixth Circuit in Smith v. Jefferson Cty. Bd. of Sch. Comm’rs recognized that in the case at hand, the “pure historical

¹⁶³ 132 S. Ct. 945, 950 (2012) (analyzing whether attaching a GPS tracking device to a vehicle and monitoring the vehicles movement was a search in violation of the Fourth Amendment) (quoting Kyllo v. U.S., 533 U.S. 27, 34 (2001)).
¹⁶⁵ 554 U.S. 570, 598 (2008). In his dissent, Justice Stevens analyzed the “contemporary concerns that animated the Framers.” Id. at 642.
approach” was “of limited utility.” There are problems that the Framer’s might not have anticipated and historical practices may do little to enlighten courts. As the Supreme Court noted, “an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems.” The problem with relying on history is that the times change, and so should our outlook on governmental practices. Courts should not use history as a tool to legitimate governmental practices that are no longer acceptable and would violate the Establishment Clause.

But, the two-step test set forth in Town of Greece inherently takes this problem into account. If history cannot resolve the question, then courts may look to the endorsement, coercion, and purpose tests. The Supreme Court in Town of Greece overtly gave greater weight to history by mandating it be analyzed in Establishment Clause cases, and therefore courts must look to history. The language in Town of Greece directs lower courts to examine the history of a practice when evaluating whether there has been a violation of the Establishment Clause. If history can demonstrate that a practice is well-settled in

166 788 F.3d 580, 588 (6th Cir. 2015) (stating that [i]n cases like this one that cannot be resolved by resorting to historical practices, we do not believe that Town of Greece requires us to depart from our pre-existing jurisprudence.

167 Id. (citing Wallace v. Jaffree, 472 U.S. 38, 80 (1985) (O’Connor, J., concurring in the judgment)).


169 County of Allegheny v. ACLU, 492 U.S. 573, 603 (1989) (“However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government’s allegiance to a particular sect or creed .... The legislative prayers involved in Marsh did not violate this principle because the particular chaplain had ‘removed all references to Christ.’”).


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American history, no further test is necessary. But if history cannot resolve the issue, then courts may turn to the other Establishment Clause tests set forth by the Supreme Court.

CONCLUSION

Because *Town of Greece* did not explicitly overrule any of the previous Establishment Clause tests, they are still fair game for lower courts to cherry pick which one to use. What the Supreme Court has made clear is that history must be taken into account in Establishment Clause cases. When the Seventh Circuit decided *Concord*, it should have recognized the historical approach in *Town of Greece* and analyzed the history of the practice in regard to the Establishment Clause. By declining to do so, the court failed to follow Supreme Court precedent that prescribes courts to look to history in Establishment Clause cases. In the future, the Seventh Circuit must at the very least acknowledge the historical approach explained in *Town of Greece*, and if applicable, engage in a dialogue about whether a historical practice comports with the Establishment Clause.
GRIN AND “BARE” IT: THE SEVENTH CIRCUIT’S STAMP OF APPROVAL ON UNREASONABLE FOURTH AMENDMENT VIOLATIONS

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INTRODUCTION

When is a person’s expectation of privacy “reasonable?” In 1967, the Supreme Court held that an electronic listening recording device atop a public telephone booth was an unreasonable invasion of privacy.¹ Conversely, in 1979, the Court deemed a pen register (an electronic device that records dialed phone numbers from a particular line) on phone company property reasonable.² In 2001 and 2012, respectively, the Court reasoned that the use of an Agema Thermovision 210 thermal imaging device to detect rudimentary heat registers of a home was unreasonable,³ as was the use of a global-positioning-system (GPS) tracking device to chart an individual’s

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movements for twenty-eight days. And in 2018, the Supreme Court found that 127 days of cell-site location data (CSLI), obtained without a warrant, was unreasonable, too.

Determining reasonability is at the heart of Fourth Amendment analysis. Specifically, courts must ask: (1) whether an individual has exhibited an actual, subjective expectation of privacy; and (2) whether this expectation is one that society would recognize as being “reasonable.” Courts reject mechanical Fourth Amendment interpretations in favor of an approach that lends generous support to citizen privacy. Doing so ensures that no individual is “at the mercy of advancing technology.” Indeed, courts are bound to “take account of more sophisticated systems that are already in use or in development.”

Undoubtedly, the most pressing Fourth Amendment issue to arise in the advent of new technology is how information is obtained. This issue touches on the second part of the Fourth Amendment analysis: reasonability. Information is typically obtained by one of two means: a (1) court order; or (2) warrant. The most marked difference between the two is the standard that must be met. For example, a court order granted pursuant to the Stored Communications Act requires a showing of “reasonable grounds” for believing that records were “relevant and material to an ongoing investigation.” In contrast, a warrant requires probable cause, which is a significantly heightened standard from “reasonable grounds.” Courts have historically held that official intrusion into the private sphere, in violation of the Fourth Amendment, generally requires a warrant supported by probable

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6 Katz, 389 U.S. at 361 (Harlan, J., concurring).
7 Kyllo, 533 U.S. at 35.
8 Id.
9 Id. at 36.
11 Carpenter, 138 S. Ct. at 2221.
cause.\textsuperscript{12} In the Fourth Amendment context, this difference is marked, though in other areas of law the terms are used almost synonymously.\textsuperscript{13}

In \textit{Naperville Smart Meter Awareness v. City of Naperville}, the Seventh Circuit held that, although the City of Naperville conducted a Fourth Amendment search when it replaced analog energy meters with digital “smart meters,” Naperville residents did not have a reasonable expectation of privacy in the data the meters produced.\textsuperscript{14} Thus, the City of Naperville can now compile the smart meter data – every fifteen minutes – without a warrant and store it for up to three years.\textsuperscript{15} The Seventh Circuit set forth a cautionary posture, clarifying that decisions such as this are case-dependent and may vary due to factors such as the interval of data collection or accessibility of data to law enforcement.\textsuperscript{16} Yet, because smart meters allow for more efficient power restoration, reduce strain on the power grid, and lessen labor costs, the court found that the fifteen-minute data collection intervals were reasonable.\textsuperscript{17}

This comment will argue that the Seventh Circuit erred in rejecting the plaintiff’s request to file a third amended complaint and that any “balancing test” to determine the “reasonable” component of a Fourth Amendment inquiry is untenable and unconstitutional under strict scrutiny analysis. These issues are particularly pressing in consideration of technological advancement’s rapid pace. While reasonability may be context-specific, the precedent the Seventh Circuit established here is dangerous because it was made without considering the ramifications of massive data collection, regardless of the context of that collection. This comment will also argue that

\textsuperscript{12} Smith v. Maryland, 442 U.S. 735, 740 (1979).
\textsuperscript{13} See, e.g., 625 ILL. COMP. STAT. ANN. 5/2-118.1(b)(2) (West, Westlaw through P.A. 110-1114); People v. Fortney, 297 Ill. App. 3d 79, 87 (2d Dist. 1998) (citing People v. Brodeur, 189 Ill. App. 3d 936, 940 (2d Dist. 1989)).
\textsuperscript{14} Naperville Smart Meter Awareness v. City of Naperville, 900 F.3d 521, 524 (7th Cir. 2018).
\textsuperscript{15} Id. at 524.
\textsuperscript{16} Id. at 529.
\textsuperscript{17} Id.
defining distinct categories as to what is reasonable or unreasonable is an equally poor solution, as has been noted by other courts considering the matter.\footnote{Kyllo v. United States, 533 U.S. 27, 41-51 (2001). (Stevens, J., dissenting) (positing that the balancing test is a misinterpretation of Smith v. Maryland and United States v. Miller, as are suggestions to establish distinct categories of information that require a warrant and those that do not).} The Supreme Court, in accordance with Smith v. Maryland and United States v. Miller,\footnote{See generally Smith v. Maryland, 442 U.S. 735 (1979); United States v. Miller, 425 U.S. 435 (1976).} generally employs a quasi-balancing test to weigh each party’s respective interests in various types of information. This method forces courts to give credence to the “quality or quantity of information obtained” in a search, which has never been tied to the Fourth Amendment’s protections, whether in the home or elsewhere.\footnote{Kyllo, 533 U.S. at 27.} By making determinations as to what is protected in the home, including the nature of what is protected in the home based upon the intervals at which the data is collected, the Seventh Circuit compromised the Fourth Amendment protections the framers intended.\footnote{See infra notes 28–41.} The third-party doctrine is inapplicable where the City of Naperville required the installation of digital smart meters to replace the analog meters because the City is the only electric provider, further heightening the risk of private information disclosure.\footnote{Naperville Smart Meter Awareness v. City of Naperville, 900 F.3d 521, 526–27 (7th Cir. 2018).} Plainly put, residents were given no choice in this matter, and the repercussions of the Seventh Circuit’s ruling, against the will of the City of Naperville’s citizens, should not be taken lightly.

Section I of this comment will discuss the historical underpinnings of the Fourth Amendment, along with its protections as technology has continued to advance. Section II will discuss the background of Naperville Smart Meter Awareness v. City of Naperville, and how the Seventh Circuit reached its decision to deny the plaintiff’s request to file a third amended complaint. Section III

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\footnote{Kyllo v. United States, 533 U.S. 27, 41-51 (2001). (Stevens, J., dissenting) (positing that the balancing test is a misinterpretation of Smith v. Maryland and United States v. Miller, as are suggestions to establish distinct categories of information that require a warrant and those that do not).}
will discuss why the Seventh Circuit erred by reviewing precedent and policy considerations. Section III will also reveal why all courts, the Seventh Circuit included, should proceed with Fourth Amendment analysis on a case-by-case basis to safeguard constitutional privacy guarantees pursuant to strict scrutiny analysis.

I. THE FOURTH AMENDMENT

The Fourth Amendment guarantees “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searchses and seizures.”23 This right “shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”24 But, when is a search a “search?” And when is a search “unreasonable?”

Technological advancements have inarguably changed the purview of the Fourth Amendment’s reach, and in a confusing way. But, how did the courts arrive at this juncture? Traditionally, the Fourth Amendment applied to property interests by protecting against trespass.25 However, courts expanded this application to hold that the “principal” object of the Fourth Amendment is not the protection of property, but of privacy.26 This shift came about from judicial recognition that privacy should be protected from unreasonable invasions.27 Today, courts agree about the general test to apply to Fourth Amendment questions,28 but there is no obvious answer to when something is “reasonable.” This is especially true as technology continues to evolve, and at ever-increasing speeds.

23 U.S. CONST. amend. IV.
24 Id.
27 Warden, 387 U.S. at 305.
A. History, Interpretations, and Technological Challenges

The fundamental purpose of the Fourth Amendment “is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.” When it was enacted, the Fourth Amendment was in “response to the reviled ‘general warrants’ and ‘writs of assistance’ of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.” As technology advanced and the government gained access to areas traditionally concealed, particularly within the home, courts struggled to consistently and predictably “assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.” However, despite this ongoing struggle for uniform applicability, the Fourth Amendment unequivocally preserves privacy against the “uninvited ear” of governmental intrusion.

It is critical to understand the meaning of the term “search” for Fourth Amendment interpretation. While the Supreme Court has never adopted an official definition of the term, a search is generally understood as “some exploratory investigation, or an invasion and quest, a looking for or seeking out.” “A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way.” Generally speaking, looking at an area open to the public is not a “search.”

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32 People v. Richardson, 60 Ill. 2d 189 (1975); People v. Loveless, 80 Ill. App. 3d 1052 (3d Dist. 1980).
34 LAFAVE, supra note 33.
35 Id.
person only has a justified expectation of privacy with respect to the interior of his personal residence. However, what constitutes a “search” is fact-dependent in each case.

There are two approaches to Fourth Amendment protections: (1) a property-based approach; and (2) a privacy-based approach. The property-based approach is the traditional approach premised on trespass, which recognizes a privacy interest when the government physically intrudes on a person’s house, papers, or effects. In contrast, the privacy-based approach is the more modern trend where courts recognize that the Fourth Amendment extends beyond property rights and into other areas in which an individual has a reasonable expectation of privacy. In the modern approach, courts must ask “whether the complaining person had a reasonable expectation of privacy in the area invaded.” The privacy-based approach does not detract from the property-based approach; rather, it provides additional protections.

The most immediate issue facing courts today in the Fourth Amendment context is technology. After all, the Supreme Court has noted that one cannot mechanically interpret the Fourth Amendment because doing so would “leave the homeowner at the mercy of advancing technology.” Courts note that while some systems might be crude, the rule the Court adopts has to take account of sophisticated systems already in use or development. For example, in Kyllo v. United States, the Court found that the thermal imager used to scan a

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36 U.S. Const. amend. IV.
38 Id. (citing Florida v. Jardines, 569 U.S. 1, 5 (2013)).
40 Bonilla, 2017 IL App (3d) 160457, ¶ 13 (citing Jardines, 569 U.S. at 10–11; People v. Burns, 2016 IL 118973, ¶¶ 27, 45).
44 Id. at 38.
triplex, which displayed heat signatures in black (cool), white (hot), and shades of gray for everything in between, may have been rudimentary, but was technology that nevertheless demanded Fourth Amendment protections.45 Use of even a rudimentary thermal imager still constituted a “search” in need of protection.46 The Court reiterated this concept – that even rudimentary technology is technology that demands constitutional protection – on numerous occasions. Indeed, as Justice Brandeis noted in his dissent in Olmstead v. United States, this Court is obligated as “[subter] and more far-reaching means of invading privacy have become available to the Government,” to ensure that no scientific progress erodes Fourth Amendment protections.47

B. Supreme Court Precedent

In 1967, the Supreme Court decided Katz v. United States.48 The Katz Court held that Katz had a reasonable expectation of privacy in his communications in a phone booth and that the government, in electronically listening to and recording the conversation, made a “search and seizure” pursuant to the Fourth Amendment.49 In Katz, the Federal Bureau of Investigations (“FBI”) attached an electronic listening and recording device atop a public telephone booth where Katz placed calls.50 While the government argued that a public telephone booth is not a constitutionally protected area, the Court, setting forth that the Fourth Amendment protects people, and not places, determined that the location of the calls was immaterial.51 Pursuant to the plain language of the Fourth Amendment, location is irrelevant to the protections granted with the exception that people are

45 Id. at 29–30.
46 See infra notes 66–73.
49 Id.
50 Id. at 348.
51 Id. at 351.
always to be secure in their houses. Moreover, due to the privacy-based shift in Fourth Amendment interpretation, it extended to “the recording of oral statements overheard without any ‘technical trespass under . . . local property law.’” Whether a trespass occurred was irrelevant, and the Court found that there was an intrusion into a “constitutionally protected area.”

Almost a decade later, the Court decided United States v. Miller. Miller charged the Court with determining whether a bank depositor had a protectable Fourth Amendment interest in his bank records. The Court found that the bank depositor did not have a reasonable expectation of privacy in bank records, here consisting of microfilms, checks, and deposit slips, because they were not “private papers.” Instead, they were business records. This case addressed third-party doctrine as well, finding that the Fourth Amendment does not prohibit obtaining information that has been revealed to a third party. Here, the depositor assumed the risk that the information would be conveyed to the Government by revealing that information to another entity. Any subpoenas issued to the bank to obtain the depositor’s records, therefore, posed no threat to the depositor’s Fourth Amendment rights.

Later, in Smith v. Maryland, the Court determined whether installation and use of a pen register at the phone company’s central office to record numbers dialed from the petitioner’s home phone...
constituted a “search” within the meaning of the Fourth Amendment.62 The Court reasoned that not only is it doubtful that phone users have an expectation of privacy in numbers dialed,63 but that because the pen register was installed on phone company property, the plaintiff could not claim that any of his property was invaded or that there was an intrusion into a “constitutionally protected area.”64 The Court reasoned that individuals know that phone companies generally keep records of numbers dialed, especially because at least some of these numbers dialed are set forth on monthly bills.65 Therefore, there was no reason to expect that numbers would not be recorded.66 Thus, the actions were not even considered a “search,” and the records were available without a warrant.67

_Kyllo v. United States_ stands for the proposition that where the government uses a device not in general public use to explore the details of a home “unknowable without physical intrusion,” the surveillance is a “search” and is presumptively “unreasonable” without a warrant.68 This is pertinent for _Naperville Smart Meter Awareness_ because it involved a home invasion in the context of advancing technology. Agents used a thermal-imaging device to scan Kyllo’s triplex to determine whether the heat emanating from it was consistent with lamps generally used for indoor marijuana growth.69 Both the majority and dissent set forth a proposed standard as to “whether the technology offers the functional equivalent of actual presence in the area being searched.”70 However, the majority specifically focused on

63 _Id._
64 _Id._ at 741.
65 _Id._ at 745.
66 _Id._
67 _Id._ at 745–46.
69 _Id._ at 27.
70 _Id._ at 39.
retaining the Fourth Amendment’s original meaning. The Court did so by holding that the government conducts a “search” when it uses a device not in general public use to explore details of a home that would otherwise be unknowable, which is presumptively unreasonable without a warrant. The dissent notably determined that, because the infrared camera passively measured heat emitted from a home’s exterior surfaces, the plaintiff could not have a reasonable expectation of privacy in that information. This “through-the-wall” theory of what constitutes a search suggested that anything leaving the home, like an aroma, would not be a search, nor would it be reasonable for an individual to expect this fact to remain private. The dissent likewise expressed concern with the majority’s characterization of whether something is “in general public use,” a factor that disappears once the technology breaches the public sphere.

In 2012, the Supreme Court held that installation of the global positioning system (“GPS”) tracking device on the plaintiff’s Jeep monitoring the vehicle’s movements was a Fourth Amendment “search.” Jones was in possession of his Jeep at all times, and the agents, although legally authorized to install a tracking device on the vehicle within ten days of issuance while the vehicle was located in the District of Columbia, installed the device on the vehicle on the eleventh day, and in Maryland. Justice Alito, concurring, specifically noted that it was the successful functioning of the GPS device that constituted a search and not the placement of the GPS device itself. It is worth noting that United States v. Jones overturned United States

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71 Id. at 40 (stating that the Fourth Amendment “is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted” (quoting Carroll v. United States, 267 U.S. 132, 149 (1925))).
72 Kyllo, 533 U.S. at 27.
73 Id. at 41 (Stevens, J., dissenting).
74 Id. at 43–44.
75 Id. at 47.
77 Id. at 402–03.
78 Id. at 420–21 (Alito, J., concurring).
v. Garcia. In Garcia, the Seventh Circuit held that, where police attached a GPS tracking device to a suspect’s car, doing so was not a search, nor was it a seizure of the car. The Seventh Circuit held that it was not a seizure because the device did not affect the car’s driving qualities, draw energy from the car, or otherwise “seize” anything from the car. The Seventh Circuit also held that the GPS placement was not a search because the GPS was merely a substitute for a public activity: following a car on a public street. However, the Jones Court found that the car was an “effect” within the meaning of the Fourth Amendment, and the warrantless GPS placement on the Jeep was a physical intrusion that violated the Fourth Amendment.

In its most recent interpretation of the Fourth Amendment, the Court analyzed two overlapping lines of cases; those that implicate a person’s expectation of privacy in: (1) physical location; and (2) information voluntarily turned over to third parties. In Carpenter v. United States, wireless carriers produced cell-site location information (“CSLI”), providing the government with 12,898 location points that catalogued Carpenter’s movements over 127 days. The government obtained this information via court orders pursuant to the Stored Communications Act after setting forth “specific and articulable facts showing that there are reasonable grounds to believe” that the records sought “are relevant and material to an ongoing criminal investigation.

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79 474 F.3d 994 (7th Cir. 2007).
80 Id. at 996–97.
81 Id. at 996.
82 Id. at 997.
85 See generally Jones, 565 U.S. at 400.
86 See United States v. Miller, 425 U.S. 435 (1976) (finding there is no expectation of privacy in financial records held by a bank); Smith v. Maryland, 442 U.S. 735 (1979) (finding there is no expectation of privacy in the records of dialed telephone numbers conveyed to a telephone company).
87 Carpenter, 138 S. Ct. at 2209.
investigation. The government used the information to produce maps placing Carpenter’s phone near four of the charged robbery locations. The Court of Appeals for the Sixth Circuit affirmed the district court, holding that Carpenter lacked a reasonable expectation of privacy in the information given to the FBI because he had voluntarily shared that information with his cell phone provider, a third party.

The Carpenter Court likened the CSLI data to GPS data, like that at issue in Jones, because in both instances, it is “detailed, encyclopedic, and effortlessly compiled.” However, the Carpenter Court found that the CSLI data was of greater concern than the GPS data because CSLI data involves “the individual continuously revealing his location to his wireless carrier.” A defendant traveling over public streets may “voluntarily convey[] to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction.” In United States v. Knotts, the government used a beeper merely to assist in tracking a vehicle that was also being followed via air search. However, Knotts was in contrast to Carpenter because the CSLI data collected was the only means used to track Carpenter. The movements in Knotts were on public roads, and the beeper was placed to assist law enforcement in tracking the movements, and on a short-term basis. Carpenter “is not about ‘using a phone’ or a person’s movement at a particular time,” but is “about a detailed chronicle of a person’s physical presence compiled

88 Id. at 2212.
89 Id. at 2212–13.
90 Id. at 2213.
91 Id. at 2216.
92 Id.
94 Id.
96 Knotts, 460 U.S. at 284–85.
every day. Thus, the privacy concerns at issue in Carpenter are greater than those in Smith or Miller.

The Court took greater concern with the proposition that CSLI is “shared” with the wireless carrier within the meaning of the third-party doctrine. Specifically, the Court found that CSLI is not shared like typical information because cell phones and their services are “such a pervasive and insistent part of daily life” that carrying one is “indispensable to participation in modern society.” There is no “affirmative act” a user takes to share information with a cellular provider; powering up means that sharing is constant and the phone will automatically generate CSLI based on calls, texts, e-mails, and other data connections. Thus, a person’s “options” are to (1) disconnect a phone from the network, or (2) to “unvoluntarily” leave a trail of location data. For these reasons, and what can only be considered as Carpenter’s “unvoluntarily” shared data trail, the Court declined to extend the third-party doctrine principles behind Smith and Miller to Carpenter.

It is important to note that Carpenter is a narrow decision. Smith and Miller remain good law, and the Carpenter decision is not intended to “call into question conventional surveillance techniques and tools, such as surveillance cameras.” Moreover, because CSLI is “an entirely different species of business record” because it implicates basic Fourth Amendment concerns about arbitrary government power much more directly than corporate tax or payroll ledgers,” a warrant theoretically would have been required to obtain

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97 Carpenter, 138 S. Ct. at 2220.
98 Id.
99 Id.
100 Id. (quoting Riley v. United States, 134 S. Ct. 2473, 2484 (2014)).
101 Carpenter, 138 S. Ct. at 2220.
102 Id.
103 Id.
104 Id.
105 Id.
the CSLI in this matter.\textsuperscript{106} The Court set forth that “[i]f the third-party doctrine does not apply to the ‘modern-day equivalents of an individual’s own “papers” or “effects,”’ then the clear implication is that the documents should receive full Fourth Amendment protection.\textsuperscript{107} Notably, there are case-specific exceptions to the warrantless search of an individual’s CSLI, such as when there is a need to pursue a fleeing suspect.\textsuperscript{108} Summarily, the Court declined to grant the state unrestricted access to CSLI due to its revealing “depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection.”\textsuperscript{109} The third-party doctrine has no bearing on whether the records in \textit{Naperville Smart Meter Awareness} deserved Fourth Amendment protection because there is no third party.

From the \textit{Katz} decision in 1967 to the \textit{Carpenter} decision in 2018, two, vital Fourth Amendment frameworks of analysis hold true. The first is that location is relevant to the extent that there was a trespass. In \textit{Smith}, the Court considered placement of the pen register tap to rule out trespass, specifically considering whether the citizen’s “‘property’ was invaded or [whether] police intruded into a ‘constitutionally protected area.’”\textsuperscript{110} The \textit{Smith} Court then clarified the distinction between the property-based Fourth Amendment right and a privacy-based right, distinguishing that the issue is whether the government infringed “a legitimate expectation of privacy.”\textsuperscript{111} The court aptly referred to this as the \textit{Katz} analysis, and rightfully so: it was the first of a long line of cases that would further distinguish property- and privacy-based Fourth Amendment rights.\textsuperscript{112} The second framework is that the Fourth Amendment protects people, not places.\textsuperscript{113} The \textit{Katz} Court did not consider it dispositive where a phone conversation

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\item[106] \textit{id.} at 2222.
\item[107] \textit{id.}
\item[108] \textit{id.} at 2223.
\item[109] \textit{id.}
\item[110] Smith v. Maryland, 442 U.S. 735, 741 (1979).
\item[111] \textit{id.}
\item[112] \textit{id.}
\end{enumerate}
\end{footnotesize}
occurred; it only mattered that the conversation occurred and that it was recorded.\textsuperscript{114} That was because “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”\textsuperscript{115} Again, this rendered location irrelevant for a privacy-based interest because a person may knowingly expose something to the public in his home – an area explicitly protected by the Fourth Amendment – meaning that anything knowingly revealed could not reasonably be expected to remain private.

II. \textit{Naperville Smart Meter Awareness}

In \textit{Naperville Smart Meter Awareness}, the Seventh Circuit determined whether the City of Naperville’s data collection from the electric public utility – which collected data in fifteen-minute intervals – was reasonable under the Fourth Amendment of the United States Constitution and Article I, § 6 of the Illinois Constitution.\textsuperscript{116} The City of Naperville, without the consent of its citizens, installed digital “smart meters” to replace traditional, analog meters on all residences to upgrade its power grid.\textsuperscript{117} Smart meters show the amount of electricity being used and when it is used.\textsuperscript{118} This can reveal information about what is happening inside the home, including energy-consumption patterns.\textsuperscript{119} With this information, and the growing catalogue of appliance load signatures, researchers can predict which appliances are present in a home and when they are

\textsuperscript{114} Id. (deeming it unimportant that the conversation at issue occurred in a “public” area (the telephone booth) and that it is irrelevant, for Fourth Amendment purposes, as to where certain activities took place).

\textsuperscript{115} Katz, 389 U.S. at 347.

\textsuperscript{116} Naperville Smart Meter Awareness v. City of Naperville, 900 F.3d 521, 524–25 (7th Cir. 2018).

\textsuperscript{117} Id. at 524.

\textsuperscript{118} Id.

\textsuperscript{119} Id. (citing Rashed Mohassel et al., \textit{A Survey on Advanced Metering Infrastructure}, 63 Int’l J. Electrical Power \& Energy Sys. 473, 478 (2014)).
used. The accuracy and nature of predictions depend on how often data is collected, as well as the sophistication of the technology used to analyze this data. Data from the meters is stored for up to three years.

Naperville Smart Meter Awareness is a citizens’ group that brought suit over concern that the meters revealed intimate details of citizens within their homes, such as when they are home, sleeping and eating routines, and what is kept and used in the home and when. The Seventh Circuit held that the data collected was a search even though it was necessary to draw inferences from the data to determine any personal information about what was actually occurring in a home. The Seventh Circuit likened the search to that in Kyllo, where officials drew inferences from the home’s thermal energy to conclude that special lamps that grow marijuana were being used. However, the Seventh Circuit noted that the smart meter issue is more invasive than rudimentary thermal images, supporting its finding that collection of the data was a search.

Although the Seventh Circuit found, without hesitation, that the smart meter data collection was a search, it deemed this search reasonable. The court partly based its’ opinion on the City of Naperville’s amended “Smart Grid Customer Bill of Rights,” which specifies that without a warrant or court order, the public utility may not provide customer information to third parties. The third-party doctrine establishes that individuals have reduced expectations of

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120 Naperville Smart Meter Awareness, 900 F.3d at 524 (citing A. Prudenzi, A Neuron Nets Based Procedure for Identifying Domestic Appliances Pattern-of-Use from Energy Recordings at Meter Panel, 2 IEEE POWER ENGINEERING SOC’Y WINTER MEETING 941 (2002)).
121 Naperville Smart Meter Awareness, 900 F.3d at 524.
122 Id.
123 Id.
124 Id. at 526–27.
125 Id.
126 Id. at 527.
127 Id. at 527–29.
128 Id. at 528.
privacy “in information knowingly shared with another.”\textsuperscript{129} The City of Naperville argued that by entering into a “voluntary” relationship to purchase electricity from the city, citizens sacrificed any expectation of privacy in smart meter data.\textsuperscript{130} The Seventh Circuit was not persuaded by this argument, and found that because the City of Naperville provides electricity through its public utility, there was no third party involved.\textsuperscript{131}

Because energy usage itself is not a crime, the court deemed the privacy interests in question in \textit{Naperville Smart Meter Awareness} to be more insignificant than they are in cases where regulatory law violations are criminally enforced.\textsuperscript{132} The court found that the government’s interest in the data collection was substantial, where “the modernization of the electrical grid is a priority for both Naperville . . . and the federal government,” as it allows “utilities to restore service more quickly,” “offer[s] time-based pricing” by reducing strain on the grid, and reduces the utilities’ labor costs.\textsuperscript{133}

Notably, the Seventh Circuit included a cautionary note immediately preceding its conclusion. The court advised that its holding was dependent on the particular circumstances of the case before it, stating that its conclusion might change “[w]ere a city to collect the data at shorter intervals” or “if the data was more easily accessible to law enforcement or other city officials outside the utility.”\textsuperscript{134} Thus, while there was no doubt that this information was a search, the “government interests in the program, and the diminished privacy interests at stake” rendered the search wholly reasonable without a warrant.\textsuperscript{135}


\textsuperscript{130} \textit{Naperville Smart Meter Awareness}, 900 F.3d at 527.

\textsuperscript{131} \textit{Id}.

\textsuperscript{132} \textit{Id}. at 528 (finding that the warrantless search of private property is “unreasonable” and that the resident had a right to deny warrantless entry by the inspector (discussing Camara v. Mun. Court of S.F., 387 U.S. 523, 530 (1967))).

\textsuperscript{133} \textit{Naperville Smart Meter Awareness}, 900 F.3d at 528–29.

\textsuperscript{134} \textit{Id}. at 29.

\textsuperscript{135} \textit{Id}.
III. SEVENTH CIRCUIT COMPLICATIONS

During oral argument in Carpenter, Nathan Freed Wessler (“Mr. Wessler”) of the American Civil Liberties Union noted the lower courts’ struggle to apply Miller and Smith to sensitive, digital age records. Specifically, Mr. Wessler noted that the five courts of appeals are “virtually begging [the Supreme] Court to provide guidance for how to protect these sensitive, digital records that the Court simply could not have imagined four decades ago. Mr. Wessler continued, proposing that certain types of information, “like heart rate data from a smart watch, or fertility tracking data from a smartphone app, information about the interior of a home, for example, from a smart thermostat that knows when the homeowner is at home and perhaps what room they’re in,” could be categorized into records that either are or are not protected. Thus, Mr. Wessler proposed that it is consistent with the role of the lower courts to take an interpretative principle from the Supreme Court and apply it over time.

The Seventh Circuit’s landmark decision in Naperville Smart Meter Awareness is precedential in the Seventh Circuit, and other circuits have yet to decide similar issues. After all, in 2016 alone, electric utilities in the United States had about 70.8 million advanced (smart) meter installations, about 88 percent of which were residential consumer installations. Experts predict smart meter installation across the United States will reach 90 million by 2020.

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137 Id.
138 Id.
139 Id.
141 ADAM COOPER, THE EDISON FOUND.: INST. FOR ELEC. INNOVATION, ELECTRIC COMPANY SMART METER DEPLOYMENTS: FOUNDATION FOR A SMART GRID (Dec. 2017),
precedent established before more widespread smart meter dissemination will be of great importance in coming years. This is especially true where law enforcement will presumably turn to this technology for investigative purposes, most likely when it is in “general public use.” The Seventh Circuit’s decision, specifically in the government interest balancing analysis, is dangerous, if not detrimental, to this vital precedent. The Seventh Circuit’s reasoning plainly ignores constitutional commands to apply strict scrutiny where a fundamental right is concerned, too. This arbitrary analysis, coupled with the potential, virtually unlimited uses for smart meter data in law enforcement, highlights the dangers lurking in the Seventh Circuit’s Naperville Smart Meter Awareness decision.

A. Precedential History

“The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained.” By way of example, the Supreme Court has held that the physical invasion of the home, “by even a fraction of an inch,” is too much. All details are intimate details in a home, “because the entire area is kept safe from prying government eyes.” Thus, any details of the home are intimate details, regardless of where or the degree to which they are detected. As was set forth in greater detail above, Fourth Amendment protections do not apply where intimate details are readily observable to the public. For example, when a person travels


143 Id. at 37.
145 Kyllo, 533 U.S. at 37.
146 See United States v. Karo, 468 U.S. 705, 735 (1984) (finding that a “search” began when Karo brought the can of ether into his home as it was “concealed from view”); Arizona v. Hicks, 480 U.S. 321 (1987) (finding a search where the officers searched for the serial number on stereo equipment in “plain view” in the alleged suspect’s home).
on a public road, and those movements are available without any technology or surveillance, there is no reasonable expectation of privacy in those movements.\textsuperscript{147} If a person knowingly exposes something in the home to the public, even though the Fourth Amendment explicitly protects the home, there is no reasonable expectation of privacy in those items or effects, either.\textsuperscript{148}

It is dangerous to propose any bright line, categorical rule of what constitutes an “unreasonable” search based on discrete categories of information. After all, the Court has historically, and repeatedly, held that a search is a search when it reveals any details within the home.\textsuperscript{149} This is even more precarious when one considers the rapidly advancing nature of technology. Even at a foundational level, there is no necessary connection between what is “intimate” and “the sophistication of surveillance equipment.”\textsuperscript{150} On point with \textit{Naperville Smart Meter Awareness} is the Supreme Court’s prior finding that it is insignificant – in terms of the intimacy of information – whether technology reveals “what hour each night the lady of the house takes her daily sauna and bath” or “nothing more intimate than the fact that someone left a closet light on.”\textsuperscript{151} Undoubtedly, courts will differ in what they subjectively find to be “intimate.”\textsuperscript{152} Therefore, so will those courts’ findings as to what is considered the reasonable subject of a search, which may or may not be permissible without a warrant. Such subjectivity is dangerous, especially when new technology reveals increasingly precise data beyond a mere light being left on.\textsuperscript{153}

Mr. Wessler’s suggestion that certain data – especially information from a smart thermostat – can be placed in a discrete

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\item\textsuperscript{147} United States v. Knotts, 460 U.S. 276, 281 (1983) (“A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”).
\item\textsuperscript{148} Katz v. United States, 389 U.S. 347, 351 (1967).
\item\textsuperscript{149} See \textit{supra} notes 68-75.
\item\textsuperscript{150} \textit{Kyllo}, 533 U.S. at 38.
\item\textsuperscript{151} \textit{Id.} at 38–39.
\item\textsuperscript{152} \textit{Id.} at 38.
\item\textsuperscript{153} \textit{Id.}
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category is shortsighted. Information from a thermostat is information from within a home that would not otherwise be known to anyone outside of the home without a search. Naperville Smart Meter Awareness raises analogous issues. Smart meters can record data in a range of intervals, but those in the City of Naperville record information every fifteen minutes. The information can reveal not only what is left on in a home, such as a closet light, but may also uncover other details within a home that would otherwise remain anonymous. To qualify the City of Naperville’s residents’ Fourth Amendment rights with a “government interest analysis” in light of the “particular circumstances of this case” contradicts precedent, violates mandated constitutional standards of review (strict scrutiny), and establishes dangerous precedent for the judiciary moving forward.

B. Policy Implications

The Carpenter Court grappled with a person’s expectation of privacy in today’s digital age. Ultimately, the Carpenter Court declined to extend Smith and Miller to cell site location data. It did so because of the “unique nature of cell phone location records,” finding Smith and Miller inapplicable regardless of “[w]hether the Government employs its own surveillance technology, as in Jones, or leverages the technology of a wireless carrier.” Cell phone records contain the “privacies of life,” and tracking is “remarkably easy,

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154 See supra note 138.
155 Naperville Smart Meter Awareness v. City of Naperville, 900 F.3d 521, 524 (7th Cir. 2018).
158 Id.
159 Carpenter, 138 S. Ct. at 2217.
160 Id.
cheap, and efficient compared to traditional investigative tools.”

Further, and analogous to GPS information, “the time-stamped data provides an intimate window into a person’s life, revealing not only his particular movements, but through them his ‘familial, political, professional, religious, and sexual associations.’”

_Carpenter_ specifically implicated the third-party doctrine first set forth in _Smith_ and _Miller_. _Smith_ and _Miller_ held that individuals lack “any protected Fourth Amendment interests in records that are possessed, owned, and controlled by a third party.” The _Carpenter_ Court declined to extend the third-party doctrine to the CSLI records, finding that, in the “rare case where the suspect has a legitimate privacy interest in records held by a third party,” a warrant is required for a “reasonable” search.

The _Carpenter_ Court furthered this in stating that “[i]f the third-party doctrine does not apply to the ‘modern-day equivalents of an individual’s own “papers” or “effects,’” then the clear implication is that the documents should receive full Fourth Amendment protection.” Indeed, the _Jones_ Court, just years ago in 2012, reconsidered the premise that an individual has no reasonable expectation of privacy in voluntarily disclosed information. The Court found this approach ill-suited to the digital age, “in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.” This includes disclosure to online retailers of something as simple as the “books, groceries, and medications” that

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162 _Carpenter_, 138 S. Ct. at 2218.
164 _Carpenter_, 138 S. Ct. at 2219.
165 _Id._ at 2260 (Kennedy, J., dissenting).
166 _Id._ at 2211 (majority opinion).
167 _Id._
169 _Jones_, 565 U.S. at 417.
individuals purchase.\textsuperscript{170} Notably, the court addresses Justice Alito’s point regarding how some may find the “tradeoff” of privacy for convenience “worthwhile” or that the decrease in privacy is simply “inevitable.”\textsuperscript{171} Yet, the Court found that sharing information, no matter how mundane, simply by using a phone or the Internet, does not render a search of that information reasonable.\textsuperscript{172} Thus, much of the debate regarding modern applications of third-party doctrine, though not directly at issue in \textit{Carpenter}, is policy-focused on what level of privacy is expected in today’s society.

To that end, the \textit{Jones} Court specifically suggested that if change is warranted, it should come from the judicial branch.\textsuperscript{173} Technology changes dramatically over time. Because of this, the Court found that “[a] legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.”\textsuperscript{174} The same can be said about smart meter technology. The smart meter movement is rapidly growing.\textsuperscript{175} As more Americans are affected by the technology, and the technology becomes increasingly sophisticated and intrusive, attitudes as to what is actually “disclosed” through use of electric utilities are likely to change.

This is illustrative of the primary issue in \textit{Naperville Smart Meter Awareness}: smart meters are the next major iteration of intrusive home technology, and public opinion is likely to change as the technology grows more sophisticated. Further, smart meters are not limited to electric utilities; gas companies have also begun implementing use of the technology. Thus, it is unsound for the judiciary to set precedent in an area that is volatile and subject to change. Moreover, the Seventh Circuit’s treatment of the “reasonable” issue – revolving around

\textsuperscript{170} \textit{Id.}

\textsuperscript{171} \textit{Id.} at 418.

\textsuperscript{172} \textit{Id.}

\textsuperscript{173} \textit{Id.} at 429–30.

\textsuperscript{174} \textit{Id.}

\textsuperscript{175} \textit{See supra} notes 140-141.
infrastructural priorities and costs – should not undermine what constitutes a “reasonable” search.

This calls into question how Fourth Amendment privacies can be reconciled with municipal needs. The City of Naperville’s citizens were given no voice in the smart meter upgrade, nor could they take their electrical needs to another company because the municipality is the sole electric provider. Thus, there are competing interests between citizen privacy and government interests. There are two plausible ways to reconcile the two with the Fourth Amendment: (1) citizens would presumably need to voluntarily consent to smart meter installation (and therefore freely share their usage data); or (2) a court would have to find that there is no reasonable expectation of privacy in the data. Yet, it would be almost impossible for a court to fulfill that second task, provided that the data would not exist but for the technology itself. Moreover, the data reveals intimate details within a home that, absent the smart meters, would not be available to utility providers or, potentially, local law enforcement. The smart meter data reveals “intimate details of the home” within the meaning of Fourth Amendment precedent, and without voluntary consent, it is difficult to see how citizens would not have a reasonable expectation of privacy in those intimate details.176

A bright line rule of what is “reasonable,” or any attempts at a sliding scale approach that weighs parties’ interests against one another, are ill-conceived, impractical, and lack a foundation in Fourth Amendment jurisprudence. In his Carpenter dissent, Justice Kennedy noted that the Court found that officials crossed “a constitutional line” by obtaining more than six days of cell-site records.177 He characterized this finding as “illogical” and something that will “frustrate principled application of the Fourth Amendment” in “vital law enforcement operations.”178 While Justice Kennedy’s concerns may not yet be true of smart meter data, court application of the Fourth

178 Id.
Amendment is intended to anticipate major technological change.\footnote{Id. (quoting Olmstead v. United States, 277 U.S. 438, 473–74 (1928)).} As such, setting untenable precedent now regarding how and when a Fourth Amendment search is reasonable, and the factors applicable to the same, is ill advised. The Seventh Circuit’s holding generally permits utility providers, including the City of Naperville, to amass intimate details regarding its customers’ homes and to store the data for up to three years without customer consent.\footnote{Naperville Smart Meter Awareness v. City of Naperville, 900 F.3d 521, 524 (7th Cir. 2018).} Courts almost universally consider the “slippery slope” argument, refusing to set precedent where it could harm future plaintiffs through generalizations and expansions of precedential principles. The Seventh Circuit’s analysis and holding in \textit{Naperville Smart Meter Awareness} is threatening for this reason.

Even more troubling is what the Seventh Circuit does not discuss: the implications for permitting this amassing of data. Though there are no criminal charges at issue in \textit{Naperville Smart Meter Awareness}, like those in \textit{Carpenter}, the implications for the use of this data in a criminal investigation remain operative. After all, what is to stop law enforcement from, after years of data collection, accessing this data as part of an ongoing investigation? Without the smart meter data, there would be no data detailing intimate usage patterns within a home. And, because the data can hypothetically be stored for years, the precedent here will intrusively alter law enforcement’s access to information that may lead to convictions whereas before, that information did not exist. The City of Naperville’s citizens were not given a choice in whether they had a smart meter installed. As such, the forced installation of the smart meters, which store information that could, at an undeterminable future date, be used as part of an investigation is the real question the court should consider in \textit{Naperville Smart Meter Awareness}. The Seventh Circuit even cautioned that the holding could be different depending on the accessibility of the data at issue to law enforcement.\footnote{Id. at 529.} Without a
crystal ball, there is no way of knowing how the information may be used at a future date. However, it is clear that today, the Seventh Circuit’s holding plainly violates Fourth Amendment rights and uses a factor-based interest analysis to hold that government interests outweigh fundamental liberties granted in the Bill of Rights.

C. Proposed Change/Analysis

Fourth Amendment rights weigh in favor of the citizens and shield them from law enforcement and other parties with “arbitrary power” that might wrongfully obtain access to certain records.182 The Seventh Circuit justified the City of Naperville’s collection of electric usage in fifteen-minute intervals because smart meters provide for more efficient power restoration, reduce strain on the power grid, and reduce labor costs.183 Weighing these interests against one another, and qualifying the holding with notes as to how minor differences in fact – such as the interval of data collection – may affect the holding is akin to the distinction Justice Kennedy set forth in Carpenter.184 After all, smart meter technology is still in its early stages.185 Thus, like the thermal imaging technology at issue in Kyllo, which, though rudimentary at the time, still constituted an unreasonable search, the more advanced data available via smart meters should follow the same logic.186 After all, the underlying Act – the American Recovery and Reinvestment Act of 2009 (“Recovery Act”) – is not yet a decade old. Thus, the Seventh Circuit is setting precedent in an area where the technology is arguably not yet in “general public use.”187

183 Naperville Smart Meter Awareness, 900 F.3d at 528–29.
184 Carpenter, 138 S. Ct. at 2234 (Kennedy, J., dissenting).
187 Kyllo, 533 U.S. at 27.
The primary issue with the Seventh Circuit’s holding in *Naperville Smart Meter Awareness* is the court’s attempt to draw the same, fine line of what is “reasonable,” as the *Carpenter* Court did. By way of example, the Seventh Circuit held, based off of subjective factors, that fifteen-minute interval utility data collection was reasonable when weighed against substantial government interests.\(^{188}\) The court focused on the City of Naperville’s interests, along with the Federal Government’s interests, in updating the power grid based on the 2009 Recovery Act.\(^{189}\) Yet, the court provided other justifications for its holding relating to consumers, who were given no legitimate choice whether their traditional meters were upgraded.\(^{190}\) For example, the court emphasized that smart meters allow quicker utility restoration after an outage and time-based pricing.\(^{191}\) The court further provided that the City of Naperville could have avoided the controversy altogether “by giving its residents genuine opportunity to consent to the installation of smart meters, as many other utilities have.”\(^{192}\)

This analysis, coupled the phrasing of the *Naperville Smart Meter Awareness* test, is a weaker version of the strict scrutiny standard that must be used when a fundamental right is at issue.\(^{193}\) The Fourth Amendment, as part of the Bill of Rights, confers fundamental rights to citizens of the many states through the Fourteenth Amendment.\(^{194}\) Thus, strict scrutiny should be applied.\(^{195}\) This means that there must be a compelling state interest, the legal provision must be narrowly tailored to accomplish that interest, and the legal provision must

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\(^{188}\) *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521, 528–29 (7th Cir. 2018).

\(^{189}\) *Id.* at 524.

\(^{190}\) *Id.*

\(^{191}\) *Id.* at 528.

\(^{192}\) *Id.* at 529.

\(^{193}\) *In re R.C.*, 195 Ill. 2d 291, 303 (Ill. 2001).

\(^{194}\) U.S. CONST. amend. XIV.

\(^{195}\) *In re R.C.*, 195 Ill. 2d at 303.
accomplish that interest by the least restrictive means available.\textsuperscript{196} The Seventh Circuit reasoned along different parameters, finding that the “search,” here the collection of smart meter data, must be “reasonable.”\textsuperscript{197} Yet, nowhere in the opinion does the Seventh Circuit mention that the City of Naperville and Federal Government had a “compelling” interest in installation of the meters. Instead, the Seventh Circuit weighed citizen privacy interests with the government’s interest in data collection,\textsuperscript{198} holding that the benefits stack in the favor of the government’s interest and, that because “the search is unrelated to law enforcement, is minimally invasive, and presents little risk of corollary criminal consequences,” it was reasonable.\textsuperscript{199} This less rigorous standard supports the Seventh Circuit’s holding while obliterating fundamental rights. An interest analysis in any Fourth Amendment context does not appreciate the scope and importance of what is at stake, something markedly absent from the Seventh Circuit’s opinion and consideration of this matter.

Thus, the crux of the court’s holding is based on consumer-focused factors, all while Naperville Smart Meter Awareness’ primary complaint is that there cannot be a voluntary disclosure of this information to the utility provider because citizens were given no meaningful choice in the installation of the smart meters.\textsuperscript{200} It is counterintuitive for a court to model a holding on consumer-focused interests when consumers are the individuals objecting to this data collection. This undermines Fourth Amendment protections and precariously overlooks what will become increasingly sensitive data as smart meter technology advances, shorter intervals are recorded, or the data is used by law enforcement with increasing regularity. Because \textit{Naperville Smart Meter Awareness} focused solely on the collection of this data in the ordinary course of business, any criminal implications

\textsuperscript{197} \textit{Naperville Smart Meter}, 900 F.3d at 527–29.
\textsuperscript{198} \textit{id.}
\textsuperscript{199} \textit{id.} at 529.
\textsuperscript{200} \textit{id.} at 527.
likely to arise in these other situations are not yet at issue. However, inaction unless and until a case arises where smart meter data is used in a criminal matter is nonsensical. Constitutional rights were violated, and these rights should be addressed before smart meters proliferate and utility companies begin amassing this data. This further emphasizes the dangers of the Seventh Circuit opinion, as the court was not overly protective of intimate details – data from within the home and not readily available without smart meter technology.201

Mr. Wessler’s suggestion that certain types of searches are “reasonable” or “unreasonable” without a warrant is similarly tenuous.202 In fact, his suggestion that thermostat data is inclusive of what can be properly categorized203 as either reasonable or unreasonable stands in contradiction to longstanding case law.204 Any data pertaining to the interior of a home that would be unavailable without the use of some technology to collect said data constitutes a search.205 To find that any category of data is reasonable without a warrant ignores the particular facts and circumstances of any case that comes before the court. This is something the Seventh Circuit emphasized as critical in its Naperville Smart Meter Awareness analysis.206 For example, had the intervals been shorter, the Seventh Circuit’s holding in Naperville Smart Meter Awareness might have been different.207 Enacting specific categories is problematic for these

201 See United States v. Karo, 468 U.S. 705, 735 (1984) (finding that a “search” began when Karo brought the can of ether into his home as it was “concealed from view”); Arizona v. Hicks, 480 U.S. 321 (1987) (finding a search where the officers searched for the serial number on stereo equipment in “plain view” in the alleged suspect’s home).
203 Id.
205 Id.
206 Naperville Smart Meter Awareness v. City of Naperville, 900 F.3d 521, 529 (7th Cir. 2018).
207 Id.
reasons, and courts should exercise extreme caution when considering similar issues on a case-by-case basis.

IV. CONCLUSION

The Seventh Circuit is the first federal court to render a decision regarding smart meter data in the context of the Fourth Amendment. As this technology continues to proliferate and improve in accordance with the Recovery Act, more courts will likely rule on the same issue. Naperville Smart Meter Awareness presented a contentious question to the Seventh Circuit because citizens lacked any meaningful choice of whether intimate details within the home were disclosed to the City of Naperville as the sole electric utility provider. Generally speaking, the precarious weighing of various subjective factors and interests was, and will continue to be, unconstitutionally under-protective and problematic, as would be the enumeration of discrete categories of data that should or should not be protected.

The Fourth Amendment’s language does not change in the same manner that technology does, but a court’s interpretation of its basic protections, as applied to that technology, must. It is important that Fourth Amendment rights are granted the same protection in all contexts as technology proliferates, advances, and grows more intrusive in the home. All courts should proceed on a case-by-case basis in weighing smart meter data and whether a search of that data is reasonable. Where there are violations of the fundamental rights safeguarded by the Fourth Amendment, it is essential that courts use a strict scrutiny standard before eliminating those rights.

There will never be neat categories of technology that should or should not constitute a “reasonable search.” Whether a search is reasonable will be context-specific and depend on several factors, such as the length of the data collection or whether an individual knowingly revealed the data to a third party or otherwise. However, it should never be dependent on what it reveals, as a search of the home is a search of the home regardless of what data that search produces. Any lingering uncertainties must be addressed under strict scrutiny
analysis, which will almost certainly occur in the near future as smart meters continue to spread across the United States.
COMBATING THE OPIOID CRISIS: HOW A DISCRETIONARY DEPARTURE MAY ENCOURAGE APPLICATION OF THE “DEATH RESULTS” SENTENCING ENHANCEMENT

MARA A. SOMLO*


INTRODUCTION

Drug overdose deaths are rising at an alarming rate.1 In 2016 alone, 63,632 people died from a drug overdose in the United States.2 In 2017, drug overdose deaths grew to an estimated 72,000.3 And yet, these statistics just scratch the surface; the United States government does not track death rates for every drug.4 In March 2018, the National Institute on Drug Abuse declared the misuse of and addiction to

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2 Id.

3 Id.

4 Id. Opioids are the main driver of drug overdose deaths. Opioid Data Analysis and Resources, CENTERS FOR DISEASE CONTROL AND PREVENTION, (February 9, 2017), https://www.cdc.gov/drugoverdose/data/index.html. Every day, more than 115 people in the United States die after overdosing on opioids. Id.
opioids a national crisis. The Centers for Disease Control and Prevention estimated that the total “economic burden” of prescription opioid abuse alone is $78.5 billion a year, which includes the cost of healthcare, lost productivity, addiction treatment and criminal justice involvement.

On May 10, 2017, then United States Attorney General Jeff Sessions sent a memorandum to all federal prosecutors notifying them of a change in Department of Justice charging and sentencing policy. He instructed prosecutors to charge and pursue the most serious, readily provable offense, which, by his definition, “are those that carry the most substantial guidelines sentence, including mandatory minimum sentences.” With this memorandum came the understanding that President Donald Trump’s administration would be tough on crime and committed to ending the drug crisis. To further this goal, federal prosecutors began looking to the United States Sentencing Guidelines for support—in particular, the “death results” sentencing enhancement.

The “death results” sentencing enhancement is derived from the Comprehensive Drug Abuse Prevention and Control Act of 1970. The Act criminalizes manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense a
controlled substance. The “death results” enhancement may be applied when the defendant commits a drug offense and “death or serious bodily injury results from the use of such substance.” Should the Government prove the dealer’s drugs were the but-for cause of a drug user’s death, the dealer’s mandatory minimum sentence is twenty years in prison. This is a significant increase from the penalty for simple drug distribution.

In United States v. Harden, the Eastern District of Wisconsin imposed the “death results” enhancement in a case involving a heroin overdose. The defendant was convicted of conspiring to distribute heroin and was sentenced to life in prison. The defendant appealed his conviction and sentence to the Seventh Circuit, which heard, as a matter of first impression, arguments as to whether the “death results” enhancement requires the Government prove the user’s death was reasonably foreseeable to the defendant. The Seventh Circuit held the “death results” enhancement does not require the Government prove any mens rea element, including reasonable foreseeability. Therefore, the “death results” enhancement shall be treated as a matter of strict liability.

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12 *Id.*
13 *Id.*
14 *Id.*
15 The penalties for simple drug distribution vary based on the quantity and type of drug; however, sentences can reach as low as five years. 18 U.S.C.A. § 841(b) (Westlaw through Pub. L. No. 115-231).
16 893 F.3d 434, 439 (7th Cir. 2018), cert. denied, No. 18-6036, 2018 WL 4509897 (Oct. 15, 2018).
17 *Id.* at 445.
18 *Id.* at 446. The court’s standard of review was de novo. *Id.*
19 *Id.* at 454. The Seventh Circuit also held: (1) the evidence was sufficient to establish that heroin distributed by the defendant was the but-for cause of death; (2) the defendant had waived his challenge to a jury instruction regarding causation; (3) the exclusion of testimony about an alternative heroin source was proper; (4) the defendant was not entitled to a mistrial even though a photograph not admitted into evidence was given to the jury; and (5) the prosecutor’s alleged misstatements did not warrant new trial. *Id.* at 434.
20 *Id.* at 448.
courts have expressed hope that drug distributors and manufacturers will think twice about dealing drugs that are dangerous to drug users because the dealer will be responsible for the user’s death.\textsuperscript{21} 

While the Seventh Circuit reached the right decision in \textit{Harden}, federal courts are taking two very different approaches to handling two similar fact patterns. Courts require the Government prove foreseeability in drug conspiracy cases where a defendant is sentenced based on a co-conspirator’s conduct; however, the Government is not required to prove foreseeability when seeking the sentencing enhancement for a defendant charged with simple drug distribution.\textsuperscript{22} 

This discrepancy is one of many, leading some district courts to express a desire for discretion—a way to “opt out” of the mandatory minimum sentence even if the “death results” enhancement applies.\textsuperscript{23} Although the Government should not be required to prove an overdose death was reasonably foreseeable to a defendant to apply the “death results” sentencing enhancement, a district court should be able to depart from the mandatory minimum sentence when the sentence can be considered a miscarriage of justice.

This Comment has four parts. Part I analyzes how courts have historically interpreted the “death results” enhancement, including the decision to require but-for causation and \textit{beyond a reasonable doubt} as the burden of proof. Part II considers how similar fact patterns result in drastically different sentences, warranting some judicial discretion. Part III dives deeper into how the Seventh Circuit reached its holding in \textit{Harden}. Finally, in Part IV, I consider the implications of \textit{Harden}: how recent cases have used \textit{Harden} as precedent, why the Supreme Court should hear a case like \textit{Harden}, and how the “death results” enhancement will affect the opioid crisis.

\textsuperscript{21} United States v. Alvarado, 816 F.3d 242, 250 (7th Cir. 2016).
\textsuperscript{22} United States v. Walker, 721 F.3d 828, 831 (7th Cir. 2013), rehearing en banc denied (Aug. 23, 2013).
\textsuperscript{23} United States v. Krieger, 628 F.3d 857, 861 (7th Cir. 2010).
STATUTORY INTERPRETATION IS FAVORABLE TO THE GOVERNMENT

Case law regarding statutory interpretation of the “death results” enhancement overwhelmingly benefits the Government. The Government should not be required to prove a user’s death was reasonably foreseeable to a defendant in order for the court to impose the “death results” enhancement because the statutory provision’s plain language demonstrates Congress’s intent to require but-for cause, rather than proximate cause. Still, since courts consider the “death results” enhancement to be an element of the offense, the Government faces a higher burden in proving the “death results” enhancement than it would if treated as a sentencing factor.

A. The Government should not be required to prove foreseeability because the “death results” sentencing enhancement requires but-for causation rather than proximate causation.

The Controlled Substances Act, as originally enacted, “tied the penalties for drug offenses to both the type of drug and the quantity involved, with no provision for mandatory minimum sentences.” This changed in 1986, when Congress enacted the Anti-Drug Abuse Act, which redefined offense categories, increased the maximum penalties, and set minimum penalties for offenders. The Act also created the “death results” enhancement. With the enhancement, the default sentencing rules do not apply when “death or serious bodily injury results from the use of the distributed substance.” The defendant is instead sentenced to a term of imprisonment which shall

25 Id. The provisions of 21 U.S.C. § 841 are often referred to as the “Len Bias laws” and are named after a popular college basketball star who died of a drug overdose in 1986. Congress enacted the provisions of 21 U.S.C. § 841 under the theory that but for their purchase of drugs, the overdose victims would not have died. Katherine Daniels and Carol M. Bast, Difficulties in Investigating and Prosecuting Heroin Overdose Cases, 41 CRIM. LAW. LAW BULLETIN 5 (2005).
26 Burrage, 571 U.S. at 209.
27 Id.
not be less than twenty years or more than life, a substantial fine, or both.\textsuperscript{28} Because the “death results” enhancement increases the minimum and maximum sentence, the elements of the enhancement have to be submitted to the jury and found beyond a reasonable doubt.\textsuperscript{29} The Supreme Court, in \textit{Burrage v. United States}, considered what evidence the Government had to present in order to meet its burden.\textsuperscript{30} Specifically, the Court assessed whether the Government met its burden when the evidence suggested the use of a drug, supplied by the defendant, contributed to, but was not the but-for cause of, the victim’s death.\textsuperscript{31} There the defendant distributed heroin to an individual who died of a drug overdose.\textsuperscript{32} The defendant was charged with unlawfully distributing heroin and that “death resulted from the use of that substance—thus subjecting [the defendant] to a 20-year mandatory minimum sentence” pursuant to \textit{21 U.S.C. § 841(b)(1)}.\textsuperscript{33} At trial, medical experts testified that the user may have died even if he did not inject the heroin.\textsuperscript{34} The defendant moved for a judgment of acquittal, arguing the Government must show the defendant’s heroin was the proximate cause of the user’s death.\textsuperscript{35} Proximate cause is defined in this context as “a cause of death that played a substantial part in bringing about the death . . . meaning the death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred.”\textsuperscript{36} The district court denied the motion and instructed the jury that the Government only had to prove the heroin was a contributing cause of

\begin{itemize}
\item \textsuperscript{28} \textit{Id.} Notably, the “substantial” fines range from $1 million to $50 million, depending on the drug. \textit{18 U.S.C. § 841(b)} (Westlaw through Pub. L. No. 115-231).
\item \textsuperscript{29} \textit{Alleyne v. United States}, \textit{570 U.S. 99}, 103 (2013).
\item \textsuperscript{30} \textit{571 U.S. 204}, 208 (2014).
\item \textsuperscript{31} \textit{Id.} at 205.
\item \textsuperscript{32} \textit{Id.} at 204.
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.} at 206.
\item \textsuperscript{35} \textit{Id.} at 207.
\item \textsuperscript{36} \textit{Id.} at 208.
\end{itemize}
the victim’s death. After the defendant was convicted, the court was required to apply the sentencing enhancement. The Eighth Circuit found the district court did not err in denying the defendant’s motion for a judgment of acquittal. The Supreme Court granted certiorari and ultimately reaffirmed that “when a crime requires not merely conduct but also a specified result of conduct, a defendant generally may not be convicted unless his conduct is both (1) the actual cause, and (2) the “legal cause (often called the “proximate cause”) of the result.” However, Congress may abrogate this principle by “speaking directly to the question.” The Court interpreted the phrase “results from” in § 841(b) as requiring but-for causation—that the death would not have occurred but for the defendant’s drug dealing—rather than proximate causation. Therefore, the Supreme Court affirmed the district court’s decision.

Proximate cause is not easily defined; “it is a flexible concept.” To say one event proximately caused another is a way of making two separate but related assertions. First, it means “the former event caused the latter.” Events have many causes; however, only some of them are

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37 Id. at 207.
38 Id. at 208.
39 Id.
40 Id. at 210.
41 Id. at 216.
42 Id. at 208.
43 Id. The Government expressed concerns that the Supreme Court’s interpretation of the “death results” enhancement would “unduly limit criminal responsibility”. However, the Court disagreed, stating “we doubt that the requirement of but-for causation for this incremental punishment will prove a policy disaster.” Id. at 216-17.
45 Paroline, 572 U.S. at 444.
46 Id.
47 Id.
proximate. To say that one event was a proximate cause of another means “it was not just any cause, but one with a sufficient connection to the result.” Proximate cause is often explained in terms of foreseeability. A requirement of proximate cause precludes liability in situations where “the causal link between conduct and the result is so attenuated that the consequence is more aptly described as mere fortuity.” The Supreme Court has “found a proximate-cause requirement built into a statute that did not expressly impose one.”

In United States v. Alvardo, the Fourth Circuit considered whether Congress intended for § 841(b)(1) to include proximate cause. In Alvardo, the defendant was convicted of knowingly and intentionally distributing heroin, resulting in death.

On appeal, the defendant argued that the district court failed to instruct the jury that he must have “reasonably foreseen” that death could result. The district court gave the following jury instruction:

If you find that the Government has proved beyond a reasonable doubt that the defendant knowingly or intentionally distributed a mixture or substance containing a detectable amount of heroin on or about March 29, 2011, you must then determine whether the Government has proved beyond a reasonable doubt that death resulted from the use of such substance.

The defendant relied on Staples v. United States, where the Supreme Court held “offenses that require no mens rea generally are

48 Id.
49 Id.
50 Id. at 445.
52 Paroline, 572 U.S. at 446.
53 816 F.3d 242, 244 (4th Cir. 2016).
54 Id. at 246.
55 Id. at 244.
56 Id. at 246.
The court broke § 841(b)(1)(C) down into two elements: (1) knowing or intentional distribution and (2) death caused by the use of that drug.\(^{58}\) The court found the first element, knowing or intentional distribution of heroin, included \textit{mens rea}.\(^{59}\) The defendant’s reliance on \textit{Staples} was misplaced however, because the court found \textit{Staples} did not require every element of an offense to have a \textit{mens rea}.\(^{60}\) Instead, \textit{Staples} directed courts to “think twice before concluding that an offense, viewed as a whole, contains no \textit{mens rea} requirement.”\(^{61}\) Therefore, § 841(b)(1)(C) did not support having a separate \textit{mens rea}, but rather served to elevate the crime of knowingly or intentionally distributing heroin to a more serious level.\(^{62}\) The absence of a separate \textit{mens rea} meant but-for cause was appropriate.\(^{63}\)

The Tenth Circuit has also held that the “death results” enhancement only requires proof of but-for causation.\(^{64}\) In \textit{United States v. Burkholder}, a district court declined to instruct the jury that the Government was required to prove an individual’s death was a reasonably foreseeable result of the charged drug distribution.\(^{65}\) The defendant was subsequently convicted.\(^{66}\) On appeal, the defendant argued that § 841(b)(1) required proof that the substance he distributed proximately caused the user’s death: that the death was a reasonably foreseeable result of his distribution.\(^{67}\) The defendant was a recovering addict and he was prescribed an opioid as part of his treatment.\(^{68}\) At the time he was prescribed the drug, the defendant signed an

\(^{57}\) \textit{Id.} at 249 (citing Staples v. United States, 511 U.S. 600, 606 (1994)).
\(^{58}\) \textit{Alvardo}, 816 F.3d at 250.
\(^{59}\) \textit{Id.}
\(^{60}\) \textit{Id.}
\(^{61}\) \textit{Id.}
\(^{62}\) \textit{Id.}
\(^{63}\) \textit{Id.}
\(^{64}\) 816 F.3d 607, 609 (10th Cir. 2016), cert. denied (2017).
\(^{65}\) \textit{Id.} at 610.
\(^{66}\) \textit{Id.} at 609.
\(^{67}\) \textit{Id.}
\(^{68}\) \textit{Id.} at 610.
agreement with his doctor to not “sell, share or give any [amount] to another person.”\textsuperscript{69} The defendant was informed that taking the drug with other drugs, including alcohol, could be dangerous.\textsuperscript{70} Still, the defendant gave one of his pills to a friend, who ultimately ingested the pill and died as a result.\textsuperscript{71} The Tenth Circuit reached its holding after declaring the case an issue of statutory interpretation, inquiring whether the “death results” enhancement requires proof of proximate cause.\textsuperscript{72} Like its sister circuits, the Tenth Circuit looked to the plain language of § 841(b)(1), specifically Congress’s choice of the words “death ... results from the use of such substance.”\textsuperscript{73} In addition to the plain language, the court focused on the context in which the language was used and surveyed other federal statutes, identifying “numerous instances in which Congress explicitly included proximate-cause language in statutory penalty enhancements.”\textsuperscript{74} The court agreed with the defendant that proximate cause “inject[s] a foreseeability element into a statute”; however, it found Congress intended to omit a proximate cause requirement for the “death results” enhancement.\textsuperscript{75} Therefore, the district court did not err in rejecting the defendant’s jury instruction.\textsuperscript{76}

\textsuperscript{69} \textit{Id.}
\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.} at 611.
\textsuperscript{73} \textit{Id.} at 614. (emphasis in original). \textit{See} United States v. Hatfield, 591 F.3d 945, 948 (7th Cir. 2010) (“Beyond that minimum causation ... it is not clear what ‘results from’ might mean.”).
\textsuperscript{74} \textit{Burkholder}, 816 F.3d at 615. \textit{See also} Camacho v. L.C. Ward, No. 15-CV 388-JDP, 2016 WL 10679358, at *3 (W.D. Wis. Sept. 12, 2016) (Petitioner argued that the district court violated \textit{Burrage} by unconstitutionally applying a sentencing enhancement by “considering the victim’s death a ‘foreseeable’ event of the petitioner and his associates’ joint criminal activity.” However, the Western District of Wisconsin determined the “foreseeability” element was unrelated to \textit{Burrage}, and the petitioner did not identify any other statutory interpretation case that would retroactively apply to the issue).
\textsuperscript{75} \textit{Burkholder}, 816 F.3d at 613.
\textsuperscript{76} \textit{Id.} at 621. Unlike the majority, the dissent was not convinced that the
B. Treating the enhancement as an element of the offense, rather than as a sentencing factor, heightens the burden of proof, benefitting the defense.

The higher the burden of proof, the more and stronger evidence the Government must present to meet its burden. In United States v. Booker, the Supreme Court held Federal Sentencing Guidelines are subject to jury trial requirements of the Sixth Amendment. For instance, in Booker, the defendant was convicted in the Western District of Wisconsin of possession with intent to distribute at least 40 grams of cocaine base. Under the Federal Sentencing Guidelines, the defendant faced a sentence of 210 to 262 months in prison. At the sentencing hearing, the judge found additional facts by a preponderance of the evidence, which resulted in a mandatory sentence between 360 months and life. The judge treated the additional facts as sentencing factors, ultimately imposing a thirty-year sentence. On appeal, the Seventh Circuit held the defendant’s sentence conflicted with Apprendi v. New Jersey, which held a fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

“results from” language of 21 U.S.C. § 841(b)(1) “unambiguously reveals Congress’s intent to ‘forgo a proximate-cause requirement’ and impose strict liability on criminal defendants.” Burkholder, 816 F.3d at 621 (Briscoe, J., dissenting). The dissent expressed its concern that the majority’s holding was inconsistent with Supreme Court precedent. Id. See also United States v. U.S. Gypsum Co., 438 U.S. 422, 438 (1978) (holding “strict-liability criminal offenses are generally disfavored and . . . far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.”).

78 Id. at 227.
79 Id.
80 Id.
81 Id. at 221.
The “statutory maximum” identified in Apprendi referred to the maximum sentence a judge could impose based “solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”

The Seventh Circuit applies the Supreme Court’s analysis to each element of the “death results” enhancement, requiring a jury to find, beyond a reasonable doubt, that the defendant committed a drug offense and death or serious bodily injury resulted from the use of the drug. In United States v. Lawler, the defendant was convicted of distributing heroin and conspiracy to possess heroin with intent to distribute. The case went to the Supreme Court, which affirmed in part, vacated in part, and remanded in light of Alleyne v. United States. The defendant’s sentence was reduced, but he again appealed to the Seventh Circuit, challenging his sentence. The defendant was charged with thirty other defendants in a single-count indictment alleging a large-scale heroin distribution conspiracy, which contributed to five overdose deaths. The defendant was considered a “low-level member of the conspiracy.” While the indictment, to which the defendant pled guilty, did reference the overdoses, the Government did not prove that any particular defendant was responsible for any particular death. Relying on Alleyne, the Seventh Circuit held that an element of the “death results” enhancement should be treated as part of the offense, and proved beyond a reasonable doubt.

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83 Booker, 543 U.S. at 221.
84 818 F.3d 281, 282 (7th Cir. 2016).
85 Id. (citing Alleyne v. United States, 570 U.S. 99, 103 (2013) (holding facts that increase a mandatory minimum sentence must be submitted to the jury and proven beyond a reasonable doubt)).
86 Lawler, 818 F.3d at 282.
87 Id.
88 Id.
89 Id. at 283.
90 Id. at 284.
“Beyond a reasonable doubt” is a significantly higher burden of proof than “preponderance of the evidence”; a higher burden favors the defense.\textsuperscript{91} By treating the sentencing enhancement as an element of the offense, rather than as a sentencing factor, the defendant can rely on the Government’s failure to meet its burden as a defense to the imposition of a sentence. The higher burden therefore offsets the fact that the Government is not required to prove proximate cause, tipping the scales from being largely in the Government’s favor to a more balanced analysis.

\textbf{THE NEED FOR DISCRETIONARY DEPARTURE STEMS FROM SENTENCING DISPARITIES FOR CASES WITH SIMILAR FACT PATTERNS}

There are cases where the “death results” enhancement clearly should apply, whether or not death was foreseeable. However, there are also cases where a twenty-year sentence would be a miscarriage of justice. In addition, the fact that foreseeability is crucial to sentencing in drug conspiracy cases, yet not required for simple drug distribution, results in significant sentencing discrepancies between similar fact patterns.

\textit{A. Cases where the “death results” enhancement should apply, whether or not death was foreseeable.}

Whether a sentence is a miscarriage of justice should be determined by separating unlawful conduct from otherwise innocent conduct.\textsuperscript{92} In \textit{Prevatte v. Merlak}, the petitioner was convicted for detonating a pipe bomb that destroyed property and resulted in the death of an innocent bystander.\textsuperscript{93} If the pipe bomb had not caused a death, the maximum sentence the petitioner could have received was

\textsuperscript{91} \textit{Id.}

\textsuperscript{92} United States v. McDuffy, 890 F.3d 796, 799-800 (2018) (citing Staples v. United States, 511 U.S. 600, 606 (1994)).

\textsuperscript{93} 865 F.3d 894, 895 (2017).
ten years.\textsuperscript{94} However, because the judge found that the bomb did cause the victim’s death, the petitioner was sentenced to forty-four years’ imprisonment on that count.\textsuperscript{95} The petitioner filed a writ for habeas corpus relief claiming that under \textit{Burrage}, the jury, and not the judge, should have made the finding that the bomb was the but-for cause of the victim’s death.\textsuperscript{96} The district court dismissed the petitioner’s claim for lack of jurisdiction and he appealed.\textsuperscript{97} The Seventh Circuit agreed that the petition should be dismissed, but also found the evidence as to causation was unrebutted at trial. Thus, the petitioner’s enhanced sentence was neither illegal nor a miscarriage of justice.\textsuperscript{98}

In \textit{United States v. McDuffy}, the defendant, charged with bank robbery, moved for the district court to recognize a specific intent \textit{mens rea} requirement after the court sought to impose a “death results” enhancement.\textsuperscript{99} The district court denied this request.\textsuperscript{100} The defendant was convicted and sentenced to life imprisonment for a bank robbery resulting in death.\textsuperscript{101} Similar to the “death results” enhancement for drug offenses, a defendant faces a mandatory minimum sentence if death results from a bank robbery.\textsuperscript{102} Here, the Ninth Circuit held the only \textit{mens rea} requirement for the sentencing enhancement was the \textit{mens rea} necessary to commit the underlying bank robbery.\textsuperscript{103} Therefore, in McDuffy’s case, the enhancement applied even if the death was an accident.\textsuperscript{104} Similar to § 841(b)(1)(C), this statutory provision\textsuperscript{105} did not contain an explicit \textit{mens rea}
requirement.\footnote{McDuffy, 890 F.3d at 801.} Still, the defendant urged the district court to read the requirement into the statute.\footnote{Id.} The Ninth Circuit looked to \textit{Staples v. United States} and determined courts must read a \textit{mens rea} requirement into a statute only when it “is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”\footnote{Id. at 799-800 (citing Staples v. United States, 511 U.S. 600, 606 (1994)).} In addition, the Ninth Circuit reasoned, “it is unusual to impose criminal punishment for the consequences of purely accidental conduct.”\footnote{McDuffy, 890 F.3d at 799-800.} But it is not unusual to punish individuals for the unintended consequences of their unlawful acts.”\footnote{Id.; United States v. Easter, 553 F.3d 519, 524 (7th Cir. 2009) (holding the Government, in a drug conspiracy case, did not have to prove the defendant intended to create a substantial risk of harm, warranting a higher sentence, when the defendant reached for his gun during flight).}

When the defendant is responsible for directly distributing drugs that result in death, there is little question that the “death results” enhancement does and should apply.\footnote{United States v. Walker, 721 F.3d 828, 836 (7th Cir. 2013), rehearing en banc denied (Aug. 23, 2013).} Courts have been less confident in their decision to apply the “death results” enhancement to defendants higher up in the drug distribution chain because foreseeability of a specific user’s death appears less and less likely.\footnote{Id.}

\textbf{B. Cases where a 20-year mandatory minimum is a miscarriage of justice.}

Sometimes, the defendant is not the cliché: not the typical “bad guy” you see in movies. Sometimes, the defendant and the drug-user had a positive, healthy relationship; they were friends or married. In the midst of grieving, these defendants are forced to face the reality that life as they know it is about to change—they face decades in prison. In \textit{Krieger v. United States}, the defendant was convicted for
distribution of fentanyl. The defendant received a twenty-year sentence because her friend died after chewing a fentanyl patch provided by the defendant. During sentencing, the defendant objected to the manner in which the Government sought the “death results” sentencing enhancement. The Government argued it was a sentencing factor, which must be proven by a preponderance of the evidence, rather than an element, which must be proven beyond a reasonable doubt. After finding by a preponderance of the evidence that death resulted from the fentanyl, the court concluded it was obligated to impose the mandatory minimum sentence. The district court expressed “discomfort with its lack of discretion and the fact that it appeared that [the defendant] was being sentenced for homicide despite having been convicted only of distributing fentanyl.”

Notably, without the enhancement, the maximum penalty for distributing small amounts of fentanyl would have been twenty years, with no minimum penalty. The defendant’s presentence investigative report recommended a sentencing range of ten to sixteen months, which is significantly shorter than the twenty-year mandatory minimum imposed by the “death results” enhancement.

Between the time of the defendant’s sentencing and appeal, the Supreme Court issued several decisions that touched on the issues Krieger raised. In Alleyne, the Supreme Court held that facts that

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113 842 F.3d 490, 492 (7th Cir. 2016).
114 Id.
115 Id.
116 Id.
117 Id.
118 Id. at 495.
119 Id.
120 Id. (“The average length of incarceration for defendants convicted under 21 U.S.C. § 841 for distribution of fentanyl where death has not resulted was seven months”). Id.
121 Id. at 496. In collateral review, the Seventh Circuit heard arguments as to whether the Government had sufficient evidence to prove, by a preponderance of the evidence, that “death resulted”. The district court was persuaded that the Government proved this element by a preponderance of the evidence, but believed
increase a mandatory minimum sentence must be submitted to the jury and proven beyond a reasonable doubt.\textsuperscript{122} Therefore, if the defendant in Krieger were to be sentenced post-\textit{Alleyne}, she could not receive the “death results” enhancement unless the indictment charged, and the jury found beyond a reasonable doubt, that the fentanyl caused her friend’s death.\textsuperscript{123} Then, in \textit{Burrage}, the Court held a defendant cannot receive the “death results” enhancement unless the drug the defendant distributed was a but-for cause of death.\textsuperscript{124}

In evaluating the \textit{Krieger} appeal, the Seventh Circuit noted the “murkiness of causation”.\textsuperscript{125} It went on to apply the Supreme Court decisions in \textit{Alleyne} and \textit{Burrage}, determining the Government was required to show that the fentanyl patch, which Krieger provided, was the but-for cause of her friend’s death.\textsuperscript{126} Krieger’s sentence was thereafter vacated and remanded to the district court for resentencing.\textsuperscript{127} The district court judge expressed his discomfort with imposing a twenty year sentence, stating the sentence was “one of the most difficult decisions [he has] had to make, and it’s a decision that [he did] not agree with . . . in [his] opinion, 20 years [wa]s too harsh.”\textsuperscript{128}

Another area of concern is ineffective assistance of counsel. The imposition of a twenty-year mandatory minimum sentence is unjust if the defendant’s defense attorney does not effectively challenge its application or hold the Government to its burden. For example, in \textit{Gaylord v. United States}, the defendant pled guilty to conspiracy to distribute and distribution of oxycodone.\textsuperscript{129} A drug user ingested pills

\begin{footnotes}
122 \textit{Krieger}, 842 F.3d at 496.
123 \textit{Id}.
124 \textit{Id}. at 501.
125 \textit{Id}.
126 \textit{Id}.
127 \textit{Id}. at 505.
128 \textit{Krieger}, 628 F.3d at 862.
129 829 F.3d 500, 503 (7th Cir. 2016).
\end{footnotes}
distributed by the defendant, as well as cocaine from another source, and died. The defendant was sentenced to twenty years based on the “death results” enhancement. The defendant later brought a 28 U.S.C. § 2255 motion to vacate, set aside or correct his sentence, arguing that as a result of ineffective assistance of counsel, the “death results” enhancement was inappropriately applied to his case. Specifically, the defense attorney did not contend that the Government failed to prove the oxycodone was the but-for cause of the drug user’s death. Approximately two years after the defendant was sentenced, the Supreme Court held that but-for causation must be shown for the “death results” enhancement to apply. In this defendant’s case, there was no evidence that the oxycodone the defendant distributed was the but-for cause of death. As a result, the Seventh Circuit vacated the district court’s judgment and remanded the case for an evidentiary hearing on the defendant’s claim of ineffective assistance of counsel.

Another area of concern is when a drug user intends to overdose because a drug user’s intentions are irrelevant in an analysis of the drug dealer’s liability. In Perrone v. United States, the defendant moved to alter or vacate his sentence for unlawful drug distribution, challenging the district court’s application of the “death results”

130 Id.
131 Id.
132 This motion is filed when the defendant believes his or her sentence was imposed in violation of the Constitution or laws of the United States or when the defendant believes his or her sentence is more than the maximum penalty authorized by law. 28 U.S.C. § 2255 (Westlaw through Pub. L. No. 115-231).
133 Gaylord, 829 F.3d at 504.
134 Id.
135 Id.
136 Id. at 507.
sentencing enhancement. In Perrone, the victim died after the defendant injected her with 7.5 grams of cocaine, part of a suicide pact gone wrong. The defendant pled guilty to a single count of unlawful drug distribution and stipulated that his distribution caused the victim’s death. On appeal, he claimed that if he knew the enhancement required the Government to show his cocaine was the but-for cause of the user’s death, he would have sought to withdraw his plea. The day before the defendant was sentenced, the Seventh Circuit decided United States v. Hatfield, which held the “death results” enhancement requires the Government prove the ingestion of the defendant’s drugs was a but-for cause of the death. The Seventh Circuit also looked to Davis v. United States, which held that “when a subsequent statutory interpretation narrows the elements of a crime, revealing that the petitioner has been convicted and sentenced for ‘an act that the law does not make criminal,’ the petitioner has suffered ‘a complete miscarriage of justice,’ that justifies relief under § 2255.” The Seventh Circuit concluded the defendant asserted a cognizable claim under § 2255; however, the evidence before the court did not suggest the defendant’s sentence was increased by the application of an enhancement of which he was “actually innocent.” Therefore, he was not entitled to an evidentiary hearing on his claims.

Like the Seventh Circuit’s holding in Perrone, the Ninth Circuit has ruled a defendant can be held responsible for a death that is an unforeseeable suicide. In United States v. Houston, the Ninth Circuit held: (1) the government need not prove it was foreseeable that the

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138 899 F.3d 898, 902 (7th Cir. 2018).
139 Id. at 900.
140 Id.
141 Id. at 901.
142 Id. at 902 (citing United States v. Hatfield, 591 F.3d 945, 948 (7th Cir. 2010)).
143 Perrone, 899 F.3d at 904 (citing Davis v. United States, 417 U.S. 333, 346-47 (1974)).
144 Perrone, 899 F.3d at 904.
145 Id.
recipient of methadone might suffer death or serious bodily injury in
order for the court to impose the “death results” enhancement; and (2)
the district court’s error in instructing the jury that proximate cause
was necessary to impose the sentencing enhancement was harmless. 146
On appeal, the defendant argued she was being held responsible for a
death that was an unforeseeable suicide. 147 Essentially, the defendant
advocated for proximate cause. The user was found dead in her home
with numerous controlled substances in her blood and urine. 148 The
defendant’s name was on a prescription bottle found at the scene. 149
The Ninth Circuit determined that there were some crimes where
proving proximate cause was unnecessary because foreseeability was
“implicit in the common understanding of the crime.” 150 These crimes
include, but are not limited to, involuntary manslaughter, conspiracy to
assault, and drug conspiracy. 151 However, this understanding did not
apply to the charge at issue: drug distribution. 152 Despite
acknowledging the inconsistent decision to require foreseeability in
some, but not all, drug cases, the Ninth Circuit agreed with its sister
circuits that the plain language of the “death results” enhancement did
not require proximate cause. 153 It also placed weight on the Fourth
Circuit’s decision in United States v. Patterson, which observed that:
“The statute puts drug dealers and users on clear notice that their
sentences will be enhanced if people die from using the drugs they
distribute.” 154 As to the defendant’s argument regarding the incorrect
jury instruction, the Ninth Circuit determined it “inured to the benefit

146 406 F.3d 1121, 1123 (9th Cir. 2005).
147 Id. at 1122.
148 Id.
149 Id.
150 Id. at 1123.
151 Id.
152 Id.
153 Id.
154 Id. at 1124 (citing United States v. Patterson, 38 F.3d 139, 145-46 (4th Cir.
1994)).
of the defendant because it placed a higher burden of proof on the Government than [was] required by law.”\textsuperscript{155}

The application of the “death results” enhancement is not contingent upon the quantity of drugs distributed or manufactured, meaning the defendants receiving the enhancement are not necessarily large-scale distributors. This dilemma appeared in \textit{United States v. Rebmann}, where the Sixth Circuit considered whether “the Government may convert a defendant’s plea of guilty to only the distribution of 1/1000th of an ounce of heroin into a homicide case by asserting that the defendant’s husband died from an overdose of heroin she sent him.”\textsuperscript{156} The Sixth Circuit concluded the district court was correct in rejecting the Government’s motion for the “death results” enhancement.\textsuperscript{157} Notably, its rationale was not based on causation, but on the burden of proof.\textsuperscript{158} The court held the Government was required to demonstrate beyond a reasonable doubt, rather than by a preponderance of the evidence, that the death of an individual, to whom the defendant distributed heroin, was a result of the distribution.\textsuperscript{159} The Sixth Circuit looked to the Supreme Court’s recent ruling in \textit{Apprendi}, and determined the “death results” provisions were more than “a mere sentencing factor.”\textsuperscript{160} Because the district court applied the sentencing enhancement to the defendant in this case based solely on its finding by a preponderance of the evidence that death resulted from the crime, the Sixth Circuit vacated the sentence and remanded the case for a determination that the death was caused by the

\textsuperscript{155} \textit{Houston}, 406 F.3d at 1125.
\textsuperscript{156} 321 F.3d 540, 541 (6th Cir. 2003). On appeal, the Government argued that even if it was unsuccessful in bringing the mandatory-minimum through the “death results” enhancement, it could use the fact that death resulted as the basis for an “enhancement for relevant conduct”, pursuant to U.S.S.G. § D1.1, which can still lead to a twenty-year sentence. The court rejected the Government’s ability to circumvent its burden by this nature. \textit{Id.} at 543.
\textsuperscript{157} \textit{Id.} at 544.
\textsuperscript{158} \textit{Id.} at 545.
\textsuperscript{159} \textit{Id.} at 541.
\textsuperscript{160} \textit{Id.}
distribution of heroin beyond a reasonable doubt. Thus, *Rebmann* represents an occasion where a defendant was first “sentence[d] for a homicide under the guise of a guilty plea to the distribution of a very small quantity of drugs.”

If one makes the argument that death is always a foreseeable result of illegal drug distribution, then “not only would the individual who produced the [drug] receive the twenty-year sentence, but *every* person connected with the conspiracy in any way—from the lowliest lookout on the corner to the boss—would all receive the same twenty-year penalty.” This result is overly broad. At the same time, strict liability makes sure that “a kingpin who finances and controls a drug distribution operation cannot escape liability for the ‘death resulting’ penalty simply because he never personally sold to costumers.”

Think of it this way: 21 U.S.C. § 841 makes it illegal to “distribute” but not “share” heroin. If two friends are physically together when they buy and use heroin for their personal use, there is arguably no distribution. If one of the two friends dies from an overdose, the other friend is not accountable for the death under the plain language of § 841. However, the Government could prosecute

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161 *Id.*

162 Id. at 545; McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986) (holding it is doubtful that Congress would have intended such a steep sentencing enhancement to be contingent on judicial fact-finding); Harris v. United States, 536 U.S. 545, 554 (2002) (holding a fact that steeply alters the defendant’s punishment is “not usually associated with sentencing factors.”).


164 *Walker*, 721 F.3d at 839.


166 *Id.*

167 *Id.*
the person who sold them the drugs and then the court would be required to apply the “death results” enhancement.\textsuperscript{168}

\textbf{C. The Government may be required to prove foreseeability when a sentencing enhancement is applied in drug conspiracy cases. This application is inconsistent with simple drug distribution cases.}

Foreseeability is heavily litigated in the context of drug conspiracy sentencing; however, courts have found these arguments have no place in their analysis for simple distribution cases. The Fourth Circuit, in \textit{United States v. Patterson}, refused to analogize case law from drug conspiracy cases, in which the defendants contested application of the “death results” enhancement, to simple distribution cases because in simple distribution cases the court is only concerned with the individual defendant’s conduct.\textsuperscript{169} In \textit{Patterson}, the defendants had hoped to apply the foreseeability requirement to their simple distribution case.\textsuperscript{170} The defendants pled guilty to unlawful distribution of morphine sulfate and meperidine, which resulted in an individual’s death, and to aiding and abetting that offense.\textsuperscript{171} The Fourth Circuit held the evidence supported the “death results” sentencing enhancement.\textsuperscript{172} A defendant brought controlled substances to a party and traded several pills in exchange for a tattoo.\textsuperscript{173} At some point in the night, the host of the party discussed her intentions to take drugs.\textsuperscript{174} The defendant subsequently left to obtain syringes from his home.\textsuperscript{175} Upon his return, the host told the defendant that another

\textsuperscript{168} \textit{Id.} There is also a risk that a sentencing enhancement constitutes a constructive amendment of the indictment when the court instructs the jury on the death results provision without such offense being set forth in the indictment. \textit{United States v. Whitfield}, 695 F.3d 288, 309 (4th Cir. 2012).

\textsuperscript{169} 38 F.3d 139, 145 (4th Cir. 1994).

\textsuperscript{170} \textit{Id.}

\textsuperscript{171} \textit{Id.} at 142.

\textsuperscript{172} \textit{Id.} at 145.

\textsuperscript{173} \textit{Id.}

\textsuperscript{174} \textit{Id.}

\textsuperscript{175} \textit{Id.}
guest was giving the host the defendant’s pills all night. Still, the defendant, host and others injected morphine, which the defendant melted down. When the friends woke up the next morning, they found the host dead. The facts of this case supported simple distribution, not a conspiracy, and established that the defendant’s actions directly contributed to the host’s death. Thus, the Fourth Circuit refused to analogize a foreseeability requirement in drug conspiracy cases to simple distribution cases, making the defendant’s case law irrelevant.

The Third Circuit’s analysis in United States v. Robinson parallels the Seventh Circuit’s reasoning in Harden. At the defendant’s sentencing hearing, the district court found that “based on their previous drug dealings, it was reasonably foreseeable to [the] defendant that [a co-conspirator] would deliver drugs to others.” The court also found: 1) the delivery of the heroin by the co-conspirator to drug users was in furtherance of a conspiracy in which the defendant was a member; and 2) the delivery was reasonably foreseeable to the defendant in connection with the criminal activity he agreed to undertake.

The Third Circuit looked to the Fourth Circuit’s holding in United States v. Patterson, which relied on the plain language of § 841(b)(1) to determine the enhancement has no reasonable foreseeability of death requirement. The Third Circuit agreed that the court should give effect to Congress’s intent. Therefore, because Congress’ language was plain and unambiguous, the court applied the statute as written. The record was clear; it was
reasonably foreseeable that the defendant’s co-conspirator would distribute the drugs to a third-party. This was not only reasonably foreseeable, but “it was the very purpose of the conspiracy.” Thus, the defendant was subject to the minimum twenty-year sentence. The First Circuit, in United States v. Soler, emphasized that the charge and the nature of the defendant’s conduct within a conspiracy shapes whether the Government has to prove death was reasonably foreseeable to a particular defendant. In Soler, the defendant argued the “death results” enhancement was inapplicable because the key event leading to the death—the drug user snorting heroin under the misimpression that it was cocaine—was not reasonably foreseeable, and that the death itself could not be foreseeable. Like in Robinson, the First Circuit placed weight on the fact that the statute did not speak to the defendant’s state of mind, which undercut the defendant’s argument that the court should impose a foreseeability test. While the defendant cited several cases that imposed a reasonable foreseeability requirement, those cases involved liability of one co-conspirator for the acts of others. In contrast, “When a defendant’s own conduct has caused the harm, those cases are inapposite” and strict liability applies. Therefore, because the defendant was not charged in a drug conspiracy, and in turn, did not argue that he was being sentenced based on a co-conspirator’s conduct, conspiracy case law supporting the foreseeability of death requirement was inapposite.

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186 Id. at 831.
187 Id.
188 Id. at 832. The defendant cited U.S.S.G. § 1B1.3(a)(3), which the court determined was consistent with its result. The section includes as relevant conduct a “jointly undertaken criminal activity . . . whether charged as a conspiracy, all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.” Id.
189 275 F.3d 146, 152 (1st Cir. 2002).
190 Id.
191 Id.
192 Id.
193 Id.
Even when courts do comment on whether a drug user’s death was reasonably foreseeable to a particular defendant, the question before the court is whether the distribution of drugs was foreseeable, not whether the death was foreseeable. In United States v. Swiney, two members of a heroin conspiracy appealed the application of the mandatory minimum sentence to their convictions. The Government filed a cross-appeal, arguing that all of the defendants should have received at least twenty years because death resulted from the use of heroin that was distributed by members of their conspiracy. The district court found no proof linking these defendants to the death, using a “critical proximate cause inquiry.” On appeal, the Government argued that all of the defendants should be held accountable for the death under the Pinkerton theory of vicarious liability. The Sixth Circuit rejected the Government’s theory of accountability “because the scope of conduct for which a defendant can be held accountable under the Sentencing Guidelines is narrower than the conduct encompassed by conspiracy law.” The court concluded, “In the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction” shall be considered during sentencing pursuant to U.S.S.G. § 1B1.3(a)(1)(B). Thus, before any of the defendants in Swiney could be subject to the sentence enhancement of 21 U.S.C. § 841(b)(1), the district court had to find that he or she was part of the distribution chain that led to a user’s death and that a conspiracy member’s distribution of heroin was “reasonably foreseeable” to other members.

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194 203 F.3d 397, 399 (6th Cir. 2000).
195 Id.
196 Id.
197 Id. (citing Pinkerton v. United States, 328 U.S. 640, 647-48 (1946)).
198 Swiney, 203 F.3d at 399.
199 Id. at 402 (emphasis added).
of the conspiracy, as defined in U.S.S.G. § 1B1.3(a)(1)(B). 200 The foreseeability requirement, while required for the sentencing enhancement, was still connected to the drug distribution rather than foreseeability of death. 201

The defendant in *United States v. McIntosh* argued the Eighth Circuit should apply the reasoning in *Swiney* to his case. 202 The court refused, finding *Swiney* is only applicable to cases where a conspiracy defendant played no direct part in manufacturing the drug or in immediately distributing the drug that caused the death or serious bodily injury. 203 Instead, the court quoted the Third Circuit’s holding in *United States v. Robinson*, which stated “the risk is inherent in distributing [a controlled substance] and thus, [Congress] provided that persons who distribute it do so at their peril.” 204 McIntosh was therefore subject to the enhancement based on his direct role in manufacturing the drug ingested by the user. 205

In 2013, the Seventh Circuit heard as a matter of first impression arguments as to whether a district court has to make specific factual findings determining whether each defendant’s conduct was part of the distribution chain that caused a user’s death. 206 *United States v. Walker* concerned the overdose deaths of five individuals who died after using heroin distributed by a large-scale drug trafficking organization. 207

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200 Id. at 406.
201 Id.
202 236 F.3d 968, 974 (8th Cir. 2001).
203 Id. See *United States v. Smith*, 223 F.3d 554, 567 (7th Cir. 2000) (“The question whether the actions of others were reasonably foreseeable to the particular defendants . . . is a factual one. Those facts will exist in some hub-and-spokes style conspiracies, especially when the culpability of individuals near the hub is at stake. They are the people who can predict what their counterparts are doing, even if they have no direct knowledge”).
204 *McIntosh*, 236 F.3d at 972 (quoting *United States v. Robinson*, 167 F.3d 824, 831 (3rd Cir. 1999)).
205 *McIntosh*, 236 F.3d at 974.
207 Id.
The defendants in *Walker* pled guilty to possession with intent to distribute and conspiracy to distribute heroin. The district court interpreted § 841 as requiring a twenty-year mandatory minimum sentence for all members of the conspiracy because the drug organization as a whole caused the deaths of several customers, essentially concluding the defendants should be held strictly liable. On appeal, the defendants argued this was an error, and the Seventh Circuit agreed, holding “a defendant can only be subject to the enhancement if the distribution of heroin that ultimately led to a victim’s death was ‘reasonably foreseeable.’”

There is unanimity across the circuits that a defendant involved in a drug conspiracy should only be sentenced for conduct foreseeable to him—the trouble is, defendants like Donald Harden believe the result of their conduct should also have to be foreseeable in order for the sentencing enhancement to apply.

*UNITED STATES v. HARDEN* WAS CORRECTLY DECIDED

In the morning of September 5, 2014, Fred Schnettler was found dead in his bedroom at his parents’ home. Upon arrival, officers observed a needle and spoon on the floor. Donald Harden was later charged with distributing the heroin that resulted in Schnettler’s death. At trial, the Government argued Schnettler purchased 0.1

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208 *Id.*

209 *Id.* at 833.

210 *Id.* at 835; *United States v. Stoddard*, 892 F.3d 1203 (D.C. Cir. 2018) (in a matter of first impression, the D.C. Circuit held district courts must make an individualized finding as to quantity of drugs foreseeable to an individual defendant before applying a mandatory minimum sentence). *See also* *United States v. Haines*, 803 F.3d 713, 741 (5th Cir. 2015) (holding a defendant may be subject to a mandatory minimum sentence based on the quantity of drugs he distributed as well as the quantity distributed conspiracy-wide if the quantity was reasonably foreseeable).

211 *United States v. Harden*, 893 F.3d 434, 439 (7th Cir. 2018).

212 *Id.*

213 *Id.*
grams of heroin from Kyle Peterson the night before he died.\textsuperscript{214} Peterson testified that he purchased the heroin from Brandi Kniebes-Larsen, who in turn testified she received the heroin from Harden.\textsuperscript{215} The Government presented a timeline to establish that Harden’s heroin reached Schnettler between 7:30 p.m. and 8 p.m. on September 4, 2014.\textsuperscript{216} The Government argued Schnettler overdosed on the heroin shortly after 10 p.m.; the defense presented a conflicting timeline.\textsuperscript{217} Kniebes-Larsen, who testified as a cooperating witness, provided crucial testimony regarding whether Harden was aware of the quality, and danger of, the heroin he distributed.\textsuperscript{218} On direct-examination, Kniebes-Larsen testified that when she purchased the heroin, Harden told her she “needed to be very careful because apparently there were bodies on this heroin.”\textsuperscript{219}

Furthermore, at the end of the trial, the jury received two special verdict questions: (1) whether the United States has established, beyond a reasonable doubt, that Frederick Schnettler died as a result of the use of a controlled substance; and (2) whether the conspiracy involved 100 grams or more of a mixture and substance containing heroin.\textsuperscript{220} With respect to the first special verdict question, the jury instruction said:

\begin{quote}

d\textsuperscript{214} \textit{Id.} at 440-41.
d\textsuperscript{215} \textit{Id.} at 442-43
d\textsuperscript{216} \textit{Id.}
d\textsuperscript{217} \textit{Id.}
d\textsuperscript{218} \textit{Id.}
d\textsuperscript{219} \textit{Id.}
While the credibility of witnesses is important to every criminal prosecution, it is especially taxing in cases involving drug overdose deaths because the key witnesses tend to either be addicts themselves or have prior convictions. Katherine Daniels and Carol M. Bast, \textit{Difficulties in Investigating and Prosecuting Heroin Overdose Cases}, 41 CRIM. LAW. LAW BULLETIN 5 (2005). In \textit{Harden}, the court found that Kniebes-Larsen was credible and ultimately relied on her testimony to suggest Schnettler’s death was foreseeable to Harden, despite Kniebes-Larsen being a heroin addict. \textit{Harden}, 893 F.3d at 443-44.
d\textsuperscript{220} \textit{Id.}
\end{quote}
The United States does not have the burden of establishing that the defendant intended that death resulted from the distribution or the use of the controlled substance. Nor does the United States have the burden of establishing that the defendant knew, or should have known, that death would result from the distribution of the controlled substance by the defendant.\textsuperscript{221}

The jury convicted Harden of conspiracy to distribute 100 grams or more of heroin, resulting in death, pursuant to 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846.\textsuperscript{222} The court applied the “death results” enhancement, and Harden was sentenced to life in prison.\textsuperscript{223}

The sentencing enhancement required that the Government prove beyond a reasonable doubt that: (1) Harden conspired to distribute 100 grams or more of heroin; and (2) death or serious bodily injury resulted from the use of the heroin.\textsuperscript{224} On appeal, Harden did not dispute that the Government presented sufficient evidence to prove the first element.\textsuperscript{225} However, Harden did contest the sufficiency of the evidence as to the second element.\textsuperscript{226} Harden’s sufficiency claim

\textsuperscript{221} Id. (emphasis added). At the end of Harden’s trial, the district court judge inquired into whether either party had any objections to the jury instructions or the verdict forms. \textit{Id}. On the Government’s recommendation, the court adjusted the verdict form to tie the death of Mr. Schnettler to Harden. \textit{Id}. The form read as follows: “Did the death of Frederick Schnettler result from the use of heroin provided by the Defendant, Donald S. Harden?” \textit{Id}. Aside from this adjustment, neither party requested any additional instructions. \textit{Id}. Thus, Harden waived any challenge regarding jury instructions, including his later argument that the jury should have been instructed regarding foreseeability. \textit{Id}. at 450.

\textsuperscript{222} \textit{Id}. at 445.

\textsuperscript{223} \textit{Id}.

\textsuperscript{224} \textit{Id}. The second element is derived from \textit{Burrage’s} holding that the “death results” enhancement of § 841 is an element that must be submitted to the jury and proved beyond a reasonable doubt. \textit{Id}.

\textsuperscript{225} \textit{Id}. at 446.

\textsuperscript{226} \textit{Id}.
hinged on his interpretation of the “death results” language. Harden argued the “death results” language requires proximate-cause. This would require the Government show Schnettler’s death was a reasonably foreseeable result of Harden’s drug dealing. Every other circuit that has addressed this issue has held the “death results” enhancement does not require proximate cause, and therefore the government need not prove foreseeability.

However, Harden argued that principles of co-conspirator liability compel a proximate cause requirement in this context. Harden relied on Pinkerton v. United States, where the Supreme Court held a defendant may only be found liable for a co-conspirator’s criminal act if it was reasonably foreseeable. The Seventh Circuit refused to apply this reasoning to Harden’s case because Harden did not claim he was sentenced based on a co-conspirator’s unforeseeable criminal act. Instead, he argued that the “consequence of his own criminal act—Schnettler’s death—was not reasonably foreseeable.” Thus, the issue presented did not implicate Pinkerton’s limitations.

227 Id. at 446-47.
228 Id. at 447.
229 Id.
230 Id. at 447-48; United States v. Burkholder, 816 F.3d 607, 618 (10th Cir. 2016); United States v. Webb, 655 F.3d 1238, 1250 (11th Cir. 2011); United States v. De La Cruz, 514 F.3d 121, 137 (1st Cir. 2008); United States v. Houston, 406 F.3d 1121, 1124-25 (9th Cir. 2005); United States v. Carbajal, 290 F.3d 277, 284 (5th Cir. 2002); United States v. McIntosh, 236 F.3d 968, 972 (8th Cir. 2001); United States v. Robinson, 167 F.3d 824, 832 (3d Cir. 1999); United States v. Patterson, 38 F.3d 139, 145 (4th Cir. 1994).
231 United States v. Harden, 893 F.3d 434, 449 (7th Cir. 2018). “Even the Government believed it bore that burden, alleging in the indictment that Schnettler’s death resulted from the use of heroin distributed by Harden and his co-conspirators, that was reasonably foreseeable to him.” Appellant’s Br. 28 (Oct. 19, 2017).
232 Harden, 893 F.3d at 449.
233 Id.
234 Id. (emphasis in original). On appeal, defense counsel argued that “Schnettler’s death, which allegedly resulted from his taking 0.1 grams of heroin that another user described as ‘junk’, occurred after the heroin passed four links down the
The Seventh Circuit also looked to the statutory language of the enhancement, which does not require proof of proximate cause. The sentencing enhancement is triggered if “death or serious bodily injury results from the use of such substance.” The use of the phrase “results from” is noteworthy because “resulting in death and causing death are not equivalents.” The Seventh Circuit identified numerous instances where Congress explicitly included the proximate cause language in sentencing enhancements. The court found that if Congress wanted to require proximate cause it would have explicitly done so. The court also considered the policy implications of its decision. “Due to the extremely hazardous nature of drug distribution, a policy of strict liability when death occurs fits the statutory language and its evident purpose.” By treating the enhancement as a matter of strict liability, the courts are de facto categorizing the death as foreseeable, regardless of whether a particular defendant foresaw or should have foreseen such a result.

POST-HARDEN: HOW THE SEVENTH CIRCUIT’S DECISION WILL MAKE A LASTING IMPACT

Defendants appealing their sentences to the Seventh Circuit have begun citing Harden hoping the court will impose a foreseeability causal chain from Harden was not reasonably foreseeable.”

235 *Id.*
236 *Id.* at 448.
237 *Id.*
238 *Id.*
239 *Id.*
240 *Id.*
241 *Id.*
242 *Id.*
243 *Id.*
requirement for the resulting death.\(^\text{244}\) At the same time, district courts are relying on the Seventh Circuit’s reasoning in *Harden* to justify why the Government need not prove foreseeability.\(^\text{245}\) While statutory interpretation explains outright why *Harden* was correctly decided, the Supreme Court should consider hearing a case where the application of the twenty-year mandatory minimum sentence is not easily rationalized. The occasional discomfort of district court judges, when imposing the “death results” enhancement without the option of exercising discretion, will likely result in a Supreme Court opinion suggesting a need for legislative reform. This is the only way district court judges will be able to depart from this mandatory minimum sentence.\(^\text{246}\) Clarity across the board will encourage prosecutors to ask for the sentencing enhancement, which will have a positive impact on the opioid crisis.

For example, in *United States v. Shanks*, the defendant relied on *Harden* to argue the “death results” enhancement could not apply because the death was not reasonably foreseeable.\(^\text{247}\) In *Shanks*, the defendant was charged with a variety of drug related offenses, including conspiracy to distribute and possessing with intent to distribute controlled substances, as well as knowingly distributing controlled substances, resulting in the deaths of two individuals, and serious bodily harm of another, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C).\(^\text{248}\) The defendant moved for an *in camera* inspection of psychological treatment records of one of the victims.\(^\text{249}\) He argued the records may contain exculpatory evidence, including evidence the victim died as a result of suicide, which he contended would release


\(^\text{245}\) *Id.*

\(^\text{246}\) The Federal Sentencing Guidelines are enacted and amended by Congress. U.S. Const. art. I, § 1. Congress has the constitutional power to make laws. *Id.* The Supreme Court may only interpret them. U.S. Const. art. III, § 1.

\(^\text{247}\) No. 18-CR-18, 2018 WL 3439639, at *1.

\(^\text{248}\) *Id.*

\(^\text{249}\) *Id.*
him of any liability for the user’s death.\textsuperscript{250} The Government argued that the “death results” enhancement is a strict liability offense.\textsuperscript{251} The district court found it was unclear how the user’s psychological records were material to his cause of death.\textsuperscript{252} Even if the user was suicidal at the time of his death, and the defendant could show the user intentionally took the drugs to commit suicide, that would not negate the but-for causation requirement.\textsuperscript{253} As to the defendant’s argument that the records would show the user’s death was unforeseeable, the court held “reasonable foreseeability is not required for the ‘death results’ enhancement.”\textsuperscript{254} Stated differently, once the Government shows the ‘but for’ causal connection between the drug and the resulting death, criminal liability attaches without the need to prove foreseeability.”\textsuperscript{255} The court looked to the Seventh Circuit’s analysis in \textit{Harden} and concluded “strict liability creates an incentive for a drug dealer to warn his customer about the strength of a particular batch of drugs being sold and to refuse to supply drugs to a particularly vulnerable people.”\textsuperscript{256}

The Seventh Circuit continues to recognize that strict liability has limits when applied to the “death results” enhancement. For example, on a conspiracy charge, “it is not sufficient for the Government to prove that a defendant participated in an overall conspiracy in which a drug user died.”\textsuperscript{257} The Government must prove a particular defendant responsible for a particular death.\textsuperscript{258} Essentially, the Government “need not prove that the death was reasonably foreseeable for the ‘death results’ enhancement to apply in a case where a defendant directly distributes drugs or uses intermediaries to distribute drugs that

\textsuperscript{250} \textit{Id.} at *2.
\textsuperscript{251} \textit{Id.}
\textsuperscript{252} \textit{Id.}
\textsuperscript{253} \textit{Id.}
\textsuperscript{254} \textit{Id.} at *3.
\textsuperscript{255} \textit{Id.}
\textsuperscript{256} \textit{Id.} (quoting United States v. Hatfield, 591 F.3d 945, 951 (7th Cir. 2010)).
\textsuperscript{257} \textit{Shanks}, 2018 WL 3439639, at *3.
\textsuperscript{258} \textit{Id.}
result in death.\textsuperscript{259} However, in a conspiracy [case], the Government must prove that the defendant’s relevant conduct encompasses the drugs linked to the death.”\textsuperscript{260} In Shanks, the defendant was not only charged as part of a conspiracy, but he also faced a substantive count of knowingly distributing drugs to the decedent.\textsuperscript{261} Therefore, the foreseeability requirement in the context of conspiracy need not apply, and the elements of the “death results” sentencing enhancement were proven on the basis of the substantive count.\textsuperscript{262}

Recently, the Third Circuit has gone so far as to allow a jury instruction on proximate cause in a case involving a “death resulted” sentencing enhancement. In United States v. Gonzalez, the defendants were convicted of conspiracy to commit interstate stalking and cyberstalking, resulting in death.\textsuperscript{263} The defendants appealed to the Third Circuit, challenging the district court’s “death resulted” instruction, which was supplied to the jury to determine whether the defendants qualified for the sentencing enhancement.\textsuperscript{264} The Government argued that under the instructions there were two theories of liability: (1) the death resulted from the defendants’ personal actions if the defendant’s actions were the actual and proximate cause of the individual’s death; or (2) the defendants were responsible for the death under co-conspirator liability.\textsuperscript{265} The district court permitted the proximate cause theory, observing that its instruction held the jury to a higher standard than the law required.\textsuperscript{266} The court thought of it as a “necessary safeguard for the defendants’ rights”.\textsuperscript{267} Thus, on appeal, the Third Circuit determined that the district court did not err because the “actual cause” part of the instruction tracked but-for causation, and

\begin{footnotes}
\item[259] Id.
\item[260] Id.
\item[261] Id. at *1.
\item[262] Id. at *3.
\item[263] 905 F.3d 165, 174 (3d Cir. 2018).
\item[264] Id. at 179.
\item[265] Id. at 188.
\item[266] Id. at 190.
\item[267] Id. at 188.
\end{footnotes}
the “proximate cause” part of the instruction provided an even more stringent finding than required.268

A. The Supreme Court should consider whether a discretionary departure is appropriate for the “death results” enhancement.

The Federal Sentencing Guidelines permit downward departures “from the prescribed sentencing range in cases in which the judge finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”269 Still, departures are not available in every case, and “in fact are unavailable in most.”270 There is no case law to support the idea that 18 U.S.C. § 3553 permits a judge to sentence below the mandatory minimum in the “death results” enhancement. In fact, court opinions where judges express their desire for discretion suggest the contrary. The Federal Sentencing Guidelines are set forth by Congress.271 Because it is unlikely that members of Congress will advocate on behalf of this discretionary departure, since it could be framed as convicted criminals serving less time, the Supreme Court will have to lead the charge. If the Supreme Court were to take issue with the district court’s lack of discretion, it can critique potential due process violations all it wants, but it must ultimately call for the legislature to amend § 841.

Congress’ goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.272 Uniformity “does not consist simply of similar sentences for those convicted of violations of the same statute . . . It consists, more importantly, of similar relationships between sentences and real

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conduct, relationships that Congress’ sentencing statutes helped to advance.” 273

Granting a district court judge discretion in a downward departure will not inhibit narcotics prosecutions and may in fact improve the opioid crisis. Courts will still be bound by the mandatory minimum sentence if death results from drug distribution or manufacturing. Prosecutors will not have to prove the death was foreseeable. A defendant whose case teeters on the line between accidental and criminal conduct will have an avenue to request relief. A defendant whose case warrants a twenty-year sentence will get one. A defendant whose case does not can be directed to addiction programs or assist law enforcement in pursuing his or her supplier. There is “growing and wholly justified” concern about the “proliferation and variety of drug crimes”, but perhaps the best way to reduce these crimes is to not feel settled in the status quo. 274

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273 *Id.* at 253-54.
274 *Id.* at 235.
DO AN ATTORNEY’S ACTIONS CONSTITUTE HIS CLIENT’S INTENT?: THE SEVENTH CIRCUIT’S BROADENING OF THE PRINCIPLES OF WAIVER

ALICE WARD*

Cite as: Alice Ward, Do an Attorney’s Actions Constitute His Client’s Intent?: The Seventh Circuit’s Broadening of the Principles of Waiver, 14 SEVENTH CIRCUIT REV. 167 (2018), at https://www.kentlaw.iit.edu/sites/ck/files/public/academics/jd/7cr/v14/ward.pdf.

INTRODUCTION

When a defendant fails to object to an issue at sentencing, he may lose the right to make that challenge again later—but only if the court determines that he acted intentionally.1 If a defendant disagrees with his lawyer’s decision not to object, should the lawyer’s failure to object constitute an intentional choice by the defendant?2 Principles of waiver should be construed in favor of the defendant and the court has the discretion to infer a defendant’s intent based on the record.3 If there are ambiguities in the record, the court should resolve them in the light most favorable to the defendant, particularly when issues of sentencing are concerned.4


1 United States v. Haddad, 462 F.3d 783, 793 (7th Cir. 2006) (citing United States v. Murry, 395 F.3d 712, 717 (7th Cir. 2005)).

2 See United States v. Scott, 900 F.3d 972, 973 (7th Cir. 2018).

3 United States v. Jaimes-Jaimes, 406 F.3d 845, 848 (7th Cir. 2005) (citing United States v. Sumner, 265 F.3d 532, 539 (7th Cir. 2001)).

4 United States v. Anderson, 604 F.3d 997, 1002 (7th Cir. 2010) (citing United States v. Richardson, 238 F.3d 837, 841 (7th Cir. 2001)).
Wayne Scott was on conditional release after serving a term of imprisonment for fraud, under 18 U.S.C. § 1341. Scott violated the conditions of his release, and on January 17, 2017, the district court held a revocation hearing to address his latest violation – opening a new line of credit without consulting his probation officer. After the court determined that Scott did violate the terms of his release, the government recommended five months in custody and an additional thirty-six months of supervised release based on a sentencing recommendation prepared for a previous probation violation. The court declined to place Scott into custody because of his compliance with his restitution payments. Defense counsel stated, “we have no objection to extending the period of mandatory supervised release.” The court then advised Scott to follow the terms of his conditional release to avoid future court involvement and Scott began to speak. Scott stated, “Your Honor, I just want to add for the record,” before his defense attorney interrupted, advising Scott to speak with him first. After speaking to Scott, defense counsel advised the judge that Scott had nothing to say and the hearing ended.

Scott retained new counsel for his next status hearing when the court discovered it had to impose a period of custody to extend Scott’s supervised release period. The new attorney requested a shorter period of supervised release but made no mention about the lack of sentencing guidelines calculation or the fact that Scott was not permitted to allocute at the revocation hearing. Scott later filed a motion to reconsider challenging the district court’s supervised release.

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5 Scott, 900 F.3d at 973.
6 Id.
7 Id.
8 Id.
9 Id. at 974.
10 Id.
11 Id.
12 Id.
13 Id.
14 Id.
violation finding, advocating for a shorter sentence of supervised release, and stating that he disagreed with his attorney’s decision to not object to the sentence of supervised release.\textsuperscript{15} The district court denied the motion and Scott timely appealed.\textsuperscript{16} The Seventh Circuit affirmed the district court’s ruling, finding that Scott waived both his challenge to the lack of sentencing guidelines calculation and his right to allocution.\textsuperscript{17}

The first part of this comment will discuss the principle of waiver and how its standard differs from that of forfeiture. The second section will summarize the Seventh Circuit’s decision in \textit{United States v. Scott}. The third section will analyze the Seventh Circuit’s decision in \textit{Scott} against precedent in the circuit and argue that the case should have been remanded to the district court for a new calculation under the sentencing guidelines.

**BACKGROUND**

When a defendant intentionally and voluntarily gives up a claim to a known right, it constitutes a waiver of that right, precludes appellate review, and extinguishes error.\textsuperscript{18} “Waiver principles should be construed liberally in favor of the defendant.”\textsuperscript{19} When a defendant does not make an objection at his sentencing hearing that may communicate that he does not wish to argue the sentence imposed.\textsuperscript{20} When a defendant decides not to make an argument for tactical reasons that constitutes an intentional decision - not mere oversight - and he has waived his ability to make that argument later.\textsuperscript{21} If a

\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} United States v. Haddad, 462 F.3d 783, 793 (7th Cir. 2006) (citing United States v. Murry, 395 F.3d 712, 717 (7th Cir. 2005)).
\textsuperscript{19} United States v. Jaimes-Jaimes, 406 F.3d 845, 848 (7th Cir. 2005) (citing United States v. Sumner, 265 F.3d 532, 539 (7th Cir. 2001)).
\textsuperscript{20} United States v. Brodie, 507 F.3d 527, 531 (7th Cir. 2007) (citing \textit{Jaimes-Jaimes}, 406 F.3d at 848).
\textsuperscript{21} \textit{Jaimes-Jaimes}, 406 F.3d at 848.
defendant does not make an argument due to oversight or negligence, however, that constitutes forfeiture and may be subject to plain error review at the appellate level, if the defendant can demonstrate good cause. 22 “Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant’s choice must be particularly informed or voluntary, all depend on the right at stake.” 23 When a legal rule was violated, there has been an error regardless of whether the defendant timely objected. 24

The Seventh Circuit found that a defendant waived his rights at sentencing when he made arguments against certain findings in his presentence report and then stated that he had no further objections. 25 Similarly, when a defense attorney stated he had reviewed the presentence report with his client and they had no objections to the guidelines calculation, the court of appeals found that the defendant knew of his right to object and intentionally decided not to do so. 26

The major difference between waiver and forfeiture is that forfeiture does not extinguish error on appeal and instead permits review for plain error. 27 However, the line between waiver and forfeiture is not always clear, and courts sometimes find it difficult to distinguish the two. 28 Waiver is an intentional decision to not assert a right while forfeiture is an accidental or negligent “failure to make the timely assertion of a right.” 29 To determine whether a right was waived or forfeited, the court must examine the defendant’s mental state at the

22 United States v. Brodie, 507 F.3d 527, 531 (7th Cir. 2007).
24 Olano, 507 U.S. at 733-34.
25 Brodie, 507 F.3d at 531.
26 United States v. Staples, 202 F.3d 992, 995 (7th Cir. 2000).
27 United States v. Butler, 777 F.3d 382, 387 (7th Cir. 2015) (citing Olano, 507 U.S. at 731).
28 Butler, 777 F.3d at 387 (citing United States v. Garcia, 580 F.3d 528, 541 (7th Cir. 2009)).
29 Olano, 507 U.S. at 733.
time he could have made the objection.\textsuperscript{30} When deciding whether a right was waived, the court analyzes each omission to determine whether it was a strategic decision to not object.\textsuperscript{31} It is the government’s burden to show a strategic justification for a defendant’s failure to object to prove waiver.\textsuperscript{32} Generally, when a defendant does not object to an issue at his sentencing hearing, the court finds that the defendant waived the issue; however, there is no rigid “rule that every objection not raised at a sentencing hearing is waived.”\textsuperscript{33} To determine a defendant’s intent in not arguing a point, the court makes inferences from the record as a whole and considers the particular circumstances.\textsuperscript{34} “[A]n argument should be deemed forfeited rather than waived if finding waiver from an ambiguous record would compel the conclusion that counsel necessarily would have been deficient to advise the defendant not to object.”\textsuperscript{35} The Seventh Circuit found that the failure to object by defendant and his counsel at sentencing was merely forfeiture and not waiver when the defendant had made an objection to the restitution calculation prior to sentencing, even though both the defendant and his counsel stated at sentencing that they had no objections.\textsuperscript{36}

When a court finds that a defendant forfeited a right, then the “remarkably demanding” plain error tests applies.\textsuperscript{37} A defendant bears the burden to show: “(1) an error or defect that (2) is clear or obvious

\textsuperscript{30} Butler, 777 F.3d at 387 (citing United States v. Anderson, 604 F.3d 997, 1001 (7th Cir. 2010)).
\textsuperscript{31} Butler, 777 F.3d at 387 (citing Anderson, 604 F.3d at 1002).
\textsuperscript{32} Anderson, 604 F.3d at 1001-02.
\textsuperscript{33} Butler, 777 F.3d at 387 (quoting United States v. Jaimes-Jaimes, 406 F.3d 845, 848 (7th Cir. 2005)).
\textsuperscript{34} Butler, 777 F.3d at 387 (citing United States v. Garcia, 580 F.3d 528, 542 (7th Cir. 2009)).
\textsuperscript{35} Jaimes-Jaimes, 406 F.3d at 848 (citing United States v. Richardson, 238 F.3d 837, 841 (7th Cir. 2001)).
\textsuperscript{36} United States v. Allen, 529 F.3d 390, 395 (7th Cir. 2008).
\textsuperscript{37} Butler, 777 F.3d at 388 (citing Anderson, 604 F.3d at 1002).
and (3) affects the defendant’s substantial rights.”38 If a defendant meets this burden, the court has the discretion to correct the error – it is not required to do so.39 The court may correct the error when it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”40 The standard of plain error review “is permissive, not mandatory.”41 The Supreme Court has determined it should be exercised “in those circumstances in which a miscarriage of justice would otherwise result.”42 While “miscarriage of justice” applies to cases where the defendant is actually innocent, the doctrine is generally applied more broadly.43

Judges are required to calculate the guidelines range before sentencing a defendant to a term of supervised release.44 While judges are not required to sentence a defendant to a term within the range, the federal code requires them to consider the enumerated subsections in section 3553(a) when deciding the length of a sentence of imprisonment and conditions of supervised release.45 The record must indicate that the district court actually considered the guidelines range.46 Failure to do so constitutes reversible error.47

When a defendant argued that his criminal history score was improperly calculated and the calculation he advocated for led to a sentencing guidelines range that overlapped with the range calculated

38 Butler, 777 F.3d at 388 (citing United States v. Olano, 507 U.S. 725, 736 (1993)).
39 Id.
40 United States v. Allen, 529 F.3d 390, 395 (7th Cir. 2008) (quoting United States v. Kibler, 279 F.3d 511, 514 (7th Cir. 2002)).
41 Olano, 507 U.S. at 735.
43 Olano, 507 U.S. at 735.
44 United States v. Downs, 784 F.3d 1180, 1181 (7th Cir. 2015).
45 United States v. Griffin, 806 F.3d 890, 892 (7th Cir. 2015) (citing United States v. Thompson, 777 F.3d 368, 373 (7th Cir. 2015) (citing 18 U.S.C. §§ 3553(c), 3583(c))).
46 United States v. Oliver, 873 F.3d 601, 610 (7th Cir. 2017).
47 Downs, 784 F.3d at 1181.
by the district court, the Seventh Circuit found that was insufficient to constitute plain error because the defendant failed to show a substantial right was affected.48 However, when the district court failed to calculate the appropriate sentencing guidelines range before imposing a period of supervised release, the Seventh Circuit found that was not a harmless error because judges are required to consider the guidelines range before imposing any sentence – even though they are not required to actually impose a sentence within that resulting range.49

**United States v. Scott**

Wayne Scott was on conditional release after completing a prison term for defrauding investors and potential investors.50 As part of his supervised release, Scott was not permitted to open new lines of credit without the approval of his probation officer.51 The government filed a motion alleging that Scott violated that provision of his release on January 17, 2017 and on July 6, 2017, the district court held a revocation hearing.52 The district court determined that Scott violated the terms of his release and, based off of a report created for a previous violation, the government recommended five months in custody and an additional thirty-six months of supervised release.53 Because Scott had been complying with his restitution payments, the court denied imposing a period of custody.54 The government renewed its request for an extended period of supervised release, and defense counsel advised that he had no objection.55 The court imposed the thirty-six months of supervised release and then addressed Scott to

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48 United States v. Butler, 777 F.3d 382, 389 (7th Cir. 2015).
49 Downs, 784 F.3d at 1181.
50 United States v. Scott, 900 F.3d 972, 973 (7th Cir. 2018).
51 Id.
52 Id.
53 Id.
54 Id.
55 Id. at 974.
remind him to continue making restitution payments to avoid future court appearances.\textsuperscript{56} Scott began to address the court, saying, “Your Honor, I just want to add for the record,” before his defense attorney interrupted, saying “No, you’re going to talk to me first.”\textsuperscript{57} After speaking to Scott, defense counsel stated, “Pardon me, Judge. Thank you for the opportunity to talk. I don’t believe he has anything else he wants to tell the Court,” and the hearing ended.\textsuperscript{58}

Scott was represented by a different attorney at his next status hearing when the court determined that the extension of Scott’s supervised release required a period of custody.\textsuperscript{59} The court ordered a one day sentence with time considered served followed by the thirty-six months of supervised release and then asked whether there was any objection.\textsuperscript{60} Scott’s new counsel stated he was, “not looking to reopen Mr. Scott’s sentencing hearing,” but advocated for a shorter period of supervised release.\textsuperscript{61} Counsel did not argue that the sentencing guidelines calculation was not performed or that Scott had no opportunity to allocate\textsuperscript{62} at the revocation hearing.\textsuperscript{63}

After the status hearing, Scott filed a motion to reconsider, on the grounds that: he did not agree with his attorney’s decision to not object to the additional time of supervised release, no sentencing guidelines calculation was performed at the hearing, the penalties were not explained to him, and he was not permitted to present mitigating

\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 974.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Allocution is a defendant’s opportunity to address the court at sentencing. The three major theories in support of allocution posit that it allows the defendant the opportunity to accept responsibility for his actions, mitigate his sentence, and humanize himself to the court. Mark W. Bennett and Ira P. Robbins, \textit{Last Words: A Survey and Analysis of Federal Judges’ Views of Allocution in Sentencing}, 65 ALA. L. REV. 735, 739 (2013) (citing Kimberly A. Thomas, \textit{Beyond Mitigation: Towards a Theory of Allocution}, 75 FORDHAM L. REV. 2641, 2655-67 (2007)).
\textsuperscript{63} Scott, 900 F.3d at 974.
factors at the hearing. The district court denied Scott’s motion and he filed a timely appeal.

The Seventh Circuit found that Scott waived his right to challenge both the thirty-six months of supervised release imposed and that the district court did not allow him to allocute. The court noted that revocation hearings do not provide the same constitutional rights to a defendant that a sentencing hearing does. However, the dissent addresses this somewhat cryptic statement by pointing out that in a revocation hearing, the district court is still required to consider the appropriate sentencing guidelines range by at least referencing a report prepared by the probation office advising what the guidelines range is. The court then cited to the fact that Scott’s counsel had no objection to the additional thirty-six months of supervised release and that while Scott began to speak to the judge, after conferring with his counsel, his attorney advised the court Scott had nothing to say. The majority opined that it did not want to interfere with the attorney-client relationship.

However, the dissent characterized the revocation hearing and the interaction between Scott and his attorney differently. Chief Judge Wood noted first that the district court did not properly calculate a guidelines sentence and instead relied on a report prepared for Scott’s previous probation violation. Then, Scott’s counsel spoke for him, stating that they did not have any objection to the imposition of an additional thirty-six months of supervised release. Next, defense counsel interrupted Scott when he attempted to assert his right to

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64 Id.
65 Id.
66 Id.
67 Id. (citing United States v. Lee, 795 F.3d 682, 685 (7th Cir. 2015)).
68 Scott, 900 F.3d at 979 (Wood, J., dissenting).
69 Scott, 900 F.3d at 974.
70 Id.
71 Id. at 975 (Wood, J., dissenting).
72 Id. at 976 (Wood, J., dissenting).
73 Id. (Wood, J., dissenting).
Finally, defense counsel spoke for Scott, advising the court that Scott had nothing to say. Scott retained a new lawyer and attempted to address the lack of sentencing guidelines calculation and allocution, but the district court ruled that it was too late. The dissent performed a thorough analysis of the record, and went line-by-line to determine what occurred at the sentencing hearing between the government, the court, and the defense. The dissent noted that Scott’s attorney agreed to extend the period of mandatory supervised release before the government or court made a recommendation of how many months to extend the supervised release. “The government recommended a 36-month term only after Scott’s counsel had agreed to some extension.” The dissent then summarized the end of the hearing as follows: Scott attempted to address to court, he was interrupted by his attorney, then conferred with his attorney, Scott’s attorney then addressed the court to advise the judge that Scott had nothing further to say, and the judge did not confirm with Scott instead just said, “All right. That’s fine.” The dissent concluded, based on its reading of the record, that Scott did not waive his arguments regarding his right to a sentencing guidelines calculation and allocution and would have remanded to the district court for a new revocation hearing where the district court would actually calculate the sentencing guidelines for Scott’s violation.

74 Id. (Wood, J., dissenting).
75 Id. (Wood, J., dissenting).
76 Id. (Wood, J., dissenting).
77 Id. (Wood, J., dissenting).
78 Id. (Wood, J., dissenting).
79 Id. (Wood, J., dissenting).
80 Id. (Wood, J., dissenting).
81 Id. (Wood, J., dissenting).
Neither Scott nor his counsel objected at his revocation hearing to the imposition of thirty-six months of supervised release. A failure to object may communicate his intention to relinquish an argument, but it does not automatically constitute a waiver. The court should also consider whether there was a strategic reason to not object to a provision at sentencing and whether it was deficient for defense counsel to not object. The Scott majority did not consider whether there was any strategic reason to not object to the period of supervised release suggested by the government. Scott retained a new attorney after his revocation hearing, and while it is not in the record, the court could have inferred it was because Scott was unhappy with his previous counsel’s performance at sentencing. As the record stands, it is at the very least ambiguous as to whether Scott’s previous counsel was acting strategically or negligently. Principles of waiver are meant to be construed in the defendant’s favor. When a court determines whether a defendant intentionally made the choice to not object, it relies on inferences from the record and the circumstances particular to the defendant.

The facts in Scott are similar to those in United States v. Jaimes-Jaimes, where the Seventh Circuit found that counsel’s failure to object to a sentence enhancement constituted forfeiture – not waiver.

82 United States v. Scott, 900 F.3d 972, 974 (7th Cir. 2018).
83 United States v. Allen, 529 F.3d 390, 395 (7th Cir. 2008) (citing United States v. Jaimes-Jaimes, 406 F.3d 845, 848 (7th Cir. 2005)).
84 Allen, 529 F.3d at 395 (citing United States v. Brodie, 507 F.3d 527, 531-32 (7th Cir. 2007); Jaimes-Jaimes, 406 F.3d at 848).
85 See Scott, 900 F.3d at 974.
86 See Scott, 900 F.3d at 974.
87 See id.
88 Jaimes-Jaimes, 406 F.3d at 848 (citing United States v. Sumner, 265 F.3d 532, 539 (7th Cir. 2001)).
89 United States v. Butler, 777 F.3d 382, 387 (7th Cir. 2015) (citing United States v. Garcia, 580 F.3d 528, 542 (7th Cir. 2009)).
90 See Jaimes-Jaimes, 406 F.3d at 848.
Scott’s counsel did not allow him to address the court and Scott later stated that he disagreed with his lawyer’s decision to not challenge the sentencing guidelines calculation. In *Jaimes-Jaimes*, the Seventh Circuit found that while the statement from defense counsel that his client did not have an objection to the content of the presentence report was significant, it did not automatically constitute a waiver of the right of the defendant to later appeal any guidelines calculation in the report. Despite the court ruling under similar circumstances that a defendant had waived his right to appeal the guidelines sentence in his presentence report, the court ruled that it was not “an inflexible rule that every objection not raised at a sentencing hearing is waived.”

When the Seventh Circuit could not think of any strategic reason for a defendant to choose not to object to multiple level increases in his offense level and the government also offered no reasonable justification, the court of appeals found that the most probable explanation was that the defendant’s counsel made an oversight in not challenging the increase. That oversight by defense counsel was accidental and not an intentional choice made by defendant and therefore constituted forfeiture and was subject to plain error review.

The Seventh Circuit in *Scott* was aware of its decision in *Jaimes-Jaimes*, the majority opinion even cites the case while discussing the concept of waiver. However, the Seventh Circuit did not discuss the facts of *Jaimes-Jaimes* or distinguish it from *Scott*. Rene Jaimes-Jaimes (“Jaimes”) pleaded guilty to unlawfully remaining in the United States after being deported. The presentence report prepared by probation and the written plea agreement prepared by the parties

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91 See *Scott*, 900 F.3d at 974.
92 *Jaimes-Jaimes*, 406 F.3d at 848.
93 Id.
94 Id.
95 Id. at 849.
96 *Scott*, 900 F.3d at 973 (quoting *Jaimes-Jaimes*, 406 F.3d at 848 (“The touchstone of waiver is a knowing and intentional decision.”)).
97 See *Scott*, 900 F.3d at 973.
98 *Jaimes-Jaimes*, 406 F.3d at 846.
both calculated that Jaimes’ offense level should be increased by sixteen points. The district court accepted the calculation and sentenced Jaimes to seventy-eight months of imprisonment, which was within the calculated guidelines range of seventy to seventy-eight months. On appeal, Jaimes argued that his offense level was improperly increased by sixteen and should have only been increased by eight, and that miscalculation constituted plain error. The Seventh Circuit agreed, vacated, and remanded for resentencing. The government argued that when defense counsel advised the court that he had no objection to the guidelines calculation Jaimes waived his right to challenge the calculation on appeal. The court agreed that in previous rulings it had found that defendants waived their right to a sentencing guidelines argument under similar circumstances; however, in those previous cases the court found the defendant was acting strategically. In Jaimes-Jaimes, the court found that the only plausible explanation for defendant’s failure to object to the sentence enhancement was oversight by his attorney. Similarly, in Scott, no strategic explanation is provided to explain why Scott’s counsel did not object to the period of supervised release offered by the government at sentencing. The court had already advised the parties that it would not impose a period of custody based on Scott’s compliance with restitution payments. The dissent in Scott pointed

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99 Id.
100 Id.
101 Id.
102 Id.
103 Id. at 847-48 (citing United States v. Staples, 202 F.3d 992, 995 (7th Cir. 2000) (finding that defendant had waived right to challenge guidelines calculation when his attorney advised the court that he had reviewed the presentence report with his client and they had no objection)).
104 Jaimes-Jaimes, 406 F.3d at 848 (citing United States v. Martinez-Jimenez, 294 F.3d 921, 923 (7th Cir. 2002); United States v. Cooper, 243 F.3d 411, 416 (7th Cir. 2001)).
105 Jaimes-Jaimes, 406 F.3d at 848.
106 See Scott, 900 F.3d at 973.
107 Id.
out that the record showed that Scott’s attorney stated he had no objection to a period of supervised release before the court even advised how long that period might be.\textsuperscript{108} If counsel did not even know what sentence the court was going to impose, how could his decision to not object to it reflect an intentional, strategic decision? The “touchstone of waiver” is when a defendant makes objections to certain conditions of supervised release and then intentionally decides to not make objections to others.\textsuperscript{109} By purposefully choosing to not object, the defendant has waived any challenges he may have had to the provision.\textsuperscript{110} Scott’s counsel did not make any objection to either the failure of the court to perform a sentencing calculation or the imposition of thirty-six months of supervised release.\textsuperscript{111} As remarked above, Scott’s counsel blindly asserted there was no objection to a period of supervised release before even learning what period of time the court would impose.\textsuperscript{112}

When an attorney argued for a shorter sentence for his client instead of making a direct challenge to the sentencing guidelines calculation, the court found forfeiture of a right instead of waiver.\textsuperscript{113} In United States v. Butler, the defendant did not challenge the calculation of his sentencing guidelines and the Seventh Circuit found that it was due to oversight by defendant’s counsel rather than an intentional decision and therefore constitute forfeiture and not waiver.\textsuperscript{114} Upon examining the record, the circuit court concluded that counsel objected to the inclusion of a state forgery offense that increased the defendant’s guidelines calculation by two points, but did not make the

\textsuperscript{108} Id. at 977 (Wood, J., dissenting).
\textsuperscript{109} United States v. Raney, 842 F.3d 1041, 1044 (7th Cir. 2016) (quoting United States v. Armour, 804 F.3d 859, 865 (7th Cir. 2015)).
\textsuperscript{110} Raney, 842 F.3d 1044 (citing United States v. Gabriel, 831 F.3d 811, 814 (7th Cir. 2016)).
\textsuperscript{111} See Scott, 900 F.3d at 973.
\textsuperscript{112} See id. at 977 (Wood, J., dissenting).
\textsuperscript{113} See United States v. Butler, 777 F.3d 382, 387 (7th Cir. 2015).
\textsuperscript{114} Id.
challenge to the guidelines calculation directly. The government could not articulate a strategic reason for defense counsel to not make the challenge and therefore the Seventh Circuit found that the defendant forfeited his right to challenge the guidelines calculation. Similarly, Scott retained new counsel for his first status hearing after sentencing who argued for a shorter period of supervised release instead of making an outright challenge to the lack of sentencing guidelines calculation. The court in Scott did not consider whether there was a strategic reason for Scott’s counsel to not make that challenge. The court could have made an inference that the failure to challenge the sentencing guidelines calculation was an oversight based on the fact that Scott filed a motion to reconsider after that hearing where he argued that he disagreed with his previous counsel’s decision to not object and reasserted his new counsel’s arguments for a shorter period of supervised release. Instead, the court concluded that if Scott wanted to challenge the lack of sentencing guidelines calculation, the time to do so was at his first hearing after sentencing.

The court’s analysis in Butler did not stop at the conclusion of forfeiture. The defendant still had to show the following under the plain error test: “(1) an error or defect that (2) is clear or obvious and (3) affects the defendant’s substantial rights.”

115 Id.
116 Id. at 388.
117 United States v. Scott, 900 F.3d 972, 974 (7th Cir. 2018).
118 See id.
119 Id.
120 United States v. Butler, 777 F.3d 382, 388 (7th Cir. 2015).
121 Id. (citing United States v. Olano, 507 U.S. 725, 736 (1993)).
122 Butler, 777 F.3d at 388.
have increased his criminal history score by two points.\textsuperscript{123} However, the court found that the conduct was not related to the specific course of conduct, and even if the two points had not been added to Butler’s criminal history score, the corresponding guidelines range would have been eighteen to twenty-four months.\textsuperscript{124} Because Butler was sentenced to twenty-four months with the two point increase to his criminal history score, he could not show that the district court would have imposed a lower sentence and therefore Butler did not show that the error affected his substantial rights.\textsuperscript{125} In \textit{Scott}, no sentencing guidelines calculation was ever done for this particular supervised release.\textsuperscript{126} For that reason, when considering whether the lack of sentencing guidelines calculation constituted plain error, the facts in \textit{Scott} more closely resemble those in \textit{United States v. Allen}, where the district court failed to make a proper calculation of restitution owed.\textsuperscript{127}

When a defendant and his defense counsel independently told the court they had no objections at sentencing, the Seventh Circuit still found evidence in the record that indicated the defendant merely forfeited his right to challenge the district court’s restitution calculation.\textsuperscript{128} The court of appeals found that the defendant had objected to the calculation before the sentencing and then determined there was no strategic reason to forego that challenge at the hearing.\textsuperscript{129} Therefore, the failure of defense counsel to object constituted forfeiture and the defendant was entitled to plain error review.\textsuperscript{130} The circuit court vacated the restitution and remanded the case to the district court for a new calculation, finding that it was plain error when the district court did not calculate the actual loss suffered by the

\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} United States v. Scott, 900 F.3d 972, 980 (7th Cir. 2018) (Wood, J., dissenting).
\textsuperscript{127} See United States v. Allen, 529 F.3d 390, 395 (7th Cir. 2008).
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
defendant’s victim. The Scott dissent notes that when revoking a defendant’s supervised release, the district court must calculate and consider the recommended guidelines range. The government relied on a 2015 report created by the probation office regarding an unrelated violation of Scott’s supervised release when it suggested a period of thirty-six months of supervised release for the 2017 violation. The Probation Office never prepared a report for the violation that was the subject of the hearing in 2017; there was no sentencing guidelines calculation done by the probation office or the district court for that particular violation of supervised release. “Judges are required to calculate the applicable guidelines range before imposing sentence, though not bound to sentence within that range.” The district court is the one responsible for calculating the guidelines sentence and the Supreme Court has noted that a miscalculation of the guidelines leads to a “risk of unnecessary deprivation of liberty [that] particularly undermines the fairness, integrity, or public reputation of judicial proceedings.” Before a judge can decide the length of a defendant’s term of supervised release, he must calculate the guidelines range according to the factors in 18 U.S.C. § 3553(a), and use the resulting range as an anchor in determining an appropriate sentence. Because the guidelines are so essential to sentencing, there is a presumption that failing to even calculate the guidelines sentence would affect a defendant’s sentence and therefore would constitute plain error by the district court.

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131 Id.
132 United States v. Scott, 900 F.3d 972, 979 (7th Cir. 2018) (Wood, J., dissenting) (citing United States v. Downs, 784 F.3d 1180, 1181 (7th Cir. 2015); United States v. Snyder, 635 F.3d 956, 959 (7th Cir. 2011)).
133 Scott, 900 F.3d at 980 (7th Cir. 2018) (Wood, J., dissenting).
134 Id.
135 United States v. Downs, 784 F.3d 1180, 1182 (7th Cir. 2015).
136 Scott, 900 F.3d at 980 (Wood, J., dissenting) (quoting Rosales-Mireles v. United States, 138 S. Ct. 1897, 1908 (2018)).
137 Downs, 784 F.3d at 1182.
138 Scott, 900 F.3d at 980 (Wood, J., dissenting) (citing Downs, 784 F.3d at 1182).
CONCLUSION

The Seventh Circuit’s precedent concerning principles of waiver and forfeiture demonstrate that there is a presumption that a defendant’s failure to object was not a waiver absent express, strategic intent by the defendant and his defense counsel to do so.\(^{139}\) Even in circumstances where a defendant appears to have intentionally waived a right, the court retains discretion to examine the record for evidence that failure to object at sentencing was an oversight.\(^{140}\) This follows the Seventh Circuit’s declaration that “[w]aiver principles should be construed liberally in favor of the defendant.”\(^{141}\) In light of its precedent, the court in Scott should have inferred from the record that Scott’s former counsel did not strategically and intentionally decide not to object to the imposition of thirty-six months of supervised release. When Scott retained new counsel, his attorney advocated for a shorter sentence at the first status hearing after sentencing; Scott filed a motion to reconsider shortly after that hearing arguing that he did not agree with his previous counsel’s decision to not object; and in that same motion Scott addressed the issue that no sentencing guidelines calculation was completed.\(^{142}\) At one point, the dissent characterized this case, after considering the record, as “not a good candidate for a finding of forfeiture, much less waiver.”\(^{143}\)

The majority in Scott argued that if Scott wished to challenge the lack of sentencing guidelines calculation and his inability to allocute, he should have done so when he retained new counsel at the status hearing.\(^{144}\) But, as the dissent points out, that is the language of

\(^{139}\) See United States v. Allen, 529 F.3d 390, 395 (7th Cir. 2008).

\(^{140}\) Id.

\(^{141}\) Id. at 979 (Wood, J., dissenting).

\(^{142}\) See Scott, 900 F.3d at 974.

\(^{143}\) Id. at 973.
forfeiture.\textsuperscript{145} Clearly, the majority did not perceive any strategic advantage by Scott’s lawyer to not objecting at that time; therefore, to not do so was an oversight and would entitle Scott to plain error review.\textsuperscript{146} While district court judges are no longer required to sentence within the guidelines,\textsuperscript{147} they are required to calculate the appropriate guidelines range and consider it when imposing a sentence.\textsuperscript{148} To not even calculate a guidelines sentence before imposing a period of supervised release was plain error that clearly had a substantial effect on Scott’s rights. The Seventh Circuit should have remanded to the district court to hold a new sentencing hearing, calculate the guidelines range for the violation at issue, consider that range prior to sentencing Scott, and then allow Scott the opportunity to allocute.

\textsuperscript{145} \textit{Id.} at 980 (Wood, J., dissenting).
\textsuperscript{146} See United States v. Brodie, 507 F.3d 527, 531 (7th Cir. 2007).
\textsuperscript{147} United States v. Booker, 543 U.S. 220 (2005).
\textsuperscript{148} United States v. Downs, 784 F.3d 1180, 1182 (7th Cir. 2015).
SANCTUARY JURISDICTIONS: IN A SYSTEM OF CHECKS AND BALANCES WHO HAS THE AUTHORITY TO DEFEAT THEM?

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INTRODUCTION

There is no doubt that for the Trump administration, immigration enforcement and mass deportation are at the top of the agenda.¹ Even before taking office on January 20, 2017, United States President Donald Trump (“President Trump”) vowed to deport all immigrants with serious criminal records—the “bad hombres.”² His administration, however, has deported more than just Mexican “criminals, drug dealers, and rapists.”³ Deportation, prolonged

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¹ Even as a presidential candidate, President Trump promised to deport over two million unauthorized immigrants which he argued had “committed crimes.” Allissa Wickham, Trump’s Plan to Deport 2M Immigrants Will Face Roadblocks, LAW360, Nov. 16, 2016.


³ See Penton, supra note 2; Michelle Ye Hee Lee, Donald Trump’s False Comments Connecting Mexican Immigrants and Crime, THE WASH. POST, Jul. 8,
detentions, denaturalization and family separation are but a few of the challenges faced by the immigrant community in the Trump Era.\textsuperscript{4} The Department of Justice, under President Trump, has aggressively enforced federal immigration laws, invoking great fear in immigrant communities across the nation.\textsuperscript{5}

In response to this hardline position on immigration enforcement, several jurisdictions throughout the United States declared themselves “sanctuaries,” or reaffirmed their already in-place sanctuary status.\textsuperscript{6} Sanctuary jurisdictions in the United States are not a new concept, they trace back to the 1980s.\textsuperscript{7} They originally emerged to protect refugees with legitimate claims to asylum from federal immigration enforcement.\textsuperscript{8} Today’s sanctuary jurisdictions limit the enforcement of federal immigration laws against all immigrants with strong ties to the community that have no serious criminal record.\textsuperscript{9} Sanctuary policies, however, vary from jurisdiction to jurisdiction.\textsuperscript{10}

When a United States citizen is pulled over for a broken tail light, they do not expect their lives to be significantly turned around.\textsuperscript{11} On

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\textsuperscript{4} In 2017, ICE arrested 37,670 individuals without criminal record by October, a 125% increase from the prior year. Amanda Holpuch, \textit{I Live in Fear: Under Trump, Life for America’s Immigrants Can Change in a Flash}, THE GUARDIAN, Oct. 18, 2018.

\textsuperscript{5} Id.


\textsuperscript{8} Id.

\textsuperscript{9} See Id.; see also, e.g., Ulloa, supra note 6.

\textsuperscript{10} See Rumore, supra note 6. For the City of Chicago being a sanctuary means providing a safe home to all Chicagoans, regardless of his or her immigration status. Chicago’s sanctuary policy is a “commitment to inclusion,” Id.

\textsuperscript{11} See Tamara Lyte, \textit{Increased Enforcement Threatens Undocumented Immigrants}, USA TODAY’S HISPANIC LIVING MAGAZINE, Sep. 23, 2017.
\end{quote}
the other hand, for an undocumented immigrant, this same situation can be detrimental to his or her future.\textsuperscript{12} If they do not have a valid driver’s license, they will be arrested and can be turned over to Immigration and Customs Enforcement (“ICE”) for deportation, even if they have no serious criminal record.\textsuperscript{13} Many times, this results in prolonged detention periods by the local law enforcement, which violates the individual’s due process rights.\textsuperscript{14} In 2012, Chicago Mayor Emmanuel signed the “Welcoming City Ordinance” that ensured undocumented immigrants are not arrested solely because of their immigration status.\textsuperscript{15}

Sanctuary policies such as the Welcoming City Ordinance of Chicago threaten President Trump’s immigration enforcement agenda,\textsuperscript{16} making them a target of his administration.\textsuperscript{17} On January 25, 2017, only five days after his inauguration, President Trump issued an executive order requiring former U.S. Attorney General Jeff Sessions (“Attorney General Sessions”) to ensure sanctuary jurisdictions were not eligible to receive certain federal funding.\textsuperscript{18} It was an effort to force sanctuary jurisdictions to cooperate in the enforcement of federal immigration laws.\textsuperscript{19} This order, however, was challenged in a federal court in California where it was permanently enjoined.\textsuperscript{20}

Despite these failed efforts, in July 2017 Attorney General Sessions continued to threaten to withhold federal funding from sanctuary jurisdictions that failed to cooperate in the enforcement of

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\textsuperscript{12} See Id.
\textsuperscript{13} See Id.
\textsuperscript{14} See Id.
\textsuperscript{15} Rumore, supra note 4.
\textsuperscript{16} See Wickham, supra note 1.
\textsuperscript{17} See Rumore, supra note 6.
\textsuperscript{18} City of Chi. v. Sessions, 888 F.3d at 276-80 (7th Cir. 2018), \textit{reh’g en banc granted in part, vacated in part}, No. 17-2991, 2018 WL 4268817 (7th Cir. 2018) \textit{and vacated}, No. 17-2991 & 18-2649, 2018 WL 4268814 (7th Cir. 2018).
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\end{flushright}
federal immigration laws. He added three new conditions to the Edward Byrne Memorial Justice Assistance Grant ("Byrne Grant"). That grant that provides state and local law enforcement agencies with substantial funds for personnel, equipment, training and other expenses. To continue to receive the Byrne Grant, Chicago and other state and local jurisdictions were required to: (1) give immigration agents unrestricted access to police stations; (2) give immigration agents at least forty-eight hour notice before a detainee was released; and (3) comply with a federal statute that encourages information sharing between local law enforcement and federal immigration agents.

Chicago, like other jurisdictions, did not give up its sanctuary policies. Mayor Emmanuel said, “We will never be coerced or intimidated into abandoning our values as a welcoming city.” Instead, Chicago was the first to file a lawsuit against the Department of Justice challenging these new conditions to the Byrne Grant, arguing that the conditions were unconstitutional.

The United States District Court for the Northern District of Illinois agreed with Chicago that the Executive Branch had overstepped the authority granted to them by the United States Constitution. On September 15, 2017, the district court granted in part Chicago’s motion for preliminary injunction. The court held that

21 Id. at 276-77.
22 Id.
23 Id. at 276-280; City of Chi. v. Sessions, 264 F. Supp. 3d 933, 936 (N.D. Ill. 2017).
24 City of Chi., 888 F.3d at 276-77.
25 City of Chi., 264 F. Supp. 3d at 937.
26 Rumore, supra note 4.
28 Id.
29 City of Chi., 888 F.3d at 276-77.
30 Id.
two of the three conditions were unconstitutional: the access and notice conditions.\textsuperscript{32} The district court found that Congress had not authorized Attorney General Sessions to impose these conditions in the first place.\textsuperscript{33} Attorney General Sessions appealed the preliminary injunction to the access and notice conditions.\textsuperscript{34}

On April 19, 2018, the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") affirmed the lower court’s decision.\textsuperscript{35} In reviewing the decision, the Seventh Circuit underlined that the issue before it was separation of powers and not immigration policy.\textsuperscript{36} The Seventh Circuit found that the Executive Branch’s actions were an “usurpation of power” because there was no congressional authorization for its actions and there was evidence that Congress repeatedly refused to impose conditions that tied funding to immigration policies.\textsuperscript{37} Judge Rovner said: “We are a country that jealously guards the separation of powers, and we must be ever-vigilant in that endeavor.”\textsuperscript{38}

The three-judge panel agreed that the notice and access conditions imposed by the Attorney General Sessions were unconstitutional as lacking congressional authorization.\textsuperscript{39} Judge Manion, however, disagreed that the injunction should be applied nationally, and instead believed the injunction should be limited to Chicago.\textsuperscript{40} He argued that imposing a nationwide injunction on these issues was beyond the

\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.} at 951.
\textsuperscript{34} \textit{City of Chi.}, 888 F.3d at 276-77.
\textsuperscript{35} \textit{Id.} at 293.
\textsuperscript{36} \textit{Id.} at 277.
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.} at 295 (Manion, J, concurring in the judgment in part and dissenting in part).
scope of the Seventh Circuit. He believed that national injunctions should only be applied when “absolutely necessary.”

Attorney General Sessions appealed the scope of the injunction, and asked the Seventh Circuit to limit the injunction to Chicago. In June 2018, the Seventh Circuit granted the Attorney General’s request to limit the preliminary injunction. The Seventh Circuit, however, did not address the issue of whether courts have the power to grant nationwide injunctions.

This article will examine the Seventh Circuit’s decision in City of Chicago v. Sessions in the context of two core principles of this nation, separation of powers and federalism. This article argues that the Seventh Circuit correctly decided that the notice and access conditions to the Byrne Grant were beyond the scope of power of the Executive Branch. Furthermore, this article argues that if the Seventh Circuit had reviewed the lower court’s decision on the third condition, it would have found the third condition unconstitutional, as the district court later did in issuing a permanent injunction against all three conditions.

Part I of the article examines the history of sanctuary jurisdictions and the principles of separation of powers and federalism. Part II of the article examines the decision in City of Chicago v. Sessions, arguing that the Seventh Circuit correctly decided that the access and notice conditions to the Byrne Grant were unconstitutional. Part II also reviews the decisions of other courts regarding the conditions placed on the Byrne Grant by Attorney General Sessions and the executive order issued by President Trump trying to withhold federal funding from sanctuary jurisdictions. Part III looks at how different courts decided and reviewed the third condition to the Byrne Grant. Finally, Part III discusses how the Seventh Circuit should have decided on the third condition had it been raised on appeal.

41 Id.
42 Id. at 300.
44 Id.
45 Id.
A. **Background: Sanctuaries, separation of powers, and federalism in the Trump Era.**

1. **The History of Sanctuary Jurisdictions.**

Sanctuary jurisdictions are not a new concept; they trace back to the 1980s.\(^{46}\) The first sanctuary jurisdictions declared themselves sanctuaries to protect refugees with legitimate claims to asylum from federal immigration enforcement.\(^{47}\) Since then, sanctuary jurisdictions have emerged to protect immigrant communities across the nation.\(^{48}\) However, sanctuary jurisdictions today differ in that they go beyond protecting refugees.\(^{49}\) Generally, sanctuary jurisdictions today declare themselves sanctuaries to demonstrate they stand in solidarity with the immigrant communities within their jurisdiction.\(^{50}\) There is no one definition for sanctuary jurisdictions, but one thing has held true of sanctuary jurisdictions throughout time: they limit the enforcement of federal immigration laws against non-criminal immigrants with strong ties to the community.\(^{51}\)

In the Trump Era, immigrant communities throughout the United States have been under constant attack.\(^{52}\) President Trump has kept his candidacy promises of: (1) mass deportation; (2) removal of Obama immigrant-friendly policies; and (3) extend the wall at the border of Mexico and the United States.\(^{53}\) In his first few weeks in office, President Trump issued anti-immigrant policies, including the initial

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\(^{46}\) McCormik, *supra* note 5, at 173-74.

\(^{47}\) *Id.*


\(^{49}\) *Id.*

\(^{50}\) *Id.*

\(^{51}\) *Id.*


\(^{53}\) *Id.*
travel ban, which became known to many as the “Muslim ban.”

These and other policies by his administration invoked great fear in immigrant communities throughout the United States, including policies that separate children from their parents.

In response to these xenophobic policies, several jurisdictions throughout the United States declared themselves sanctuary cities or reaffirmed their sanctuary status. Because sanctuary jurisdictions limit the enforcement of federal immigration laws, they too have become a target of the Trump administration and have not been spared from scrutiny in President Trump’s tweets. President Trump has taken active steps to keep his campaign promise to block funding to sanctuary jurisdictions.

a. Congress’ response to sanctuary jurisdictions: The two statutes.

The Trump administration is not the first branch of government to try to overcome sanctuary jurisdictions’ unwillingness to enforce federal immigration laws. In 1996, Congress enacted two statutes, § 1644 and § 1373, in response to a rise in sanctuary jurisdictions. Both statutes were created to facilitate information sharing between the federal government and the state and local governments on issues

54 Id. at 630. Trump signed the initial travel ban, which suspended the admission of all refugees and of individuals from seven predominantly Muslim countries, days after being inaugurated. Id.

55 Over two thousand migrant children were separated from their parents when they were apprehended by immigrant officials at the border in 2018. David S. Rubenstein, Immigration Blame, 87 Fordham L. Rev. 125, 178 (2018).

56 See Rumore, supra note 4. On November 13, 2016, Chicago Mayor Ram Emmanuel, reaffirmed Chicago’s stance as a “Welcoming City.”


58 Id.

59 McCormick, supra note 5, at 174-76.

60 Id.
of immigration.\textsuperscript{61} Congress’ intent, however, was to encourage but not require this type of communication.\textsuperscript{62}

Section 1644 prohibited state and local governments from restricting information sharing that would help the federal government enforce federal immigration laws.\textsuperscript{63} While section 1373, encouraged state and local governments to share information that would help the federal government with the enforcement of immigration laws and policies.\textsuperscript{64} Since these provisions were enacted, courts have limited their scope.\textsuperscript{65} These provisions were used as a tool to try to overcome sanctuary jurisdiction policies in court.\textsuperscript{66} Courts found that state and local laws requiring cooperation with federal authorities regarding the sharing of immigration information were not preempted by federal law.\textsuperscript{67} Despite the small victory, most attempts to overcome sanctuary jurisdictions through these provisions failed.\textsuperscript{68} The provisions were found to authorize the free communication between local and state officials and the federal authorities regarding information that could help enforce federal immigration laws.\textsuperscript{69} They were meant to prevent

\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} See Doe v. New York City, 860 N.Y.S.2d 841, 844 (Sup. Ct. N.Y. 2008) (finding that § 1373 does not impose an affirmative duty to report immigration information to federal authorities); Johnson v. Hurt, 893 F. Supp. 2d 817, 840 (S.D. Tex. 2012) (finding that Congress’ intent in § 1373 was to create a “nationwide system of voluntary information sharing” to assist with federal enforcement of immigration laws).
\textsuperscript{66} McCormick, supra note 5, at 194.
\textsuperscript{67} See Fonseca v. Fong, (finding that a state statute requiring local law enforcement to report certain individuals believed to be undocumented immigrants to federal authorities was not preempted by federal law).
\textsuperscript{68} See Sturgeon v. Bratton, 174 Cal. App. 4th 1407, 1415-16 (2009) (finding that a statute prohibiting local officials from asking an individual’s immigration status for the sole purpose of learning their status was not preempted by federal law because it did not prohibit the communication of information to federal authorities, and thus was not in conflict with federal law).
\textsuperscript{69} McCormick, supra note 5, at 199-200.
states from placing obstacles against this type of communication; however, the provisions did not require this communication, nor did they permit it when other federal laws protected the information, such as privacy laws. Therefore, even after the enactment of these provisions, sanctuary jurisdictions continued to exist and prevail. If Congress chose not to require sanctuary jurisdictions to cooperate with the enforcement of federal immigration laws, can the Executive Branch require compliance? Does the Executive Branch have the power to defeat sanctuary jurisdiction’s policies?


Separation of powers is a core principle of this nation. The framers of the U.S. Constitution specifically built a system of checks and balances to prevent any one branch from becoming too powerful. Yet, since the nineteenth century, the scope of the Executive Branch has been greatly broadened. Both Democratic and Republican presidents alike have used the “executive pen” to issue executive orders that carry out their agendas, especially when dealing with issues of immigration. In fact, since President Trump took office in 2017, he has signed over seventy-seven executive orders, including multiple versions of the travel ban. President Trump signed more executive orders in his first one hundred days in office than any other recent president. To put this in perspective, consider that the

70 Id.
71 Id.
72 Id.
73 City of Chi. v. Sessions, 888 F.3d 272, 277 (7th Cir. 2018).
74 Id.
75 Tara L. Branum, President or King? The Use and Abuse of Executive Orders in a Modern-Day America, 28 J. LEGIS. 1, 2-5 (2002).
76 Id.
77 Leada Gore, How many executive orders has President Trump signed?, REAL TIME NEWS FROM AL.COM, July 30, 2018.
78 Id.
first twenty-four presidents issued 1262 executive orders collectively. This heavy use of the executive pen has raised the question of what is the scope of the Executive Branch? The Trump administration has been before the courts on this issue more than once.

The framers of the U.S. Constitution were determined to build a system different than the one they escaped. The framers wanted to ensure that they did not fall under the rule of another tyrant king, so they created a system that ensured history would not repeat itself in the United States. First, the framers divided the power of the federal government into three separate branches: judicial, executive, and legislative. They tasked each branch with specific responsibilities and granted them specific powers to carry out those responsibilities. Next, the framers created a system of checks and balances to prevent any one branch of the federal government from becoming too powerful. Each branch of government has ways to check the power of the other two branches.

This system of checks and balances has withstood the test of time and has, for the most part, functioned as the framers intended. Generally, the branches have operated in balance with one another. The power of the Executive Branch, however, has been greatly expanded and continues to be expanded to date. So, does the

79 Branum, supra note 65, at 9-10.
80 See Id.
82 Branum, supra note 65, at 10-12.
83 Id.
84 Id.
85 Id. at 15. The legislative branch would create the law, the Executive Branch would enforce the law, and the judicial branch would interpret the law. Id.
86 Id.
87 Id. For example, the president has the power to veto a legislative bill presented by Congress. The judicial system can declare laws created by Congress or actions taken by the President unconstitutional. In turn, the President checks the courts by through his power to appoint judges.
Executive Branch have the power to condition federal funding to compel states to comply with the enforcement of federal immigration laws? If so, who or what gives the Executive Branch that power? This is exactly the issue that was brought before the Seventh Circuit in *City of Chicago v. Sessions*, but before reviewing the court’s decision in that case, it is important we discuss another fundamental principal of United States law, federalism. Can the federal government coerce states to enforce federal laws?

3. Federalism.

There is no doubt that federalism places a limitation on congressional power when it threatens the sovereignty of the states. In *New York v. United States* and *Printz v. United States*, the Supreme Court held that the federal government could not compel states to enforce federal laws. In 1996, however, the Second Circuit distinguished the two anti-sanctuary federal statutes from both cases. The court found that Congress had not forced state and local governments to enact or enforce federal regulatory programs. Does federalism prevent the Executive Branch from conditioning federal funds to compel state and local governments to enforce federal immigration laws? If the Executive Branch had the authority to condition federal funding the way it did, would federalism protect sanctuary cities?

**B. The Seventh Circuit’s review of City of Chicago v. Sessions.**

Chicago has been a sanctuary jurisdiction since 1982, when several Chicago churches harbored refugees protecting them from

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91 McCormick, supra note 5, at 185-86.
92 Id.
enforcement of federal immigration laws.\textsuperscript{93} In 2006, Chicago codified its sanctuary city policies with the enactment of its welcoming ordinance.\textsuperscript{94} That same year the federal government established the Byrne Grant, which provides state and local law enforcement substantial funds for criminal justice expenses.\textsuperscript{95} For years, Chicago received federal funding through the Byrne Grant without any issues.\textsuperscript{96}

Over the years, several bills have been introduced in the House of Representatives and the Senate attempting to condition federal grants in a way that would coerce states and local governments to cooperate with the enforcement of federal immigration laws; however, none of these bills have become law.\textsuperscript{97} On January 25, 2017, President Trump issued an executive order requiring Attorney General Sessions to ensure that sanctuary jurisdictions were no longer eligible to receive certain federal funding, including the Byrne Grant.\textsuperscript{98} This order was challenged in a federal court in California where it was permanently enjoined.\textsuperscript{99}

After President Trump’s order was enjoined, Attorney General Sessions directly issued three conditions to the Byrne Grant, again attempting to coerce states and local governments to comply with the enforcement of federal immigration laws.\textsuperscript{100} The three conditions were: notice, access, and compliance.\textsuperscript{101} The notice condition required local law enforcement to notify federal agents in advance when they scheduled the release of individuals suspected to be in violation of federal immigration laws.\textsuperscript{102}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{93} Rumore, \textit{supra} note 4.
\item\textsuperscript{94} See \textsc{chicago, illinois, mun. code} § 2-173-005 \textit{et seq.} (2007).
\item\textsuperscript{95} City of Chi. v. Sessions, 888 F.3d 272, 276-80 (7th Cir. 2018); City of Chi. v. Sessions, 264 F. Supp. 3d 933, 936 (N.D. Ill. 2017).
\item\textsuperscript{96} \textit{City of Chi. v. Sessions}, 888 F.3d at 276-80.
\item\textsuperscript{97} \textit{Id.}
\item\textsuperscript{98} \textit{Id.}
\item\textsuperscript{99} \textit{Id.}
\item\textsuperscript{100} \textit{Id.}
\item\textsuperscript{101} \textit{Id.}
\item\textsuperscript{102} City of Chi. v. Sessions, 264 F. Supp. 3d 933, 937 (N.D. Ill. 2017).
\end{enumerate}
\end{footnotesize}
enforcement to give federal agents access to its detention facilities and detained individuals. The final condition required local law enforcement to comply with federal statute § 1373, which prevents local and state governments from restricting information sharing between local law enforcement and federal immigration agents.

Chicago challenged all three conditions to the Byrne Grant in federal district court, because these conditions directly conflicted with its sanctuary policies. Chicago argued that these conditions were unconstitutional and asked the district court to issue a preliminary injunction for all three conditions. The district court agreed with Chicago that the notice and access conditions were unlawful and issued a nationwide preliminary injunction for those conditions. The court held that Attorney General Sessions had no authority to issue those conditions, and that any efforts to impose the conditions violated the separation of powers and were ultra vires. The district court, however, did not grant a preliminary injunction for the compliance condition.

This case was brought before the Seventh Circuit, on appeal by Attorney General Sessions for the notice and access conditions. The third condition was not reviewed by the Seventh Circuit. Attorney General Sessions argued that the lower court’s decision was wrong because he had statutory authority to impose the access and notice conditions. He said that his authority for his actions came from a statute defining the duties and functions of the Attorney General.

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103 Id.
104 Id.
105 Id. at 936.
106 Id.
107 Id.
108 City of Chi. v. Sessions, 888 F.3d 272, 282 (7th Cir. 2007).
109 City of Chi., 264 F. Supp. 3d at 936.
110 City of Chi., 888 F.3d at 276-80.
111 Id.
112 Id. at 282-84.
113 Id.
specifically pointed to a section of the statute that reads, “[t]he Attorney General shall exercise such powers and functions . . . , including placing special conditions on all grants, and determining priority purposes for formula grants.”114 The Seventh Circuit said Attorney General Sessions’ interpretation of this statute was contrary to Congress’ intent.115 Furthermore, the Court pointed out that this section of the statute would be an odd place for Congress to grant such a power.116

The Seventh Circuit stressed that the issue before them was one of separation of powers and not immigration policies.117 In reviewing whether the Executive Branch had the power to withhold federal funding from sanctuary jurisdictions, the Court first turned to the U.S. Constitution, which exclusively provides that the power of the purse belongs to Congress.118 The Attorney General, however, did not contend that the Executive Branch has inherent power to condition grants.119 Instead, Attorney General Sessions argued that his power to condition federal funding originated with Congress, but was delegated to him.120 The Seventh Circuit agreed that Congress can delegate certain powers to the Executive Branch, but disagreed with the Attorney General that Congress did so in this situation.121

To determine whether the Executive Branch overstepped its power, the Court analyzed whether Congress delegated the power to condition the federal funding in question to the Executive Branch.122 First, the Court looked to the statute, to determine if there was an explicit grant of power from Congress.123 The statute does not

114 Id. at 284 (quoting 34 U.S.C. 10102(a)(6) (West 2017)).
115 City of Chi., 888 F.3d at 276-80.
116 Id.
117 Id. at 277.
118 Id.
119 Id. at 283.
120 Id.
121 Id. at 286.
122 Id. at 283-86.
123 Id.
explicitly grant the Executive Branch the power to withhold federal funding for the Byrne Grant. The Seventh Circuit acknowledged that the statute granted Attorney General Sessions with some powers typically reserved for Congress, but the Court concluded that none of the provisions in the statute gave him the authority to impose such conditions on federal funding.

The Seventh Circuit also addressed this issue from a separation of powers standpoint. The Court was concerned that if the Executive Branch could not only determine policy, but also enforce it, then there would be no check against tyranny – the very reason our founders even created a system with separation of powers. Judge Rovner said, “[i]t falls to us, the judiciary, as the remaining branch of government, to act as a check on such usurpation of power.”

1. The Ninth Circuit’s review of City & County of San Francisco v. Trump

The Ninth Circuit, like the Seventh Circuit, found that the Executive Branch violated the separation of powers principle, “an integral part of the Founder’s design.” However, the court reached this determination on a slightly different matter. Instead of reviewing the conditions placed on the Byrne Grant by Attorney General Sessions, the Ninth Circuit reviewed President Trump’s Executive Order 13,768, signed on January 25, 2017. Like Attorney General Sessions conditions on the Byrne Grant this executive order was intended to withhold federal funding from sanctuary cities.

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124 Id.
125 Id.
126 Id. at 277.
127 Id.
128 Id.
129 City & Cnty. of S.F. v. Trump, 897 F.3d 1225, 1231-32 (9th Cir. 2018).
130 Id.
131 Id.
The executive order required the Attorney General to ensure that any jurisdiction that refused to comply with 8 U.S.C § 1373 was not eligible to receive federal grants. The Ninth Circuit found that President Trump’s executive order “direct[ed] the agencies of the Executive Branch to withhold funds appropriated by Congress in order to further the Administration's policy objective of punishing cities and counties that adopt so-called ‘sanctuary’ policies.”

The Ninth Circuit conducted a similar analysis to the Seventh Circuit in reaching its decision. The President’s power “must stem either from an act of Congress or from the Constitution itself.” The court looked first to the U.S. Constitution to determine who has the power to condition federal grants. The Ninth Circuit pointed out that the power of the purse is an “exclusive congressional power.” The court found that the President’s “power [was] at its lowest ebb” here because Congress had not delegated to the President the power to condition new federal grants with compliance of 8 U.S.C § 1373. The Ninth Circuit stressed that the Trump administration “ha[d] not even attempted to show that Congress authorized it to withdraw federal grant[s]” from sanctuary jurisdictions. Furthermore, the court pointed out that Congress had repeatedly rejected legislation that aligned with the goals of President Trump’s order. The Ninth Circuit

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132 Id.
133 Id.
134 Id. at 1233.
135 Id. at 1232-35.
136 Id. at 1233 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585(1952)) (internal quotations omitted).
137 City & Cnty. of S.F. v. Trump, 897 F.3d at 1232-35.
138 Id. at 1231.
139 Id. at 1233-34 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952)) (internal quotations omitted).
140 City & Cnty. of S.F. v. Trump, 897 F.3d at 1234.
141 Id.
found that the Executive Branch had “claimed for itself Congress's exclusive spending power.”\footnote{142}{Id.}

Without congressional authorization, the Ninth Circuit held that the Executive Branch could not refuse to issue federal grants to sanctuary cities.\footnote{143}{Id. at 1231.} Therefore, on August 1, 2018, the Ninth Circuit affirmed the lower court’s decision in part.\footnote{144}{Id.} The Ninth Circuit remanded the case only for the reconsideration of the scope of the injunction.\footnote{145}{Id.}

While the Ninth Circuit reviewed a slightly different matter, its decision focused on the same core principle of separation of powers. Both cases dealt with the Executive Branch, under President Trump, attempting to withhold federal funding from jurisdictions that did not help enforce federal immigration laws. One court reviewed the Attorney General’s actions in reaching this goal, while the other reviewed the President’s similar actions. What is important is that both courts reached the conclusion that Congress controls federal spending, and not the Executive Branch, and that Congress has not delegated that power to the Executive Branch.\footnote{146}{Id.} The Ninth Circuit also agreed with the Seventh Circuit that the Executive Branch could only withhold federal funding from sanctuary jurisdictions if it had congressional authorization.\footnote{147}{Id.} Therefore, finding Executive Order 13,768 unconstitutional.\footnote{148}{Id.} Additionally, two other district courts have found against the Executive Branch on similar issues for the same reason: the power of the purse belongs to Congress and Congress has not delegated that authority to the Executive Branch.\footnote{149}{See City of Seattle v. Trump, No. 17-497-RAJ, 2017 U.S. Dist. LEXIS 173376, at *26-27 (W.D. Wash. Oct. 19, 2017) (finding President Trump’s order

In 1996, Congress enacted 8 U.S.C § 1373, a statute that encouraged communication between state and local governments and the federal government regarding individual’s immigration status.150 The statute was meant to facilitate information sharing between the federal government and the state and local governments on issues of immigration.151 Congress’ intent, however, was not to require such communication.152 Section 1373 simply encouraged state and local governments to share information that would help the federal government with their efforts of enforcing immigration laws and policies.153 Nonetheless, this statute was used as a tool to try to overcome sanctuary jurisdiction policies in court.154 But most attempts to overcome sanctuary jurisdictions through this statute failed.155 Courts found the statute to authorize the free communication between local and state officials and the federal authorities regarding information that could help enforce federal immigration laws.156 They were meant to prevent states from placing obstacles against this type conditioning funding to sanctuary cities unconstitutional); City of Phila. v. Sessions, 309 F. Supp. 3d 289, 344 (E.D. Pa. 2018) (finding the three conditions imposed by the Attorney General invalid and in violation of both statutes and the U.S. Constitution).

150 Id.
151 Id.
152 Id.
153 Id.
154 McCormick, supra note 5, at 194.
155 See Sturgeon v. Bratton, 174 Cal. App. 4th 1407, 1415-16 (2009) (finding that a statute prohibiting local officials from asking an individual’s immigration status for the sole purpose of learning their status was not preempted by federal law because it did not prohibit the communication of information to federal authorities, and thus was not in conflict with federal law).
156 McCormick, supra note 5, at 199-200.
of communication;\textsuperscript{157} however, the provisions do not require this communication.\textsuperscript{158}

On January 25, 2017, only five days after his inauguration, President Trump issued an executive order requiring the Attorney General to ensure that any jurisdiction that refused to comply with 8 U.S.C § 1373 was not eligible to receive federal grants.\textsuperscript{159} This order was challenged in a federal court in California where it was permanently enjoined.\textsuperscript{160} The Ninth Circuit held that the executive order violated the separation of powers principle.\textsuperscript{161} The Ninth Circuit said that the Executive Branch could not refuse to issue federal grants to sanctuary cities without congressional authorization.\textsuperscript{162}

In July 2017 Attorney General Sessions threatened that federal funding to sanctuary jurisdictions would be withheld if those jurisdictions failed to cooperate in the enforcement of federal immigration laws.\textsuperscript{163} He added three new conditions to the Byrne Grant: notice, access, and compliance.\textsuperscript{164} The third condition required local and state jurisdictions to comply with federal statute § 1373 that encourages information sharing between local law enforcement and federal immigration agents.\textsuperscript{165}

On September 15, 2017, a district court found that the three new conditions of access and notice were unconstitutional.\textsuperscript{166} The district court applied a preliminary nationwide injunction on those conditions, but not the third condition.\textsuperscript{167}

\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} City of Chi. v. Sessions, 888 F.3d 272, 276-80 (7th Cir. 2018).
\textsuperscript{161} City & Cnty. of S.F. v. Trump, 897 F.3d 1225, 1231-32 (9th Cir. 2018).
\textsuperscript{162} Id. at 1231.
\textsuperscript{163} City of Chi. v. Sessions, 888 F.3d at 276-77 (7th Cir. 2018).
\textsuperscript{164} Id.
\textsuperscript{165} City of Chi., 264 F. Supp. 3d at 937.
\textsuperscript{166} Id.
\textsuperscript{167} Id. at 951.
Attorney General Sessions appealed the preliminary injunction to the access and notice conditions.\textsuperscript{168} The Seventh Circuit, however, did not review the constitutionality of the third condition.\textsuperscript{169} If the Seventh Circuit had reviewed the third condition it would have found that condition unconstitutional for the same reason it found the other two conditions unconstitutional. First, the power of the purse exclusively belongs to Congress. Second, Congress has not delegated this power to the Executive Branch. When issuing the preliminary injunction, the district court did not find there was sufficient evidence at that time to find the third condition unconstitutional. The court had a more difficult time finding that condition unconstitutional because the condition is based on a statute. However, when deciding whether to grant the permanent injunction the district court found that the third condition was also unconstitutional on the same grounds it found the other conditions unconstitutional. For those reason, the district court granted the permanent injunction against all three conditions, including the condition of compliance. Similarly, other district courts have found the compliance condition unconstitutional.

CONCLUSION

During President Trump’s campaign, he vowed to deport all immigrants with serious criminal records, but his administration has deported more than just the “Mexican drug dealers, criminals, and rapist.” The Trump administration has taken an aggressive stance in enforcing federal immigration laws, and to advance this hardline position on immigration enforcement, President Trump issued an executive order conditioning federal funding trying to force sanctuary jurisdictions to cooperate in the enforcement of federal immigration laws. When the order was enjoined by a federal court in California, former Attorney General Sessions placed three conditions on the Federal Byrne Grant, requiring jurisdictions to comply with federal immigration enforcement laws.

\textsuperscript{168} City of Chi., 888 F.3d at 276-77.

\textsuperscript{169} See City of Chi. v. Sessions, 888 F.3d at 276-77 (7th Cir. 2018).
Separation of powers is a core principle of this nation. The framers of the U.S. Constitution specifically built a system of checks and balances to ensure that no branch would become too powerful. Yet, since the nineteenth century, the scope of the Executive Branch has been greatly broadened. In recent years, that scope has broadened further through the President’s use of executive orders. The scope of the Executive Branch’s power has repeatedly been a question before the courts under the Trump administration, especially in terms of immigration policies. Does the U.S Constitution grant the Executive Branch the power to withhold federal funding from jurisdictions that do not enforce federal immigration laws? If not, who gave the Executive Branch that authority?

The U.S. Constitution leaves no doubt that the power of the purse belongs to Congress and not the Executive Branch. While Congress can, it has not authorized the Executive Branch to condition federal grants in this manner. In fact, Congress has repeatedly refused legislation that ties federal funding to immigration laws, including legislation proposed by the 115th Congress. Plain and simple, President Trump’s executive order and Attorney General Sessions’ conditions to the Byrne Grant, violated the U.S. Constitution’s principle of separation of powers. Multiple federal courts have found President Trump’s order and Attorney General Sessions’ conditions to the Byrne Grant unconstitutional on this ground. The Seventh Circuit in City of Chicago v. Sessions, found two of Attorney General Sessions’ conditions to the Byrne Grant unconstitutional. The Seventh Circuit described the Executive Branch’s actions as a “usurpation of power.”

Judge Rovner stressed: “We are a country that jealously guards the separation of powers, and we must be ever-vigilant in that endeavor.”

I could not agree more with the Seventh Circuit: no one branch should have all that power. The Executive Branch tried to resolve a broken immigration system with a stroke of pen, but pushing xenophobic policies is not the answer. And, the Executive Branch

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170 City of Chi. v. Sessions, 888 F.3d 272, 277 (7th Cir. 2018).
171 Id.
cannot expect state and local governments to want to enforce such extreme, harsh policies, policies that rip young children out their parent’s arms. A broken immigration system will not be resolved overnight, much less by a single executive order. Violating the core principles of separation of powers and federalism are not the solution. Congress and the Executive Branch must work together to resolve this issue, but this issue will never be fixed if our government continues acting based on party lines. If the federal government wants state and local governments to enforce federal law, the branches must work together to pass non-xenophobic legislation that fixes our immigration system.
INTRODUCTION

Questions of the existence of an employment relationship are not easily resolved by only turning to federal labor and employment statutes. Federal employment laws provide definitions for “employer” and “employee,” but the definitions are not always helpful and often do not provide enough guidance when the employment relationship is in dispute. It is crucial that labor and employment laws clearly define who is protected and who is not. The question of who is considered an employee and who is considered an employer is equally important to both parties. Employees need to know whether they are protected under the law, and employers need to know whether they are subject to liability.¹ Vague definitions in the statutes and application of ever-
changing tests, with the goal of defining an employment relationship, are evidence of inconsistency in the law.

The Seventh Circuit recently explored this topic in *Harris v. Allen County Board of Commissioners*. The plaintiff, Harris, was employed by the Allen County Superior Court as a Youth Care Specialist but was stationed at the Allen County Juvenile Center. The plaintiff signed the Allen Superior Court’s employee handbook, acknowledging the Superior Court as his employer. However, other documents that the plaintiff received during the term of his employment, such as his medical records authorization and performance evaluations, bore the seal of the Allen County Board of Commissioners, or listed the board as the plaintiff’s employer. The plaintiff was injured while at the Juvenile Center, collected workers’ compensation benefits and later tried to return to work, but was denied his position because of physical restrictions caused by his injury. The plaintiff filed a discrimination suit under the Americans with Disabilities Act (ADA) against both the Allen County Superior Court and the Allen County Board of Commissioners. The question at issue was whether the Board of Commissioners was an indirect employer of the plaintiff and the court determined it was not based on an analysis of “sufficient control.”

Part I of this note explores current labor and employment statutes and the statutory language courts turn to when beginning their analysis as to whether an employment relationship exists between an individual and an employer. Part II discuss the various tests used to establish the employment relationship and how the Seventh Circuit’s test has evolved over the years. Part III provides an overview of the Seventh Circuit’s opinion in *Harris v. Allen County Board of Commissioners*. Part IV then discusses whether the Seventh Circuit correctly decided the case. Part V provides a broad discussion about the concerns with

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2 890 F.3d 680 (7th Cir. 2018).
3 *Id.* at 681.
4 *Id.* at 681-82.
5 *Id.* at 682.
6 *Id.* at 683.
7 *Id.*
inconsistency in the courts and how mislabeling employees as independent contractors has detrimental effects on both employers and employees. Finally, the note concludes with a suggestion as to how the courts may begin to address the blurred lines between employees and independent contractors.

**BACKGROUND**

**A. Examples of Statutory Definitions**

To begin the discussion about employment status, one would think it would be most helpful to turn to the actual language of the statute under which the employer or employee is seeking relief.

Under the Americans with Disabilities Act of 1990 (ADA), an “employee” is defined as “an individual employed by an employer.” An “employer” is defined as “a person engaged in an industry affecting commerce that has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.” Similar anti-discrimination laws define the terms almost identically.

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8 42 U.S.C.A. § 12111(4).


10 The Age Discrimination in Employment Act (ADEA) defines “employee” as “an individual employed by any employer except that the term ‘employee’ shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term “employee” includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.” 29 USCS § 630(f). “Employer” under the ADEA “means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any
The Supreme Court previously “recognized that it is appropriate for a court construing one employment statute . . . to look to other employment law statutes . . . for guidance.”\(^1\) Consider the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA) below.

The FLSA defines “employee” as “an individual employed by an employer”\(^12\) and “employer” as

\(^{11}\) Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 611 (2012). See, Rutherford Food Corp. v. McComb, 331 U.S. 722, 723 (1947) (In an FLSA case, it was appropriate to turn to the NLRA for guidance because these acts are both considered to be part of “social legislation.”).

any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.”

The NLRA defines “employee” as

Any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

“Employer” is defined as

any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

While some statutes are more detailed than others, it remains clear that the language is quite circular- leaving the courts to have to develop their own tests to establish whether an employment relationship exists.

B. The Standards Used to Establish an Employment Relationship are Plentiful (to say the least)

The Supreme Court has said that the common law agency test is the appropriate standard to apply when the statute does not provide a clear-cut definition. The Supreme Court has said that the common law agency test is the appropriate standard to apply when the statute does not provide a clear-cut definition. Under agency law, the employer (master) is a “principal who employs an agent . . . to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of that service.” The employee (servant) is “an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the control by the master.” This begins the discussion of the numerous standards created by the courts to determine employment status.

The Court in Darden adopted this common-law test to define “employee” under the Employee Retirement Income Security Act of 1974 (ERISA). The Court considered

the hiring party’s right to control the manner and means by which the product is accomplished . . . the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long the work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the

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17 Restatement of Agency (Second) 220(1) (1958).
18 Restatement of Agency (Second) 220(2) (1958).
19 Darden, 503 U.S. at 323.
provision of the employee benefits; and the tax treatment of the hired party.\(^{20}\)

Additionally, the Court noted that this common-law test calls for “all of the incidents of the relationship [to] be assessed and weighed with no one factor being decisive.”\(^{21}\)

In a more recent decision, the Supreme Court again was asked to determine whether an individual was an employee under the ADA.\(^{22}\) The individuals in that case were four physician-shareholders who owned the corporation,\(^{23}\) and they constituted the board of directors for the corporation.\(^{24}\) The Court, again looking at the relationship through an agency lens, determined that the element of control was “the principal guidepost that should be followed in this case.”\(^{25}\) The case turned on whether the shareholder-directors worked independently or whether they were under the control of the clinic.\(^{26}\) This analysis was also guided by a test created by the Equal Employment Opportunity Commission (EEOC) that used 6-factors to answer the Court’s very question.\(^{27}\) The factors consider

(1) whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work; (2) whether and, if so, to what extent the organization supervises the individual’s work; (3) whether the individual reports to

\(^{20}\) *Id.* (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 752 (1989)).

\(^{21}\) *Id.* at 324 (quoting NLRB v. United Ins. Co. of America, 390 U.S. 254, 258 (1968)). (“Since the common-law test contains ‘no shorthand formula or magic phrase that be applied to find the answer . . . .’”)


\(^{23}\) A medical clinic.

\(^{24}\) *Id.* at 442.

\(^{25}\) *Id.* at 448.

\(^{26}\) *Id.*

\(^{27}\) *Id.* at 449 (citing Equal Employment Opportunity Commission, Compliance Manual §§ 605:0008-605:00010 (2000)).

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someone higher in the organization; (4) whether and, if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses, and liabilities of the organization.  

Interestingly, the Court returned to its own language from *Darden* when it said that there is no “shorthand formula or magic phrase” by which an answer can be found in every case.  

This language seems to suggest that no one factor is determinative and all the circumstances surrounding each case should be considered.

States, such as California, have also developed their own standards when dealing with questions of employment status. The California Supreme Court in *Dynamex* created a new test for determining whether an individual is an employee or an independent contractor. After a lengthy discussion about previous California cases that dealt with this same question, the California Supreme Court concluded that it would apply a 3-factor test, also known as the “ABC” test. This test asks employers, when classifying individuals as independent contractors, to establish that

(A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity’s business; and (C) that

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29 *Clackamas*, 538 U.S. at 450 n.10.
31 *Id.* at 955. Under this standard, workers are automatically considered employees unless the employer can satisfy the test.
the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.\textsuperscript{32}

The Internal Revenue Service (IRS) also created its own standard for employers to use when determining whether an individual is an employee or an independent contractor for tax purposes.\textsuperscript{33} One scholar suggested a rise in the use of independent contractors by businesses in order to “cut costs while maintaining a high level of operational efficiency.”\textsuperscript{34} This inevitably leads to blurred lines and the IRS developed a 20-factor test\textsuperscript{35} by looking at “past cases and rulings bearing on the determination of whether a business’s purported independent contractors were actually employees.”\textsuperscript{36}

The Seventh Circuit, like many other circuits, applies a multi-factor test to address the question of employment status. In \textit{Knight v. United Farm Bureau Mutual Insurance Company}, the Northern District of Indiana addressed the “economic realities” test as one that most courts use to “determin[e] whether a Title VII claimant is an employee or an independent contractor.”\textsuperscript{37} The district court turned to a D.C. Circuit case\textsuperscript{38}, among others,\textsuperscript{39} which looked to the “economic realities” of the work relationship between the employee and the

\textsuperscript{32} Id. at 957.
\textsuperscript{33} Rev. Rul. 87-41 (IRS RRU), 1987-1 C.B. 296, 1987 WL 419174
\textsuperscript{35} Rev. Rul. 87-41 (IRS RRU), 1987-1 C.B. 296, 1987 WL 419174
\textsuperscript{38} \textit{Spirides}, 613 F.2d at 831.
\textsuperscript{39} See Wheeler v. Hurdman, 825 F.2d 257 (10th Cir. 1987); Mares v. Marsh, 777 F.2d 1065 (5th Cir. 1985); Garrett v. Phillips Mills, Inc., 721 F.2d 979 (4th Cir.1983); Cobb v. Sun Papers, 673 F.2d 337 (11th Cir.).
employer. The D.C. Circuit considered the general principles of the law of “agency” and identified eleven factors which were pertinent in deciding whether an employment relationship existed between the parties. The factors included:

(1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the “employer” or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the “employer”; (9) whether the worker accumulates retirement benefits; (10) whether the “employer” pays social security taxes; and (11) the intention of the parties.

The district court in Knight, without much of an explanation, consolidated the D.C. Circuit’s eleven-factor test into five factors. This test became known as the Knight five-factor test. Its factors included:

(1) the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work; (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace; (3) responsibility for the costs of operation, such

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40 Spirides, 613 F.2d at 831.
41 Spirides, 613 F.2d at 831-32.
42 Id. at 832.
43 742 F. Supp. at 521.
as equipment, supplies, fees, licenses, workplace, and maintenance of operations; (4) method and form of payment and benefits; and (5) length of job commitment and/or expectations.44

The plaintiff appealed the case to the Seventh Circuit, which validated the use of the five-factor test. 45 Today, the Seventh Circuit still applies the five-factor test when trying to determine whether an employment relationship exists.46

HOW THE SEVENTH CIRCUIT MOST RECENTLY APPLIED THE KNIGHT FIVE-FACTOR TEST

In Harris v. Allen County Board of Commissioners, the plaintiff, Harris, was employed by the Allen County Superior Court (Superior Court) to work in a juvenile center as a Youth Care Specialist.47 Under Indiana law, the Superior Court has the ability to establish juvenile detention and shelter care facilities, and the Superior Court decides who it will employ as staff and how to budget.48 Under this statutory scheme, Allen County is responsible for paying the expenses of the facility.49

In 2003, the plaintiff injured his back after being kicked by an inmate at the juvenile center.50 He received medical treatment, disability benefits, and permanent partial impairment benefits under this under Allen County’s workers compensation insurance.51 The plaintiff was contacted by an Allen County employee who sent him

44 Id.
46 See Love v. JP Cullen & Sons, Inc., 779 F.3d 697, 702 (7th Cir. 2015).
47 890 F.3d at 682.
48 Id. at 681.
49 Id.
50 Id. at 682.
51 Id.
forms regarding his workers’ compensation benefits. The forms listed “Allen County Government” as his employer. The plaintiff informed the county employee that his doctor determined the plaintiff had reached “maximum medical improvement” and was given work restrictions. The county employee told the plaintiff that he would not be able to return to his position at the Juvenile Center due to his work restrictions. However, she began helping him find another job within Allen County. The county employee offered the plaintiff a job as a part-time judicial assistant; however, the plaintiff rejected the offer because the position was without benefits.

The plaintiff was granted an independent medical exam by the Indiana Workers’ Compensation Board. The independent doctor concluded that the plaintiff had reached maximum medical improvement. It was after this second exam that the county employee reached out to the plaintiff to inform him that his benefits were terminated and he would not be able to return to work at the Juvenile Center because his work restrictions “prevented him from ‘perform[ing] the essential functions’ of his position at the Juvenile Center, ‘with or without a reasonable accommodation.’” The county employee claimed to be the ADA Coordinator and offered to help the plaintiff find another position within Allen County government. The county employee also offered to contact the hiring officials of job vacancies to assist the plaintiff in getting preference for positions for which he qualified. The county employee later informed the plaintiff that he did not qualify for the positions he applied for. Because the

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52 Id.
53 Id.
54 Id.
55 Id.
56 Id.
57 Id.
58 Id.
59 Id.
60 Id.
61 Id. at 682-83.
county employee could not identify a position that would accommodate the plaintiff’s work restrictions, the county employee informed the plaintiff that he was considered no longer employed.\footnote{Id. at 683.}

The plaintiff brought suit against the Allen County Superior Court and the Allen County Board of Commissioners (the Board) for discrimination under the ADA.\footnote{Id.} The district court found that the Board was not the plaintiff’s employer and therefore did not violate the ADA.\footnote{Id.} The district court analogized the case to another Indiana case where probation officers were found to be employees of the court due to the statutory scheme in place.\footnote{Harris v. Allen Cnty. Bd. Of Comm’rs, 2017 U.S. Dist. LEXIS 57369 at 19 (citing O’Reilly v. Montgomery County, 2003 U.S. Dist. LEXIS 4585 at *5).} In O’Reilly, the county was not considered the probation officers’ employer because “the main indicia of employment, the right to control, [wa]s prescribed by statute solely to the court.”\footnote{2017 U.S. Dist. LEXIS 57369 at 19 (quoting O’Reilly, 2003 U.S. Dist. LEXIS 4585 at *3).} Based on this analysis, the Board in Harris was granted summary judgment.\footnote{2017 U.S. Dist. LEXIS 57369 at 19-20.}

The plaintiff appealed the district court’s decision, and the Seventh Circuit reviewed the decision \textit{de novo}. The Seventh Circuit affirmed the district court’s decision.\footnote{Harris, 890 F.3d at 685.} The plaintiff argued: (1) the county paid his wages and benefits; (2) several documents identified the Board as his employer; and (3) the county employee dealt with his disability accommodations and his termination.\footnote{Id. at 684.} The court noted that a five-factor test is typically used to determine whether a party is an indirect employer, but the court notes that the “factors are simply a detailed application of the economic and control considerations present in the ‘economic realities’ test.”\footnote{Id. at 683 (citing Love, 779 F.3d at 702; Knight, 950 F.2d 377).} The most important question

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was whether the supposed employer exercised sufficient control over the plaintiff.\footnote{Harris, 890 F.3d at 683. (citing Knight, 950 F.2d at 378; Love, 779 F.3d at 705).} The court turned to two “key control powers:” hiring and firing.\footnote{Harris, 890 F.3d at 684. (quoting EEOC v. Illinois, 69 F.3d 167, 169 (7th Cir. 1995)).} Under Indiana law, the Board did not control the plaintiff’s “hiring, firing, day-to-day duties, and salary . . . .”\footnote{Harris, 890 F.3d at 685.} All of those aspects of the plaintiff’s employment rested with the Allen Superior Court, not the Board.\footnote{Id. at 685.}

To the plaintiff’s first argument, the Seventh Circuit concluded that the Board was statutorily required to pay the Juvenile Center’s expenses, and, therefore, even though the Board was not required to pay his workers’ compensation benefits, the Board paying those benefits to the plaintiff was not enough to show that the Board controlled the plaintiff’s employment.\footnote{Id. at 685.} To the plaintiff’s second argument, the court concluded that the documents bearing the Board’s seal or identifying the Board as the plaintiff’s employer were not sufficient to show control of employment.\footnote{Id. at 685.} The plaintiff offered evidence that the Board conducted performance evaluations, but he was unable to show that the Board was responsible for his discipline while employed at the Juvenile Center.\footnote{Id.} The Seventh Circuit noted that the plaintiff’s final argument, that the county employee’s involvement exceeded what was statutorily required, was his strongest point because the employee was the one to notify the plaintiff that he would not be able to return to his former position, she offered him an alternative position, she assisted him in finding other employment, and she was the one who informed him he was terminated.\footnote{Id.} However, the plaintiff was unable to show that it was the county employee or the

\footnotesize{71 Harris, 890 F.3d at 683. (citing Knight, 950 F.2d at 378; Love, 779 F.3d at 705).}
\footnotesize{72 Harris, 890 F.3d at 684. (quoting EEOC v. Illinois, 69 F.3d 167, 169 (7th Cir. 1995)).}
\footnotesize{73 Harris, 890 F.3d at 685.}
\footnotesize{74 Id.}
\footnotesize{75 Id. at 685.}
\footnotesize{76 Id.}
\footnotesize{77 Id.}
\footnotesize{78 Id.}
Board that *made the decision* to terminate the plaintiff.\textsuperscript{79} The county employee indicated to the plaintiff in a letter that she was not in the position to hire him, and could only contact the hiring officials on his behalf.\textsuperscript{80} The Seventh Circuit concluded:

> It would be unreasonable to infer that [the county employee] or the Board had the ability to control these aspects of [the plaintiff’s] employment, given that Indiana statutory scheme explicitly vests control over [the plaintiff’s] employment in the Allen Superior Court and that there is no evidence that would allow a trier of fact to find the reality was otherwise.\textsuperscript{81}

**Was the Court Correct in its Decision?**

It is evident that the Seventh Circuit has evolved its determination of employment status and the associated tests over the last few decades. The court began by looking at various circuits to see how they were addressing the question of establishing employment relationships.\textsuperscript{82} It discussed the “economic realities” test used by the D.C. Circuit in *Spirides* but agreed with the district court that the inquiry was limited to five factors in *Knight*.\textsuperscript{83}

While the Seventh Circuit cited the five-factor test in *Harris*, it did not go through all the factors to conclude that the Allen County Board of Commissioners was not the plaintiff’s employer. Yet, in *Spirides*, the Seventh Circuit indicated that “consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative.”\textsuperscript{84} Still, the court stated that the

\textsuperscript{79} *Id.* (Emphasis added).
\textsuperscript{80} *Id.*
\textsuperscript{81} *Id.*
\textsuperscript{82} See *Spirides*, 613 F.2d at 831; *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1160 (5th Cir. 1986).
\textsuperscript{83} 950 F.2d at 378-79.
\textsuperscript{84} 613 F.2d 826 at 831 (citing Local 777 v. NLRB, 603 F.2d 862, 866 (D.C. Cir. 1978)).
employer’s right of control was the most important factor to review.85 The Seventh Circuit cases that used Spirides place the same emphasis on the right of control,86 which may explain why the Seventh Circuit in Harris only looked at the factor of control.87 But was the Seventh Circuit trying to establish a single-factor test for determining whether an employment relationship exists between individuals and employers?

Regardless of whether the court was attempting to create a new test, the Seventh Circuit should have let this case go to a jury. As previously mentioned, the Seventh Circuit cited its own precedent when discussing what factors are necessary in assessing whether an employer has the right to control and direct an individual’s work.88 The key elements are hiring and firing.89 In the present case, however, there was a clear dispute as to who fired the plaintiff.90 The plaintiff stated that the county employee made the decision when she initiated the conversations regarding his benefits, but he was not able to provide proof that she was the one who made the decision.91 In a footnote, the Seventh Circuit briefly mentions that the plaintiff also provided a statement that he spoke to a Superior Court employee who had no knowledge of his firing and who told the plaintiff that “‘downtown . . . handle[d]that.’”92 The court dismissed the statement because it was inadmissible,93 but if the factor of control was so important, would it not have made a difference if Allen County made the decision to fire the plaintiff? This information, at the very least, created a genuine

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85 Id. at 831.
86 See Knight, 950 F.2d 377; Love, 779 F.3d 697.
87 Harris, 890 F.3d at 683.
88 Id. at 684.
89 Id. (quoting EEOC, 69 F.3d 169).
90 The Board insisted that it did not make the decision to terminate the plaintiff, but the Superior Court also does not clearly state it made that decision. Harris, 890 F.3d at 684 n.1.
91 Harris, 890 F.3d at 685.
92 Id. at 686 n.2.
93 Harris, 890 F.3d at 686. Neither the district court nor the Seventh Circuit indicate why the statement was inadmissible.
dispute of material fact, which would bar granting summary judgment. Given the emphasis on the factor of control—in particular, the aspects of hiring and firing the employee—this fact could have led the jury to reach a different conclusion.

ADDRESSING THE INCONSISTENCY IN A BROADER CONTEXT

The concerns with inconsistency in the standards that help establish employment status can be better understood in the context of employees versus independent contractors. There are several industries in which workers’ classification falls somewhere between an employee and an independent contractor. Some of these industries include transportation, construction, hospitality, janitorial, personal care, and home health care. According to the IRS, independent contractors generally have the “right to control or direct the result of the work[, but] not what will be done and how it will be done.” Additionally, an independent contractor is considered to be “self-employed” for tax purposes.

The implications for classifying an individual as an employee or an independent contractor are quite substantial. For example, employers are not “bound to provide workplace protections and

94 FED. R. CIV. P. 56(a).
95 Brishen Rogers, Redefining Employment for the Modern Economy, 10 Advance 3 (2016), 3.
benefits” to independent contractors, only their employees. An example of this is Uber classifying its drivers as independent contractors and not employees. This allows Uber to avoid giving drivers health insurance.

When employers classify their workers as independent contractors, they also do not have to withhold or pay taxes on the payments made to the independent contractors. Doing this “[robs] unemployment insurance and workers’ compensation funds of billions of much-needed dollars, reducing federal, state and local tax withholding and revenues, while saving as much as 30% of payroll and related taxes otherwise paid for ‘employees.’”

One can see how straddling the lines between these classifications can leave an employee extremely vulnerable and without other protections discussed in this note. In the example of Uber drivers, a recent class action brought against the company by the drivers asks that the drivers be recognized as employees under the California Labor Code, and not independent contractors. Specifically cited in that case is the drivers’ wanting Uber to pay the full amount of the tips they receive as prescribed by the California’s labor code. In cases


103 O’Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1134 (N.D. Cal. 2015).

104 Id.; Cal. Lab. Code § 351.
such as these, however, there are other consequences of being labeled as independent contractors. Because the workers are not employees, they are consequently not protected under anti-discrimination laws, such as the ADA, the ADEA, and Title VII. The drivers also do not have the opportunity to organize a union and have representation that can negotiate favorable employment terms for the drivers - at least not under the NLRA. It is definitely possible that some form of organization may be created for these drivers to participate in bargaining with the companies, but the drivers and the union would not be afforded the same protections under the NLRA and disputes would not be addressed by an agency like the National Labor Relations Board (NLRB).\footnote{Brishen Rogers, Redefining Employment for the Modern Economy, 10 Advance 3 (2016), 7.}

Moreover, it is important to note that data has shown that 10-30 percent or more of employers misclassify their employees as independent contractors.\footnote{Sarah Leberstein & Catherine Ruckelshaus, \textit{Independent Contractor vs. Employee: Why independent contractor misclassification matters and what we can do to stop it}, 2 (Nat'l Emp. L. Project ed., May 2016), https://www.nelp.org/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf.} Uncertainty in employment status likely leads to litigation, and if it is up to courts to decide whether individuals should be classified as employees or independent contractors, the individuals are at the mercy of the court (and the many conflicting tests) where they have raised their claim.

\textbf{A solution?}

It is concerning that courts do not have a concrete standard that can applied uniformly to establish an employment relationship between an employee and an employer. While it is clear many of the cases would depend on the specific circumstances of the case and, therefore, it is difficult to create a multi-factor test that would apply to each set of facts, there should be some sort of guide that can be used by the courts. In the context of employees versus independent contractors, California’s ABC test seems to make the most sense.
Given the very real concerns about misclassifying individuals as independent contractors rather than employees\textsuperscript{107} (due to ignorance or self-serving intentions), classifying individuals as employees unless the employer can satisfy a certain standard\textsuperscript{108} seems to be the best way to protect both employees and employers like. This author is not prepared to say what kind of factors should go into this standard, as the discussion in this note suggests that all the circumstances surrounding the potential employment relationship are essential and should be considered.\textsuperscript{109} However, in light of the numerous tests to establish an employment relationship between an individual and an employer and the lack of guidance in the labor and employment statutes, it seems to be a step in the right direction.

\textsuperscript{107} See \textit{supra} part IV.

\textsuperscript{108} See case cited \textit{supra} note 30.

\textsuperscript{109} See case cited \textit{supra} note 29 and 85.