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ABOUT THE SEVENTH CIRCUIT REVIEW

Purpose

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

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

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

I had the honor of serving as the Executive Editor of the SEVENTH CIRCUIT REVIEW during the 2013–2014 academic year. I have had such a rewarding experience this past year, and I would like to thank Professor Morris and the seminar students for making my experience a memorable one.

Authors of the REVIEW write a case note about current issues recently heard at the Seventh Circuit. In sixteen short weeks, each student chooses a topic, researches it, and writes a publishable article expressing their opinion on that topic. Additionally, each author serves as an editor, providing feedback and support to one another. In my role as Executive Editor, I worked closely with students through every step of the writing process, taking on both a teaching and an editing role. Through this experience, I watched each student grow as a writer, and my own writing improved as well.

This course is so unique because the goal of the course—to write a publishable article—does not have a substantive base. Class time is spent learning not only the mechanics of academic legal writing but also learning how to think analytically about the law. This type of discussion is not necessarily available in other law school courses, and I found it both challenging and thought-provoking. By focusing on why the law is the way it is, Professor Morris facilitates a discussion that inevitably leads to a deeper understanding of specific legal issues.

McKenna Prohov will be the new Executive Editor for the 2014–2015 academic year. She participated in the course first as an author and editor, and I played an active role in selecting her for Executive Editor. I have complete confidence in McKenna, and I know she will do a fantastic job at teaching and editing the REVIEW.
Students from this past year should be proud of their contributions to the SEVENTH CIRCUIT REVIEW. I can confidently say that each article will be of assistance to the legal community as a whole. Thanks again to Professor Morris for leading such a wonderful class, and I hope you enjoy reading this issue of the REVIEW as much as I enjoyed working on it.

Very respectfully,
Kathleen Mallon
Executive Editor, SEVENTH CIRCUIT REVIEW
LAUNDRY AND CABLE TELEVISION: HOW THE SEVENTH CIRCUIT PRESERVED CONSUMER PROTECTION CLASS ACTION LITIGATION FROM WASHING DOWN THE TUBES

STEPHEN D. PAUWELS


INTRODUCTION

Despite the nationwide availability of cheap consumer products and services in the marketplace, consumers lacked an inexpensive and suitable forum in which to bring small claims. Beginning in the latter part of the twentieth century, these claims found a home in federal class action, governed by Federal Rule of Civil Procedure (FRCP or Rule) 23. Class action litigation was designed to provide an efficient mechanism for multiple claims with common questions of law or fact to be brought as a single litigation unit. Subsection (b)(3) of Rule 23 permits consumers who have suffered relatively minor harms to bring their claims en masse, greatly defraying the cost of litigation.

* Juris Doctor, May 2014, Chicago-Kent College of Law, Illinois Institute of Technology; Executive Articles Editor, CHICAGO-KENT LAW REVIEW, 2013–2014; B.A., Political Science and History, Miami University, 2007. I would like to thank Professor Hal Morris for his guidance and support. I would also like to thank my parents, George and Cynthia Pauwels, for their unyielding encouragement.
Basic economic principles dictate that potential plaintiffs who suffer monetary harm are unlikely to sue when the cost of litigating would result in nothing more than a pyrrhic victory. This economic disincentive is heightened when only *de minimus* monetary harms are at stake. An example of this type of class action claim comes from the District Court for the District of New Jersey. In *Katz v. Live Nation Inc.*, Live Nation customers filed a class action suit against the company for charging a mandatory six-dollar parking fee for each ticket, regardless of whether a ticket buyer drove to the venue.\(^1\) These fees, when considered individually, were far too small to justify an individual bringing a lawsuit to vindicate his rights, but represented a large source of revenue for Live Nation, which benefited not from the size of the fee, but rather from the number of consumers charged.\(^2\)

Commentators have viewed recent Supreme Court jurisprudence as tightening the requirements to survive class certification\(^3\)—yet another move by a business-friendly court to curb consumer protections.\(^4\) One Supreme Court decision, *Comcast v. Behrend*,\(^5\) has sparked controversy in the realm of class action litigation by refining the predominance rules around damage classes.\(^6\)

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1. Katz, et al. v. Live Nation Inc., No. 09–3740 (MLC), 2010 WL 2539686, at *1 (D.N.J. Sept. 2, 2010). The case settled in 2014 for: (1) three (3) free lawn tickets to a Free Ticket Event, as described in sub-section 6(a) below; and (2) a coupon code for a five dollar ($5.00) discount on ticket purchases. Amended Class Settlement Agreement And Release, 12, ECF. No. 85-1.
2. Amended Class Settlement Agreement And Release 8, ECF. No. 85-1 (noting there are 362,928 class members).
5. 133 S. Ct. 1426 (2013).
6. Damages classes are those classes that seek classwide damages in addition to the other common questions of law or fact that the class has been organized for.
This Note’s purpose is to look at how the Seventh Circuit has approached predominance through the lens of *Butler v. Sears, Roebuck, and Co. II* (*Sears II*) following the Supreme Court’s decision to vacate and remand *Butler v. Sears, Roebuck, and Co. I*. Three questions will direct this discussion: How did the Seventh Circuit apply the Court’s analysis to the facts of *Sears II*? Did the Seventh Circuit correctly interpret the majority decision to only apply to classes seeking classwide damages, or were they incorrectly swayed by Justice Ginsburg’s dissent? To what extent are the circuit courts divided on how to apply *Comcast*?

Part I of the note will provide background information on class actions generally, including a brief review of the development of the predominance requirement. Part I will also provide the facts of *Sears II* and, the case’s procedural history through the federal court system. Part II will review the analysis the Seventh Circuit used in its *Sears II* decision and discuss whether the court correctly interpreted *Comcast* in light of *Sears II*’s facts. Part III will look beyond the Seventh Circuit to the other circuits that have had the opportunity to review predominance in light of *Comcast* and consider whether, and to what degree, those courts agree with the Seventh Circuit. Part III will also look to how the district courts sitting within the Seventh Circuit have analyzed predominance. Finally, Part IV will offer my conclusions on the Seventh Circuit’s *Comcast* application and its implications for the future of class action litigation in the Seventh Circuit.

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7 The predominance inquiry found in Rule 23(b)(3) asks whether individual questions of fact or law will “overwhelm questions common to the class.” *Comcast v. Behrend*, 133 S. Ct. 1426, 1433 (2013). Where “proposed classes are sufficiently cohesive to warrant adjudication by representation,” the predominance test is satisfied and class certification should be granted. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997).
8 727 F.3d 796 (7th Cir. 2013).
9 702 F.3d 359 (7th Cir. 2012).
I. BACKGROUND

While the introductory paragraphs have discussed the basic reasons for having the class mechanism built into the federal rules, a more thorough discussion of the development of class actions and their current role will help frame the later conversation.

A. The development of Rule 23 and class action jurisprudence (1938 – present)

Rule 23 is a deviation from the general rule that litigation must be “conducted by and on behalf of the named parties only.”\(^\text{10}\) While class actions were included in the original 1938 Federal Rules, the class action framework we know today is the result of “a bold and well-intentioned [revision in 1966 designed] to encourage more frequent use of class actions.”\(^\text{11}\) While the revisions did not initially spur a spate of collective litigation, the courts eventually took a liking to the tool in the mid-1980s when forced to respond to “dockets clogged with mass tort cases.”\(^\text{12}\)

For the next fifteen to twenty years, class actions became a popular method for trying common claims. Two major factors created the conditions for Rule 23’s booming acceptance. First, high paydays encouraged plaintiffs’ attorneys to seek out potential class representative plaintiffs.\(^\text{13}\) Second, the high stakes of class litigation forced defendants to settle rather than “risk a potentially bankrupting judgment” at trial.\(^\text{14}\) The impulse to settle was strengthened by the lack of interlocutory review, now permitted under Rule 23(f), which forced

\(^{10}\) Walmart v. Dukes, 131 S.Ct. 2541, 2550 (2011) (quoting Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)).
\(^{11}\) Charles A. Wright, Class Actions, 47 F.R.D. 169, 170 (1970).
\(^{12}\) Klonoff, supra note 3, at 736.
\(^{13}\) Id. at 737–38.
\(^{14}\) Id.
defendants to wait until final judgment to challenge class certification.\textsuperscript{15}  

Class action plaintiffs in recent years have suffered setbacks in Congress, with the Class Action Fairness Act, and with recent decisions in the United States Supreme Court. In 2005, Congress enacted the Class Action Fairness Act.\textsuperscript{16} The Act had two goals: reduce forum shopping by expanding the diversity jurisdiction rules to permit cases with minimum diversity\textsuperscript{17} where the collective amount in controversy exceeds five million dollars; and enhance review of class action settlements for fairness.\textsuperscript{18} The Act was intended to sweep truly national class actions into the federal courts, while preserving the state courts for disputes of a more local character under the “home state exception.”\textsuperscript{19} Congress believed plaintiffs were filing lawsuits in state courts known to be unfriendly for defendants and escaping removal by including non-diverse parties in the suits.\textsuperscript{20} While having the added benefit of helping defendant corporations that preferred a federal
forum, the main goal of the Class Action Fairness Act was to prevent these forum selection abuses. On the whole, the Act has been successful at driving large class actions into federal forums, though forum shopping now takes place among the federal district courts rather than among the states.

Recent Supreme Court decisions have further curtailed class plaintiffs’ choices to bring their suits and obtain class certification. Commenters point to five recent Supreme Court decisions—each decided by a bare 5-4 majority with the same five justices in the majority—that have fundamentally reshaped how class actions work in the federal system. Through these five rulings, Stolt-Nelson, S.A. v. Animalfeeds Int’l Corp., AT&T Mobility LLC v. Concepcion, Wal-Mart v. Dukes, Genesis Healthcare Corp v. Symczyk, and Comcast Corp v. Behrend, the Court restricted class actions for claims rooted in consumer contracts, employment contracts, and employment discrimination; permitted defendants to offer settlements to individual plaintiffs; and allowed for closer scrutiny of proposed classes before certification. One case stands in contrast to these five in its ruling for the plaintiffs seeking class certification: Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds, where the court refused to expand the amount of proof required to achieve class certification in securities fraud claims based on the “fraud on the market” theory.

With this backdrop in mind, the next subsection will review the basics of class certification and what plaintiffs must allege and prove.

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21 Id. See also, S. REP. NO. 109-14 at 10–27 (2005).
22 Id.
24 Potentially destroying class certification by eliminating numerosity.
25 Id.
26 133 S. Ct. 1184 (2013).
B. Class certification requirements under Rule 23

In a Rule 23 evaluation, the court looks at several criteria to determine the worthiness of a class for certification. The threshold inquiry under Rule 23(a) depends on four elements: numerosity, commonality, typicality, and adequacy of representation.27 These elements require the plaintiff to show that there are enough potential class members to warrant class certification, that there is a common question of law or fact among the parties, that the claims of the named plaintiff are typical of the rest of the class, and that the class counsel will adequately represent the interests of the class.28 Once these elements have been satisfied, the class must fit into one of the three categories permitted under Rule 23(b). Subsection (b)(1), or limited fund classes are where the total amount of damages for all potential plaintiffs would exceed the defendant’s assets, thus creating inconsistent standards of conduct for the defendant or affecting the rights of other plaintiffs not parties to the individual suit.29 Subsection (b)(2) classes are where the defendant’s conduct applies generally to the class, so that injunctive or declaratory relief is appropriate for the whole class.30 Finally, subsection (b)(3) classes are where there are common questions of law or fact that predominate over individual issues such that class certification is “superior” to individual litigation.31

This comment will focus on the 23(b)(3) classification and specifically the predominance requirement therein. Predomiance is a question of efficiency.32 The purpose of the predominance requirement is to make sure that the common questions of either law or fact are central to the issue of liability before the court. Where efficiency is the goal of the predominance test, common questions that only address

32 See Amchem, 521 U.S. at 615–16.
ancillary or tangential issues of the litigation do not satisfy predominance because the cost and complexities of class litigation far outweigh the benefits obtained through combined litigation of common issues. For class litigation to be efficient, the common issues must move litigation far enough ahead such that only relatively minor individual issues remain.

Thus, the predominance requirement is not fulfilled where “individual questions . . . overwhelm questions common to the class.” On the contrary, if common issues predominate, the requirement is fulfilled and class certification can proceed. Where there are only common questions among the class or there are no common questions among the class, no in-depth predominance analysis need be done. In cases where both common and individual questions must be resolved, the court must consider several factors at the subjective discretion of the district court.

Three recent U.S. Supreme Court decisions have looked toward the predominance requirement in Rule 23; this Note’s purpose is to review how the Seventh Circuit has approached predominance through the lens of Sears II, following the Supreme Court’s decision to vacate and remand Butler v. Sears, Roebuck, and Co. I. The Court ordered the Seventh Circuit to reconsider the case in light of the Court’s ruling in Comcast Corp. v. Behrend, where the Court held that “a damages suit cannot be certified to proceed as a class action unless the damages sought are the result of the classwide injury that the suit alleges.”

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35 Id.
36 727 F.3d 796 (7th Cir. 2013).
37 702 F.3d 359 (7th Cir. 2012).
38 133 S. Ct. 1426 (2013).
39 Sears II, 727 F.3d at 799.
C. Comcast Corp. v. Behrend and the effect on predominance

A group of plaintiffs filed suit in the District Court for the Eastern District of Pennsylvania alleging various antitrust violations against Comcast Corporation for using a monopoly to charge supra-competitive prices on cables services in certain markets. The district court granted class certification despite dismissing three of the four antitrust claims as incapable of classwide proof. The court found that Comcast’s activities created an impermissibly high barrier for new entrants into the affected markets and recognized that the plaintiffs’ damages model was sufficient to measure the relief of the remaining theory of liability.

The Third Circuit, in a divided opinion, affirmed the findings of the district court; Comcast filed and was granted certiorari in the Supreme Court.

1. Justice Scalia delivers the opinion for the Court

Justice Scalia wrote the majority opinion for the Court and initially noted the necessity of the reviewing court to look beyond the pleadings to the underlying facts of the case because “class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” Further, the Court notes that “addition[al] safeguards for (b)(3) class members beyond those provided for (b)(1) and (b)(2),” including the ability to opt-out of class litigation, indicate that courts must take a more in-depth look at the predominance question before certification is granted.

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40 Comcast, 133 S. Ct. at 1430.
41 Id.
42 Id. at 1431.
43 Id. at 1431.
44 Id. at 1432 (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ___, ___, 131 S. Ct. 2541, 2551-52 (2011)).
45 Comcast, 133 S. Ct. at 1432.
With those concepts in mind, the Court proceeded to look at whether the district court properly granted class certification despite relying on a damages model that relied on all four theories of relief, rather than requiring the plaintiffs’ expert to tailor the damages model to the remaining antitrust theory. Based on testimony of plaintiffs’ expert at a hearing in the trial court, the Court found that plaintiffs had not shown that the plaintiffs’ damages model was capable of proving that damages are able to be calculated. Thus, plaintiffs would have to prove damages individually, destroying predominance of common questions.

Justice Scalia focused on the failure of the Third Circuit to look into the merits of the case to determine the worthiness of the case for class certification. Justice Scalia wrote:

The District Court and the Court of Appeals saw no need for respondents to “tie each theory of antitrust impact” to a calculation of damages. [Behrend v. Comcast Corp.] 655 F.3d [182] at 206 [(3d Cir. 2011)]. That, they said, would involve consideration of the “merits” having “no place in the class certification inquiry.” Id. at 206-207. That reasoning flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry

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46 Id. at 1433.
47 Id. at 1434.
48 Id. at 1434–35. SCOTUSblog commentator Sergio Campos frames the issue as whether the claims are susceptible to common answers or whether common questions are all that are necessary for class certification. Sergio Campos, Opinion analysis: No common ground, SCOTUSBLOG (Mar. 29, 2013, 4:30 PM), http://www.scotusblog.com/2013/03/opinion-analysis-no-common-ground. His analysis relies on Amgen and Wal-Mart as proof of an on-going divide on the Court as to what a plaintiff must prove to succeed on the question of predominance. Id. The issue of whether a divide exists and, if so, which side is correct is not the subject of this paper; the analysis moving forward accepts the majority decision in each case as the rule of law.
49 Comcast, 144 S. Ct. at 1433.
into the merits of the claim. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2564 n.6 (2011).\(^{50}\)

Proceeding from the determination that the courts below had failed to apply the correct depth of inquiry into the predominance question, the Court applied the correct method and determined that “[t]here is no question that the model failed to measure damages resulting from the particular antitrust injury on which petitioners’ liability in this action is premised.\(^{51}\)

The failure, according to the Court, existed in the incongruity between the claims that survived Comcast’s motion to dismiss and the plaintiffs’ proposed method for calculating damages.\(^{52}\) While the Third Circuit waived off Comcast’s concerns of incongruity, reasoning that the damages model was not flawed at all,\(^{53}\) the Court looked to the three remaining theories of liability the district court rejected, and posited that those alternate theories may be the cause of the increased prices in the market.\(^{54}\)

\(^{50}\) *Id.* 1433.

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

\(^{52}\) *Id.* at 1434. The incongruity exists because the damages model was based on all four causes of action the plaintiffs initially alleged. Justice Scalia relied on the failure of the plaintiffs to adjust the damages model to fit the remaining cause of action as indication that the Plaintiffs could not show that the remaining cause of action resulted in an increase in cable rates.

\(^{53}\) *Behrend v. Comcast Corp.*, 655 F.3d 182, 205 (3d Cir. 2011) (“The [damages model was] not intended to calculate damages, but instead to construct an estimated competitive “but-for” Philadelphia market (a market absent the alleged anticompetitive market). . . . In other words, the model calculates supra-competitive prices regardless of the type of anticompetitive conduct.”).

\(^{54}\) *Comcast*, 133 S. Ct. at 1434–1435 (“The permutations involving four theories of liability and 2 million subscribers located in 16 counties are nearly endless.”).
2. Justice Ginsburg pens a sharp dissent, joined by Justices Breyer, Sotomayor, and Kagen

Justice Ginsburg began the Rule 23 discussion in her dissent by dismissing the possibility that the majority opinion should be read as breaking new ground on the predominance question. Nonetheless, Justice Ginsburg did not quibble with the majority’s conclusion that the “questions of law or fact common to class members predominate over any questions affecting only individual members.”

The dissent took issue with the idea that damages stemming from a classwide injury must be measurable on a classwide basis. The dissent pointed to a long line of cases that stand for the proposition that “individual damages calculations do not preclude class certification under Rule 23(b)(3).” Most notably, the dissent pointed to Amchem Products v. Windsor, decided only sixteen years earlier, where the Court held exactly the opposite of the majority’s ruling in Comcast.

To distinguish this case from the typical antitrust predominance issue, the dissent pointed to the unique procedural posture of the case. Here, the case was originally granted certiorari on the question of “[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a classwide basis.” Based on this question, the parties’ briefing and oral arguments focused on the admissibility of expert testimony – a question that was not addressed in the majority’s opinion.

55 Comcast, 133 S. Ct. at 1436 (Ginsburg, J., dissenting).
56 Id.
57 Id.
58 Id. at 1437 (citing a “legion” of appellate court decisions).
59 Id. (“Predominance is a test readily met in actions alleging violations of the antitrust laws.”) (citing Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625 (1997)).
60 Id. at 1435.
61 Id. at 1435–36.
The majority, instead, rephrased the question as to whether certification was proper where the plaintiffs had failed to establish damages could be measured on a classwide basis. 62 This, the dissent noted, is “both unwise and unfair” because the respondents could not “train their energies” on the separate issue of whether they had satisfied the predominance requirement with their expert testimony. 63

3. The take-away: what does the decision mean for the future of the ability for classes to gain certification without the ability to prove classwide damages?

What the district and circuit courts should take away from this opinion is not quite clear. The majority’s opinion focuses on the lower courts’ failing to inquire deeply enough into the merits of the damages model, which the Court found to be legally insufficient to determine classwide damages. 64 But the dissent correctly identified a reluctance, at least at the circuit court level, to deny class certification where individual damages calculation is necessary, particularly in the antitrust context. 65

A fair reading of the case points to the need for district courts to conduct a “rigorous analysis that the prerequisites” of Rule 23 have been satisfied. 66 Thus, district courts should not hesitate to look beyond the pleadings to the merits, where doing so is necessary to determine whether class certification should be granted. As Justice Scalia notes, granting of class certification is a departure from the

62 Id. at 1431, n.4 (majority opinion).
63 Id. at 1436 (Ginsburg, J., dissenting).
64 Comcast, 133 S. Ct. at 1432–33 (majority opinion).
65 Id. at 1437 (Ginsburg, J., dissenting) (“[W]hen adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate . . . [p]redominance is a test readily met in actions alleging violations of the antitrust laws.”) (citing Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625 (1997)).
66 Comcast, 133 S. Ct. at 1432 (majority opinion).
ordinary structure of civil litigation, and thus requires an “affirmative demonstration” of worthiness.\textsuperscript{67}

The real question that arises is not whether courts need to look beyond the pleadings, but what kind of proof is required to demonstrate predominance. The Court makes clear that if a damages model is not reflective of the theories of liability and the relief sought, the model is an insufficient basis for Rule 23(b)(3) class certification.\textsuperscript{68} The issue, though, is that the Court did not explicitly over\textit{turn} \textit{Amchem} or the generally accepted notion that individual determinations of damages do not foreclose the possibility of class certification.\textsuperscript{69}

Various lower courts have addressed the issue head-on including the Second, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits since the Court handed down its decision in March 2013. The Seventh Circuit also addressed this issue in \textit{Butler v. Sears, Roebuck, & Co. II}, when the Court remanded \textit{Butler v. Sears, Roebuck, & Co. I} for reconsideration in light of \textit{Comcast Corp. v. Behrend}.\textsuperscript{70}

\textsuperscript{67} Id.
\textsuperscript{68} Id. at 1433.
\textsuperscript{70} 727 F.3d 796 (7th Cir. 2013).
PART II. BUTLER V. SEARS, ROEBUCK, AND COMPANY AND HOW THE CASE CAME TO PROMINENCE

A. The plaintiffs file suit and seek class certification

Class representatives Susan Munch, Larry Butler, Joseph Leonard, and Victor Matos originally filed suit in December 2006 against Sears, Roebuck, and Co. [“Sears”] on behalf of similarly situated purchasers of various Kenmore Elite high-efficiency washing machines. 71 The named representatives alleged various claims including violation of state consumer protection laws, common law fraud, and breach of implied warranty of merchantability. 72 Their complaint alleged that each plaintiff had purchased a Kenmore washing machine in 2004 or 2005 and had, in short order, begun experiencing mechanical issues, mechanical failure, clothes not being cleaned, stains occurring during the washing process, and mold and mildew growing inside the machines. 73

After the initial causes of action were dismissed, the plaintiffs amended their complaint to allege two major defects: electronic control board failure and water drainage failure. Sears again moved to dismiss in November 2007. 74 Plaintiffs realleged the state consumer fraud claims, an unjust enrichment claim, and sought declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. 75 The court again dismissed the state consumer fraud act claims, the unjust enrichment claim, and the § 2201 claim as to marketing and unlawful gains from extended warranties, but denied dismissal for the § 2201 claim for failure to honor its two-year warranty. 76

72 Id. at 1.
73 Id.
75 Id.
76 Id.
The final version of the complaint alleged breach of warranty for two separate classes of plaintiffs: those whose machines suffered from the mold defect and those whose machines suffered from the control board failure.  

**B. The Northern District of Illinois rules on class certification; both parties appeal**

The district court was asked to certify two separate classes: mold plaintiffs and control board plaintiffs. While finding no issue with certifying the control board plaintiffs’ class, the court carefully considered the mold plaintiffs’ claims in light of the predominance requirement under Rule 23(b)(3).

Recognizing that the plaintiffs claimed the mold problem stems from a common defect with the machines that renders them unable to clean themselves, the court noted that Sears had taken several remedial steps to fix the mold issue. Finding that neither the plaintiffs’ expert nor the plaintiffs’ themselves have accounted for how these remedial steps have impacted the mold growth in the machines, the court held that the issue is model dependent and not as pervasive as the plaintiffs allege. Thus, because the mold issues are model-specific and depend on Sears’ knowledge of ongoing issues with the machines, the court found that the common issues do not predominate over the common questions and denied certification. Notably, the court rejected the plaintiffs’ argument that the predominance inquiry employed requires an improper finding on the merits that is more appropriately left until after certification has been granted or denied.

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78 Id.
79 Id. at *14–16.
80 Id. at *16.
81 Id. at *17.
82 Id.
83 Id. (‘The court notes that in the Seventh Circuit, preliminary inquiries into the facts and merits are appropriate in reviewing the predominance of common
C. The Seventh Circuit makes its initial ruling

The case first came before the Seventh Circuit on a Federal Rules of Civil Procedure 23(f) motion for an interlocutory appeal by both parties from the Northern District of Illinois’ decision to deny class certification as to the mold issue and to grant certification in part as to the defective control unit issue. The court’s determination centered on the predominance question under FRCP 23(b)(3) and looked to whether the district court incorrectly denied class certification as to the mold issue. The first issue was whether there was a common question concerning the predisposition of the machines to develop an odorous mold due to their design. The court found that, despite Sears’ claim that they sold twenty-seven different types of Kenmore machines over the period in question, only five of the various changes that Whirlpool, the machines’ manufacturer, made were related to the mold issue. Thus, the common question—whether the machines were defective in permitting the growth of mold—is common to all parties. The only issue requiring individual determination was the amount of damages owed.

The second issue was whether the court had correctly granted class certification for the defective control unit claims. The crux of the complaint is that Sears knew about a defect during manufacture of the control boards yet continued to manufacture machines with defective boards and charge customers with defective machines hundreds of dollars to fix the defect. The court, again, found a common question in whether the control boards were indeed defective and that the only

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issues for certification purposes.”) (citing Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 676–77 (7th Cir. 2001)).
85 Id.
86 Id.
87 Id.
88 Id.
89 Id. at 363.
issue requiring individual determination was that of harm suffered by the class members.\(^90\)

Finding that there were common questions among all class members, the court found that the claims predominated over the individual damages claims and were sufficient to warrant class certification with the caveat that the district court may wish to create subclasses depending on the specific model of washing machine or the state in which the class member resided to comply with state law.\(^91\)

The Seventh Circuit denied Sears’ petition to rehear the case \textit{en banc} in December 2012.\(^92\)

\textit{D. Petition for Certiorari and the Supreme Court’s involvement}

Following the Seventh Circuit’s decision, Sears petitioned the Supreme Court for certiorari.\(^93\) The Supreme Court in a memorandum opinion vacated the Seventh Circuit’s judgment and remanded the case for review in consideration of the Court’s recent decision in \textit{Comcast Corp. v. Behrend}.\(^94\)

\textit{E. The Seventh Circuit’s rehearing on remand}

The Seventh Circuit framed the issue on remand as an issue of law: “whether the \textit{Comcast} decision cut the ground out from under our decision ordering that the two classes be certified.”\(^95\) With this in mind, Judge Posner, writing for the unanimous court, evaluated the implication that \textit{Comcast} has on the court’s ruling in \textit{Sears I}.\(^96\) Judge Posner argued that the \textit{Comcast} holding is simply that “a damages suit

\(^{90}\) Id.

\(^{91}\) Id. at 362-63.

\(^{92}\) Id.


\(^{94}\) Sears, Roebuck, and Co. v. Butler, 133 S. Ct. 2768 (mem.).

\(^{95}\) Butler v. Sears, Roebuck, and Co. II, 727 F.3d 796, 798 (7th Cir. 2013).

\(^{96}\) Id. at 799.
cannot be certified as a class action unless the damages sought are the result of classwide injury that the suit alleges.”97 Thus, the Court’s ultimate rule is that a damages model that does not identify damages that are the result of the wrong is insufficient to warrant class certification.98

Judge Posner applied this broadly: washing machine mold class members only seek damages attributable to mold while control unit class members only seek damages attributable to the control unit defect.99 He went on to distinguish this case factually from the Comcast decision. In Comcast, the district court attempted to determine damages on a classwide basis; not so in this case.100 Rule 23(c)(4)101 permits the segregation of issues so that classes can move forward solely on the common issues that predominate while maintaining the individual issues unique to specific class members for separate resolution.

Rejecting the damages determination as the rationale for the Court’s decision to remand, Judge Posner proceeded to the evidentiary requirements Comcast emphasized are necessary to prevent class litigation from proceeding where individual issues actually predominate.102

The court rejected Sears’ argument that the district court’s analysis was not sufficiently thorough to satisfy the Comcast requirement and holds that individual damages need not be identical across all class members to satisfy predominance.103 This standard, the

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97 Id. (emphasis omitted).
98 Id.
99 Id. at 800.
100 Id.
101 “Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.” Federal Rule of Civil Procedure 23(c)(4).
102 Butler v. Sears, Roebuck, and Co. II, 727 F.3d 796, 800 (7th Cir. 2013). See also Advisory Committee Notes to 1966 Amendment of Rule 23(b)(3); Pella Corp. v. Saltzman, 606 F.3d 391, 393–94 (7th Cir. 2010) (per curiam).
103 Sears II, 727 F.3d at 800.
104 Id. at 801.
court argued, would effectively spell the death knell of class certification and is far afield from what the Supreme Court held in Comcast.\textsuperscript{105}

The court concludes by reinstating its November 13, 2012, order granting class certification:

There is a single, central, common issue of liability: whether the Sears washing machine was defective. Two separate defects are alleged, but remember that this class action is really two class actions. In one the defect alleged involves mold, in the other the control unit. Each defect is central to liability. Complications arise from the design changes and from separate state warranty laws, but can be handled by the creation of subclasses.\textsuperscript{106}

Sears subsequently petitioned for, and was denied certiorari.\textsuperscript{107}

III. THE SEVENTH CIRCUIT CORRECTLY NARROWED THE APPLICABILITY OF COMCAST TO CLASSES SEEKING CLASSWIDE DAMAGES

\textit{A. A brief analysis of the Seventh Circuit’s Post-Comcast Predominance Jurisprudence}

To understand the Seventh Circuit’s interpretation of Comcast \textit{v. Behrend}, it is necessary to look at how the court has interpreted predominance in three recent decisions: Sears \textit{II}; Parko \textit{v. Shell Oil Co.};\textsuperscript{108} and Ira Holtzman, C.P.A. & Assocs. \textit{v. Turza}.\textsuperscript{109} In each of these cases, the Seventh Circuit was faced with determining whether the district court below had correctly ruled on whether the common

\textsuperscript{105} Id.
\textsuperscript{106} Id. at 801–02.
\textsuperscript{108} 739 F.3d 1083 (7th Cir. 2014).
\textsuperscript{109} 728 F.3d 682 (7th Cir. 2013).
issues predominated over the class. These rulings establish the contours of the Seventh Circuit’s predominance jurisprudence following Comcast.

In each case, the court applies the same rule from Comcast regarding the necessity of a damages model to fit the theory of liability. In Sears II, the court distinguished between the classes here and the class in Comcast on both factual and legal grounds. Interestingly, while holding that predominance requires a review of the merits, the Seventh Circuit specifically rejected the notion that “a class action limited to determining liability on a classwide basis, with separate hearings to determine . . . the damages of the individual class members” does not satisfy predominance. This is contrary to the Comcast ruling where Justice Scalia implicitly rejected the notion that a class should be granted Rule 23(b)(3) certification where damages have to be calculated individually.

In Sears II, Judge Posner maneuvered around this point of contention by focusing on factual and procedural distinctions between the cases. Judge Posner relied on two basic distinctions. First, the plaintiffs in Comcast “fail[ed] to base all the damages they sought on the . . . injury of which the plaintiffs were complaining,” which was not so in Sears II. Second, the district court in Sears II was not asked to determine damages on a classwide basis, unlike Comcast.

The Seventh Circuit’s conclusion is clear when viewed through the lens of the other two, much more clear-cut, cases mentioned above.

In Ira Holtzman, the court determined the validity of a district court’s granting of class certification to a class of plaintiffs who had received fax-based solicitation in violation of the Telephone Consumer Act.

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10 Sears II, 727 F.3d at 800.
11 Id.
12 Justice Scalia foreclosed the notion, and the dissent spent significant time arguing against the idea, that a class action could proceed without a method for determining classwide liability by reversing the decision of the lower courts instead of simply holding the damages model as insufficient to base classwide adjudication of the antitrust impact.
13 Sears II, 727 F.3d at 800.
Protection Act of 1991, 47 U.S.C. § 227.\textsuperscript{114} Deciding that the \textit{Comcast} case was inapposite to the facts at issue, the court pointed to the statutory remedy that allows easily calculable damages for each member of the plaintiff class.\textsuperscript{115} The court concluded that an easily calculable remedy, such as the statutorily available remedy available to the class members here, was completely distinguishable from the facts in \textit{Comcast}.\textsuperscript{116} While in \textit{Comcast}, the majority feared that individual calculation of damages would subsume the common issues,\textsuperscript{117} here there is no fear that the common questions of law or fact would not predominate over individual determination of damages.\textsuperscript{118}

Importantly, the damages available are not simply a matter of dividing a pot of money among all of the class members; rather, the class members would all have to prove they have actually received the faxes at issue.\textsuperscript{119} Once the court determined the receipt of the faxes and the number received, the calculation of damages would simply be the product of the number of faxes received and the statutory damages permitted.\textsuperscript{120} Because the calculation of damages, though needing individual determination, would require nothing more than multiplying the number of faxes received by the amount of statutory damages available, the defendant’s liability to the group as a whole easily predominated over individual issues.\textsuperscript{121}

Finally, in \textit{Parko v. Shell Oil Co.} decided in January 2014, the Seventh Circuit, for the first time since \textit{Comcast}, rejected class certification based on the district court’s improper finding of predominance.\textsuperscript{122} Here, the plaintiffs sought class certification to pursue claims against various defendants for allegedly leaking

\begin{footnotes}
\item \textsuperscript{114} Id. at 683.  \\
\item \textsuperscript{115} Id. at 684.  \\
\item \textsuperscript{116} Id.  \\
\item \textsuperscript{117} \textit{Comcast v. Behrend}, 133 S. Ct. 1426, 1433 (2013).  \\
\item \textsuperscript{118} Ira Holtzman, C.P.A., & Assocs. v. Turza, 728 F.3d 682, 684 (7th Cir. 2013).  \\
\item \textsuperscript{119} Id.  \\
\item \textsuperscript{120} Id.  \\
\item \textsuperscript{121} Id.  \\
\item \textsuperscript{122} \textit{Parko v. Shell Oil Co.}, 739 F.3d 1083, 1084 (7th Cir. 2014).
\end{footnotes}
“benzene and other contaminants into the groundwater under the class members’ homes.” The Seventh Circuit rejected class certification, finding that the plaintiffs had not met their burden to prove that common questions would predominate over the class because a determination of liability and damages would require individual, rather than classwide evaluation. The court found that even assuming the plaintiffs could survive the threshold Rule 23(a) requirements, damages would have to be determined individually based on the diminution in property value each class member has suffered. The court further pointed to the inability of the residents to exclude any other cause for the loss in property value or to even fix causation on the alleged groundwater contamination.

Taking these cases together, the Seventh Circuit has clearly defined the predominance inquiry in the post-Comcast world. With Sears II and Holtzman, the court has defined the two areas where classes will be able to achieve class certification under FRCP 23(b)(3): 1) where the class bifurcates the damages question from liability such as in Sears II; and 2) where the class seeks determination of classwide damages but damages are susceptible to such a determination, such as in Holtzman. On the other side of the coin, the court defined when classes will not achieve class certification through Parko: where the determination of damages requires individualized inquiry into the harm caused by the defendants.

These cases provide district courts with a clear picture of what putative classes should be granted certification and which would run afoul of the Supreme Court’s ruling in Comcast. Indeed, the Northern District of Illinois and the Northern District of Indiana have already taken up the question of whether class certification is appropriate based on the Court’s decision in Comcast. In seven district court cases,
only two putative classes failed to achieve class certification. The rest of the cases relied on a broad reading of the Seventh Circuit’s analysis in Sears II and distinguished the Supreme Court’s reasoning on the facts of Comcast.

B. The Seventh Circuit’s Opinion Properly Applied Comcast to Plaintiffs Seeking Class Certification

Numerous scholars predicted the Comcast decision would result in a reduction of courts granting class certification. While it is

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127 Tamas v. Family Video Movie Club, Inc., No. 11 C 1024, 2013 WL 4080649, at *9 (N.D. Ill. 2013); Harris v. Reliable Reports, Inc., No. 1:13–CV–210 JVB, 2014 WL 931070, at *9 (N.D. Ind. 2014) (“[I]t would be premature to strike Harris’s class . . . when no discovery has been undertaken.”).
128 Fox v. Riverview Realty Partners, No. 12 C 9350, 2014 WL 1613022, at *6 (N.D. Ill. 2014) (relying on a class of only 100 members (compared to the two million members of the Comcast case) and a “mechanical” damages calculation); Kurgan v. Chiro One Wellness Centers LCC, Case No. 10–cv–1899, 2014 WL 642092, at *8 (N.D. Ill. 2014) (relying on the statutory structure of the Illinois Minimum Wage Law to find that adjudication of liability would “aid in resolving damages” and the manageability of their determination); Reliable Reports, 2014 WL 931070, at *9 (relying on Espenscheid v. Directsat USA, LLC, 705 F.3d 770, 776 (7th Cir. 2013) for the proposition that “the district court must carefully explore the possible ways of overcoming problems in calculating individual damages.”); Driver v. AppleIllinois, LLC, Case No. 06 C 6149, 2013 WL 5818899, at *11–12 (N.D. Ill. 2013) (“Applying Comcast as expansively as Smith suggests would virtually prohibit class certification in wage and hour cases . . . There is no indication in Comcast that the Court intended to undo the 67 years of decisions setting FLSA damages under the burden-shifting framework of Mt. Clemens.”); Healey v. Int’l Bhd. of Elec. Workers, Local Union No. 134, 296 F.R.D. 587, 594–95 (N.D. Ill. 2013) (distinguishing Comcast on the fact that this case only has forty class members and that some damages-related issues are common to the class); Tamas, 2013 WL 4080649 at *9 (finding that plaintiffs had not sufficiently proven that the liability issues predominated); Harris v. comScore, Inc., 292 F.R.D. 579, 589 (N.D. Ill. 2013) (“[I]ndividual factual damages issues do not provide a reason to deny class certification when the harm to each plaintiff is too small to justify resolving the suits individually.”).
129 See, e.g., Campbell, supra note 23, at 480; Ellen Meriwether, Comcast Corp. v. Behrend: Game Changing or Business as Usual?, 27-SUM ANTITRUST 57,
likely too soon to tell whether the doom-and-gloom future for class actions will come to fruition, the Seventh Circuit’s analysis in Sears II keeps that concern at bay.

First, if we look at the Seventh Circuit’s predominance jurisprudence before the High Court handed down its opinion in Comcast, it is apparent that very little, if anything, has changed.\footnote{See, e.g., Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 773 (7th Cir. 2013) (decided one month before Comcast); Pella Corp. v. Saltzman, 606 F.3d 391, 394 (7th Cir. 2010) (three years before Comcast); Arreola v. Godinez, 546 F.3d 788, 801 (7th Cir. 2008) (five years before Comcast).} In Espenscheid v. DirectSat USA, LLC, the Seventh Circuit recognized in the (b)(3) context that where calculation of damages is “mechanical, formulaic, a task not for a trier of fact but for a computer program” the court need not deny class certification.\footnote{705 F.3d at 773.} Similarly, in Messner v. Northshore University Health System, the Seventh Circuit vacated and remanded a district court’s denial of class certification for a putative (b)(3) class of antitrust plaintiffs.\footnote{669 F.3d 802, 819 (7th Cir. 2012).} In a case very similar to the facts of Comcast, the Seventh Circuit held that proof of “uniformity of price increases” was a bridge too far to achieve class certification.\footnote{Id. This case is an interesting counterexample to Comcast and is worth much greater consideration on its own merits. Suffice it to say, the case is factually distinguishable from Comcast on the basic point that defendants did not challenge the congruity of the injury alleged with the damages sought, only that the damages would require individual calculation. In this way, Messner is very much like the Holtzman case discussed supra where uniformity of damages is not necessary to satisfy the predominance inquiry. See Ira Holtzman, C.P.A. & Assocs. v. Turza, 728 F.3d 682, 684 (7th Cir. 2013).}
Further, the court upheld certification for a bifurcated trial where individual trials would be held to determine causation and damages for each class member while the court would determine the common issue of defect in certain models of Pella windows.\textsuperscript{134} Finally, the court noted the flexibility district courts have with class certification when it held that despite variances in each class member’s personal damages, “judges can devise solutions to address that problem if there are substantial common issues that outweigh the single variable of damages amounts.”\textsuperscript{135}

Thus, the Seventh Circuit has correctly not changed the tune that “Rule 23 allows district courts to devise imaginative solutions to problems created by the presence . . . of individual damages issues.”\textsuperscript{136} The court will continue to grant class certification where damages are not subject to classwide determination. Instead of foregoing 23(b)(3) classes or creating an increased barrier to entry, the court relied on the mechanism in Rule 23(c)(4) to limit classes to liability, while reserving individual determination of damages for a later day.

The Seventh Circuit’s conclusion plainly fits within the limiting language both the dissent and the majority employed in their respective opinions.\textsuperscript{137} Comcast has truly broken no new ground for classes seeking certification under Rule 23(b)(3), both in the Seventh Circuit and for each circuit to have considered the issue. For example the Fifth, Sixth, and Tenth Circuits all held, following Comcast, that bifurcation of the liability and damages questions renders the Comcast ruling inapplicable.\textsuperscript{138} Further, the Second, Ninth, and D.C. Circuits

\textsuperscript{134} Pella Corp. v. Saltzman, 606 F.3d 391, 394 (7th Cir. 2010).
\textsuperscript{135} Arreola, 546 F.3d at 801.
\textsuperscript{136} Carnegie v. Household Int’l, Inc., 376 F.3d 656, 661 (7th Cir. 2004).
\textsuperscript{137} Comcast Corp. v. Behrend, 133 S.Ct. 1426, 1433 (2013) (“We start with an unremarkable premise. If respondents prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition.”). Id. at 1436 (Ginsburg, J., dissenting) (“[T]he opinion breaks no new ground on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3).”).
\textsuperscript{138} See In re Deepwater Horizon, 739 F.3d 790, 817 (5th Cir. 2014) (internal quotation marks omitted) (“[T]he rule of Comcast is largely irrelevant where determinations of liability and damages have been bifurcated in accordance with
agree that predominance may still be satisfied where individual calculations of damages are necessary.\(^\text{139}\) Only two circuits, the Eighth and the Eleventh, have considered predominance without applying \textit{Comcast} to the facts; both courts denied certification because the plaintiffs could not successfully prove \textit{any} common issue predominated.\(^\text{140}\)

In short, the Seventh Circuit has considerable support in refusing to depart from the common understanding that “individual damages calculations do not preclude class certification under Rule 23(b)(3).”\(^\text{141}\) Despite the concerns of academics and commentators, and the current Supreme Court trend to heighten class action prerequisites, the Seventh Circuit has put \textit{Comcast Corp. v. Behrend} in its rightful place: the case clarifies the district court’s need to investigate the merits of class certification and to require congruence between the

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\(^\text{139}\) See \textit{Catholic Health Care West v. U.S. Foodserv.}, 729 F.3d 108, 122 (2d Cir. 2013) (“[B]ecause the question whether the invoices materially misrepresented the amounts due to [defendant] is common to all plaintiffs, the class will prevail or fail in unison on this point—rendering certification appropriate.”); \textit{Leyva v. Medline Indus.}, 716 F.3d 510, 513–14 (9th Cir. 2013) (“[T]he presence of individualized damages cannot, by itself, defeat class certification.”); \textit{In re Rail Freight Fuel Surcharge Antitrust Litigation}, 725 F.3d 244, 252 (D.C. Cir. 2013) (common
evidence must show all the class members were actually harmed by the alleged wrongdoing, but not necessarily the amount of damages incurred).

\(^\text{140}\) \textit{Halvorson v. Auto-Owners Ins. Co.}, 718 F.3d 773, 779 (8th Cir. 2013) (rejecting class certification where questions of liability would require individual inquiries and “will predominate over whether Auto-Owners’s process was reasonable and overwhelm questions common to the class.”); \textit{Bussey v. Macon County Greyhound Park, Inc.}, No. 13–12733, ___ Fed.Appx. ___, 2014 WL 1302658, at *6 (11th Cir. 2014) (reversing the district court’s grant of class certification for failure to conduct a “rigorous analysis”).

\(^\text{141}\) \textit{Comcast}, 133 S.Ct. at 1437 (Ginsburg, J., dissenting).
injury alleged and the damages model before predominance is satisfied.

IV. CONCLUSION

What we can take away from the Seventh Circuit’s jurisprudence is that not much has changed, as the Comcast dissent correctly predicted. When the Supreme Court decided Comcast in 2013, an overwhelming majority of scholars predicted that Rule 23 had been forever altered. Professor John Campbell, at the University of Denver, predicted that “many meritorious claims will either never get started, die on the vine, or, even if they do succeed, provide relief to a more narrowly drawn class.” Others have similarly chimed in, fretting over the future of class action litigation.

The Court, perhaps unintentionally, provided myriad reasons for these prognosticators to wring their hands. Not the least of which was changing the question presented after the parties had briefed the issues, rejecting the prêt à porter Daubert issue in exchange for the unchallenged predominance question. If these commentators had stepped back from the decision for a moment, they would have understood the narrowness of Justice Scalia’s opinion. Most notably, the Court made no attempt to backpedal from Amchem Products v. Windsor, nor does the Court attempt to establish any new rule of law. Despite the bend-over-backwards approach the Court used to reach this question, Comcast’s biggest contribution to the predominance jurisprudence is clarification of certain principles already generally accepted in the circuit and district courts.

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142 Id. at 1436 (Ginsburg, J., dissenting).
143 Campbell, supra note 23, at 480.
144 See, e.g., Meriwether, supra 129, at 57; Klonoff, supra note 3, at 799–800.
145 Ready to wear.
146 Comcast, 133 S. Ct. at 1435 (Ginsburg, J., dissenting).
147 It would make sense if the Court reached to address this question.
148 Including the requirement of the district court to “look beyond the pleadings” to perform a rigorous analysis to determine whether class certification
And the Seventh Circuit agrees. Through the *Sears II* decision, the court makes clear that the predominance requirements have not meaningfully changed with the *Comcast* decision. Had *Comcast* meant what the commentators had predicted, the Seventh Circuit could have relied on the district court’s reasoning and held that common proof of damages for class members is required and rejected certification.\(^{149}\) Plainly, the Seventh Circuit refused to do so.

Moreover, the reasoning in *Sears II* is consistently applied through the court’s decisions in *Holtzman* and *Palko*, indicating that the *Sears II* conclusion is not an aberration. Finally, the decisions of the district courts within the Seventh Circuit and the other circuit courts strengthen the weight of the Seventh Circuit’s opinion. There does not seem to be a court within the Seventh Circuit, district or circuit, nor a circuit court in the country that agrees with the doom-and-gloom outlook peddled in early 2013.

Moving forward, the question will be to what degree the Supreme Court is satisfied with the Seventh Circuit’s reasoning. The Court’s denial of certiorari for *Sears II* suggests that the Seventh Circuit’s decision is in line with what Justice Scalia advocated. Yet the recent history of the Supreme Court’s Rule 23 jurisprudence intimates otherwise. Thus, one must ask, will the Supreme Court fall in line with its decisions in *Walmart* and *AT&T Mobility* to further constrain consumers rights under Rule 23? Or does the Court’s decision in *Comcast* mark a degree of satisfaction with where class action law stands today? *Sears II* may well be the key to answering that question.

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\(^{149}\) Butler v. Sears, Roebuck, and Co. II, 727 F.3d 796, 801 (7th Cir. 2013).
JUDGE POSNER GOT IT RIGHT: REQUIRING ABORTION DOCTORS TO HAVE HOSPITAL ADMITTING PRIVILEGES PLACES AN UNDUE BURDEN ON A WOMAN SEEKING AN ABORTION

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INTRODUCTION

When the Supreme Court decided Planned Parenthood of Southeastern Pennsylvania v. Casey in 1992, it replaced Roe v. Wade’s strict scrutiny analysis with a looser standard, the undue burden test. Casey demarcated a monumental paradigm shift and opened the door to more abortion regulation than was permitted under

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3 John A. Robertson, Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis, 14 U. PA. J. CONST. L. 327, 329 (2011) (explaining “Casey opened the door to more regulation than had been acceptable under Roe.”).

4 Casey, 505 U.S. at 874–79.
State legislatures began to promulgate new laws and as momentum grew to increasingly regulate abortion in the United States, the federal government passed the federal Partial-Birth Abortion Ban Act in 2003. In 2007, the constitutionality of the Partial-Birth Abortion Ban Act was challenged in \textit{Gonzales v. Carhart} because the Act prohibited abortion doctors from performing the “most common type of second trimester abortion in the United States.” Writing for the \textit{Carhart} Court, Justice Kennedy informally began to reshape the undue burden test by allowing inklings of rational basis review to seep into the Court’s analysis. The Court’s decision to uphold the law opened the floodgates to increased abortion regulation. “The holding was seen as a victory by anti-abortion forces, who saw an opportunity to “chip away” at the abortion doctrine established by \textit{Roe}.”

Although the \textit{Casey} and \textit{Carhart} opinions did not overturn \textit{Roe}, “anti-abortion lawmakers interpreted the rulings . . . as an indication to reverse \textit{Roe}'s main principles.” Pro-life members of state legislatures began testing the boundaries of the undue burden test. Legislators began passing new laws, designed to chip away at a woman’s fundamental right to choose to terminate a pregnancy. These laws have taken an array of forms. The Targeted Regulation of Abortion

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\begin{itemize}
  \item[6] \textit{Id.} at 154.
  \item[9] Shainwald, \textit{supra} note 5, at 153.
  \item[10] \textit{Carhart}, 550 U.S. at 158.
  \item[12] \textit{Id.}
  \item[13] \textit{Id.} at 154.
  \item[14] \textit{Id.}
  \item[15] \textit{Id.}
\end{itemize}
Providers (TRAP) laws are particularly common; these laws are typically designed to restrict abortion services to licensed clinics or hospitals, and require abortion providers to acquire additional licenses. Forty-five states have passed TRAP laws that subject physicians performing abortion to stringent regulations, which are “not placed on comparable healthcare providers.”

This Comment focuses on one specific type of TRAP law: state statutes that require a doctor who performs abortions to have admitting privileges at a hospital within a certain radius of an abortion clinic. More specifically, this Comment focuses on a Wisconsin statute signed into law in July 2013 that requires abortion doctors to have admitting privileges at a hospital within a thirty-mile radius of a clinic where abortions are performed.

Although the scope of the question presented to the Seventh Circuit in Planned Parenthood of Wisconsin, Inc. v. Van Hollen was limited to the appropriateness of the district court’s issuance of a preliminary injunction, the majority opinion, written by Judge Posner, addressed the constitutional questions surrounding this statute. Judge Posner suggested that the Wisconsin admitting privileges statute placed an undue burden on a woman seeking an abortion and that the statute bears no rational relation to furthering its stated purpose of

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16 Id. at 155.
18 Id. at 157.
19 See id. at 165 (“The recent imposition of unnecessary and burdensome regulations targeting abortion providers over other medical professionals is an obvious attempt to increase costs, prevent ease of access to abortion care, and drive these physicians out of practice”) (citing Lisa M. Brown, The TRAP: Targeted Regulations of Abortion Providers, NAT’L ABORTION FED’N, http://www.prochoice.org/about_abortion/facts/trap_laws.html.
20 Wis. Stat § 253.095(2) (2013). In the state of Wisconsin 97 percent of abortions are performed in clinics. Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 789 (7th Cir. 2013).
21 See generally Van Hollen, 738 F.3d 786.
protecting maternal health. Additionally, he observed that the statute singles-out abortion doctors and subjects them to additional oversight not required for similarly situated physicians, which violates equal protections of the law. This Comment argues that Judge Posner accurately assessed the constitutionality of Wisconsin’s admitting privilege statute. Furthermore, it argues that when the Supreme Court evaluates the constitutionality of admitting privileges TRAP laws, it should use Judge Posner’s reasoning as a guide to strike down those laws.

First, this Comment provides a brief overview of the transformation of the constitutional analysis of abortion regulation from a strict scrutiny analysis to the undue burden test and briefly describes TRAP laws. It also describes the facts, procedural posture, and holding of Van Hollen. Then, it briefly describes the Fifth Circuit case, Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, where a similar statute was at issue, yet the court came to a radically different conclusion. Second, this Comment argues that when the Supreme Court has the opportunity to evaluate the constitutionality of these admitting privileges statutes, it should use Judge Posner’s reasoning in Van Hollen as a guide to strike down the laws. Universally, these laws (1) place an undue burden on a woman seeking an abortion; (2) bear no rational relation to their stated goal of protecting the health of the mother; and (3) violate equal protections of the law by discriminating against physicians who perform abortions.

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22 Id. at 789, 798.
23 Id. at 790.
24 See generally id.
BACKGROUND

First, this background section provides a very brief overview of three Supreme Court cases that have critically shaped abortion jurisprudence in the United States. Second, it describes TRAP laws and the effect these laws have on the regulatory framework for abortion in the United States. Third, this section provides relevant information about both the Seventh Circuit’s Van Hollen case and the Fifth Circuit’s Abbott case.

A. Summary of Abortion Jurisprudence in the United States

The Court first recognized a woman’s fundamental right to terminate her pregnancy in its 1973 decision in Roe v. Wade.26 The Court struck down a Texas statute that criminalized abortion except in cases where a mother’s life was at risk.27 The Roe Court held that the liberty clause of the Fourteenth Amendment guaranteed a right to privacy that included a woman’s right to choose to terminate a pregnancy.28 However, the Court also concluded that a woman’s fundamental right to an abortion was not absolute.29

Using strict scrutiny to define the outer limits of this fundamental right to abortion, the Court found that a state has a compelling interest in protecting the health of the mother and potential life.30 It held that a state could promulgate “narrowly tailored” regulations to protect these interests31 and established guidelines for permissible abortion regulations in each trimester of pregnancy.32 In the first trimester (weeks 1–12), only basic medical safety regulations were permissible;

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26 See generally 410 U.S. 113 (1986).
27 Id. at 164.
28 Id. at 152–53.
29 Id. at 154.
30 Id. at 154–55.
31 Id.
32 Id. at 163–65.
state regulations could not interfere with a woman’s choice to have an abortion.\textsuperscript{33} In the second trimester (weeks 13–27), the Court held there was a compelling state interest in the health of the mother and states could limit the availability of abortion in this trimester as a means to protect this interest.\textsuperscript{34} In the third trimester (weeks 28–40), the Court held that the state had a compelling interest in both the health of the mother and in protecting the life of the unborn.\textsuperscript{35} Thus, states could proscribe abortions in the third trimester as long as applicable regulations contained a health exception to protect the life of the mother.\textsuperscript{36}

Fast-forward nineteen years later: in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, the Court tossed out Roe’s trimester guidelines but upheld its basic holdings.\textsuperscript{37} The Casey Court made three key holdings. First, a state has a compelling interest in protecting maternal health.\textsuperscript{38} Second, state regulations cannot have the effect of placing an undue burden on a woman’s right to an abortion until the point of fetal viability.\textsuperscript{39} Third, post-viability, the state has a compelling interest in potential life and can proscribe post-viability abortion.\textsuperscript{40} These three key holdings transformed how courts evaluate a governmental interest in regulating abortions. Casey gave states the ability to regulate abortion throughout a woman’s entire pregnancy based on compelling state interests in protecting maternal health and protecting the potential life of the unborn.\textsuperscript{41}

Although Casey limited a state’s ability to regulate pre-viability abortions, the Court did \textit{not} define what types of regulations would

\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{38} Id. at 869–70.
\textsuperscript{39} Id. at 876–78.
\textsuperscript{40} Id. at 869–72.
\textsuperscript{41} Id. at 872.
create an undue burden for a woman seeking an abortion. The Court merely stated that a regulation creates an unconstitutional undue burden if it “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” The Court’s failure to define the terms “undue burden” and “substantial obstacle” created ambiguity and opened the door to increased abortion regulation.

However, while Casey may have opened the door to increased abortion regulation, the Court’s 2007 decision in Gonzales v. Carhart opened the floodgates. The Carhart Court upheld the federal Partial Birth Abortion Ban Act of 2003, which prohibited doctors from performing “intact D&E” second trimester abortions. The Court held that on its face, the prohibition of “intact D&E” late-term pre-viability abortions did not place a “substantial obstacle” in the path of a woman seeking an abortion because of the availability of other late-term abortion procedures. Thus, the Court allowed the federal government to establish a blanket prohibition on one specific type of abortion procedure.

Moreover, while writing for the majority in Carhart, Justice Kennedy began to unofficially reshape Casey’s undue burden test. He noted that where the regulation “does not impose an undue burden,” the State “can use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interest in regulating the medical profession [and] . . . to promote respect for life.” Justice Kennedy stated that when an abortion regulation does not have the effect of creating an undue burden, then a

42 See generally id.
43 Id. at 877.
44 Shainwald, supra note 5, at 153.
46 Id. at 132, 168.
47 Id. at 154–56, 164.
48 See id. at 158.
49 Id.
regulation must stand if the regulation has a rational relationship to furthering a legitimate government interest.\textsuperscript{50} The Court then upheld the Partial Birth Abortion Ban Act of 2003.\textsuperscript{51} The Court held the government had a “substantial” interest in protecting the ethics and integrity of the medical profession and in protecting potential life,\textsuperscript{52} and held that the law was rationally related to furthering these interests.\textsuperscript{53}

However, most notably, the Act was upheld even though it lacked a provision permitting doctors to perform the “intact D&E” abortion procedure if a doctor believed it was necessary to protect the life of the mother.\textsuperscript{54} The Court reasoned that prohibiting this procedure did not create a significant health risk to women because of uncertainty about whether it was ever medically necessary for a physician to perform the intact D&E procedure.\textsuperscript{55} Justice Kennedy noted, that the Court has “given state and federal legislatures wide discretion to pass legislation in areas where there are medical and scientific uncertainty.”\textsuperscript{56} Hence, the Court allowed the Act to stand despite the fact that it did not contain the once required medical exception provision, which would permit an otherwise prohibited abortion procedure to be performed when maternal life was at risk.

Thus, post-\textit{Carhart}, it appears that a state may regulate a pre-viability abortion as long as these regulations do not place an undue burden on a woman seeking an abortion and they have a rational relationship to the asserted governmental interest.\textsuperscript{57} So, “[i]f \textit{Casey} ‘opened the door to more regulation than had been acceptable under

\textsuperscript{50} See id. at 156–60.
\textsuperscript{51} Id. at 156–59.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 156–63.
\textsuperscript{54} Id. at 161.
\textsuperscript{55} Id. at 161–66.
\textsuperscript{56} Id. at 163.
\textsuperscript{57} See id. at 156–60.
Roe,’ . . . Carhart blew the door off its hinges.” 58 Anti-abortion activists saw Carhart’s holding as an opportunity to continue to “chip away” at a woman’s right to terminate her pregnancy. 59 Ever since the decisions in Casey and Carhart, anti-abortion activists have advocated for abortion regulations that “systematically test the boundaries of what the Court meant by ‘undue burden’ and ‘substantial obstacle.’” 60

B. The Increased Prevalence of TRAP Laws in the United States since Gonzales v. Carhart

Typically, the pro-life movement has taken two approaches to undermining Roe and restricting abortion. 61 In the first approach, anti-abortion advocates attempt to pass state statutes that criminalize abortion; 62 however, these statutes have proven ineffective because they fail to pass constitutional muster. 63 The second approach to undermining Roe has been more successful than the first. In this approach, anti-abortion advocates pass laws that are incremental in spirit and chip away at a woman’s ability to obtain an abortion. 64 These regulations have been described as having the “cumulative effect of [creating] legal restrictions short of bans and extralegal pressures to restrict the provision of legal abortion services and create ‘abortion free’ states without criminalization.” 65 Anti-abortion activists

58 Shainwald, supra note 5, at 154 (emphasis added) (citation omitted).
59 Robertson, supra note 3, at 329–30 (“Even if the scope of new regulatory leeway is small, the victory has energized anti-abortion forces to chip away at the right recognized in Roe and Casey.”).
60 Shainwald, supra note 5, at 154.
62 Id. at 1358–59 (explaining that in 2006 and 2008 pro-life activists in South Dakota tried to pass a ballot measure criminalizing abortion in direct conflict with the Supreme Court’s ruling in Roe v. Wade).
63 Id. See generally Roe v. Wade, 410 U.S. 113 (1986).
64 Shainwald, supra note 5, at 154–55.
65 Johnsen, supra note 61, at 1360.
typically argue that these incremental regulations are necessary to protect maternal health.\textsuperscript{66}

In recent years, anti-abortion activists have promulgated one particularly popular form of incremental regulations, referred to as TRAP laws: Targeted Regulation of Abortion Providers.\textsuperscript{67} As of 2013, forty-five states have enacted TRAP laws.\textsuperscript{68}

Common TRAP regulations include those that restrict where abortion care may be provided. Regulations limiting abortion care to hospitals or other specialized facilities, rather than physicians’ offices, require doctors to obtain medically unnecessary additional licenses, needlessly convert their practices into mini-hospitals at a great expense or provide abortion services only at hospitals, an impossibility in many parts of the country.\textsuperscript{69}

Although individually these laws may appear to only have a minimal effect on a woman’s ability to obtain an abortion, when aggregated, these laws have the effect of heavily regulating abortion providers.\textsuperscript{70} Thus, these TRAP laws compound to significantly undermine a woman’s right to abortion services.\textsuperscript{71} The admitting privileges statutes at issue in both \textit{Van Hollen} and \textit{Abbott} are characterized as TRAP laws.

\textsuperscript{66} \textit{Id.}
\textsuperscript{67} Shainwald, \textit{supra} note 5, at 154–55.
\textsuperscript{68} \textit{Id.} at 165.
\textsuperscript{69} \textit{Id.}
\textsuperscript{70} \textit{See id.}
\textsuperscript{71} \textit{See Johnsen, supra} note 61, at 1359–60.
C. Planned Parenthood of Wisconsin Inc. v. Van Hollen

1. Statement of the Facts

On Friday, July 5, 2013, the Governor of Wisconsin signed into law a statute requiring doctors who perform abortions in a clinical setting to have admitting privileges at a hospital within thirty miles of the clinic where an abortion is performed. By its terms, the statute was to become effective three days later, on Monday, July 8, 2013.

2. Procedural Background

Wisconsin’s two abortion providers, Planned Parenthood of Wisconsin and Milwaukee Women’s Medical Services, filed suit in federal district court on July 5, 2013 challenging the constitutionality of the law, and simultaneously moved for a temporary restraining order. The district court “granted the motion on July 8 and later converted it to a preliminary injunction against enforcement of the statute pending a trial on the merits.” Following the court’s decision, state officials appealed the injunction. The district court then stayed the trial as it awaited Seventh Circuit review of the issuance of the preliminary injunction order. Judge Posner noted that had “enforcement of the statute not been stayed two of the four abortion clinics . . . would have had to shut down because none of their doctors had admitting privileges at a hospital within the prescribed [thirty-

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72 Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 788 (7th Cir. 2013).
73 Id.
74 Id. at 788.
75 Id.
76 Id.
77 Id.
mile] radius of the clinics, and a third hospital would have lost the services of half its staff.\textsuperscript{78}

When the district court issued the temporary restraining order blocking the admitting privileges statute from going into effect, it used a two-part balancing test.\textsuperscript{79} To receive a preliminary injunction, a party must show that it has (1) no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits. If the moving party makes this threshold showing, the court weighs the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to the nonmoving party or the public is sufficiently weighty that the injunction should be denied.\textsuperscript{80}

First, the district court analyzed the admitting privileges statute under the undue burden test and held that Planned Parenthood would likely prevail in a trial on the merits.\textsuperscript{81} The court reasoned that the law did not bear a rational relationship to its purported purpose of protecting maternal health.\textsuperscript{82} The court also stated that the law had the effect of placing a substantial obstacle in the path of a woman seeking an abortion because it would have a substantial impact on the practical availability of abortion in Wisconsin.\textsuperscript{83} Second, the district court held women were likely to suffer irreparable harm if the law was permitted to go into effect.\textsuperscript{84} The Court reasoned that women will be “foreclosed from having an abortion in the next week either because of the undue

\textsuperscript{78} Id. at 789.
\textsuperscript{79} Planned Parenthood of Wis., Inc. v. Van Hollen, 963 F. Supp. 2d 858, 864 (W.D. Wis. 2013).
\textsuperscript{80} Id. (quoting Ezell v. City of Chi., 651 F.3d 684, 694 (7th Cir. 2011)) (citing ACLU of Ill. v. Alvarez, 679 F.3d 583, 589 (7th Cir. 2012)).
\textsuperscript{81} Id. at 865–67.
\textsuperscript{82} Id. at 865–66.
\textsuperscript{83} Id. at 867–68.
\textsuperscript{84} Id. at 868.
burden of travel or the late stage of pregnancy, as well as fac[e]
increasing health risks caused by delay." A few weeks later, the
district court employed the same balancing test and reasoning when it
issued a preliminary injunction, which extended the temporary
restraining order.

When the Seventh Circuit reviewed the issuance of the
preliminary injunction it stated that it must use a deferential standard
of review because of the "uncertainty involved in balancing the
considerations that bear on the decision" and the "haste with which the
district judge must strike the balance." However, when applying the
balancing test to decide whether issuance of a preliminary injunction
was appropriate, Judge Posner used language from Casey’s undue
burden test and Carhart’s reasoning to weigh in on the merits of the
law.

3. Holdings

First, in applying the two-prong balancing test employed by the
district court, the Seventh Circuit held that the district court’s issuance
of a preliminary injunction was justified, pending a trial on the
merits. The Court reasoned that it would be impracticable for
abortion providers to obtain the statutorily required hospital admitting
privileges within the three days between the statute’s signing into law
and its enactment. Judge Posner agreed that at a minimum, the
process for obtaining admitting privileges at a hospital takes two to

85 Id.
87 Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 795 (7th Cir.
2013).
88 See generally id.
89 Id. at 798–99.
90 Id. at 788–89, 793.
three months. Judge Posner also reasoned that based on the facts in the record, enacting the statute would place an undue burden on women seeking an abortion, and Planned Parenthood was likely to prevail in a trial on the merits. He noted that the State did not adequately demonstrate that the law had a rational basis or that its enactment furthered its stated purpose of protecting the health of a woman having an abortion. Furthermore, he found that the law would have a substantial impact on the “practical” availability of abortion in Wisconsin, placing an undue burden on a woman seeking an abortion.

Second, the court held that Planned Parenthood faced greater irreparable harm from immediate enforcement of the statute than the State faced by having the enforcement delayed. Allowing the law to go into effect on July 8 would have forced two and a half of Wisconsin’s four abortion clinics to close, subjecting patients to weeks of delays while doctors attempted to secure hospital-admitting privileges. Moreover, Judge Posner reasoned that the State failed to demonstrate that Wisconsin is so “rife with serious complications from abortions” that the statute needed to take effect immediately.

In addition to applying the two-part balancing test, Judge Posner observed “an issue of equal protection of the law is lurking in this case.” He noted that the state appears to be treating doctors who perform surgical abortion differently than doctors who perform other

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91 Id. at 788.
92 Id.
93 Id. at 788–99.
94 Id. at 789–90, 798.
95 See id. at 791–96.
96 Id. at 793, 795–96.
97 Id. at 789, 796.
98 Id. at 797.
99 Id. at 790.
outpatient surgical procedures—even though these other procedures are more likely to result in complications requiring hospitalization. The Analysis section of this article describes Judge Posner’s reasoning in more detail and explains why the Supreme Court should use his reasoning as a guide when it hears a case involving an admitting privileges statute.

**D. Planned Parenthood of Greater Texas Surgical Health Services v. Abbott**

The Seventh Circuit is not the only federal circuit court to hear a case involving a state statute requiring abortion doctors to have hospital admitting privileges. In 2013, the Fifth Circuit decided *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, which presented the same issue as *Van Hollen*. However, contrary to the Seventh Circuit’s holding in *Van Hollen*, the Fifth Circuit’s decision stayed the district court’s preliminary injunction and permitted the law to go into effect. The court reasoned that the admitting privileges statute was unlikely to place an undue burden on a woman seeking an abortion.

Two amendments to Texas abortion laws were at issue in *Abbott*. Similar to the Wisconsin law, one of the amendments at issue required doctors performing abortions in Texas to have admitting privileges “on the date of the procedure” at a hospital located no more than thirty miles from the clinic where the “abortion is performed.” The Texas legislature passed its law on July 12, 2013 and it was to

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100 *Id.*


102 *Id.* at 410, 419.

103 *Id.* at 416.

104 The other amendment at issue in this case “[L]imits the use of abortion-inducing drugs to a protocol authorized by the United States Food and Drug Administration (FDA), with limited exceptions.” *Id.* at 409.

105 *Id.*
take effect on October 29, 2013.\textsuperscript{106} Thus, the time between signing into law and the effective date of the Texas statute distinguished it from the Wisconsin statute; whereas abortion doctors in Wisconsin had three days to clamor for abortion privileges,\textsuperscript{107} doctors in Texas had a little over three months to secure these privileges.\textsuperscript{108}

Planned Parenthood of Texas brought a suit challenging the constitutionality of the amendments in the United States District Court for the Western District of Texas in September of 2013.\textsuperscript{109} Following a three-day bench trial, the district court struck down the portion of the law requiring doctors to have hospital admitting privileges.\textsuperscript{110} The court stated that the law was “without a rational basis and places a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”\textsuperscript{111} The court enjoined the enforcement of that provision.\textsuperscript{112} The State appealed the judgment.\textsuperscript{113}

The issue before the Fifth Circuit was “the disposition of the State’s motion to stay the district court’s permanent injunction pending the outcome of the appeal on the merits.”\textsuperscript{114} Writing for the court, Judge Owen stated that the court must use a four-factor balancing test to decide whether to grant the stay pending appeal.\textsuperscript{115} The four factors used were: (1) whether the applicant [the State] made a strong showing that it is likely to succeed on the merits; (2) whether the State will be “irreparably injured” if a stay is not granted; (3) whether

\textsuperscript{106} See id.
\textsuperscript{107} Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 788 (7th Cir. 2013).
\textsuperscript{108} See Abbott, 734 F.3d at 409.
\textsuperscript{109} Id. at 409–10.
\textsuperscript{110} Id. at 410.
\textsuperscript{112} Id. at 909.
\textsuperscript{113} Abbott, 734 F.3d at 410.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
issuing the stay would “substantially injure the other parties interested in the proceeding;” and (4) “where the public interest lies.”116

The court addressed the first factor at length in its opinion, and only very briefly addressed the three other factors.117 The court reasoned that the State demonstrated that it was likely to succeed on the merits because the State’s “substantial interests” in regulating the medical profession provided a rational basis for the law.118 After making this determination, the court weaved Casey’s undue burden test into its reasoning to demonstrate why the State is likely to succeed in a trial on the merits.119

Ultimately, the Fifth Circuit decided that there is “a substantial likelihood that the State will prevail in its argument. The Court decided that Planned Parenthood failed to demonstrate that an undue burden would be placed on women seeking abortions or that the hospital-admitting-privileges requirement creates a substantial obstacle in the path of a woman seeking an abortion.”120 The Court held that, on its face, the text of the law does not “indicate that its purpose is ‘to place a substantial obstacle in the path of a woman seeking an abortion,’”121 and the law furthers a substantial governmental interest in regulating the medical profession.122 Ultimately, the court found that requiring hospital admitting privileges did not place an undue burden on a woman seeking an abortion in a large “fraction” of cases, and for this reason, it passed constitutional muster.123

116 Id.
117 See generally id.
118 Id. 411–12.
119 See id. at 412–16.
120 Id. at 416.
121 Id. at 413–14 (quoting Gonzales v. Carhart, 550 U.S. 124 (2007)).
122 Id. at 411–12.
123 Id. at 414–15.
ANALYSIS

The underlying cases in Van Hollen and Abbott have yet to be decided on their merits. However, the Supreme Court will likely soon weigh the constitutionality of admitting privileges TRAP laws because of their growing prevalence throughout the United States.¹²⁴ Currently, ten states require abortion doctors to have hospital admitting privileges or an alternate arrangement,¹²⁵ and courts in four more states (including Wisconsin) have temporarily blocked the enforcement of similar statutes.¹²⁶ When asked to decide whether these admitting privileges laws are constitutional, the Supreme Court should strike them down. Even individually, these laws impose an unconstitutional undue burden on a woman seeking an abortion, let alone when they are aggregated.

TRAP laws substantially impact the practical availability of abortions in a state because clinics are forced to close as doctors try to obtain the requisite privileges from hospitals.¹²⁷ Moreover, hospital credential committees have complete discretion over whether to grant a physician admitting privileges.¹²⁸ These committees can justify denying privileges to physicians who perform surgical abortions using an array of unweighed and subjective criteria without violating federal

¹²⁶ Eckholm, supra note 124 (noting Alabama, Mississippi and North Dakota have temporarily blocked these statutes).
¹²⁷ See Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 791–97 (7th Cir. 2013).
¹²⁸ Id. at 791–93.
Although these admitting privileges laws are unconstitutional when standing alone, they become even more unduly burdensome when combined with other abortion regulations because they unreasonably restrict the practical availability of abortion.\textsuperscript{130}

Furthermore, admitting privileges statutes bear no rational relationship to their purported purpose of protecting maternal health. There is no medical justification for requiring these privileges. Less than 1-percent of surgical abortions result in complications requiring hospitalization,\textsuperscript{131} thus no legitimate medical basis exists to justify requiring abortion doctors to have admitting privileges.\textsuperscript{132} Moreover, best practices within the United States’ medical community do not require physicians performing outpatient surgeries that are similar to surgical abortion to provide an additional level of “continuity of care” to their patients.\textsuperscript{133} In fact, admitting privileges laws raise constitutional equal protections concerns because abortion doctors receive disparate treatment when compared to other similarly situated medical professionals.\textsuperscript{134}

Thus, momentum to hear a case addressing this specific type of TRAP law is building. These laws severely restrict a woman’s ability to exercise her right to terminate her pregnancy without bearing any rational relationship to their purported purpose of protecting maternal health. In fact, these laws do nothing more than discriminate against abortion providers. Due to the controversial nature of these laws, it is

\textsuperscript{129} Id.
\textsuperscript{130} See Guttmacher Inst., State Policies in Brief: An Overview of Abortion Laws, 2–3 (Apr. 2014), http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf (showing how many states layer regulations on top of each other creating a heavily regulated environment for abortion providers and their patients).
\textsuperscript{131} Van Hollen, 738 F.3d at 797.
\textsuperscript{132} Id. at 790.
\textsuperscript{133} Planned Parenthood of Wis., Inc. v. Van Hollen, 963 F. Supp. 2d 858, 864 (W.D. Wis. 2013).
\textsuperscript{134} Van Hollen, 738 F.3d at 790.
unsurprising that some Supreme Court Justices have expressed that they fully expect to hear the Abbott case on appeal.\textsuperscript{135}

When the Supreme Court finally decides to weigh in on the constitutionality of these admitting privileges statutes, it should use Judge Posner’s reasoning in \textit{Van Hollen} as a guide. First, the Court should apply \textit{Casey}'s undue burden test to strike down these laws because they place a substantial obstacle in the path of a woman seeking an abortion. Second, even if the Court decides that these laws do not have the effect of placing an undue burden on a woman, they cannot survive the rational basis review prescribed by \textit{Carhart} because they do not bear any rational relation to their asserted purpose of protecting maternal health. Third, these laws violate equal protections of the law because they require physicians who perform abortions to have an additional layer of oversight that is not required for other similarly situated physicians.

\textit{A. Requiring Abortion Doctors to have Hospital Admitting Privileges Places an Undue Burden on a Woman Seeking an Abortion}

By requiring physicians who perform abortions in outpatient clinics to have admitting privileges at a local hospital, state governments place an undue burden on a woman seeking an abortion because this requirement substantially impacts the practical availability of abortion.\textsuperscript{136} For example, after the Fifth Circuit stayed the law at issue in Abbott, one-third of Texas’ thirty-some abortion clinics closed their doors as doctors tried to secure admitting privileges,\textsuperscript{137} “[leaving] much of South Texas without any abortion clinics.”\textsuperscript{138} Similarly, Judge Posner anticipated that if the Wisconsin’s statute goes into effect, two-and-a-half of the state’s four abortion

\textsuperscript{135} Eckholm, \textit{supra} note 124.

\textsuperscript{136} See \textit{Van Hollen}, 738 F.3d at 791–97.

\textsuperscript{137} Eckholm, \textit{supra} note 124.

\textsuperscript{138} \textit{Id.}
clinics would be forced to close.\textsuperscript{139} Thus, when contemplating these TRAP laws within the context of the overall abortion policy landscape of the United States, it is clear that Judge Posner’s reasoning in \textit{Van Hollen} is applicable beyond the borders of Wisconsin. These laws substantially affect the practical availability of abortion in a given state and impose an undue burden on a woman seeking an abortion.

In \textit{Van Hollen}, Judge Posner reasoned that the enactment of these TRAP laws would substantially restrict the practical availability of abortion in Wisconsin. First, Judge Posner reasoned that the three-day window abortion providers needed to obtain admitting privileges in Wisconsin was impracticable.\textsuperscript{140} Second, he explained that hospitals have discretion when granting admitting privileges,\textsuperscript{141} and this discretion makes it difficult to predict which doctors will receive admitting privileges and will likely impede women’s access to abortion services.\textsuperscript{142} Third, Judge Posner reasoned that “virtually all abortions in Wisconsin” are performed in Planned Parenthood’s four clinics, and a “significant fraction” of Planned Parenthood’s doctors did not have admitting privileges at a hospital within thirty miles of a clinic.\textsuperscript{143}

1. The Unreasonable Timeframe for Wisconsin Doctors to Acquire Hospital Admitting Privileges

When Judge Posner affirmed the district court’s issuance of the preliminary injunction, he wrote, “[t]he impossibility of compliance with the statute even by doctors fully qualified for admitting privileges is a compelling reason for the preliminary injunction, albeit a reason that diminishes with time.”\textsuperscript{144} He noted that it was “unquestioned” that

\textsuperscript{139} \textit{Van Hollen}, 738 F.3d at 789, 791.
\textsuperscript{140} \textit{Id.} at 788.
\textsuperscript{141} \textit{Id.} at 788–89.
\textsuperscript{142} See \textit{id.}
\textsuperscript{143} \textit{Id.} at 791.
\textsuperscript{144} \textit{Id.} at 789.
it usually takes a “minimum of two to three” months for a doctor to obtain hospital-admitting privileges because hospital credential committees typically only meet once a month to make these decisions.\textsuperscript{145} Thus, Judge Posner held that the impossibility of statutory compliance within the three-day timeframe was a sufficient reason for the issuing the preliminary injunction.\textsuperscript{146} Judge Manion also concurred with Judge Posner’s decision on this ground.\textsuperscript{147} However, in writing for the court, Judge Posner moved beyond the impossibility of statutory compliance within the three-day timeframe and addressed substantive reasons that the statute created an unconstitutional undue burden on women.\textsuperscript{148} Judge Posner’s reasoning regarding these substantive issues is universally applicable to this type of TRAP law and should be used to strike down these laws across the United States.

2. Hospitals have Discretion in Granting Doctors Admitting Privileges

In \textit{Van Hollen}, Judge Posner reasoned that the statute at issue would substantially affect the practical availability of abortion in Wisconsin because hospital credential committees have full discretion when deciding whether to grant admitting privileges to a doctor.\textsuperscript{149} He noted that “[h]ospitals are permitted rather than required to grant such privileges,”\textsuperscript{150} and requiring these privileges will cause delays in a woman’s ability to obtain an abortion.\textsuperscript{151} Hospital credential committees typically only meet once a month and the process typically takes at least three months.\textsuperscript{152} Moreover, the criteria used by hospital credential committees to decide which doctors will receive admitting

\begin{itemize}
  \item \textsuperscript{145} \textit{Id.} at 788.
  \item \textsuperscript{146} \textit{Id.} at 788–89.
  \item \textsuperscript{147} \textit{Id.} at 799 (Manion, J., concurring).
  \item \textsuperscript{148} See generally \textit{id.} (majority opinion).
  \item \textsuperscript{149} \textit{Id.} at 791–93.
  \item \textsuperscript{150} \textit{Id.}
  \item \textsuperscript{151} See \textit{id.}
  \item \textsuperscript{152} \textit{Id.}
\end{itemize}
privileges are not uniform—the criteria may vary from hospital to hospital.\textsuperscript{153} As Planned Parenthood noted in its brief to the Seventh Circuit:

Barriers to obtaining privileges include hospital requirements that physicians admit a minimum number of patients each year; requirements that physicians live in the vicinity of the hospital; and requirements that physicians identify other physicians with privileges at the same hospital willing to provide back-up coverage. In addition, some hospitals have ‘closed’ staff requirements, such as academic hospitals that only privilege faculty members or hospitals that only privilege doctors who belong to certain private physician practices.\textsuperscript{154}

The criteria used to determine whether a doctor will receive admitting privileges is “multiple, various and unweighed,”\textsuperscript{155} and as such, the process used for granting these privileges is not mechanical—it is an art. Thus, it is difficult to predict which doctors will be granted these privileges.\textsuperscript{156} Supporters of these statutes argue that federal law (the “Church Amendments”) prohibits hospitals that receive federal funding, including religiously affiliated hospitals, from denying admitting privileges to doctors who perform abortions.\textsuperscript{157} However, this argument is flawed.

First, hospital administrators may not even be aware of the Church Amendments. As mentioned in \textit{Van Hollen}, one of the Wisconsin State Senators responsible for promulgating the admitting privileges TRAP law and the chief medical officer of a Catholic

\begin{footnotes}
\item[153] \textit{Id.} at 792.
\item[154] Brief of Plaintiffs-Appellees at 8, Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786 (2014) (No. 13-2726).
\item[155] \textit{Van Hollen}, 738 F.3d at 792.
\item[156] \textit{Id.}
\item[157] \textit{Id.} at 791 (citing 42 U.S.C. § 300a–7(c)(1)(B)).
\end{footnotes}
Hospital in Wisconsin were unaware the Church Amendments even existed. The chief medical officer, Rita Hanson, wrote in an email, “Wheaton Franciscan Healthcare is a ministry of the Catholic Church . . . [f]or that reason, if it's known to us that a doctor performs abortions and that doctor applies for privileges at one of our hospitals, our hospital board would not grant privileges.”

Second, as Judge Posner explained, even if religiously affiliated hospitals are aware of the Church Amendments, hospitals can easily argue that an abortion doctor was denied privileges on grounds other than the doctor’s provision of abortion services. The process for granting admitting privileges is not objective and mechanical; it is subjective and amorphous. Hospital administrators are not required to use standardized criteria to decide which physicians are granted admitting privileges, making difficult—if not impossible—for a physician who performs abortions to prove that he has been unlawfully denied these privileges. For example, Judge Posner stated that the Senior Counsel for the National Women’s Law Center found:

[In other states that have recently passed privileges requirements for abortion providers, religiously affiliated hospitals have denied the doctors’ applications by citing their failure to meet other standards, such as admitting a certain number of patients per year. In Mississippi, a Baptist hospital did not provide doctors at an abortion clinic with an application for privileges because none of its staff would write letters in support of the doctors, according to a court

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159 Id.

160 Id.

161 See id. at 791–92.
affidavit provided by the clinic’s attorneys at the Center for Reproductive Rights.\textsuperscript{162}

An example from Texas further highlights the subjective criteria used to evaluate whether to grant a doctor admitting privileges. Recently, University General Hospital Dallas revoked two abortion doctors’ hospital admitting privileges.\textsuperscript{163} The doctors received identical letters explaining that their privileges were revoked because the hospital had learned that the doctors perform abortions and performing abortions amounts to unacceptable “disruptive behavior.”\textsuperscript{164}

Nevertheless, as Judge Posner noted, “pretext aside,” one common and lawful criteria used to evaluate whether to grant admitting privileges to a doctor is “the number of patient admissions a doctor can be expected to produce for the hospital.”\textsuperscript{165} Typically, hospitals want to grant privileges to doctors who will likely admit many patients; these doctors generate more revenue for the hospital because admitted patients require more hospital employees and staff to care for them.\textsuperscript{166} However, using this criterion to decide whether to grant these privileges is problematic for abortion doctors because very few abortions, a “negligible” number, result in complications requiring hospitalization.\textsuperscript{167} An “even smaller fraction” of these complications

\textsuperscript{162} Id.
\textsuperscript{164} Id. (linking to one of the letters at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/UGHDLetter.pdf) (last visited Apr. 18, 2014). After filing a lawsuit and settling with the hospital out of court, the physicians’ admitting privileges were reinstated. Becca Aaronson & Alexa Ura, 2 Abortion Doctors Settle Suit Over Revoked Privileges, THE TEXAS TRIBUNE (June 10, 2014), http://www.texastribune.org/2014/06/10/abortion-doctors-sue-hospital-revoking-privileges/.
\textsuperscript{165} Van Hollen, 738 F.3d at 792–93.
\textsuperscript{166} Id. at 793.
\textsuperscript{167} Id.
are likely to arise when a woman is located near the hospital where the
doctor who performed the abortion has admitting privileges, making it
likely a woman suffering from abortion related complications would
visit a different hospital for treatment.  

Even moving beyond Judge Posner’s reasoning in *Van Hollen*,
the American Medical Association (AMA) has criticized hospital
credentialing committees’ use of criterion that takes into account a
doctor’s anticipated number of patient admittances.  The AMA
issued an opinion in 1994 stating, “[d]ecisions regarding hospital
privileges should be based upon the training, experience, and
demonstrated competence of candidates, taking into consideration the
availability of facilities and the overall medical needs of the
community, the hospital, and especially patients. Privileges should not
be based on numbers of patients admitted to the facility.” Thus,
when the number of patients a doctor will admit is factored into the
admitting privileges calculus, hospital administrators can easily and
lawfully deny abortion doctors these privileges; physicians who
perform abortions are unlikely to generate much business for the
hospital.  

When evaluating the constitutionality of these statutes, the
Supreme Court should remain cognizant of the fact that hospital
administrators have the ability to arbitrarily deny doctors admitting
privileges. Hospital administrators are not held accountable for their
choices because they are not required to use a transparent and
standardized process when deciding who will receive admitting
privileges. The lack of transparency and subjective nature of the
process for deciding whether to grant a doctor admitting privileges

\footnotesize{\textsuperscript{168} See id. (noting that the state did not dispute the district court’s finding that
“up to half of the complications will not present themselves until after the patient is
home”).

\textsuperscript{169} Id. at 792–93.

\textsuperscript{170} Opinion 4.07–Staff Privileges, AM. Med. Ass’n. (June 1994),
http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-
medical-ethics/opinion407.page.

\textsuperscript{171} See *Van Hollen*, 738 F.3d at 793.}
places a substantial obstacle in the path of a woman seeking an abortion. Hospitals can arbitrarily and significantly restrict the number of doctors eligible to perform abortions in a given state by denying doctors these requisite admitting privileges.

3. The Substantial Impact of Hospital Admitting Privilege Requirements on the Practical Availability of Abortion in a State

Where enacted, these TRAP laws impose an undue burden on women who are trying to obtain abortions because of the likeliness that these laws will greatly reduce the number of doctors and clinics that perform abortions.\textsuperscript{172} As Judge Posner reasoned in \textit{Van Hollen}, clinic closures and the “sudden shortage of eligible doctors” to perform abortions will likely create a substantial delay in a woman’s ability to obtain an abortion and may “result in the progression of pregnancy to a stage at which an abortion would be less safe, and eventually illegal.”\textsuperscript{173} When evaluating the constitutionality of admitting privileges statutes, the Supreme Court should take into account the substantial impact that these laws will have on the practical availability of abortion when clinics are forced to close and women are unduly burdened as a result.\textsuperscript{174}

In \textit{Van Hollen}, Judge Posner explained that two of Wisconsin’s four abortion clinics will be forced to close if Wisconsin’s law goes into effect and a third clinic will lose half of its abortion doctors.\textsuperscript{175} Many of the doctors at Planned Parenthood work at more than one clinic, so each doctor must obtain admitting privileges at multiple hospitals, which will cause a delay in the provision of abortions within the state.\textsuperscript{176} Since these doctors must wait to obtain privileges before providing abortions, clinics will shut down or staff will be reduced.

\textsuperscript{172} See \textit{id.} at 795–96.
\textsuperscript{173} \textit{Id.} at 796.
\textsuperscript{174} See \textit{id.} at 791–98.
\textsuperscript{175} \textit{Id.} at 789.
\textsuperscript{176} \textit{Id.} at 791.
until these privileges are granted. Furthermore, because 60-percent of the patients served by the state’s four abortion clinics have incomes below the federal poverty line, “some patients will be unable to afford the longer trips they’ll have to make to obtain an abortion when the clinics near them shut down.” Thus, poor women become unduly burdened as a result of the implementation of these statutes.

Nationally, the percentage of women seeking an abortion with an income 100-percent below the federal poverty line drops slightly to 42-percent, however, a significant portion of women obtaining abortions throughout the United States are low-income and regulations that force clinics to close only make it increasingly difficult for these women to obtain abortions. For example, if the Wisconsin law is permitted to take effect, one of the clinics that will be forced to close is located in Appleton. Appleton is located near the center of the state, and the two clinics that would remain open are both about one hundred miles south of Appleton. Thus, a low-income woman who lives north of Appleton and does not live near the Minnesota border, must travel up to an additional one hundred miles in each direction to obtain an abortion.

The American College of Obstetricians and Gynecologists (ACOG) and the AMA’s amici brief for the Abbott case further illustrates the hardship that clinic closures place on low-income women. The ACOG and AMA noted in their brief, that 40-percent of women obtaining abortions in Texas fall below the federal poverty

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177 Id. at 789.  
178 See id. at 796.  
180 Van Hollen, 738 F.3d at 796.  
181 Id.  
182 Id.  
The brief then discussed how surveys have revealed that low-income women often need time “to raise money [to obtain an abortion], including for travel” and that low-income women often delay having abortions because they lack the financial means to obtain an abortion. The ACOG and AMA explain that delaying an abortion for financial reasons or otherwise has real consequences—it “increases [a woman’s] exposure to complications and risks.”

The Abbott court stated that this “incidental effect” of making it more expensive or difficult for a woman to obtain an abortion is not alone enough to invalidate a law. However, these admitting privileges statutes have more than an “incidental effect” on poor women. They place a “nontrivial burden on the financially strapped” and other women who have difficulty traveling long-distances, “such as those who already have children.” As Judge Posner noted in the case of the Appleton clinic, this additional two hundred-mile trip really translates to a four hundred-mile trip because the state also requires a woman to wait 24-hours before having an abortion.

Thus, the effect of these admitting privileges statutes becomes even more unduly burdensome when considered in conjunction with other abortion regulations. Even if the Supreme Court were to decide that the admitting privileges statutes alone are not enough to impose an undue burden on a woman seeking an abortion, when combined with other abortion regulations, these statutes impose an undue burden on women.

As Judge Posner observed in Van Hollen, “when one

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184 Id.
185 Id.
186 Id. at 10.
188 Id.
189 Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 796 (7th Cir. 2013).
190 See State Facts About Abortion: Texas, GUTTMACHER INST. (April 2014) (http://www.guttmacher.org/pubs/sfaa/texas.html); see also Rachel Benson Gold & Elizabeth Nash, TRAP Laws Gain Political Traction While Abortion Clinics—and
abortion regulation compounds the effects of another, the aggregate effects on abortion rights must be considered.”

Judge Posner’s reasoning regarding the aggregate effect of these laws applies beyond the borders of Wisconsin because many states heavily regulate abortion. For example, the financial burden on a large proportion of Texas women seeking abortions is further compounded when hospital admitting privileges requirements are applied on top of existing state laws which require a woman to both receive “state-directed counseling” and wait 24-hours before having an abortion. Moreover, after the admitting privileges statute went into effect in Texas, one-third of the state’s thirty clinics closed. As a result, many low-income women in Texas must not only make multiple trips to obtain an abortion, they must also travel to clinics located even farther from their homes.

A study by the Guttmacher Institute further reinforces the idea that these laws compound to substantially restrict the practical availability of abortion in a state and create an undue burden on

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*Van Hollen*, 738 F.3d at 796.


*See Guttmacher Inst., supra note 190.*

Eckholm, *supra* note 124.

*See The Texas Policy Evaluation Project, Texas State Abortion Rate Decreases 13 Percent Since Implementation of Restrictive Law: Number of abortion clinics falls from 41 to 22 over same period* (July 23, 2014), http://www.utexas.edu/cola/orgs/txpep/_files/pdf/7-23-14-TxPEP-AbortionRateDecreases-Press-Release.pdf (stating the number of women of reproductive age in Texas living in a county more than 200 miles from a clinic providing abortion in Texas increased from 10,000 in April 2013 to 290,000 by April 2014).
women seeking abortions.\textsuperscript{196} Between 2011 and 2013, thirty states enacted 205 new abortion restrictions, totaling more than the “number that had been enacted in the entire previous decade.”\textsuperscript{197} The Guttmacher Institute study identified ten categories of major abortion restrictions; it then assessed whether a state had enacted at least one provision from any of these categories in the years 2000, 2010, and 2013.\textsuperscript{198} In the study, “[a] state was considered “supportive” of abortion rights if it had enacted provisions in no more than one of the restrictive categories, “middle ground” if it had enacted provisions in two or three, and “hostile” if it had enacted provisions in four or more.”\textsuperscript{199} According to the study, “the overall number of states hostile to abortion rights has grown since 2000, while the number of supportive and middle-ground states has shrunk. In 2000, 13 states were hostile to abortion rights; by 2010, that number was 22, and by 2013, it was 27.”\textsuperscript{200}

“[T]he cohort of states already hostile to abortion rights was responsible for nearly all of the abortion restrictions enacted in 2013.”\textsuperscript{201} These new restrictions have dramatically altered the abortion policy landscape.\textsuperscript{202} The influx in abortion regulation since 2011 has had the effect of piling abortion regulations on top of each other, particularly in hostile states.\textsuperscript{203} When examined in the aggregate, these laws have made it unduly burdensome for a woman to exercise her fundamental right to terminate a pregnancy. As the Guttmacher Institute observed, doctors must meet very robust, stringent and

\textsuperscript{196} Boonstra & Nash, \textit{supra} note 192 (citation omitted).
\textsuperscript{197} \textit{id.}
\textsuperscript{198} \textit{id.}
\textsuperscript{199} \textit{id.}
\textsuperscript{200} \textit{id.}
\textsuperscript{201} \textit{id.} (“In 2000, only two states—Mississippi and Utah—had five of the 10 major types of restrictions in effect. By 2013, 18 states had six or more major restrictions, and seven states had eight or more. Louisiana, the most restrictive state in 2013, had 10.”).
\textsuperscript{202} \textit{id.}
\textsuperscript{203} See \textit{id.}
expensive regulatory requirements to provide abortion services in a given state. As doctors struggle to implement these regulatory requirements, clinics close and women have no choice but to travel farther, spend more money, and wait longer to obtain abortions.

B. Admitting Privileges TRAP Laws are not Rationally Related to their Purported Purpose of Protecting Maternal Health

In Van Hollen and Abbott, the State asserted that the rationale for requiring abortion doctors to have hospital admitting privileges is to protect maternal health. However, these admitting privileges statutes bear no rational relation to their purported purpose because very few abortions result in complications that require hospitalization. Moreover, the medical community does not believe that abortion doctors need to provide “continuity of care” to ensure optimal treatment for patients or that requiring continuity of care even aligns with medical best practices.

First, in Van Hollen, “no documentation of medical evidence” was presented to the Wisconsin legislature demonstrating “a medical need” for requiring doctors to have admitting privileges. Generally, the medical community considers surgical abortion a relatively safe and low-risk procedure when compared to other outpatient medical procedures. As noted by the district court in Van Hollen, “the risk of

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204 See id.
205 See id.
206 Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 789 (7th Cir. 2013); see Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406, 411–12 (5th Cir. 2013).
207 See Van Hollen, 738 F.3d at 789.
208 Planned Parenthood of Wis., Inc. v. Van Hollen, 963 F. Supp. 2d 858, 864 (W.D. Wis. 2013).
209 Van Hollen, 738 F.3d at 789.
210 Elizabeth Flock, Docs: Texas Abortion Bill Doesn’t Make Sense, U.S. NEWS AND WORLD REP. (June 27, 2013),
death associated with childbirth is 14 times higher than that associated with abortion. The risk of death related to abortion overall is less than 0.7 deaths per 100,000 procedures.\textsuperscript{211} Abortion complications “are estimated to occur in only one out of 111 physician-performed aspiration abortions (the most common type of surgical abortion); and 96 percent of complications are ‘minor.’\textsuperscript{212} In fact, a recent study found that “only 1 in 1,915 aspiration abortions (0.05%)” results in complications that require hospitalization.\textsuperscript{213} These statistics are staggering when compared to studies demonstrating that the rate of complications arising from colonoscopies is significantly higher than that of abortions—yet doctors performing colonoscopies are not required to have hospital admitting privileges.\textsuperscript{214}

Furthermore, in \textit{Van Hollen}, Judge Posner noted that doctors who perform outpatient surgeries, such as various arthroscopic or laparoscopic procedures, are not required to have hospital admitting privileges.\textsuperscript{215} He observed that doctors who perform surgical abortion often perform other similar gynecological procedures, such as “surgical completion of a miscarriage,”\textsuperscript{216} and these doctors are not required to have admitting privileges when performing a procedure that “appear[s] to be virtually indistinguishable from an abortion from a medical standpoint.”\textsuperscript{217} Even doctors performing other outpatient surgeries that require general anesthesia, are not required to have

\textsuperscript{211} \textit{Van Hollen}, 963 F. Supp. 2d at 863.

\textsuperscript{212} \textit{Van Hollen}, 738 F.3d at 797.

\textsuperscript{213} \textit{Id.}

\textsuperscript{214} \textit{Id.} at 790.

\textsuperscript{215} \textit{Id.} (citing a study showing that “a quarter of all surgery in the United States is performed outside of hospitals”).

\textsuperscript{216} \textit{Id.} (explaining this procedure occurs when a doctor removes the remaining fetal tissue from a woman’s uterus following a miscarriage and likening this procedure to a “spontaneous abortion”).

\textsuperscript{217} \textit{Id.}
admitting privileges,\textsuperscript{218} despite the fact that ACOG believes that abortion is less risky than the use of general anesthesia.\textsuperscript{219} Thus, this statute does not further its purported rationale of protecting the health of the mother because surgical abortions are relatively safe.\textsuperscript{220} Women who have had a surgical abortion do not typically experience complications that require hospitalization.\textsuperscript{221}

Yet, anti-abortion advocates argue that if a woman is hospitalized from abortion-related complications, she will receive “better continuity of care” if the doctor who performed the abortion has hospital admitting privileges and can continue to treat her.\textsuperscript{222} However, even in the rare instance where a patient requires hospitalization, the appropriate doctor to manage the patient’s care may be a subspecialist and not the physician who performed the abortion.\textsuperscript{223} For example, if the patient has “a cardiac or lung related complication [she] should be seen by a cardiologist or a pulmonologist” rather than the doctor who performed the abortion.\textsuperscript{224} Moreover, as the district court in \textit{Van Hollen} observed, the admitting privileges requirement runs “counter to the current hospital care model, which increasingly relies on dedicated staff physicians or ‘hospitalists,’ including an on-call ob-gyn, rather than the outdated model that relies on physicians who provide outpatient care with hospital privileges.”\textsuperscript{225} Thus, the practice of highly qualified outpatient physicians, such as abortion doctors, handing off care to a hospital-employed physician is congruent with

\textsuperscript{218} Shainwald, \textit{supra} note 5, at 166.
\textsuperscript{219} Id. (citing Flock, \textit{supra} note 210).
\textsuperscript{220} \textit{Van Hollen}, 738 F.3d at 789, 797.
\textsuperscript{221} Id.
\textsuperscript{222} Id. at 789.
\textsuperscript{223} Shainwald, \textit{supra} note 5, at 166.
\textsuperscript{224} Id.
\textsuperscript{225} Planned Parenthood of Wis., Inc. v. Van Hollen, 963 F. Supp. 2d 858, 864 (W.D. Wis. 2013).
best practices in hospital care and does not constitute “patient abandonment.”

Even the ACOG has publicly condemned these admitting privileges TRAP laws, stating that they are unnecessary for “the provision of safe abortions.” ACOG guidelines recommend that clinicians who provide abortions outside of a hospital should have protocols in place to transfer patients to a hospital if complications arise. Lisa Hollier, chair of the Texas district of ACOG, noted, “[T]he [hospital admitting privileges] regulations are much more stringent than for other surgical procedures at similar risk, such as a colonoscopy.” Thus, as Judge Posner states, absent a requirement that physicians performing similar or riskier outpatient procedures have hospital admitting privileges, the only purpose the Wisconsin legislature could have when enacting this law was to restrict access to safe and legal abortions within the state.

C. Admitting Privileges Statutes Violate the Equal Protections Clause by Discriminating Against Doctors who Perform Abortions

Beyond the fact that these admitting privileges laws do not bear any rational relationship to protecting maternal health, they also violate equal protections of the law. As Judge Posner stated in Van Hollen, “the state seems indifferent to complications from non-hospital procedures other than surgical abortion (especially other gynecological procedures) even when they are more likely to produce complications.” In fact, the incidence of complications of abortion

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226 Id.
227 Shainwald, supra note 5, at 165 (citations omitted).
228 Id.
229 Flock, supra note 210.
230 Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 790–91 (7th Cir. 2013).
231 See id. at 789–90.
232 Id. at 790.
is so low that the Court cited the State’s report, which noted that in 2012 there were “only 11 complications out of 6,692 abortions” in Wisconsin. Therefore, complications occurred at “a rate of less than 1.6 tenths of 1 percent (1 per 608 abortions).” There is no reasonable justification for singling out abortion providers for additional medical oversight when the rate of complications related to surgical abortions is significantly lower than the rate of complications associated with similar outpatient surgical procedures.

Anti-abortion advocates argue that requiring abortion doctors to have admitting privileges at a local hospital acts as a “Good Housingkeeping Seal of Approval,” a testament to the competence of the physician. According to the Fifth Circuit’s *Abbott* decision, the State has a “substantial interest” in regulating and “protecting the integrity and ethics of the medical profession.” Writing for the court, Judge Owen believed that requiring local admitting privileges furthered this interest. She stated, “the State offered evidence that such a requirement fosters a woman’s ability to seek consultation and treatment for complications directly from her physician, not from an emergency room provider.” Judge Owen cited testimony from multiple doctors who argue that this requirement provides additional oversight beyond the initial licensing and license renewal process, which helps ensure high quality patient care and the quality of doctors permitted to perform abortions. These doctors argued this extra-layer of “protection for patient safety” is necessary because the stigma attached to abortion makes it likely that complications are likely

233 Id.
234 Id.
235 Id. at 797.
236 See id.
238 Id.
239 Id.
240 Id. 411–12.
underreported. However, in Van Hollen, the State did not present any evidence to support the claim that abortion-related complications were underreported, which calls into question the doctors’ reasoning in Abbott that abortions are likely underreported.

Moreover, as noted previously, best practices in hospital care do not require physicians from outpatient clinics to continue to provide care at a hospital when complications do arise. According to the Plaintiffs-Appellees’ brief in Van Hollen, when a complication arises in outpatient medicine, “hospitals provide emergency care to patients who need it, including admitting the patients if necessary, regardless of whether the physician who provided the outpatient care has admitting privileges at that hospital.”

In fact, in the case of Wisconsin’s statute, “nothing [in the statute] requires an abortion doctor who has admitting privileges to care for a patient . . . [h]e doesn’t have to accompany her to the hospital, treat her there, visit her, call her, or indeed do anything that a doctor employed by the hospital might not do for the patient.” Thus, it is unconstitutional to require extra oversight of abortion doctors when physicians performing equally invasive procedures are not monitored in this manner and there are no statutory provisions requiring physicians who perform outpatient surgical procedures to provide continuity of care to their patients.

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241 See id. at 412.
242 See Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 790 (7th Cir. 2013).
244 Brief of Plaintiffs-Appellees at 13–14, Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786 (2014) (No. 13-2726) (“Transfers of care between physicians occur routinely in medicine. Dr. Hargarten testified that such transfers occur ‘every day from other hospitals and physicians in cases where those physicians cannot provide the definitive treatment the patient requires,’ and the ‘transferring physician is rarely, if ever, on the staff of the hospital.’”).
245 Van Hollen, 738 F.3d at 798.
CONCLUSION

Although the Supreme Court has yet to evaluate the constitutionality of admitting privileges TRAP laws, when it does, the Court should rely on Judge Posner’s reasoning in *Van Hollen* to reach its decision. Even though Judge Posner’s opinion relied on the facts in the record for *Van Hollen*, his reasoning can be expanded beyond the borders of Wisconsin. As one state successfully promulgates a regulation restricting access to abortion, other states follow suit by enacting similar statutes, resulting in an influx of abortion regulation and making it increasingly difficult for a woman to obtain an abortion in the United States.

Thus, although the combination of abortion regulations may vary from state to state, access to abortion is a universal concern. When the Supreme Court has the opportunity to make a decision about the constitutionality of hospital admitting privileges statutes, it should strike them down. These laws impose an undue burden on a woman seeking to exercise her fundamental right to terminate a pregnancy; they bear no rational relation to their purported purpose of protecting maternal health; and they violate equal protections of the laws through disparate treatment of abortion doctors.
YES, WE WERE WRONG; NO, WE WILL NOT MAKE IT RIGHT: THE SEVENTH CIRCUIT DENIES POST-CONVICTION RELIEF FROM AN UNDISPUTED SENTENCING ERROR BECAUSE IT OCCURRED IN THE POST-BOOKER, ADVISORY GUIDELINES ERA

GREGORY S. DIERDORF

Cite as: Gregory S. Dierdorf, Yes, We Were Wrong; No, We Will Not Make It Right: The Seventh Circuit Denies Post-Conviction Relief From An Undisputed Sentencing Error Because It Occurred In The Post-Booker, Advisory Guidelines Era, 9 SEVENTH CIRCUIT REV. 301 (2014) at http://www.kentlaw.iit.edu/Documents/Academic Programs/7CR/v9-2/dierdorf.pdf.

INTRODUCTION

Finality in the criminal process is essential to the effective administration of justice,¹ but where an undisputed sentencing error amounts to a miscarriage of justice, a defendant may obtain post-conviction relief.²

The Seventh Circuit allowed such relief in Narvaez v. United States.³ In Narvaez, the defendant was erroneously sentenced as a

² See, e.g., Narvaez v. United States, 674 F.3d 621 (7th Cir. 2011).
³ See generally id.
career offender under the then-mandatory United States Sentencing Guidelines (the “Sentencing Guidelines” or “Guidelines”). Two years later, in Hawkins v. United States (hereinafter Hawkins I), the Seventh Circuit denied relief under circumstances that were nearly identical to those that warranted relief in Narvaez. The court distinguished Hawkins I from Narvaez because the Hawkins I defendant was sentenced at a time where the Sentencing Guidelines were advisory, rather than mandatory. According to the court, a sentencing error under the advisory Guidelines was “less serious” because the sentencing judge had ample discretion to depart from the recommended sentencing range.

Four months after the Seventh Circuit decided Hawkins I, the Supreme Court decided Peugh v. United States. In Peugh, the Court held that a misapplication of the advisory Guidelines could give rise to an Ex Post Facto Clause violation. In reaching this conclusion, the Court observed that, although the Guidelines are no longer binding on judges, the Guidelines still “exert controlling influence on the sentence that the court will impose” and “achieve binding legal effect through a set of procedural rules and standards for appellate review that, in combination, encourage district courts to sentence within the guidelines.”

In light of Peugh, Hawkins requested that the Seventh Circuit reconsider his plea for post-conviction relief. Peugh arguably rejected the Seventh Circuit’s distinction between mandatory and

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4 See generally id.
5 See generally, Hawkins v. United States, 706 F.3d 820 (7th Cir. 2013) [hereinafter Hawkins I].
6 Id. at 822.
7 See id. at 824.
9 Id. at 2083–84.
10 Id. at 2085.
11 Id. at 2086 (citing Miller v. Florida, 482 U.S. 423, 432–33 (1987) (internal quotation marks omitted)).
12 See generally Hawkins v. United States, 724 F.3d 915 (7th Cir. 2013) [hereinafter Hawkins II].
advisory Guideline sentencing errors. In *Hawkins v. United States* (hereinafter *Hawkins II*), the court found *Peugh* inapplicable to its analysis in *Hawkins I* on the basis that *Peugh* did not address a plea for post-conviction relief, and affirmed its decision to deny Hawkins’s motion. This Comment argues for a different result, taking the stance that *Peugh*’s broad analysis of the post-*Booker*, advisory Guideline regime undercut the Seventh Circuit’s rationale for denying relief in *Hawkins I*.

First, this Comment provides relevant background information regarding the Sentencing Guidelines, the standards that govern post-conviction relief, and the Seventh Circuit’s application of those standards in *Hawkins I*. Then, this Comment explains the *Peugh* decision and the Seventh Circuit’s rationale behind its decision in *Hawkins II*. Finally, this Comment argues that, contrary to the court’s holdings in *Hawkins II*, the *Peugh* decision illustrates the binding legal effect of advisory Sentencing Guidelines, and demonstrates that Hawkins’s suffered a miscarriage of justice that entitles him to collateral relief.

**BACKGROUND**

**A. An Overview of the Federal Sentencing Scheme**

Until 1984, federal sentencing judges possessed nearly unbridled discretion to impose prison sentences under the then-indeterminate sentencing system, which produced sentencing disparity across the federal courts. Congress then determined that inconsistent criminal sentences were “a serious impediment to an evenhanded and effective

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13 See id. at 916.
14 Id. at 916–17.
15 Mistretta v. U.S., 488 U.S. 361, 363 (1989) (noting “Statutes specified penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long.”).
16 Id. at 366.
operation of the criminal justice system.” In response to this concern, Congress enacted the Sentencing Reform Act (“SRA”) of 1984. The SRA brought uniformity to the sentencing process by establishing the United States Sentencing Commission (the “Commission”), which promulgates Sentencing Guidelines. The Sentencing Guidelines serve as a rubric for calculating the appropriate sentencing range for “each category of offense and each category of defendant.”

While the Guidelines were originally binding upon the sentencing judges, in Booker v. United States, the Supreme Court converted the Guidelines to advisory in order to remedy a Sixth Amendment violation. The sentencing process remained the same, but the sentencing court had greater discretion to impose an outside-the-Guidelines prison sentence.

Under the current, post-Booker procedure, the sentencing court still calculates and considers the appropriate Guidelines sentencing range, but may depart from the sentencing range as warranted in accordance with the sentencing considerations set forth in 18 U.S.C. § 3553(a). Should the sentencing court depart from the recommended sentencing range, the court must explain its rationale with reference to the § 3553(a) sentencing factors. The Court has noted that “a major

17 Id.
19 Mistretta, 488 U.S. at 366–67; see United States v. Booker, 543 U.S. 220, 253 (2005) (“Congress’ basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.”).
21 Sarah French Russel, Reluctance to Resentence: Courts, Congress, and Collateral Review, 91 N.C. L. Rev. 79, 90 (2012) (While the courts were authorized to depart from the sentencing range under limited circumstances, “courts viewed the Sentencing Guidelines as mandatory”).
22 Booker, 543 U.S. at 226.
24 Booker, 543 U.S. at 245.
departure should be supported by a more significant justification that a minor one." On appeal, sentences are reviewed for abuse of direction.  

Sentencing errors, including miscalculating the sentencing range, are generally reversible on direct appeal.  Once a defendant has exhausted his appeals, the sentence becomes final. At this point, a defendant’s ability to obtain relief from the sentencing error is far more limited.

B. Post-conviction Relief under 28 U.S.C. § 2255

Once a conviction becomes final, a defendant may seek post-conviction relief under 28 U.S.C. § 2255. Pursuant to § 2255, a prisoner may request that the court vacate, set aside, or correct the sentence upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

The remedy that is available to a prisoner under § 2255 is identical to that which is available by habeas corpus. Section 2255 was simply enacted to ensure that prisoners could seek post-conviction relief in a convenient forum; the forum in which the prisoner is confined.

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27 Id. at 51.
28 See id.
32 Id.
34 Id. at 427–28 (citation omitted).
Just as habeas corpus is reserved for exceptional circumstances, the availability of post-conviction relief under § 2255 relief is similarly limited.\textsuperscript{35} Courts generally disfavor collateral review of final judgment because such review (1) undermines the public’s confidence in the accuracy of judicial decisions; (2) places administrative burdens on the court system that interferes with the timely administration of justice; and (3) may create evidentiary issues on remand when a substantial amount of time has passed since matter was initially adjudicated.\textsuperscript{36} For these reasons, the scope of collateral review under § 2255 is more limited than direct appeal, meaning that collateral relief is not always available even though the claimed error may have warranted reversal on direct appeal.\textsuperscript{37}

If a claimed error is neither jurisdictional nor constitutional, § 2255 relief is only available if the error constitutes “a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with rudimentary demands of fair procedure.”\textsuperscript{38} An error constitutes a miscarriage of justice where it is so fundamental as to “[render] the entire proceeding irregular and invalid.”\textsuperscript{39} For example, the Court has held that a miscarriage of justice occurs where an individual is imprisoned for “an act that the law does not make criminal.”\textsuperscript{40} Beyond that, the contours of this standard remain largely undefined.\textsuperscript{41}

Circuit courts generally agree that post-conviction relief could be granted for a sentencing error, but are reluctant to actually find that a

\textsuperscript{35} Id. at 428.
\textsuperscript{36} See Addonizio, 442 U.S. at 184 n.11 (citations omitted).
\textsuperscript{37} Id. at 184.
\textsuperscript{38} Hill, 368 U.S. at 428.
\textsuperscript{39} Addonizio, 442 U.S. at 186.
\textsuperscript{40} Davis v. United States, 417 U.S. 333, 347 (1974).
\textsuperscript{41} See Russel, supra note 21, at 127-28 (Based on limited instruction from the Supreme Court, lower courts have “considerable flexibility” to determine whether a miscarriage of justice has occurred).
sentencing error ever rises to the level of miscarriage of justice.\textsuperscript{42} In the Seventh Circuit, a sentencing error constitutes a miscarriage of justice where “a change in the law reduces the defendant’s statutory maximum sentence below the imposed sentence.”\textsuperscript{43} In such a case, post-conviction relief is available.\textsuperscript{44}

\section*{C. The Seventh Circuit Grants Post-Conviction Relief from a Sentencing Error after an Intervening Change in the Law Demonstrates that the Defendant Should Not Have Been Classified as a Career Offender}

\subsection*{1. The Career Offender Sentencing Enhancement}

Under the SRA, the Commission is tasked with promulgating the Sentencing Guidelines.\textsuperscript{45} While Congress granted the Commission some discretion in determining the categories of offenses and categories of defendants,\textsuperscript{46} Congress specifically required that the Commission establish higher sentencing ranges for repeat offenders who commit crimes of violence.\textsuperscript{47} In response to this Congressional directive, the Commission promulgated U.S.S.G. § 4B1.1, which is commonly known as the career offender enhancement.\textsuperscript{48}

Under § 4B1.1, a defendant who has at least two prior felony convictions for a “crime of violence” is subject to an enhanced sentencing range.\textsuperscript{49} A “crime of violence” means

\begin{itemize}
  \item \textsuperscript{42} See Sun Bear v. United States, 644 F.3d 700, 704–05 (8th Cir. 2011) (citing cases demonstrating the courts’ reluctance to hold that a sentencing error constitutes a miscarriage of justice).
  \item \textsuperscript{43} Welch v. U.S., 604 F.3d 408, 412-13 (7th Cir. 2010).
  \item \textsuperscript{44} Id.
  \item \textsuperscript{45} 28 U.S.C. § 994(a)(1).
  \item \textsuperscript{46} See id. § 994(c)–(d) (listing various factors to consider for each category).
  \item \textsuperscript{47} Id. § 994(h).
  \item \textsuperscript{48} Hawkins v. United States, 706 F.3d 820, 823 (7th Cir. 2013).
  \item \textsuperscript{49} Id. at 821; see U.S.S.G. § 4B1.1.
\end{itemize}

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any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) [ . . . ] otherwise involves conduct that presents a serious potential risk of physical injury to another.⁵⁰

The Supreme Court has observed that career offenders are “a category of offender [that is] subject to particularly severe punishment.”⁵¹ On average, a career offender will face a prison sentence at least twice as long as he would face absent the career offender enhancement.⁵² To determine whether an offense is a “crime of violence,” courts will consider “the statutory elements of the crime, rather than the particular facts underlying the conviction.”⁵³ This is called the “categorical approach.”⁵⁴

Until 2009, most circuit courts, including the Seventh Circuit, considered all felony escape convictions to be violent crimes in the context of the career offender enhancement.⁵⁵ Meaning that every escape conviction was treated as a crime of violence, regardless of whether the escape was a violent, forcible escape⁵⁶ or a non-violent, walkaway escape.⁵⁷ This philosophy was premised on the notion that, even if the escape itself did not involve violence, there exists a

⁵² See Russel supra note 21, at 99 (the career offender enhancement “can double, triple, or even quadruple a defendant’s sentence”).
⁵³ See United States v. Franklin, 302 F.3d 722, 723 (7th Cir. 2002).
⁵⁴ Id.
⁵⁶ See id. (examples of forcible escapes are breaking out of a building and wrestling free of guards).
⁵⁷ See id. (examples of walkaway escapes are leaving a halfway house, failing to report for confinement, and failing to return to confinement).
potential for violence while the escapee attempts to avoid recapture.\textsuperscript{58} Accordingly, courts reasoned, a felony escape conviction “presents a serious potential risk for physical injury to another,” which classifies all felony escapes as “crimes of violence” under § 4B1.1.\textsuperscript{59}

2. The Supreme Court Implements a Change in the Law by Distinguishing Between Violent and Non-violent Escapes in the Context of Sentencing Enhancements

In January 2009, the Supreme Court decided \textit{Chambers v. United States}, in which the Court considered whether the Illinois crime of “failure to report for weekend confinement” is a “violent felony” in the context of the Armed Career Criminal Act (“ACCA”).\textsuperscript{60} Under the ACCA, an individual who has “three previous convictions . . . for a violent felony or a serious drug offense” and is subsequently convicted of being a felon in possession of a firearm faces a mandatory fifteen (15) year prison sentence.\textsuperscript{61} The ACCA defines “violent felony” as a “crime punishable by imprisonment for a term exceeding one year” that “involves conduct that presents a serious potential risk of physical injury to another.”\textsuperscript{62} The definitions of a “violent felony” under the ACCA and a “crime of violence” under the Sentencing Guidelines are identical, and, in the Seventh Circuit, judicial interpretations of either definition apply to both.\textsuperscript{63}

In \textit{Chambers}, the petitioner pleaded guilty to a charge of being a felon unlawfully in possession of a firearm in violation of 18 U.S.C. § 922(g).\textsuperscript{64} At sentencing, the Government sought the application of the

\textsuperscript{58} \textit{Franklin}, 302 F.3d at 724 (citing United States v. Gosling, 39 F.3d 1140, 1142 (10th Cir. 1994) “[E]very escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious potential to do so.”).

\textsuperscript{59} \textit{See Chambers}, 473 F.3d at 726; U.S.S.G. § 4B1.1.


\textsuperscript{61} \textit{Id.} at 124 (citing 18 U.S.C. 924(e)).

\textsuperscript{62} \textit{Id.}

\textsuperscript{63} \textit{See Narvaez v. United States}, 674 F.3d 621, 624 (7th Cir. 2011).

\textsuperscript{64} \textit{Chambers}, 555 U.S. at 124.
ACCA’s fifteen (15) year minimum sentence on the basis of the petitioner’s prior criminal convictions. The petitioner agreed that two of his prior convictions fell within the ACCA’s “violent felony” definition, but disputed that a third conviction, for “failing to report to a penal institution,” was a “violent felony” that triggered the mandatory minimum sentence.

In resolving this question, the Court first determined that, for purposes of the ACCA, the crime of failure to report is separate and distinguishable from the crime of escape from custody. The Court observed that a failure to report is premised on inaction, which is less aggressive and less likely to cause bodily harm than the behavior that underlies an escape from physical custody. The Court then held that the crime of failure to report is not a “violent felony” as defined by the ACCA because, based on the available empirical evidence, it did not “[present] a serious potential risk of physical injury to another.” Thus, Chambers rejected the categorical treatment of felony escapes as crimes of violence regardless of whether the offense actually involved a violent act.

3. The Seventh Circuit Grants Post-Conviction Relief in Light of Chambers Where the Defendant Was Sentenced under the Pre-Booker, Mandatory Sentencing Guidelines

In light of Chambers, the Seventh Circuit, in Narvaez v. United States, granted post-conviction relief from a prison sentence that was premised on a misapplication of the career offender enhancement.

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65 Id.
66 Following his conviction for robbery and battery, the petitioner was required to report to a local prison for eleven (11) weekends of incarceration. He failed to report for weekend confinement on four occasions, which led to the conviction that was at issue in this case. Id. at 124-25.
67 Id. at 126-27.
68 Id.
69 Chambers, 555 U.S. at 128, 130.
70 See id. at 127.
71 Narvaez v. United States, 674 F.3d 621, 623 (7th Cir. 2011).
Narvaez, the defendant was sentenced as a career offender because he had two prior convictions for felony escape where he failed to return to confinement.72 The defendant was sentenced in the pre-Booker era, and the career offender enhancement increased the defendant’s then-mandatory sentencing range from 100-125 months to 151-188 months.73 After calculating the sentencing range, the judge imposed a 170-month prison sentence.74 While Chambers made clear that the sentencing judge erroneously applied the career offender enhancement,75 the court could only grant post-conviction relief if it determined that this error constituted a miscarriage of justice.76

In concluding that a miscarriage of justice occurred, the court analogized this case to Davis v. United States.77 In Davis, the Supreme Court held that miscarriage of justice occurs where a defendant is punished “for an act that the law does not make criminal.”78 The Narvaez court found this case analogous because the Narvaez defendant’s “career offender” classification was premised on offenses that, according to Chambers, could not form the basis for this classification.79 In essence, he was punished for offenses the law does make punishable.80 The court noted that this error was amplified by the fact that the defendant was sentenced in the pre-Booker era, and the judge was required to impose a sentence within the erroneously

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72 Id. at 623–24.
73 Id. at 624.
74 Id.
75 The court observed that the Chambers holding could be applied retroactively it presented a substantive rule of law that “[prohibits] a certain category of punishment for a class of defendants because of their status or offense.” Id. at 626 (quoting O’Dell v. Netherland, 521 U.S. 151, 157 (1997)).
76 See Narvaez, 674 F.3d at 627–28.
77 Id.
79 See Narvaez, 674 F.3d at 628.
80 See id.
enhanced sentencing range. Accordingly, the court held that a miscarriage of justice occurred.

In reaching this holding, the court rejected the government’s argument that a miscarriage of justice could not have occurred because the defendant was sentenced below the statutory maximum and could receive the same sentence on remand. The court recognized that by labeling the defendant as a career offender, the sentencing court “created a legal presumption that he was to be treated differently from other offenders because he belonged in a special category reserved for the violent and incorrigible.” According to the court, while the defendant does not have a right to a lower sentence, “he does have an absolute right not to stand before the court as a career offender when the law does not impose that label on him.”

4. The Seventh Circuit Refuses to Grant Post-Conviction Relief Where the Defendant Was Sentenced under the Post-Booker, Advisory Sentencing Guidelines

Two years after Narvaez, the Seventh Circuit decided Hawkins v. United States (Hawkins I) in which the defendant, Bernard Hawkins, similarly sought post-conviction relief under § 2255. Hawkins I presented a case that was nearly identical to Narvaez except for one detail: Hawkins was sentenced in the post-Booker era where the Sentencing Guidelines were advisory, while the Narvaez defendant was sentenced under the pre-Booker, mandatory Guidelines. This

81 Id. at 628-29.  
82 Id. at 629.  
83 Id.  
84 Narvaez, 674 F.3d at 629.  
85 Id.  
86 Hawkins v. United States, 706 F.3d 820, 821–22 (7th Cir. 2013).  
87 Id. at 824.
distinction proved fatal to Hawkins’s motion for post-conviction relief.\(^{88}\)

In March 2003, Hawkins pled guilty to assaulting a federal officer in violation of 18 U.S.C. § 111.\(^{89}\) Hawkins was sentenced as a career offender because he had two convictions for felony escape on his criminal record.\(^{90}\) Similar to the escapes at issue in Narvaez, both of Hawkins’s escapes were non-violent.\(^{91}\) On each occasion, Hawkins simply signed himself out of a halfway house and failed to return. Hawkins was sentenced pre-Chambers, however, and both escapes were considered “crimes of violence” for sentencing purposes.\(^{92}\)

Taking into account the career offender-sentencing enhancement, Hawkins’s sentencing range was 151-180 months.\(^{93}\) If Hawkins had not been sentenced as a career offender, his sentencing range would have been 15-21 months.\(^{94}\) While the sentencing judge recognized that the sentencing range was advisory, the judge sentenced Hawkins to 151 months in federal prison.\(^{95}\)

Following Chambers and Narvaez, Hawkins sought post-conviction relief under § 2255.\(^{96}\) While the Seventh Circuit had granted post-conviction relief for this type of error in Narvaez, it now had to consider whether such relief could be granted now that the

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\(^{88}\) Id. at 823–24.

\(^{89}\) United States v. Hawkins, 136 F. App’x. 922, 923 (7th Cir. 2005).

\(^{90}\) Id.

\(^{91}\) See Narvaez v. United States, 674 F.3d 621, 623-24 (7th Cir. 2011).

\(^{92}\) Hawkins, 136 F. App’x. at 923.

\(^{93}\) See id. at 924.

\(^{94}\) Id. at 923.

\(^{95}\) Hawkins v. United States, 706 F.3d 820, 821 (7th Cir. 2013).

\(^{96}\) Id. at 823. Hawkins was originally sentenced in the pre-Booker era, which would have made this case indistinguishable from Narvaez. See id. at 822. However, Booker was decided while Hawkins’s direct appeal was pending in the Seventh Circuit. Id. On the authority of Booker, the Seventh Circuit remanded Hawkins’s case for resentencing under the now-advisory Sentencing Guidelines. Id. The judge initially imposed a 151-month prison sentence pre-Booker, and reentered the same sentence post-Booker. Id.

\(^{97}\) See generally id.
Guidelines are “merely advisory.” Judge Posner, writing for the court, acknowledged that the sentencing judge was wrong for treating Hawkins’s walkaway escapes as crimes of violence and labeling him as a career offender. The court held, however, that Hawkins did not suffer a miscarriage of justice that could be remedied through post-conviction relief.

In reaching this conclusion, Judge Posner stressed that because Narvaez was sentenced in the pre-Booker era where the Guidelines “were the practical equivalent of a statute,” his sentence arguably exceeded that which was authorized by law. In contrast, Hawkins was sentenced in the post-Booker era where the sentence is premised, primarily, on the sentencing factors set forth in 18 U.S.C. § 3553(a).

According to the court, under these circumstances, Hawkins was not “punished for conduct that is not punishable” because the sentencing court could impose a 151-month sentence based on the various sentencing factors rather than the erroneous sentencing enhancement.

According to Judge Posner, not every error can be corrected through post-conviction relief, “even if the error is not harmless.” Post-conviction relief is disfavored in the interest of finality, and not every error that is reversible on direct appeal may be corrected years later. The interest of finality will not justify “[subjecting] a defendant to a punishment the law cannot impose on him,” such as a sentence that exceeds the mandatory sentencing range. However, “[an] error in the interpretation of a merely advisory guideline is less

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98 Id. at 821.
99 Id. at 823.
100 Id. at 824.
101 See id. at 822.
102 Id. at 822-23.
103 See id.
104 Id. at 823.
105 Id. at 824.
106 Id. at 824 (internal quotation marks omitted) (citation omitted).
serious.”\textsuperscript{107} In that case, the scale is tipped in favor of finality, and post-conviction relief is unavailable.\textsuperscript{108}

Judge Rovner dissented from the court’s decision to deny Hawkins’s motion for post-conviction relief.\textsuperscript{109} In her view, \textit{Narvaez} was clearly controlling and the distinction between mandatory and advisory Sentencing Guidelines was “illusory.”\textsuperscript{110} Additionally, Judge Rovner disagreed with the court’s disinclination to allow post-conviction relief in the interest of finality, noting the significant and detrimental effect of a career offender enhancement on the sentencing process.\textsuperscript{111} Put simply, according to Judge Rovner, “finality must not trump justice where a court must correct a career offender enhancement that all agree was imposed in error.”\textsuperscript{112} Accordingly, Judge Rovner concluded that such an error constitutes a miscarriage of justice that entitles Hawkins to post-conviction relief.\textsuperscript{113}

THE CURRENT LAW

A. The Seventh Circuit Refuses to Reconsider Hawkins I Despite the Supreme Court’s Recognition that the Advisory Sentencing Guidelines Have “Binding Legal Effect”

Few Guidelines have as significant of an impact on a defendant’s prison sentence as the career offender-sentencing enhancement,\textsuperscript{114} which imposes a heightened prison sentence upon violent, repeat offenders.\textsuperscript{115} In \textit{Narvaez}, the Seventh Circuit granted post-conviction relief from a prison sentence that was premised on the misapplication

\textsuperscript{107} Id. at 824.
\textsuperscript{108} Id. at 824–25.
\textsuperscript{109} Id. at 825 (Rovner, J. dissenting).
\textsuperscript{110} Id. at 826 (Rovner, J. dissenting).
\textsuperscript{111} Id. at 827–28 (Rovner, J. dissenting).
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 832 (Rovner, J. dissenting).
\textsuperscript{114} See id.
\textsuperscript{115} See U.S.S.G. § 4B1.1.
of the career offender enhancement. While the defendant was sentenced in 2003, the sentencing error did not become apparent until the Supreme Court decided Chambers in 2009. Notably, the Narvaez defendant was sentenced in the pre-Booker era, where the erroneously enhanced sentencing range was binding upon the judge. According to the Seventh Circuit, a miscarriage of justice occurred when the sentencing judge erroneously “[increased], dramatically, the point of departure for [the defendant’s] sentence.”

Two years later, in Hawkins I, the court denied post-conviction relief from the same sentencing error because the Hawkins defendant was sentenced in the post-Booker era. Although the sentencing judge similarly increased Hawkins’s sentencing range based on the misapplication of the career offender enhancement, the court held that this error was “less serious” because the post-Booker-judge had greater discretion to depart from the erroneously enhanced sentencing range. According to the court, such an error did not constitute a miscarriage of justice that could be remedied through post-conviction relief.

Thus, taken together, Narvaez and Hawkins I demonstrate that the Seventh Circuit has drawn a line between pre-Booker sentencing errors and post-Booker sentencing errors, allowing post-conviction relief in the former but not the latter. This distinction is premised on the perception that the post-Booker Guidelines merely advise, rather than bind, the sentencing judges. This premise, however, was undercut by the Supreme Court’s recognition in Peugh v. United States

116 See generally, Narvaez v. United States, 674 F.3d 621 (7th Cir. 2011).
117 Id. at 623–24.
118 Id. at 628–29.
119 Id. at 629.
120 Hawkins v. United States, 706 F.3d 820, 823–24 (7th Cir. 2013).
121 Id. at 824.
122 Id. at 824–25.
123 Id. at 822-24.
that the post-

Booker, advisory Guidelines still has “binding legal effect.”

1. The Supreme Court Holds that the Misapplication of Advisory Guidelines Can Violate the Ex Post Facto Clause

\textit{Peugh} was decided in June 2013, four months after \textit{Hawkins I}.\footnote{See \textit{Peugh}, 133 S.Ct. at 2078.} In \textit{Peugh}, the defendant was convicted for crimes committed in 1999 and 2000, but was sentenced in accordance with the 2009 Sentencing Guidelines rather than the more lenient 1998 version that was in effect at the time the crimes occurred.\footnote{See \textit{Calder v. Bull}, 3 Dall. 386, 390 (1798).} The Court was presented with the issue of whether a misapplication of the Sentencing Guidelines could violate the \textit{Ex Post Facto} Clause of the Constitution.\footnote{Id. at 2081.}

An \textit{ex post facto} law enhances the punishment for a crime after the crime has been committed.\footnote{See generally id.} The crux of the government’s argument was that the misapplication of merely advisory Sentencing Guidelines could not give rise to an \textit{ex post facto} violation because the sentencing court is not required to impose a sentence within the recommended sentencing range.\footnote{Id. at 2084.} The Court rejected this contention, holding that the post-

Booker, advisory Guidelines are the “lodestar of sentencing,” and “[a] retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an \textit{ex post facto} violation.”\footnote{Id. at 2086.}

In reaching this conclusion, the Court observed that, while advisory in nature, the Guidelines achieve “binding legal effect through a set of procedural rules and standards for appellate review.”\footnote{Id. at 2086.} For example, sentencing courts must calculate the correct

\footnote{133 S.Ct. 2072, 2086 (2013). }\footnote{See \textit{Peugh}, 133 S.Ct. at 2078. }\footnote{Id. at 2079. }\footnote{See \textit{Calder v. Bull}, 3 Dall. 386, 390 (1798). }\footnote{See \textit{Peugh}, 133 S.Ct. at 2081. }\footnote{Id. at 2084. }\footnote{Id. at 2086.}
sentencing range as the first step in the sentencing process. A failure to do so is grounds for remand. Additionally, while a district court may impose a non-Guidelines sentence, the court “must consider the extent of the deviation and ensure the justification is sufficiently compelling to support the degree of the variance.” Furthermore, even where a judge deviates from the advised sentencing range, the sentencing range determines the point from which the sentence is adjusted. Thus, according to the Court, “the Guidelines are in a real sense the basis for the sentence.” Moreover, within-Guidelines sentences are presumptively reasonable on review, which further incentivizes sentencing judges to enter within-Guidelines sentences.

Congress created the current sentencing scheme to achieve uniformity in federal sentencing. The now-advisory Guidelines still achieve this purpose. Indeed, since 2007, district courts have only imposed sentences outside the Guidelines sentencing range in twenty percent of cases, absent a Government motion. Thus, based on the significant influence that the Guidelines exert over the sentencing process, the Court held that Guidelines could form the basis of an Ex Post Facto Clause violation, even under in post-Booker, advisory regime.

132 See id. at 2083.
133 Id. at 2083 (citation omitted).
134 Peugh, 133 S.Ct.at 2083.
135 Id.
136 Id.
137 See Id.
139 Peugh, 133 S.Ct. at 2084.
140 Id.
141 Id. at 2084.
2. The Seventh Circuit Refuses to Reconsider *Hawkins I* in Light of *Peugh*

In light of *Peugh*, Hawkins requested that the Seventh Circuit reconsider his motion for post-conviction relief.\(^{142}\) While the court recognized that *Peugh* was arguably significant to Hawkins’s case to the extent that “the Court held that an error in calculating a merely advisory guidelines range nevertheless invalidated the sentence,” Judge Posner, again writing for the court, denied Hawkins’s motion for reconsideration.\(^{143}\)

In reaching this conclusion, Judge Posner provided three reasons why *Peugh* does not apply to Hawkins’s motion for post-conviction relief.\(^{144}\) First, the *Peugh* holding was limited to constitutional errors, which are not present in Hawkins’s case.\(^{145}\) Second, since *Peugh* concerned an *Ex Post Facto* Clause violation, *Peugh* was decided against a different legal standard than is applied to Hawkins’s motion for post-conviction relief.\(^{146}\) Third, *Peugh* does not apply retroactively, as would be required to incorporate that decision into Hawkins’s motion.\(^{147}\) Beyond distinguishing *Peugh*, Judge Posner reiterated his stance in *Hawkins I* that, while the district court admittedly erred, “the social interest in a belated correction of the error [was] outweighed by the social interest in the finality of judicial decisions.”\(^{148}\)

Judge Rovner argued for a contrary conclusion in her dissenting opinion.\(^{149}\) In her view, the only basis for denying Hawkins’s motion in *Hawkins I* was the perceived distinction between the advisory and mandatory Sentencing Guidelines.\(^{150}\) According to Judge Rovner, this

\(^{142}\) See *generally* *Hawkins v. United States*, 724 F.3d 915 (7th Cir. 2013).
\(^{143}\) *Id.* at 915–16.
\(^{144}\) *Id.* at 916–17.
\(^{145}\) *Id.*
\(^{146}\) *Id.* at 917.
\(^{147}\) *Id.* at 917.
\(^{148}\) *Id.* at 918.
\(^{149}\) See *id.* at 919.
\(^{150}\) *Id.* at 919–20. (Rovner, J. dissenting).
distinction was rejected by Peugh, where the Court “[instructed] that the advisory nature of the Guidelines and the presence of discretion did not alleviate the infirmities that arise when a sentencing court chooses the improper Guideline range as a starting point.”\(^{151}\) And, while the Peugh Court considered an ex post facto violation, the specific holding is not at issue here.\(^{152}\) Rather, it is the Court’s broad reasoning in regard to the legal force and effect of the advisory Sentencing Guidelines that undercuts the court’s holding in Hawkins I.\(^{153}\) Additionally, Judge Rovner elaborated on her concerns regarding the majority’s elevation of finality over fairness by noting that, wherever the line between fairness and finality may fall, “justice requires the ability to rectify substantial uncontroverted judicial errors that cause significant injury,” as was seen in this case.\(^{154}\)

**ANALYSIS**

**A. The Seventh Circuit Erroneously Decided Hawkins’s § 2255 Motion**

The Seventh Circuit got it wrong. Rather than recognize the impact of Peugh on the court’s treatment of advisory Sentencing Guidelines, the court avoided the issue by holding that Peugh did not apply to Hawkins’s challenge.\(^{155}\) As Judge Rovner correctly recognized in her dissent, however, the court need not apply the holding of Peugh to determine that Hawkins I was wrongly decided.\(^{156}\)

By revisiting Hawkins I in light of Peugh, it is clear that Hawkins was entitled to post-conviction relief for two reasons. First, in Peugh, the Court articulated general principles regarding the legal effect of

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\(^{151}\) *Id.* at 920 (Rovner, J. dissenting) (citing Peugh v. United States, 133 S.Ct. 2072, 2086 (2013)).

\(^{152}\) *Id.* at 921–22 (Rovner, J. dissenting).

\(^{153}\) *Id.* (Rovner, J. dissenting).

\(^{154}\) *Id.* at 922 (Rovner, J. dissenting).

\(^{155}\) *Id.* at 916–17.

\(^{156}\) *Id.* at 921-22 (Rovner, J. dissenting).
advisory Sentencing Guidelines that align *Hawkins I* with *Narvaez*. Second, by rejecting the distinction between advisory and mandatory Guidelines, the *Peugh* Court tipped the scale in favor of granting post-conviction relief and elevating “fairness” over “finality.”

1. The *Peugh* Decision Aligns *Hawkins* With *Narvaez*

In *Hawkins I*, Judge Posner indicated that, post-*Booker*, a prison sentence is primarily determined by considering the sentencing factors set forth in 18 U.S.C. § 3553(a). As such, the Sentencing Guidelines calculation is “less important” and a misapplication of the career offender enhancement “less serious.” Posner is correct, to a certain extent. Mandatory Sentencing Guidelines will certainly exert greater influence over the sentencing process than advisory Guidelines. However, it does not follow that the misapplication of the career offender enhancement under the advisory Guidelines does not rise to the level of a miscarriage of justice.

In *Narvaez*, the court held that a miscarriage of justice occurred because the defendant was erroneously classified as a career offender, an individual who was deserving of severe punishment. The court considered this designation to be extremely damaging because the erroneously enhanced sentencing range was the “lodestar” for the defendant’s sentence. Once designated a career offender, the defendant could do nothing to “erase that branding or its effect on his sentence.” For this reason, the court concluded that a defendant has “an absolute right not to stand before the court as a career offender when the law does not impose that label on him.”

158. *Id.* at 822.
159. *Id.* at 824.
160. *Narvaez v. United States*, 674 F.3d 621, 629 (7th Cir. 2011).
161. *Id.*
162. *Id.*
163. *Id.* at 629.
Just like the defendant in Narvaez, Hawkins was erroneously branded as a career offender and subjected to a higher sentencing range.\textsuperscript{164} It would appear, then, that the Narvaez reasoning should have applied with full force in Hawkins \textit{I}.\textsuperscript{165} Indeed, in Hawkins \textit{I}, Judge Posner recognized that the advisory Guidelines still have an “anchoring effect” on a defendant’s prison sentence.\textsuperscript{166} However, Judge Posner nonetheless held that a miscarriage of justice had not occurred because the judge was not \textit{required} to impose a sentence within the erroneously enhanced sentencing range.\textsuperscript{167}

In Peugh, the Court recognized that the advisory Guidelines have “binding legal effect”\textsuperscript{168} and remain the “lodestone of sentencing.”\textsuperscript{169} While the advisory Guidelines are not binding by law, they are binding in effect.\textsuperscript{170} Accordingly, Peugh narrowed the gap between the mandatory Guidelines in Narvaez\textsuperscript{171} and the advisory Guidelines in Hawkins \textit{I}.\textsuperscript{172}

Additionally, Peugh’s effect on Hawkins \textit{I} is amplified by the fact that the Peugh Court challenged the Seventh Circuit’s reluctance to grant relief from sentencing errors in the post-\textit{Booker} era. Specifically, the Peugh Court reversed the Seventh Circuit’s decision in United States v. Peugh\textsuperscript{173} and abrogated United States v. Demaree.\textsuperscript{174} By rejecting the rationale of these cases, the Peugh Court arguably

\textsuperscript{164} Hawkins \textit{I}, 706 F.3d 820, 825–26 (7th Cir. 2013) (Rovner, J. dissenting).
\textsuperscript{165} See id. at 826–27 (Rovner, J. dissenting).
\textsuperscript{166} Id. at 824 (the “anchoring effect” refers to the tendency for a judge who enters a non-guideline sentence to still enter a sentence close to the advised sentencing range).
\textsuperscript{167} See id. at 824–25.
\textsuperscript{168} Peugh v. United States, 133 S.Ct. 2072, 2084 (2013).
\textsuperscript{169} Id. at 2086.
\textsuperscript{170} See id. at 2084.
\textsuperscript{171} See Narvaez v. United States, 674 F.3d 621, 628–29 (7th Cir. 2011).
\textsuperscript{172} Hawkins \textit{I}, 706 F.3d 820, 822–23 (7th Cir. 2013).
\textsuperscript{173} 675 F.3d 736 (7th Cir. 2012), reversed, Peugh, 133 S.Ct. 2072 (2013).
\textsuperscript{174} 459 F.3d 791 (7th Cir. 2006), abrogated, Peugh, 133 S.Ct. 2072 (2013).
rejected, albeit indirectly, a similar rationale that formed the basis of the court’s decision in *Hawkins I*.

In *United States v. Demaree*, the Seventh Circuit, in an opinion authored by Judge Posner, held that advisory sentencing guidelines could not form the basis for a violation of the *Ex Post Facto* Clause.\(^{175}\) While the court acknowledged that sentencing guidelines could be *ex post facto* laws, the court distinguished between pre-*Booker* and post-*Booker* guidelines, and held that “the *ex post facto* clause should apply only to laws and regulations that bind rather than advise.”\(^{176}\) The court reasoned that, while the applicable advisory Guidelines will “nudge” a sentencing court towards a sentencing range, the judge has “unfettered” discretion to impose a sentence outside the applicable range.\(^{177}\) Thus, advisory Sentencing Guidelines could not substantially disadvantage the defendant during the actual sentencing process as to implicate the *ex post facto* clause.\(^{178}\)

In *Hawkins I*, the court relied upon a similar line of reasoning to determine that a misapplication of the career offender enhancement in the advisory Guidelines era could not give rise to a miscarriage of justice.\(^{179}\) In *Hawkins I*, the court distinguished the pre-*Booker* and post-*Booker* Sentencing Guidelines, explaining that errors in the post-*Booker* era are less serious because the sentencing judge is not required to impose a sentence within the recommended range.\(^{180}\) The court even went so far as to indicate that calculating the sentencing range is irrelevant to the sentencing process.\(^{181}\)

Thus, in both *Demaree* and *Hawkins I*, the Seventh Circuit distinguished the pre-*Booker*, mandatory Guidelines from the post-

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\(^{175}\) *Demaree*, 459 F.3d at 795.
\(^{176}\) *Id.* at 794–95.
\(^{177}\) *Id.* at 795.
\(^{178}\) See *id.* at 793.
\(^{179}\) See *Hawkins v. United States*, 706 F.3d 820, 824–25 (7th Cir. 2013).
\(^{180}\) *Id.* at 822-23.
\(^{181}\) See also *id.* (While the judge must calculate the sentencing range, the judge may not presume that a within-Guidelines sentence is reasonable. Rather, the judge must consider the sentencing factors set forth in 18 U.S.C. § 3553(a) to determine the appropriate prison sentence).
Booker, advisory Guidelines on the basis that, in the post-Booker era, a judge has the discretion to impose a sentence outside the applicable Guidelines range, while in the pre-Booker era he did not.\textsuperscript{182}

The Peugh Court rejected this rationale by holding that the advisory Guidelines have “binding legal effect.”\textsuperscript{183} Rather than “nudge” the sentencing court towards a sentencing range, the advisory Guidelines “steer” federal sentences towards the advised sentencing range through “a set of procedural rules and standards for appellate review that, in combination, encourage district courts to sentence within the guidelines.”\textsuperscript{184} As this distinction formed the basis of the court’s decision in Hawkins I, the Peugh decision undercut the court’s reasoning in that case.\textsuperscript{185}

In Hawkins II, Judge Posner appeared to resolve this contradiction by observing that \textit{ex post facto} challenges and motions for post-conviction relief are decided against two different standards.\textsuperscript{186} An \textit{ex post facto} violation occurs where “a change in the law creates a significant risk of a higher sentence.”\textsuperscript{187} Post-conviction relief, in contrast, requires “actual prejudice.”\textsuperscript{188} Accordingly, Judge Posner held that, while advisory Guidelines may create a significant risk of a higher sentence, it does not follow that a misapplication of the Guidelines could also result in actual prejudice.\textsuperscript{189}

Judge Posner’s concerns are not without merit. In reaching this conclusion, however, the court appears to ignore key language from Peugh that indicates advisory Guidelines errors can cause actual prejudice.\textsuperscript{190} The Peugh Court specifically observed that the

\textsuperscript{182} Id. at 824; see Demaree, 459 F.3d at 794-95.
\textsuperscript{183} Peugh v. United States, 133 S.Ct. 2072, 2086 (2013).
\textsuperscript{184} See id. at 2084, 2086.
\textsuperscript{185} Hawkins v. United States, 724 F.3d 915, 920–921 (7th Cir. 2013) (Rovner, J. dissenting).
\textsuperscript{186} Id. at 917.
\textsuperscript{187} Id. (quoting Peugh, 133 S.Ct. at 2088).
\textsuperscript{188} Id. (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)).
\textsuperscript{189} Id. at 917.
\textsuperscript{190} See id. at 921 (Rovner, J. dissenting).
Guidelines are not deprived of “force as the framework for sentencing” simply because “a district court may ultimately sentence a defendant outside the [applicable] Guidelines range.”\(^{191}\) The potential for actual prejudice is further illustrated by the fact that, since 2007, the “vast majority” of courts impose a sentence within the applicable Guidelines range or below the applicable range.\(^{192}\) Even under the advisory scheme, a misapplication of the career offender enhancement “creates a high probability of getting a much higher sentence,”\(^{193}\) which warrants post-conviction relief.

2. The *Peugh* Decision Minimizes Concerns Regarding Finality in the Criminal Process

Furthermore, in light of *Peugh*, the sentencing error in *Hawkins I* so closely resembles the sentencing error in *Narvaez* that the denial of post-conviction relief can no longer be premised on the need for finality in the criminal process. Certainly, the interest of finality cannot be elevated above all other interests, otherwise the judiciary would deny all appeals and requests for post-conviction relief.\(^{194}\) The question is where to draw the line.\(^{195}\) On one side of the line we have *Narvaez*, and on the other, *Hawkins I*. By rejecting the distinction between advisory and mandatory Guidelines, *Peugh* pushed *Hawkins I* over the line, thereby entitling Hawkins to post-conviction relief.

In *Hawkins I*, Judge Posner recognized that resentencing places less of a burden on district courts than does complete retrials, but still considered the burden substantial.\(^{196}\) In weighing the interest of finality, Judge Posner observed that finality must yield where a defendant has received a punishment that is not authorized by law,

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\(^{191}\) *Peugh* v. United States, 133 S.Ct. 2072, 2083 (2013).

\(^{192}\) *Id.* at 2084.

\(^{193}\) *Hawkins* v. United States, 706 F.3d 820, 831 (7th Cir. 2013).

\(^{194}\) *See Hawkins II*, 724 F.3d at 923 (Rovner, J. dissenting).

\(^{195}\) *Id.*

\(^{196}\) *Hawkins I*, 706 F.3d at 824 (approximately 80,000 prisoners are sentenced each year).
such as a sentence in excess of a binding sentencing range.\textsuperscript{197} To the contrary, the miscalculation of an advisory sentencing range is “less serious,” and cannot be elevated over the interest in finality.\textsuperscript{198}

Judge Posner reiterated his stance in *Hawkins II*, where he commented, “[judicial] systems that ignore the importance of finality invite unreasonable delay in the disposition of cases.”\textsuperscript{199} Thus, in Hawkins’s case, preventing judicial delay is more important than providing post-conviction relief from a sentencing error that may or may not have increased the defendant’s prison sentence.\textsuperscript{200}

Ironically, it is judicial delay that put Hawkins in this position to begin with. Hawkins was originally sentenced under the mandatory, pre-*Booker* Guidelines.\textsuperscript{201} *Booker* was decided two years later while Hawkins’s direct appeal was still pending.\textsuperscript{202} The Seventh Circuit remanded Hawkins’s case for resentencing under the post-*Booker* advisory scheme.\textsuperscript{203} On remand, the district court applied the career offender enhancement and imposed the same 151-month sentence as was entered under the pre-*Booker* scheme, which was affirmed on appeal as reasonable because it was “within a properly calculated guidelines range.”\textsuperscript{204} If Hawkins’s sentence would have become final before the Court decided *Booker*, his case would be indistinguishable from *Narvaez*, and there could be little argument that he would be entitled to relief.

According to *Narvaez*, a defendant has “an absolute right not to stand before the court as a career offender when the law does not impose that label on him.”\textsuperscript{205} Refusing to grant Hawkins post-conviction relief because he was sentenced in the post-*Booker* era

\begin{footnotes}
\item[197] \textit{Id.}
\item[198] \textit{Id.}
\item[199] *Hawkins II*, 724 F.3d at 918.
\item[200] \textit{Id.} at 919.
\item[201] United States v. Hawkins, 136 F. App’x. 922, 924 (7th Cir. 2005)
\item[202] \textit{Id.}
\item[203] \textit{Id.}
\item[204] United States v. Hawkins, 168 F. App’x. 98, 99 (7th Cir. 2006).
\item[205] *Narvaez* v. United States, 674 F.3d 621, 629 (7th Cir. 2011).
\end{footnotes}
appears to contradict the plain language of the Narvaez decision. Compounding this apparent injustice is the fact that Hawkins would have received his final sentence in the pre-Booker era but for judicial delay in deciding his direct appeal. Now that Peugh bridges the gap between Narvaez and Hawkins I, allowing Hawkins to remain in prison arguably calls into question the legitimacy of the criminal justice system. Where such a question can be raised, the court should err on the side of “fairness” and allow post-conviction relief.

CONCLUSION

Hawkins was prejudiced by the misapplication of the career offender enhancement and the Seventh Circuit should have granted him post-conviction relief. The Seventh Circuit premised its Hawkins I decision on the purported distinction between mandatory and advisory Guidelines, but the Peugh Court rejected this distinction by emphasizing the “binding legal effect” of the post-Booker, advisory Sentencing Guidelines. Accordingly, the Seventh Circuit’s decision in Narvaez and the Supreme Court’s decision in Peugh, taken together, stand for the proposition that the misapplication of a career offender enhancement is a miscarriage of justice that can be remedied on post-conviction relief, regardless of whether the defendant was sentenced under the mandatory or advisory Sentencing Guidelines. Therefore, the Seventh Circuit erroneously denied Hawkins’s motion for rehearing in Hawkins II, and, by extension, erroneously denied Hawkins’s motion for post-conviction relief in Hawkins I.

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206 Hawkins, 136 F. App’x. at 925.
DON’T BREAK THE SAFETY VALVE’S HEART: HOW THE SEVENTH CIRCUIT SUPERIMPOSES SUBSTANTIAL ASSISTANCE ON THE MANDATORY MINIMUM SAFETY VALVE’S COMPLETE TRUTHFUL DISCLOSURE REQUIREMENT

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INTRODUCTION

In January 2014, the Seventh Circuit upheld a circuit split regarding the mandatory minimum safety valve provision, which provides low-level defendants who meet five criteria the chance to receive a sentence below the mandatory minimum.¹ Specifically, the split concerns the safety valve’s truthful disclosure requirement, which requires defendants provide all the information they have to


¹ United States v. Acevedo-Fitz, 739 F.3d 967 (7th Cir. 2014); United States v. Adu, 82 F.3d 119, 121 (6th Cir. 1996).
prosecutors—also called “the heart of the provision.” The circuits disagree as to whether a defendant when they invoke the provision but then lie or omit information to prosecutors before telling the truth is eligible for the safety valve. The Seventh Circuit holds that when a defendant invokes the safety valve and lies to prosecutors, even if he eventually tells the truth, he cannot receive safety valve relief. The other circuits hold that defendants may lie at a proffer before providing complete disclosure and still retain safety valve eligibility. These circuits permit eligibility within a range: some provide safety valve relief when a defendant provides prosecutors with a single lie; at least one has gone so far as to state a defendant will not automatically lose eligibility even after committing perjury at trial.

The Second Circuit best summarizes the reasoning of the circuits that allow safety valve relief despite previous lies: the [safety valve’s] text provides no basis for distinguishing among defendants who make full disclosure immediately upon contact with the government, defendants who disclose piecemeal as the proceedings unfold, and defendants who wait for the statutory deadline.

In Part I, I discuss the mandatory minimums and safety valve. In Part II, I analyze the Circuit split about the safety valve provision.

2 There is a second circuit split regarding whether the information must be both objectively and subjectively truthful, but that is outside the scope of this article. See United States v. Thompson, 76 F.3d 166, 170-71 (7th Cir. 1996); United States v. Sherpa, 110 F.3d 656, 659-63 (9th Cir. 1996); United States v. Reynoso, 239 F.3d 143, 144, 150 (2d Cir. 2000); Sentencing, Telling the Truth and the Safety Valve: Three Circuits Differ 17 No. 10 CRIM. PRAC. REP. 4 (May 14, 2003).
3 United States v. Feliz, 453 F.3d 33, 35 (1st Cir. 2006).
4 United States v. Mejia-Pimental, 477 F.3d 1100, 1105 (9th Cir. 2007); United States v. Madrigal, 327 F.3d 738, 743-44 (8th Cir. 2003); United States v. Edwards, 65 F.3d 430, 433 (5th Cir. 1995); United States v. Schreiber, 191 F.3d 103, 108-09 (2d Cir. 1999).
5 Acevedo-Fitz, 739 F.3d at 971.
6 United States v. Padilla-Colon, 578 F.3d 23, 31-2 (1st Cir. 2009); Mejia-Pimental, 477 F.3d at 1108; Schreiber, 191 F.3d 103; Madrigal, 327 F.3d 738 at 745; United States v. Rodriguez, 676 F.3d 183, 190-91 (D.C. Cir. 2012).
7 United States v. DeLaTorre, 599 3d 1198, 1206 (10th Cir. 2010).
9 Schreiber, 191 F.3d at 106.
In Part III, I critique mandatory minimums and the way judicial interpretation, particularly by the Seventh Circuit, superimposes substantial assistance – the requirement that defendants have useful information that assists prosecutors - on the safety valve. In Part IV, I argue courts should not superimpose substantial assistance on the safety valve and instead utilize the plain language reading.

MANDATORY MINIMUMS AND THE SAFETY VALVE

Sentencing in the federal system is a complex interaction between mandatory minimums and the sentencing guidelines. 10 For some crimes, including drug crimes, judges are statutorily required to impose a mandatory minimum sentence. 11 For drug crimes, mandatory minimum sentences are based on the type and amount of drug a defendant possessed. 12 Before the Mandatory Minimum Sentencing Reform Act, adopted in 1994, defendants could only receive a lesser sentence if they substantially assisted prosecutors. 13 Applying a “grim calculus [in which] drug kingpins may suffer little while subordinates serve long sentences,” 14 high-level criminal defendants could

11 United States v. Quirante, 486 F.3d 1273, 1275 (11th Cir. 2007); Philip Oliss, Note, Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines, 63 U. CIN. L. REV. 1851, 1851 (Summer 1995).
14 United States v. Milo, 506 F.3d 71, 77 (1st Cir. 2007).
substantially assist prosecutors to receive a lesser sentence because they had more knowledge of the criminal extent of their activities, whereas low-level criminal defendants were ineligible for shorter or less severe sentences because they had no such information and could not substantially assist prosecutors with their investigations.

The result further goes against the purpose stated in the sentencing section of the United States Code, “[t]he court shall impose a sentence sufficient, but not greater than necessary.” The Code states “[t]he court, in determining the particular sentence to be imposed, shall consider . . . the nature and circumstances of the offense and the history and characteristics of the defendant;” as well as “the need for the sentence imposed — . . . to provide just punishment,” “afford adequate deterrence,” and “protect the public from further crimes of the defendant.” Thus judges, scholars, the American Bar Association, the Judicial Conference, and the Sentencing Commission called for change because mandatory minimums “undermine federal sentencing reform goals of uniformity and proportionality.” Indeed “disparity is inevitable” under mandatory minimums. A report summarizes Congress’s concerns: “for the very offenders who most warrant proportionally lower sentences – offenders that by guideline

15 18 U.S.C. § 3553(a) (West).
16 Id.
definitions are the least culpable—mandatory minimums generally operate to block the sentence from reflecting mitigating factors.”19

These concerns about deleterious and harsh sentences led Congress to pass a provision, which gives low-level, nonviolent drug offenders the chance to receive a sentence below the mandatory minimum.20 This exemption, referred to as the safety valve, applies to federal drug offenses including possession, conspiracy and importation.21 To be eligible for the safety valve, defendants must prove, by a preponderance of the evidence, that they meet five enumerated criteria:

(1) the defendant does not have more than 1 criminal history point . . . ;
(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon . . . ;
(3) the offense did not result in death or serious bodily injury;
(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense . . . and was not engaged in a continuing criminal enterprise . . . ; and
(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but

the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.\textsuperscript{22}

Although meeting all five criteria may be difficult, the safety valve can “provide[] an important escape from mandatory minimum sentencing.”\textsuperscript{23} If a defendant meets the requirements, he is eligible for a reduced sentence, so a judge waives the mandatory minimum and imposes a “strictly regulated reduction[]” under the Federal Sentencing Guidelines.\textsuperscript{24} While theoretically the safety valve provides an escape hatch for lower level offenders, from its enactment there has been much debate over whether it in fact “protect[s] low-level drug offenders from inflated sentences.”\textsuperscript{25}

The Federal Sentencing Guidelines assign offenses “an initial base sentencing level” based on the amount of drugs the defendant possessed.\textsuperscript{26} The offense constitutes a certain number of points, and the judge adds points for aggravating factors and subtracts points for mitigating factors.\textsuperscript{27} Finally, the judge adjusts the sentence within the

\textsuperscript{24} United States v. Adu, 82 F.3d 119, 121 (6th Cir. 1996).
mandatory range based on the offender’s criminal history. The Sentencing Guidelines discount potentially mitigating – and generally relevant – issues such as the offender’s “family and community ties, education, and employment,” and only permit judges to consider factors such as the defendant’s cooperation for possible sentence reduction. In contrast, the safety valve permits judges to consider further mitigating factors, and can have a major impact on sentences. Under the safety valve, the government provides input as to whether the defendant met his burden, but judges may independently decide whether the defendant shared all the information he had available. If the judge determines the defendant met all five requirements – even if the information they provided was not useful – the judge must impose the safety valve.

Frequently, there is no dispute about the first four requirements: 1) criminal history; 2) use of violence; 3) “death or serious bodily injury;” and 4) offender level. However the fifth element requires a defendant “[n]ot later than the time of the sentencing hearing . . . truthfully provide to the Government all information and evidence the defendant has concerning the offense or offenses.” This element is subject to several interpretations, and is

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30 U.S. SENTENCING GUIDELINES MANUAL § 3A-D (2002); Van Etten, supra note 28, at 1272.

31 H.R. REP. No. 103-460, at 5 (1994); Bowman, supra note 24, at 120; Albonetti, supra note 10, at 407.

32 United States v. Oye, 397 F. App’x 697, 699 (2d Cir. 2010); United States v. Valenzuela-Sanchez, 245 F. App’x 678, 680 (9th Cir. 2007); Oliss, supra note 11, at 1885.

33 United States v. Quirante, 486 F.3d 1273, 1275 (11th Cir. 2007); United States v. Alvarado-Rivera, 412 F.3d 942, 949 (8th Cir. 2005).


35 Id.; United States v. Steward, 93 F.3d 189 (5th Cir. 1996).
thus the most heavily litigated.\textsuperscript{36} Courts interpret the fifth element as requiring a defendant to provide information about other crimes that are “part of the same course of conduct or of a common scheme or plan,” which includes “uncharged related conduct.”\textsuperscript{37} Courts sometimes refer to this as the “‘tell all you can tell’ requirement.”\textsuperscript{38} The truthfulness requirement, particularly regarding prior inconsistent statements, is the subject of an ongoing circuit split.\textsuperscript{39}

\textbf{THE CIRCUIT SPLIT REGARDING THE SAFETY VALVE}

In the Seventh Circuit, defendants are not eligible for the safety valve if they lie to prosecutors after invoking the safety valve – even if they come clean before their sentencing date.\textsuperscript{40} Several other circuits hold defendants may meet the complete and truthful disclosure requirement even if they lie to prosecutors so long as they ultimately tell the truth, although courts may properly consider any prior lies or inconsistent statements when determining whether the eventual disclosure was complete and truthful.\textsuperscript{41} The best way for a defendant to receive safety valve relief is to provide a proffer to the government, either through a debriefing or in writing, and be prepared to prove his

\begin{footnotes}
\item[36] United States v. Brownlee, 204 F.3d 1302, 1305 (11th Cir. 2000); United States v. Marin, 144 F.3d 1085, 1086 (7th Cir. 1998); United States v. Shrestha, 86 F.3d 935, 940 (9th Cir. 1996); United States v. Ceballos, 605 F.3d 468, 472 (8th Cir. 2010); United States v. Altamirano-Quintero, 511 F.3d 1087, 1096 (10th Cir. 2007); United States v. Salgado, 250 F.3d 438, 459 (6th Cir. 2001); United States v. Cruz, 156 F.3d 366, 372 (2d Cir. 1998); United States v. Sabir, 117 F.3d 750, 753 (3d Cir. 1997).
\item[37] United States v. Miller, 151 F.3d 957, 958 (9th Cir. 1998); \textit{Ceballos}, 605 F.3d at 472; \textit{Altamirano-Quintero}, 511 F.3d at 1096; United States v. Montes, 381 F.3d 631, 635-36 (7th Cir. 2004); \textit{Salgado}, 250 F.3d at 459; \textit{Cruz}, 156 F.3d at 372.
\item[38] \textit{Shrestha}, 86 F.3d at 939 (quoting United States v. Acosta-Olivas, 71 F.3d 375, 378-79 (10th Cir. 1995)).
\item[39] United States v. Ramunno, 133 F.3d 476 (7th Cir. 1998); \textit{Brownlee}, 204 F.3d at 1302.
\item[40] United States v. Acevedo-Fitz, 739 F.3d 967, 969 (7th Cir. 2014).
\item[41] United States v. Padilla-Colon, 578 F.3d 23, 31-2 (1st Cir. 2009); United States v. Mejia-Pimental, 477 F.3d 1100, 1108 (9th Cir. 2007); United States v. Jeffers, 329 F.3d 94, 99-100 (2d Cir. 2003).
\end{footnotes}
statement is complete and truthful. These safety valve debriefings occur under a variety of circumstances, “from an intense grilling to a perfunctory conversation undertaken primarily to satisfy the formal requirements of the safety valve.” The Circuits also disagree as to when the complete truthful disclosure must occur. Many courts require defendants provide disclosure before their sentencing hearing; others do not require complete disclosure until the actual sentencing, or even the second sentencing hearing. This distinction plays no role in the Seventh Circuit because defendants lose any hope of safety valve relief if they are not completely forthcoming at their first debriefing. Yet in other circuits, the distinction can make a large difference.

A. The Seventh Circuit's View: Prior Inconsistent Statements Bar a Defendant from Safety Valve Eligibility

The Seventh Circuit was the first to interpret truthful disclosure as requiring a defendant make a “good faith effort to cooperate” with authorities from the moment he invokes the safety valve. Some policy reasons behind this good faith interpretation include efficiency and the benefits of an easy-to-apply bright-line rule, as one omission or lie automatically forecloses safety valve relief. Another argument underlying the good faith interpretation is that the government should not have to conduct multiple investigations, nor repeatedly share its

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42 United States v. Schreiber, 191 F.3d 103, 108 (2d Cir. 1999); United States v. Montanez, 82 F.3d 520, 523 (1st Cir. 1996).
43 Frank O. Bowman, III & Michael Heise, Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences, 86 IOWA L. REV. 1043, 1073 (2001); e.g. Flanagan, 80 F.3d at 146; United States v. Ramirez, 94 F.3d 1095, 1101 (7th Cir. 1996).
44 Brownlee, 204 F.3d at 1305; United States v. Shrestha, 86 F.3d 935, 940 (9th Cir. 1996); Mejia-Pimental, 477 F.3d at 1105; United States v. Madrigal, 327 F.3d 738, 743-44 (8th Cir. 2003); United States v. Edwards, 65 F.3d 430, 433 (5th Cir. 1995); Schreiber, 191 F.3d 103 at 108-09.
45 United States v. Marin, 144 F.3d 1085, 1095 (7th Cir. 1998).
46 United States v. Arrington, 73 F.3d 144, 148 (7th Cir. 1996).
information with a defendant simply to get the complete truth.\textsuperscript{48} Further, the government has the right to expect defendants tell the truth and not try to game the system.\textsuperscript{49} Consistently, the Seventh Circuit holds “lying is inconsistent with a good-faith effort to cooperate, and thus a sentencing judge may refuse the safety valve to a defendant who was caught lying during safety[|]valve debriefings.”\textsuperscript{50} Thus, it stands to reason a judge may refuse safety valve relief for a defendant who later tells the complete truth because the safety valve was intended to protect only those defendants who fully disclose all information they possess during their first debriefing.\textsuperscript{51} The Seventh Circuit expressed concern about giving a defendant multiple opportunities “to change his version of events and attempt to make a more complete disclosure until the version comports with the government’s evidence.”\textsuperscript{52} For similar reasons, the court further held that a letter purporting to be a complete truthful statement that denies culpability where the evidence proves otherwise does not make a defendant eligible for the safety valve.\textsuperscript{53} It reasoned “[c]ontin[uing] to cling to a false version of events and dispute [one’s] culpability . . . is a sufficient basis for refusing to invoke the safety valve.”\textsuperscript{54} In an early case, \textit{United States v. Marin}, the Seventh Circuit emphasized a “defendant is not entitled to deliberately mislead the government and wait until the middle of the sentencing hearing to . . . provide a truthful disclosure.”\textsuperscript{55}

\textsuperscript{48} \textit{Marin}, 144 F.3d at 1093-94.
\textsuperscript{49} \textit{Marin}, at 1093-94; Shebesta, supra note 22, at 548.
\textsuperscript{50} United States v. Acevedo-Fitz, 739 F.3d 967, 970 (7th Cir. 2014); \textit{Montes}, 381 F.3d at 637; \textit{Ramunno}, 133 F.3d at 482.
\textsuperscript{51} \textit{Marin}, 144 F.3d at 1086, 1092; United States v. Nunez, 627 F.3d 274, 282-833 (7th Cir. 2010).
\textsuperscript{52} \textit{Marin}, 144 F.3d at 1091.
\textsuperscript{53} United States v. Corson, 579 F.3d 804, 814 (7th Cir. 2009).
\textsuperscript{54} \textit{Id}.
\textsuperscript{55} \textit{Marin}, 144 F.3d at 1091.
1. The Seventh Circuit Reaffirmed its Safety Valve Approach in *United States v. Acevedo-Fitz*

In January 2014, the Seventh Circuit reaffirmed its approach to the safety valve. In *United States v. Acevedo-Fitz*, it explicitly rejected the “plain language” interpretation used by other circuits. The opinion Judge Flaum authored stated:

None of these decisions persuades us to retreat from our common-sense understanding that a defendant who intentionally lies while seeking to benefit from the safety valve is not acting in good faith and is not within the class of offenders whom Congress intended to protect from potentially harsh statutory minimum penalties. The point of § 3553(f)(5) is that a defendant who *waits until the last minute* to seek the safety valve will not be penalized for his tardiness, but tardiness is very different from trying repeatedly to deceive the government until time has run out.

In *Acevedo-Fitz*, the Seventh Circuit precluded safety valve eligibility for a defendant who initially lied before providing the truth. Prosecutors charged Acevedo-Fitz with conspiracy, heroin distribution, and three counts of using a communication facility in committing a felony drug crime. Acevedo-Fitz pleaded guilty to the conspiracy charges, and admitted to selling heroin on several occasions. The government dropped the other charges. Acevedo-Fitz lied during two safety valve briefings, both before and after his guilty plea; he only admitted the truth after the government confronted his lies using recorded conversations. Acevedo-Fitz continued to deny remembering the events, but told investigators he might

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56 United States v. Acevedo-Fitz, 739 F.3d 967 (7th Cir. 2014).
57 Id. at 971.
58 Id.
59 Id. at 969.
60 Id.
61 Id. at 968.
62 Id.
63 Id. at 969.
remember more if he could hear the recordings. The government argued Acevedo-Fitz was ineligible for the safety valve because he failed to provide “all [the] information” he had. Acevedo-Fitz contended the safety valve applied because before his sentencing hearing he sent the government a letter where he admitted to all heroin sales, identified his customers and supplier, and described the location of each transaction. The government countered Acevedo-Fitz lied, did not cooperate during his safety valve debriefings, denied documented offenses, and his letter contained insufficient detail. Acevedo-Fitz argued he provided some truthful statements during the debriefings and the missing details were unimportant. Nonetheless, the district court found his “debriefings ‘absolutely would not come anywhere close to being in the ball park of qualifying’ him for the safety valve, particularly since he denied events which were demonstrably true.” The district court reasoned, while the letter technically met statutory requirements because Acevedo-Fitz tendered it prior to sentencing, it was “too little too late, with emphasis on the too little,” noting that the defendant only provided the “bare minimum” of information. Acevedo-Fitz’s sentencing range, had he been eligible for the safety valve, would have been between 87 and 108 months: the court sentenced him to 120.

The Seventh Circuit affirmed the sentence and reasoned “Acevedo-Fitz apparently contends, he was free to lie to the government so long as, if found out, he retracted his lies and made a full, truthful disclosure before the sentencing hearing.” The Seventh Circuit held that because Acevedo-Fitz’s debriefing statements were “demonstrably false in light of the recorded telephone conversations,” and contradicted his guilty plea as well as statements he made during

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64 Id.
65 Id.
66 Id.
67 Id.
68 Id.
69 Id. at 970.
70 Id. at 969.
71 Id.
72 Id. at 970.
his plea colloquy, he intentionally deceived investigators and thus “forfeited his eligibility for the safety valve by lying, i.e., trying to secure a sentencing benefit through bad faith.” The opinion highlighted that even in circuits that do not consider prior lies bad faith, courts may consider those lies in determining if the defendant eventually told the truth. The Seventh Circuit further reasoned “[t]he point of [the safety valve] is that a defendant who waits until the last minute to seek the safety valve will not be penalized for his tardiness, but tardiness is very different from trying repeatedly to deceive the government until time has run out.” The Seventh Circuit held that due to Acevedo-Fitz’s “lack of cooperation” and “resistance to admitting irrefutable offense conduct” he could not prove his letter was complete and truthful by “a bare assertion.”

**B. Other Circuits Hold that a Defendant May be Eligible for the Safety Valve Even After Lying to Prosecutors**

The majority of circuits utilize a plain-language reading of the safety valve, granting relief even to defendants who initially lied to prosecutors, so long as they provided complete truthful disclosure. However, the circuits disagree as to the timing of the truthful disclosure. Some circuits hold complete disclosure prior to the sentencing hearing – even in the judge’s chambers on the day of the sentencing hearing – qualifies a defendant for the safety valve. Other courts grant relief to defendants who repeatedly withheld information,

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73 Id. at 971.
74 Id. at 970.
75 Id. at 971.
76 Id. at 972.
77 United States v. Schreiber, 191 F.3d 103, 108-09 (2d Cir. 1999); United States v. DeLaTorre, 599 3d 1198, 1206 (10th Cir. 2010); United States v. Brownlee, 204 F.3d 1302, 1305 (11th Cir. 2000); United States v. Tournier, 171 F.3d 645, 647 (8th Cir. 1999).
78 DeLaTorre, 599 3d at 1206; United States v. Jeffers, 329 F.3d 94, 98-100 (2d Cir. 2003); Brownlee, 204 F.3d at 1305; United States v. Gaviria, 116 F.3d 1498, 1521-22 (D.C. Cir. 1997); Schreiber, 191 F.3d 103 at 107; Deltoro-Aguilera v. United States, 625 F.3d 434, 437 (8th Cir. 2010).
or committed perjury at trial, so long as, before their sentencing hearing, the defendants provide complete disclosure.\(^79\)

1. In Many Circuits, While Prior Lies and Inconsistent Statements do Not Preclude Safety Valve Relief, Those Statements May be Considered as Evidence Regarding Truthful Disclosure

Several Circuits hold that, while lies or omissions do not automatically foreclose safety valve relief, a defendant’s lies are relevant to determining if the final statement is complete and truthful.\(^80\) Because lies are relevant, the court may “consider any lies the defendant may have told when evaluating the defendant’s truthfulness.”\(^81\) The Second Circuit pointed out that a defendant who lies or changes his story “risks irrevocably undermining his or her credibility” leading to doubts his disclosure is truthful and complete.\(^82\) Defendants risk exposure of their lies at the sentencing hearing, which would preclude safety valve relief.\(^83\) It further reasoned that the government could refuse to meet with a defendant caught in a lie, because lying damages the defendant’s credibility.\(^84\) The First Circuit warns defendants that avoiding a debriefing is dangerous because the defendant must prove he provided truthful disclosure, and it is unlikely a defendant is unable to provide information unknown to the government.\(^85\) The First Circuit has implied that, following an inadequate attempt at truthful disclosure a defendant might meet the complete and truthful disclosure requirement by requesting an additional chance.\(^86\) Even in circuits where prior lies and inconsistent statements are considered, a defendant who told several different stories may remain eligible, as sentencing courts may “credit the last

\(^79\) Jeffers, 329 F.3d at 98-100.
\(^80\) Brownlee, 204 F.3d at 1305; Schreiber, 191 F.3d at 107; Deltoro–Aguilera, 625 F.3d at 437; United States v. Aidoo, 670 F.3d 600, 610 (4th Cir. 2012) cert. denied, 133 S. Ct. 627 (2012).
\(^81\) Brownlee, 204 F.3d at 1305; Aidoo, 670 F.3d at 610.
\(^82\) Schreiber, 191 F.3d 103 at 107.
\(^83\) Id.
\(^84\) Id. at 108.
\(^85\) United States v. Montanez, 82 F.3d 520, 523 (1st Cir. 1996).
\(^86\) Id. at 524.
version of events as truthful and grant safety valve relief on such basis.\textsuperscript{87}

2. In Some Circuits Even Repeated Lies Do Not Preclude Safety Valve Relief, so long as a Defendant Provides Complete Truthful Disclosure by His Sentencing

Some circuits hold even repeated lies do not preclude safety valve relief.\textsuperscript{88} In these circuits, “the safety valve is available so long as the government receives the information no later than the time of the sentencing hearing, even if a defendant’s last-minute move to cooperate is a complete about-face.”\textsuperscript{89} The Eighth Circuit holds early, consistent cooperation is “not a precondition for safety valve relief.”\textsuperscript{90} In \textit{United States v. Deltoro–Aguilera}, the Eighth Circuit upheld safety valve relief for a defendant who lied in three interviews, but provided complete disclosure at a fourth interview before she was sentenced.\textsuperscript{91} Similarly, in \textit{United States v. Tournier}, the Eighth Circuit specifically rejected the contention safety valve relief “must be denied to those whose tardy or grudging cooperation burdens the government with a need for additional investigation.”\textsuperscript{92} The Eighth Circuit further found accepting responsibility and substantially assisting the government are not “precondition[s] to safety valve relief, which is even available to defendants who put the government to the expense and burden of a trial.”\textsuperscript{93}

Similarly, in \textit{United States v. Mejia-Pimental}, the Ninth Circuit overturned a safety valve denial because the district court “construed good faith too broadly.”\textsuperscript{94} Mejia-Pimental had three sentencing hearings; he eventually offered to share what he knew, but the government refused because he lied and his information would be

\textsuperscript{87} United States v. Gomez-Perez, 452 F.3d 739, 741-42 (8th Cir. 2006).
\textsuperscript{88} Deltoro–Aguilera v. United States, 625 F.3d 434, 437 (8th Cir. 2010); United States v. Mejia-Pimental, 477 F.3d 1100, 1101-02 (9th Cir. 2007).
\textsuperscript{89} \textit{Deltoro–Aguilera}, 625 F.3d at 437.
\textsuperscript{90} United States v. Tournier, 171 F.3d 645, 647 (8th Cir. 1999).
\textsuperscript{91} \textit{Deltoro–Aguilera}, 625 F.3d at 437.
\textsuperscript{92} \textit{Tournier}, 171 F.3d at 647.
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} United States v. Mejia-Pimental, 477 F.3d 1100, 1101-02 (9th Cir. 2007).
useless. Mejia-Pimental wrote a letter providing everything he knew, including the involvement of others. The Ninth Circuit reasoned “good faith” requires nothing more than truthful complete disclosure by the sentencing, because “[a]nything else would unjustifiably impose on a defendant an additional burden above and beyond the plain meaning of the [safety valve’s] text.” The court further reasoned “the good faith inquiry focuses on the defendant’s cooperation in fully disclosing his knowledge of the charged offense conduct, not on identifying a defendant’s pre-sentencing delays in providing this information.” The court concluded a defendant satisfies the truthfulness requirement “regardless of his timing or motivations.” In so deciding, the Ninth Circuit expressly rejected the idea that good faith requires a defendant provide the disclosure without delay or “attempts to impede law enforcement investigation” because the Sentencing Guidelines already require judges impose lengthier sentences for obstruction.

3. Some Circuits Hold that Even Defendants who Confess, then Recant, or Commit Perjury at Trial, then Provide Complete Truthful Disclosure may still be Eligible for Safety Valve Relief

In United States v. Schreiber, the Second Circuit held, assuming “complete and truthful” disclosure, the defendant complied with the safety valve by submitting a letter and affidavit prior to his sentencing. The court reasoned:

[t]he plain words of the statute provide only one deadline for compliance . . . Nothing in the statute suggests that a defendant is automatically disqualified if he or she previously lied or withheld information. Indeed, the text provides no basis for distinguishing

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95 Id. at 1103.
96 Id.
97 Id. at 1104-05.
98 Id. at 1106.
99 Id.
100 Id. at 1107 (citing U.S.S.G. §§ 3C1.1, 3E1.1, 5K1.1.).
among defendants who make full disclosure immediately upon contact with the government, defendants who disclose piecemeal as the proceedings unfold, and defendants who wait for the statutory deadline by disclosing “not later than” sentencing.\textsuperscript{102} The Second Circuit held that withholding information — or indeed even committing perjury at trial — does not automatically make a defendant ineligible for the safety valve as long as, by the time of his sentencing, he truthfully provides all the information he has.\textsuperscript{103} Where a defendant meets all five safety valve requirements, the court cannot deny safety valve relief.\textsuperscript{104} In \textit{Schreiber}, the Second Circuit expressly disagreed with the Seventh Circuit’s reasoning in \textit{Marin}: that the government’s interest in the truth during interviews “provides any basis for placing additional requirements on defendants who seek to comply with the safety valve.”\textsuperscript{105} Instead, the Second Circuit held, “the government’s right to a [safety valve] disclosure does not accrue until [sentencing],” emphasizing the government can penalize “defendants who lie or withhold information during proffer sessions” under other statutes.\textsuperscript{106}

Other courts provide safety valve relief even to defendants who confess then recant because the “recantation does not diminish the information” provided by the defendant.\textsuperscript{107} The Ninth Circuit reasoned “[t]he safety valve statute is not concerned with sparing the government the trouble of preparing for and proceeding with trial,” or “providing the government a means to reward a defendant for supplying useful information.”\textsuperscript{108} Rather, “the safety valve was designed to allow the sentencing court to disregard the statutory minimum in sentencing first-time nonviolent drug offenders who

\begin{footnotes}
\footnotetext[102]{\textit{Id.} at 106.}
\footnotetext[103]{United States v. Jeffers, 329 F.3d 94, 98-100 (2d Cir. 2003).}
\footnotetext[104]{\textit{Id.} at 100.}
\footnotetext[105]{\textit{Schreiber}, 191 F.3d at 108 (citing United States v. Marin, 144 F.3d 1085, 1093 (7th Cir. 1998)).}
\footnotetext[106]{\textit{Id.}; see U.S.S.G. § 3C1.1 (obstruction of justice).}
\footnotetext[107]{United States v. Shrestha, 86 F.3d 935, 940 (9th Cir. 1996).}
\footnotetext[108]{\textit{Id.}}
\end{footnotes}
played a minor role in the offense.”

Following similar reasoning, the D.C. Circuit remanded a case for resentencing consistent with the safety valve. The defendant in *United States v. Rodriguez* originally lied about a cocaine transaction in part because he feared for his family. The D.C. Circuit held, because Rodriguez eventually “came clean about all aspects of the transaction,” he met all five elements.

The Tenth Circuit holds a defendant who provides complete truthful disclosure in the Judge’s chambers just before his sentencing hearing is not barred from safety valve relief merely because of his “last ditch effort” before sentencing. The Eighth Circuit goes one step further, reasoning that, while typically full and complete disclosure should happen before sentencing “to prevent the defendant from misleading the government or manipulating the sentence,” complete disclosure sufficient to meet the fifth element for safety valve relief may be possible even after the sentencing hearing begins. In *United States v. Madrigal*, the Eighth Circuit clarified a statement it made in an earlier decision: “a defendant who cynically waits to see what the government can prove at sentencing before telling all is unlikely to warrant safety valve relief.” In *Madrigal*, it highlighted “‘unlikely’ would seem not to preclude all possibilities of receiving the safety valve after making a proffer after the start of a sentencing hearing.” The majority of circuits hold the plain language of the safety valve requires complete truthful disclosure before sentencing, but previous lies or omissions do not automatically preclude safety valve relief.

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109 *Id.* (quoting *United States v. Arrington*, 73 F.3d 144, 147 (7th Cir. 1996)).
111 *Id.* at 188-89.
112 *Id.* at 190-91.
113 *United States v. Gama-Bastidas*, 142 F.3d 1233, 1242-43 (10th Cir. 1998).
114 *United States v. Madrigal*, 327 F.3d 738, 745 (8th Cir. 2003).
115 *Id.* at 746 (quoting *United States v. Morones*, 181 F.3d 888, 891 n.2 (8th Cir. 1999)).
116 *Id.*
III. A CRITIQUE OF MANDATORY MINIMUMS: HOW THE SAFETY VALVE FAILS TO CORRECT UNJUST MANDATORY MINIMUM SENTENCES THE WAY CONGRESS INTENDED

Congress blamed “uncertain and inadequate penalties” for the growing drug problem, so it enacted mandatory minimums.\(^{117}\) However, mandatory minimums are untenable, and, as Chief Justice Rehnquist pointed out, lead to several unintended and undesirable consequences.\(^{118}\) First, mandatory minimums “upset federalism” because they turn many state drug offenses into federal crimes.\(^{119}\) Second, both mandatory minimums and the Sentencing Guidelines are unfair and fail to work as Congress intended.\(^{120}\) Third, the current sentencing system “expressly forbids judges from considering personal characteristics like the defendant’s age and family responsibilities.”\(^{121}\) However, “[j]ustice in sentencing requires an individualized assessment of the offender and the offense . . . [which] cannot be made by a distant bureaucracy pursuant to abstract rules that disregard important context.”\(^{122}\)

Mandatory minimums “squander scarce resources” because defendants receive sentences far greater than are reasonable.\(^{123}\) This is due, in part, because mandatory minimums “typically identify just one aggravating factor, and then pin the prescribed enhanced sentence


\(^{119}\) *Hearing on Mandatory Minimum Sentences*, (Stewart Statement), supra note 18, at 5.


\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) *Hearing on Mandatory Minimum Sentences*, (Carnes Testimony), supra note 18, at 2.
totally on that one factor” disregarding all mitigating factors. Mandatory sentences also are frequently unpredictable, and their “inflexibility and deliberate inattention to context” ultimately produces unfair and unjust results – results the Seventh Circuit alluded to in Acevedo-Fitz. Because mandatory minimums are unjust, they corrode “our judicial system [which] must enjoy the respect of the public. The robotic imposition of sentences that are viewed as unfair or irrational greatly undermines that respect.” Moreover, “mandatory minimums are automatic, indiscriminate, and blunt provisions that deny trial courts the ability to calibrate punishment to correspond to a defendant’s actual criminal conduct and circumstances.” The safety valve fails to address these issues because the vast majority of defendants are not eligible; the safety valve fails to remedy unjust sentences under the mandatory minimum, and the safety valve fails to solve the problems inherent with substantial assistance.

A. The Vast Majority of Defendants Are Not Eligible for the Safety Valve

The safety valve provides relief for defendants convicted of five specific offenses involving certain controlled substances: 1) drug trafficking; 2) possession; 3) smuggling; 4) attempt or conspiracy to violate controlled substance provisions; or 5) attempt or conspiracy to violate the controlled substance import/export provisions. To be eligible for the safety valve, defendants must provide complete truthful

124 Id. at 5-6.
125 Schulhofer, supra note 118, at 208, 211; United States v. Acevedo-Fitz, 739 F.3d 967, 971 (7th Cir. 2014); Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, supra note 21 at 13-15.
128 18 U.S.C. § 3553(f); United States v. Brehm, 442 F.3d 1291, 1299 (11th Cir. 2006).
disclosure to prosecutors. But the required form of this disclosure is unclear. Most frequently, prosecutors interview the defendant, or the defendant provides a proffer. However, simply because a defendant proffers a statement and invites prosecutors to request additional information does not guarantee the defendant will qualify. While judges independently determine if a defendant provided complete truthful disclosure, judges must rely on the prosecutor’s input about that disclosure because the defendant discloses his information to the prosecutor, and the prosecutor has all the information regarding the transaction. This means prosecutors’ “near-total control” over safety valve eligibility makes it “virtually impossible for an offender to obtain safety valve relief without the prosecutor’s support, because he would have to convince the judge – over the prosecutor’s opposition – that he has been truthful and complete.” Because prosecutors frequently want as much information as possible, they likely will ignore the fifth element’s express statement that the information need not be useful or novel. Some prosecutors even charge defendants with crimes not covered by

129 United States v. Jimenez-Martinez, 83 F.3d 488, 495-96 (1st Cir. 1996); United States v. Contreras, 136 F.3d 1245, 1246 (9th Cir. 1998); United States v. Cervantes, 519 F.3d 1254, 1257 (10th Cir. 2008).

130 United States v. De La Torre, 599 F.3d 1198, 1206-07 (10th Cir. 2010).

131 United States v. Mejia-Pimental, 477 F.3d 1100, 1105 (9th Cir. 2007); United States v. Madrigal, 327 F.3d 738, 743-44 (8th Cir. 2003); United States v. Edwards, 65 F.3d 430, 433 (5th Cir. 1995); United States v. Schreiber, 191 F.3d 103, 108-09 (2d Cir. 1999); United States v. Marin, 144 F.3d 1085, 1093 (7th Cir. 1998).

132 U.S. v. Milkintas, 470 F.3d 1339, 1345 (11th Cir. 2006); United States v. O’Dell, 247 F.3d 655, 675 (6th Cir. 2001); United States v. Ortiz, 136 F.3d 882, 884 (2d Cir 1997); United States v. Flanagan, 80 F.3d 143, 146-47 (5th Cir. 1996); United States v. Ivester, 75 F.3d 182, 185-86 (4th Cir. 1996).

133 United States v. Stewart, 391 F. App’x 490, 494 (6th Cir. 2010); United States v. Espinosa, 172 F.3d 795, 796 (11th Cir. 1999).

134 United States v. Alvarado-Rivera, 412 F.3d 942, 949-50 (8th Cir. 2005) (Bright, J., Dissenting); Bronn, supra note 26, at 498.


the safety valve to ensure the defendant is ineligible.\textsuperscript{137} If a defendant is ineligible for the safety valve he can only receive a sentence less than the mandatory minimum by providing substantial assistance.\textsuperscript{138} These issues mean the safety valve fails to address “federal prosecutors’ charging discretion.”\textsuperscript{139} This may explain why judges, activists and legal scholars want judges to determine eligibility.\textsuperscript{140}

Most drug offenders receive mandatory minimum sentences largely because the safety valve’s scope is limited.\textsuperscript{141} Many judges and scholars feel Congress should expand the safety valve, particularly since more than two-hundred thousand people are serving mandatory minimum “one-size-fits-all” sentences.\textsuperscript{142} Twenty-eight former United States Attorneys turned judges feel the continuing sentencing disparity even with the safety valve “cannot be justified and results in sentences that are unjust and do not serve society’s interest.”\textsuperscript{143} Former prosecutors, judges and legal commentators join groups like the American Bar Association and the non-partisan Federal Judicial Center in calling to repeal mandatory minimums, or at the very least to limit their use to “the most extraordinary circumstances.”\textsuperscript{144} One judge

\textsuperscript{137} Erik Luna & Paul G. Cassell, \textit{Mandatory Minimalism}, 32 Cardozo L. Rev. 1, 54 (September 2010).
\textsuperscript{138} 18 U.S.C. § § 3553(f), (e); Siegler & Zunkel, \textit{supra} note 12, at 2.
\textsuperscript{139} Oliss, \textit{supra} note 11, at 1890; see United States v. Vasquez, 09-CR-259 (JG), 2010 WL 1257359 (E.D.N.Y. Mar. 30, 2010).
\textsuperscript{140} \textit{Hearing on Mandatory Minimum Sentences, (Carnes Testimony), supra} note 16, at 8.
\textsuperscript{141} Siegler & Zunkel, \textit{supra} note 12, at 12; Luna & Cassell, \textit{supra} note 137, at 54.
\textsuperscript{142} \textit{Hearing on Mandatory Minimum Sentences, (Stewart Statement) supra} note 18, at 6; Doyle, \textit{supra} note 21, at 7.
\textsuperscript{144} \textit{Hearing on Mandatory Minimum Sentences, (Stewart Statement), supra} note 18, at 5; \textit{Hearing on Mandatory Minimum Sentences, (Carnes Testimony), supra} note 18, at 22.
summarized the continuing sentencing issues, stating “any reasonable person who exposes himself or herself to this system of sentencing, whether judge or politician, would come to the conclusion that such sentencing must be abandoned in favor of a system based on principles of fairness and proportionality.”

B. The Safety Valve Fails to Fix Sentencing Disparities Inherent in Mandatory Minimums and Further Fails to Fix the Issues Caused by Substantial Assistance

The safety valve fails to address the mandatory minimum’s sentencing disparities, including “inverted sentences,” which occur when a low-level defendant receives a similar sentence to a higher-level offender when that higher-level offender has more information to provide; “misplaced equality,” which happens when statutes result in sentences that are neither proportional nor commensurable under the circumstances; and “cliffs,” which happen when similarly situated defendants receive vastly different sentences. The safety valve also fails to fix the issues inherent with substantial assistance, often called the cooperation paradox.

Inverted sentences occur because a defendant who committed a more serious crime can disclose more information. The Seventh Circuit addressed this issue in United States v. Brigham, stating “[t]he more serious the defendant’s crimes, the lower the sentence—because


146 United States v. Brigham, 977 F.2d 317, 318 (7th Cir. 1992); Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, supra note 21; Oliss, supra note 11, at 1888; Albonetti, supra note 10, at 408.

147 Brigham, 977 F.2d at 317-18 (low-level driver sentenced to 120 months, kingpin to 84. “Mandatory minimum penalties, combined with a power to grant exemptions, create a prospect of inverted sentences”); United States v. Evans, 970 F.2d 663, 676-78 & n.19 (10th Cir. 1992) (low level defendants sentenced between 210 months and life, organizers sentenced to probation or supervised release).

148 Id. at 318; Doyle, supra note 21, at 3-4.
the greater his wrongs, the more information and assistance he has to offer to a prosecutor.” Further, mandatory minimums “distort traditional roles by transferring judicial discretion to legislatures as well as prosecutors.” When judges lack sentencing discretion and prosecutors have “undue and unreviewable influence,” sentences are disproportionate. Indeed, judges must often impose mandatory minimums that “seem[ ] greatly disproportionate to the crime and terribly cruel to the human being.” As one judge summarized: “The absence of fit between the crude method of punishment and the particular set of circumstances before me was conspicuous; when I imposed sentence . . . everyone present, including the prosecutor, could feel the injustice.”

Mandatory minimums intentionally create disproportionate sentences because they “resemble a search for severity,” focusing on a single factor so “a severe penalty that might be appropriate for the most egregious of offenders will likewise be required for the least culpable violator.” This means many offenders receive excessive sentences. Such misplaced equality is “inconsistent with the sentencing reform objectives of proportionality and uniformity.” While proponents of mandatory minimums claim long sentences deter crime, in actuality this deterrence is exceedingly low, leading to the incarceration of large numbers of easily replaced low-level drug dealers without benefitting society. In many instances, mandatory

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149 Brigham, 977 F.2d at 318.  
150 Hearing on Mandatory Minimum Sentences, (Stewart Statement), supra note 18, at 5.  
151 Id.; Brigham, 977 F.2d, at 317-18; Evans, 970 F.2d at 676-78.  
152 Hearing on Mandatory Minimum Sentences, (Carnes Testimony), supra note 18, at 8.  
154 Hearing on Mandatory Minimum Sentences, (Carnes Testimony), supra note 18, at 2, 6-7.  
155 Id. at 2; Brigham, 977 F.2d, at 317-18; Evans, 970 F.2d, at 676-78 & n.19.  
157 United States v. Newhouse, 919 F. Supp. 2d 955, 974-75 (N.D. Iowa 2013) (easily replaced); Report to the Congress: Cocaine and Federal Sentencing Policy,
minimum sentences undermine “accurate outcomes” and may “increase the possibility of wrongful convictions.” This explains why most judges feel they “should be allowed to use the generally permissible sentencing factors.”

Under mandatory minimums, judges frequently must impose conflicting sentences for two defendants convicted of possessing the same amount of drugs. This cliff effect occurs because mandatory minimums are linked to the quantity of drugs, so small differences – such as 499 grams versus 500 grams – lead to vastly disparate sentences. The safety valve may make the cliff effect worse because defendants who are quite different in many respects often receive the exact same sentence. Therefore, the safety valve “increase[s] cliffs by establishing another mandatory bright-line rule that punishes very similar offenders with very different degrees of severity.” Reducing disparities – such as cliffs – is a “prime directive” of the Sentencing Commission, which recently found the safety valve contributes to “widening sentencing gap[s].”

158 Luna & Cassell, supra note 138, at 67.
161 Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, supra note 21; Oliss, supra note 11, at 188; 5 Albonetti, supra note 10, at 409; Froyd, supra note 30, at 1499; USSC on Mandatory Minimums: Testimony of Judge William W. Wilkins, Jr., Chairman, 6 FED. SENT’G REP. 67, 67 (1993).
162 USSC on Mandatory Minimums, (Wilkins Testimony), supra note 162, at 67; Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, supra note 21; Froyd, supra note 30, at 1499.
164 Aaron Rappaport, The State of Severity, 12 FED. SENT’G REP. 3, 3 (July/August 1999) (prime directive); Report to the Congress: Cocaine and Federal Sentencing Policy, supra note 144, at 58 (gaps).
The safety valve fails to mitigate harsh drug sentences and, when an offender fails to qualify, mandatory minimums lead to longer sentences.\(^{165}\) Just twenty-three percent of drug offenders were eligible for the safety valve in 2012.\(^{166}\) Just six percent of those sentenced under the mandatory minimum were high-level offenders.\(^{167}\) Seventy-one percent of low-level offenders were ineligible for the safety valve, and received mandatory minimum sentences.\(^{168}\) Presuming high-level offenders have a similar conviction rate to low-level offenders, the safety valve fails to provide shorter sentences for less culpable defendants.\(^{169}\) Mandatory minimums result in longer sentences for the most vulnerable and significantly longer sentences for minorities.\(^{170}\) Racial sentencing disparity and even its perception “fosters disrespect for and lack of confidence in the criminal justice system.”\(^{171}\) Without confidence and respect, our jury system will be less effective because if individuals do not respect our laws they may be less likely to follow them.\(^{172}\)


\(^{167}\) Id. at 170, tbl. 40; Siegler & Zunkel, \textit{supra} note 12, at 3-4.

\(^{168}\) 2012 Sourcebook, \textit{supra} note 167, tbl. 40, 44; Siegler & Zunkel, \textit{supra} note 12, at 3-4.

\(^{169}\) United States v. Brigham, 977 F.2d 317, 317-18 (7th Cir. 1992); United States v. Evans, 970 F.2d 663, 676-78 & n.19 (10th Cir. 1992).


\(^{171}\) \textit{Report to the Congress: Cocaine and Federal Sentencing Policy, supra} note 144, at viii.

\(^{172}\) \textit{Williams, 788 F. Supp. 2d at 882; Hearing on Mandatory Minimum Sentences, (Carnes Testimony), supra} note 18, at 2.
The safety valve also does nothing to alleviate the disparity between almost identical defendants who receive drastically different sentences. Because an ineligible offender may have “mitigating circumstances that substantially differentiate him or her from other offenders dealing in the same quantity of drugs,” but cannot receive a lesser sentence, the safety valve does not solve “excessive uniformity.” This goes against fairness, because “[a] just legal system seeks not only to treat different cases differently but also to treat like cases alike. Fairness requires sentencing uniformity as well as efforts to recognize relevant sentencing differences.” In enacting the safety valve, Congress “focused upon the unfair way in which federal sentencing failed to treat similar offenders similarly,” and intended the safety valve to reduce the inequity and disparity caused by mandatory minimums by restricting them to “kingpins and managers.” However, the safety valve only applies to a small group of low-level defendants, does not apply to many others, and frequently fails entirely to assist mid-level offenders who are neither kingpins nor managers. Moreover, “[l]ow-level, non-violent drug addicts are not drug kingpins engaged in repeated and ‘extremely lucrative’ drug trafficking as envisioned by Congress. On the contrary, they [are] low-level cogs in the drug trade, who are readily replaced.”

The safety valve also fails to solve the problems of the cooperation paradox, which increases the inequity of mandatory

174 Oliss, supra note 11, at 1890; Pepper v. United States, 131 S. Ct. 1229, 1252 (2011) (Breyer, J., concurring in part and concurring in the judgment); Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, supra note 21.
175 Pepper, 131 S. Ct. at 1252 (Breyer, J., concurring).
176 Id.
177 Vasquez, 2010 WL 1257359.
minimum sentences under substantial assistance. Before the enactment of the safety valve, sentencing concessions were available only to those defendants who “provide[d] the most information at the earliest possible point in an investigation,” and generally required a defendant to testify against others or assist investigators. The substantial assistance exception provided powerful incentives for defendants to cooperate, but it also created a cooperation paradox, permitting sentence reductions only for those defendants with significant knowledge or responsibility, or for those defendants who win “the race to be the first to ‘spill the beans.’” This cooperation paradox, which results in “meting out the harshest penalties to those least culpable,” the Seventh Circuit recognizes “is troubling, because it accords with no one’s theory of appropriate punishments.” Because Congress modeled the safety valve’s truthful disclosure requirement after the substantial assistance provision, the safety valve shares many of these same problems. However, this modeling makes little sense, because the safety valve is based on the offender’s culpability while substantial assistance is based on the defendant’s ability and desire to assist prosecutors. Substantial assistance relates neither to the offender’s culpability nor to the traditional factors that determine if a defendant is a threat to society. In contrast, the safety valve’s first four elements reflect the traditional safety factors - 1) criminal history;
2) use of violence; 3) “death or serious bodily injury;” and 4) offender level.\footnote{188}

While Congress designed the safety valve to reduce disparate sentences, it “is not a cure-all. It does not completely loosen the heavy-handed approach of mandatory minimums for many, if not most, drug defendants.”\footnote{189} In actuality, under the safety valve many similar offenders continue to receive vastly different sentences.\footnote{190} As one judge lamented, the safety valve, while “commendable in spirit, amount[s] to gnats around the ankles of the elephant . . . safety valve relief from a mandatory minimum does no more than relegate the defendant to a Guidelines range that matches, and even exceeds, the mandatory minimum.”\footnote{191} Thus, the safety valve fails to remedy disparities and ensure only high-level offenders receive mandatory minimum sentences.\footnote{192} This “offend[s] a bedrock principle of justice” because the sentences are “greater than necessary to comply’ with the purposes of punishment.”\footnote{193} Moreover, the safety valve “often lead[s] to absurd results,”\footnote{194} and Washington lawmakers sentencing crimes rather than individuals is “utterly un-American.”\footnote{195}

\footnote{188} 18 U.S.C. § 3553(f).
\footnote{190} Oliss, supra note 11, at 1890; United States v. Schreiber, 191 F.3d 103, 108 (2d Cir. 1999).
\footnote{192} United States v. Ortiz, 136 F.3d 882, 883 (2d Cir. 1997); United States v. Marin, 144 F.3d 1085, 1091 (7th Cir. 1998); United States v. Contreras, 136 F.3d 1245, 1246 (9th Cir. 1998).
\footnote{193} Hearing on Mandatory Minimum Sentences, (Stewart Statement), supra note 18, at 5.
\footnote{194} Siegler & Zunkel, supra note 12, at 3; Hearing on Mandatory Minimum Sentences, (Carnes Testimony), supra note 18, at 2.
\footnote{195} Hearing on Mandatory Minimum Sentences, (Stewart Statement), supra note 18, at 1.
IV. COURTS SHOULD UTILIZE THE PLAIN LANGUAGE INTERPRETATION, NOT SUPERIMPOSE SUBSTANTIAL ASSISTANCE REQUIREMENTS ON THE SAFETY VALVE, AND PERMIT RELIEF FOR DEFENDANTS WHO ORIGINALLY LIE TO ALIGN WITH CONGRESSIONAL INTENT

The safety valve “grant[s] relief to defendants whose knowledge may be of little or no use to the government,” and who cannot meet the substantial assistance requirements.\(^{196}\) However, the judicial good faith interpretation of the safety valve superimposes substantial assistance requirements on the fifth element, which results in unintended consequences that fail to comport with Congress’ intent.\(^{197}\) Courts should use the plain language of statutes unless the result is either “so gross as to shock . . . common sense” or “is ‘demonstrably at odds’ with legislative intent.”\(^{198}\) The Second Circuit explains how this applies to the safety valve: “the text provides no basis for distinguishing among defendants who make full disclosure immediately upon contact with the government, defendants who disclose piecemeal as the proceedings unfold, and defendants who wait for the statutory deadline.”\(^{199}\) One advantage of conditioning safety valve relief on complete truthful disclosure is that because the defendant is hoping for a reduced sentence, it makes sense to require he prove he has disclosed all the information he has.\(^{200}\) The plain language reading of the safety valve provides a greater incentive for defendants to tell the truth by permitting them to decide to tell the truth until their sentencing.\(^{201}\)

\(^{196}\) United States v. Shrestha, 86 F.3d 935, 938-39 (9th Cir. 1996).

\(^{197}\) United States v. Matos, 328 F.3d 34, 36 (1st Cir. 2003); H.R. REP. NO.103-460 (1994).

\(^{198}\) United States v. Schreiber, 191 F.3d 103, 106 (2d Cir. 1999) (quoting Crooks v. Harrelson, 282 U.S. 55, 60 (1930) and United States v. Reyes, 116 F.3d 67, 71 (2d Cir. 1997)).

\(^{199}\) Id.

\(^{200}\) Shebesta, supra note 22, at 544.

\(^{201}\) Schreiber, 191 F.3d 103; United States v. Tournier, 171 F.3d 648 (8th Cir. 1999); United States v. Shrestha, 86 F.3d 935, 935 (9th Cir. 1996); Krecht v. United States, 846 F. Supp. 2d 1268, 1286 (S.D. Fla. 2012) (quoting United States v. Figueroa, 199 F.3d 1281, 1283 (11th Cir. 2000)); Shebesta, supra note 22, at 554.
A. Conditioning Safety Valve Relief on Complete Truthful Disclosure from the Moment a Defendant Invokes the Safety Valve and Failing to Require any Proof from the Prosecutor a Defendant Lied Frustrates Congress’ Purpose Because This Judicial Interpretation Superimposes Substantial Assistance on the Safety Valve’s Fifth Element

Courts – including the Seventh Circuit – treat the safety valve the same way they treat substantial assistance. But this is improper because the two statutes work in separate and distinct ways. Substantial assistance is not a “precondition to safety valve relief” and the truthful disclosure element “need not rise to the level of substantial assistance.” While substantial assistance requires a defendant’s information help the prosecutor, the fifth element of the safety valve expressly provides the information need not be “relevant or useful.” Thus the safety valve “focus[es] . . . on the defendant’s providing information, rather than on the Government’s need for information.” Further, prosecutors can “penalize[e] defendants who lie or withhold information during proffer sessions” under an independent and unrelated statute.

The statutes’ titles further illustrate their differences. Substantial assistance is entitled “Limited Authority to impose a sentence below a statutory minimum.” Thus, substantial assistance is a departure from the mandatory minimum, leaving the mandatory minimum as “a reference point for a specific, carefully circumscribed

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202 Shrestha, 86 F.3d at 939 (quoting United States v. Arrington, 73 F.3d 144, 149 (7th Cir. 1996)).
203 United States v. Winebarger, 664 F.3d 388, 393-94 (3d Cir. 2011); United States v. Ahlers, 305 F.3d 54, 59 (1st Cir. 2002); United States v. Fountain, 223 F.3d 927, 928 (8th Cir. 2000); United States v. A.B., 529 F.3d 1275, 1284 (10th Cir. 2008).
204 Tournier, 171 F.3d at 647 (precondition); United States v. Montanez, 82 F.3d 520, 522 (1st Cir. 1996) (substantial assistance).
206 United States v. Flanagan, 80 F.3d 143, 146 (5th Cir. 1996).
207 United States v. Schreiber, 191 F.3d 103, 108 (2d Cir. 1999) (citing U.S.S.G. § 3C1.1 (obstruction of justice)).
208 18 U.S.C. § 3553(e).
type of departure” but the mandatory minimum still applies.\footnote{United States v. Ahlers, 305 F.3d 54, 59 (1st Cir. 2002); United States v. Fountain, 223 F.3d 927, 928 (8th Cir. 2000).} In contrast, the safety valve’s title “Limitation on the applicability of statutory minimums in certain cases” makes it an excusal from “the mandatory minimum [which] is to be disregarded once certain conditions are met.”\footnote{Ahlers, 305 F.3d at 59; 18 U.S.C. § 3553(f); United States v. Poyato, 454 F.3d 1295, 1299 (11th Cir. 2006); United States v. Holguin, 436 F.3d 111, 117 (2d Cir. 2006); United States v. Morrisette, 429 F.3d 318, 324-25 (1st Cir. 2005).} This demonstrates how Congress “intended to authorize sentencing judges to ignore the limitations imposed by statutory minimum sentences and treat a ‘mandatory minimum’ case like any other.”\footnote{Ahlers, 305 F.3d at 59.} Had Congress intended the safety valve to operate the same way as substantial assistance, it would likely never have enacted the safety valve. Congress enacted the safety to rectify many injustices under the mandatory minimum sentencing scheme; injustices that substantial assistance did not address.\footnote{United States v. Shrestha, 86 F.3d 935, 938 (9th Cir. 1996); Mandatory Minimum Sentencing Reform Act of 1994, H.R. REP. NO.103-460, 103rd Cong., 2d Sess. (1994); S. REP. NO. 225, 98th Cong., 1st Sess. 40 (1983).} Congress intended the safety valve to provide leniency for low-level defendants who provide what information they have regardless of whether it is new or useful, so disclosure need “not amount to ‘substantial assistance.’”\footnote{United States v. Montanez, 82 F.3d 520, 522 (1st Cir. 1996).} Indeed, “[t]he sharp divergence between these regimes leads inexorably to the conclusion that Congress had different plans in mind for the operation and effect of the two provisions.”\footnote{Ahlers, 305 F.3d at 59.}

Providing separate requirements for the safety valve and substantial assistance also aligns with the reasons behind the safety valve – to provide an opportunity for lower level offenders to escape sentencing under harsh mandatory minimums.\footnote{United States v. Matos, 328 F.3d 34, 36 (1st Cir. 2003); H.R. REP. NO. 103-460, at 5 (1994); Hrvatin, supra note 179, at 215.} Most safety valve litigation regards the fifth factor, and focuses on the amount of information the defendant provided, when he provided it, and how
much information he must provide about other conspirators and conduct outside the actual charges. This is due in part because the determination of whether a defendant completely and truthfully provided all information at his disposal “rests largely on a necessarily imprecise and largely unverifiable assessment by the prosecutor.” This leaves prosecutors with “considerable de facto discretion either to smooth the path to a safety valve adjustment or to block it.”

Despite the safety valve’s explicit statement that the defendant’s information need not be useful, judges “apply the [fifth] element in the same manner that they apply the substantial assistance provision: by looking to approval from the government. Instead of utilizing the government’s word as a mere recommendation, judges have permitted it to become dispositive of the credibility determination.” This means even with the safety valve, cooperation is the only meaningful way defendants can reduce their sentences. Thus, judicial interpretation implying a good faith substantial assistance requirement into the fifth element extends the same sentencing problems Congress enacted the safety valve to remedy.

A plain language reading of the safety valve would permit the safety valve to work the way Congress intended and not re-introduce a substantial assistance requirement.

216 United States v. Feliz, 453 F.3d 33, 35 (1st Cir. 2006); United States v. Cruz, 106 F.3d 1553, 1557 (11th Cir. 1997); United States v. Vazquez, 460 F. App’x 442, 444 (5th Cir. 2012); United States v. Schreiber, 191 F.3d 103, 104 (2d Cir. 1999); United States v. Rodriguez-Colon, 296 F. App’x 767, 768 (11th Cir. 2008).

217 Bowman & Heise, supra note 44, at 1072, 1073.


219 Bronn, supra note 26, at 484; Vasquez, 2010 WL 1257359; United States v. Ajugwo, 82 F.3d 925, 929 (9th Cir. 1996); Hearing on Mandatory Minimum Sentences, supra note 18, at 5 (Stewart Statement).

220 United States v. Montes, 602 F.3d 381, 390 (5th Cir. 2010) (quoting United States v. Krumnow, 476 F.3d 294, 295-98 (5th Cir. 2007); United States v. Christensen, 582 F.3d 860, 862 (8th Cir. 2009); United States v. Johnson, 580 F.3d 666, 673 (7th Cir. 2009).

221 United States v. Matos, 328 F.3d 34, 36 (1st Cir. 2003); H.R. REP. NO. 103-460, at 5 (1994); United States v. Montanez, 82 F.3d 520, 522 (1st Cir. 1996).
1. Placing the Burden of Proof on Defendants Without any Prosecutorial Showing Regarding Truthful Disclosure Reinstates Substantial Assistance on the Safety Valve

Neither the safety valve nor its legislative history discusses the burden of proof, but the Seventh Circuit interpreted the safety valve as requiring defendants prove they met all five elements. The court assumed the safety valve was a departure from mandatory minimums, so it allocated the burden of proof the same way it did other departures, like substantial assistance. Other circuits followed. But the Seventh Circuit misread the safety valve provision: it is not a departure but rather an excusal from mandatory minimums. So the burden of proof for the safety valve need not be allocated the same way it is for departures. Requiring the defendant to prove their eligibility without any affirmative showing from the government regarding the statement’s truthfulness means the government need only make a blanket statement to preclude eligibility. Accepting the government’s claims about truthful disclosure without further investigation “transforms the . . . safety valve into the . . . substantial assistance provision,” particularly “because fear of a negative recommendation by the government puts immense pressure on the defendant to disclose as much information as possible . . . for fear that

222 United States v. Ramirez, 94 F.3d 1095, 1097-99 (7th Cir. 1996).
223 Ramirez, 94 F.3d at 1097-99; Bronn, supra note 24, at 501-02.
224 United States v. Montanez, 105 F.3d 36 (1st Cir. 1997); United States v. Verners, 103 F.3d 108, 110 (10th, Cir. 1996) (citing Ramirez, 94 F.3d at 1100-1102); United States v. Ajugwo, 82 F.3d 925, 929 (9th Cir. 1996); United States v. Honea, 660 F.3d 318, 328 (8th Cir. 2011); Bronn, supra note 26, at 485.
225 Ramirez, 94 F.3d at 1100; Bronn, supra note 26, at 501-02.
226 Ramirez, 94 F.3d at 1100; Bronn, supra note 26, at 501-02.
227 Honea, 660 F.3d at 328; Verners, 103 F.3d at 110; Ajugwo, 82 F.3d at 929; United States v. Miller, 179 F.3d 961, 967-68 (5th Cir. 1999) (quoting United States v. Miranda-Santiago, 96 F.3d 517, 529 -30 (1st Cir. 1999); United States v. Gales, 560 F. Supp. 2d 27, 28 (D.D.C. 2008).
the government will be unsatisfied and claim that the defendant is lying.”

Judges have no reliable way to determine whether a defendant provided all information they had and a defendant is frequently unable to prove his information was truthful, particularly when prosecutors disagree. Certainly, as the Seventh Circuit acknowledges, low-level drug dealers frequently have little information because criminal enterprises purposely restrict low-level dealers’ knowledge of the overall operation, so they have no information to provide. Criminal enterprises may intentionally provide false information to low-level dealers to send prosecutors astray. The Seventh Circuit described this precise problem: “[d]rones of the organization—the runners, mules, drivers, and lookouts—lack the contacts and trust necessary to set up big deals, and they know little information of value. Whatever tales they have to tell, their bosses will have related.” It is also likely prosecutors will frequently feel they have not received enough information, particularly because they almost certainly have more information than does any low-level defendant. As the safety valve expressly states, “the fact that the defendant has ‘no relevant or useful’ information to provide will not prevent a finding that the defendant has fulfilled the fifth requirement only requires defendants be completely forthcoming.” However, because judges must make credibility determinations based solely on the defendant’s proffer and

228 Bronn, supra note 26, at 496-97; e.g. Miller, 179 F.3d at 967-68; Gales, 560 F. Supp. 2d at 28.


230 United States v. Brigham, 977 F.2d 317 (7th Cir. 1992); Deborah Young, Rethinking the Commission’s Drug Guidelines: Courier Cases Where Quantity Overstates Culpability, 3 FED. SENT. REP. 2, 64 (1990).

231 Young, supra note 231, at 63-64.

232 Brigham, 977 F.2d at 317.

233 18 U.S.C. § 3553(f)(5); Shrestha, 86 F.3d at 938.
the government’s bare assertion about the proffer’s truthfulness without any further showing, there is little opportunity to find the truth.\textsuperscript{234} By permitting prosecutors to control the eligibility determination, many “otherwise eligible and truthful defendants” will be ineligible.\textsuperscript{235} This goes against Congressional intent, as demonstrated by the fact that Congress enacted the safety valve, and did not include a government motion requirement.\textsuperscript{236} It also frustrates judges because, “by merely asserting doubt about an offender’s truthfulness, a prosecutor can place the offender in the position of having to prove a negative. It is difficult to imagine how a defendant can prove that he does not know a supplier’s name.”\textsuperscript{237} This judicial dissatisfaction with requiring a defendant prove all five elements with no evidence provided by the prosecution that he has not told the truth has been a contentious issue since the safety valve’s enactment.\textsuperscript{238}

One common objection to shifting the burden to the government is that it would encourage low-level offenders to lie; however, this is inapposite.\textsuperscript{239} Since defendants only qualify for the safety valve if they provide truthful disclosure, many will not lie for fear of losing their chance at relief.\textsuperscript{240} This is particularly true since most courts consider lies or omissions when they determine whether the defendant eventually provided complete truthful disclosure.\textsuperscript{241} Another objection is prosecutors may have to reveal information about continuing drug investigations.\textsuperscript{242} However, the government has all the

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\textsuperscript{234} Gales, 560 F. Supp. 2d at 29; Bronn, supra note 26, at 488.
\textsuperscript{235} Bronn, supra note 26, at 485-86.
\textsuperscript{236} 18 U.S.C. §§ 3553(e), (f); United States v. Stewart, 391 F. App’x 490, 494 (6th Cir. 2010); United States v. Espinosa, 172 F.3d 795, 796 (11th Cir. 1999).
\textsuperscript{237} Gales, 560 F. Supp. 2d at 28.
\textsuperscript{239} United States v. Marin, 144 F.3d 1085, 1091 (7th Cir. 1998).
\textsuperscript{240} United States v. Schreiber, 191 F.3d 103, 107 (2d Cir. 1999).
\textsuperscript{241} United States v. Brownlee, 204 F.3d 1302, 1305 (11th Cir. 2000); Schreiber, 191 F.3d 103 at 107; Deltoro–Aguilera v. United States, 625 F.3d 434, 437 (8th Cir. 2010).
\textsuperscript{242} Bronn, supra note 26, at 504-05.
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requisite information to prove whether the defendant is truthful,
prosecutors could reveal this proof *in camera* so as not to threaten any
ongoing investigations. More importantly, this concern is irrelevant to
the reasons Congress passed the safety valve. Requiring the
government prove a defendant was untruthful would preserve
Congress’s intent, because “[i]f the government had to weigh the cost
of challenging the defendant’s disclosure with potential difficulties in
their ongoing investigations . . . [it would] only challenge a
defendant’s safety[] valve credibility in instances when the government
has valid evidence that the defendant was untruthful.”

Most circuits, including the Seventh, place the burden of
proving safety valve eligibility on the defendant, but two circuits
require the government prove the defendant failed to meet the fifth
element. The Fifth and Ninth Circuits shift the burden of proof to the
government with regard to truthful disclosure, which helps ensure the
safety valve comports with Congress’s intent. Congress
intentionally distinguished the two provisions in several ways – one
important method was to give the judge the ultimate eligibility
decision. Another is that the safety valve is concerned solely with
truthful disclosure, and not whether the defendant can provide new or
useful information. By relying solely on a prosecutor’s statements,
“the courts have evaded their responsibility of determining eligibility.”
If courts insisted the government demonstrate
untruthfulness, it would better serve the safety valve’s purpose of
providing an opportunity for a lesser sentence for defendants who

243 *Id.*
244 United States v. Matos, 328 F.3d 34, 36 (1st Cir. 2003); H.R. REP. NO. 103-460, at 5 (1994).
245 Bronn, *supra* note 26, at 505.
246 United States v. Acevedo-Fitz, 739 F.3d 967, 969-70 (7th Cir. 2014); *Matos*,
328 F.3d at 38; Bronn, *supra* note 26, at 488.
247 United States v. Shrestha, 86 F.3d 935, 940 (9th Cir. 1996); United States v.
Miller, 179 F.3d 961, 961 (5th Cir. 1999).
248 18 U.S.C. § § 3553(e), (f); *Shrestha*, 86 F.3d at 940.
249 18 U.S.C. § § 3553(e), (f); *Shrestha*, 86 F.3d at 940.
250 Bronn, *supra* note 26, at 498.

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provide complete truthful disclosure. Because the safety valve is not tied to the defendant’s ability to assist the government, and because most low-level defendants cannot assist the government because they lack knowledge, the concerns underlying substantial assistance do not apply to the safety valve. Courts should construe ambiguous statutes in favor of defendants, so the burden of proof should shift to the government when the fifth factor may make a defendant ineligible for the safety valve. Requiring the government prove a defendant failed to meet the fifth factor “honors the safety valve’s mandate that the offender’s disclosure need not be new or useful.” It would also ensure judges make the final determination, and prevent prosecutors from “mak[ing] adverse eligibility recommendations if they are simply unsatisfied with the defendant’s disclosure.”

2. Judicial Interpretation Requiring Defendants to Provide Truthful Disclosure from the Time They Invoke Safety Valve Relief Goes Against Congressional Intent by Requiring Substantial Assistance for Safety Valve Relief

Many courts that grant safety valve relief to defendants who lie before telling the truth hold defendants must provide complete disclosure before the sentencing hearing occurs. The sentencing hearing deadline improves efficiency by creating a bright-line rule that

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251 Id. at 500; Shrestha, 86 F.3d at 940; Miller, 179 F.3d at 961; United States v. Miranda-Santiago, 96 F.3d 517, 519 (1st Cir. 1996).
252 United States v. Rodriguez, 60 F.3d 193, 196 (5th Cir. 1995); United States v. Brigham, 977 F.2d 317 (7th Cir. 1992).
253 18 U.S.C. § 3553(f); Van Etten, supra note 28, at 1297.
255 Bronn, supra note 26, at 507.
256 Id.
257 United States v. Mejia-Pimental, 477 F.3d 1100, 1105 (9th Cir. 2007); United States v. Madrigal, 327 F.3d 738, 743-44 (8th Cir. 2003); United States v. Edwards, 65 F.3d 430, 433 (5th Cir. 1995); United States v. Schreiber, 191 F.3d 103, 108-09 (2d Cir. 1999).
is easy to apply, reduces time in court, keeps the government from having to argue against its use after that time, and permits the government to question the defendant more extensively about his statement. However, this bright-line rule shares a major problem with all bright-line rules because “it sweeps so broadly that it creates harsh results that were probably not intended.”

Regarding the disclosure’s timing, Congress did not intend the safety valve to “spare the government the trouble of preparing for and proceeding with trial,” or “provid[e] the government a means to reward a defendant for supplying useful information.” Substantial assistance addresses these considerations, and defendants who obstruct investigations receive longer sentences. Moreover, the safety valve’s “plain words . . . provide only one deadline for compliance . . . Nothing in the statute suggests that a defendant is automatically disqualified if he or she previously lied or withheld information.” Nor does it “distinguish[] among defendants who make full disclosure immediately upon contact with the government, defendants who disclose piecemeal as the proceedings unfold, and defendants who wait for the statutory deadline by disclosing ‘not later than’ sentencing.” Even defendants who provide “tardy or grudging cooperation,” are eligible for safety valve relief because defendants satisfy the truthfulness requirement, “regardless of [their] timing or motivation,” rendering any “pre-sentencing delays” irrelevant.

A major justification for imprisonment is to protect society. However, this concern is addressed by the safety valve’s first four

260 United States v. Shrestha, 86 F.3d 935, 940 (9th Cir. 1996).
261 18 U.S.C. § 3553(e); Mejia-Pimental, 477 F.3d at 1107.
262 Schreiber, 191 F.3d at 106.
263 Id.
264 United States v. Tournier, 171 F.3d 645, 647 (8th Cir. 1999).
265 Mejia-Pimental, 477 F.3d at 1106.
266 18 U.S.C. § 3553(a); Bronn, supra note 26, at 505-06.
requirements – criminal history, use of violence, whether the act resulted in “death or serious bodily injury,” and the offender’s involvement. Further, a defendant’s truthfulness does not align with their culpability or the threat they pose to society. Thus, courts should work to ensure the safety valve applies to low-level offenders, rather than using the fifth element as a proxy for substantial assistance and unfettered prosecutorial discretion. As one court aptly stated:

The government is not free to play cat and mouse with defendants, leading safety valve debriefings down blind alleys and then blaming the defendants for failing to disclose material facts. Nor can the government squeeze all the juice from the orange and then deprive a truthful and cooperative defendant of his end of the bargain by juxtaposing trivial inconsistencies or exaggerating inconsequential omissions. Disqualification based on one lie defeats the safety valve’s purpose – to reduce the severity of sentences imposed on low-level defendants. Because insisting upon complete disclosure from the time a defendant invokes safety valve relief re-imposes the substantial assistance requirement, the Seventh Circuit’s good faith interpretation essentially reinstates mandatory minimums for a majority of offenders, excluding too many defendants and creating unfair results because the safety valve’s text does not impose any such requirement. The plain language interpretation is persuasive, as Congress did not intend

267 18 U.S.C. § 3553(f); Bronn, supra note 26, at 505-06.
270 Matos, 328 F.3d at 42.
272 United States v. Ramunno, 133 F.3d 476 (7th Cir. 1998); United States v. Wrenn, 66 F.3d 1 (1st Cir. 1995).
delays in truthful disclosure to preclude safety valve relief, but rather intended to rectify harsh mandatory minimum sentences.\textsuperscript{273} Moreover, Congress’ purpose for passing the safety valve is separate from – and unrelated to – substantial assistance.\textsuperscript{274} Because Congress intended the safety valve to benefit defendants, and the rule of lenity requires courts construe ambiguous criminal statutes in favor of defendants due to the severity and moral implications of a criminal conviction, courts should construe the safety valve in the defendant’s favor when the fifth factor may make a defendant ineligible for the safety valve.\textsuperscript{275}

CONCLUSION

For all these reasons, the judicially imposed requirement that defendants provide complete truthful disclosure from the moment they invoke the safety valve defeats the safety valve’s purpose; to spare less culpable offenders from mandatory minimum sentences.\textsuperscript{276} Utilizing the plain-language interpretation of the safety valve would result in a greater number of defendants being eligible, and would help mitigate inverted sentences, misplaced equality, and cliffs.\textsuperscript{277} Providing an incentive to defendants to disclose information to the government serves a utilitarian function.\textsuperscript{278} It makes sense to require the defendant provide complete truthful disclosure as it is the defendant who hopes for a reduced sentence and the government may receive useful information.\textsuperscript{279} The plain language interpretation of the safety valve

\textsuperscript{273} United States v. Mejia-Pimental, 477 F.3d 1100, 1107 (9th Cir. 2007).
\textsuperscript{274} 18 U.S.C. § 3553(f); Matos, 328 F.3d at 36; H.R. REP. NO. 103-460, at 5 (1994).
\textsuperscript{276} 18 U.S.C. § 3553(f); United States v. Shrestha, 86 F.3d 935, 938 (9th Cir. 1996); United States v. Acosta-Olivas, 71 F.3d 375, 378 (10th Cir. 1995); United States v. Schreiber, 191 F.3d 103, 108 (2d Cir. 1999); Matos, 328 F.3d at 36; H.R. REP. NO. 103-460, at 5.
\textsuperscript{277} United States v. Brigham, 977 F.2d 317, 318 (7th Cir. 1992); Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, supra note 21; Oliss, supra note 11, at 1888; Albonetti, supra note 10, at 408.
\textsuperscript{278} Shebesta, supra note 22, at 544.
\textsuperscript{279} Id.
provides greater incentive for defendants to provide complete truthful information to prosecutors because a defendant who is disqualified after one lie has no reason to share any more information. Furthermore, immediately disqualifying a defendant due to a prior lie or omission means more defendants receive disparate and harsh sentences. Congress enacted the safety valve because, “for the very offenders who most warrant proportionally lower sentences-offenders that by guideline definitions are the least culpable-mandatory minimums generally operate to block the sentence from reflecting mitigating factors.” So the “least culpable offenders may receive the same sentences as their relatively more culpable counterparts.” The current sentencing system “is perceptibly unfair: mandatory statutory sentences [are] applied consistently only to those who are the least culpable, and to whom, perhaps, the statutes should not apply at all.” A plain language reading of the safety valve, as utilized in most circuits, comports with Congress’ intent while providing just sentences for low-level defendants.

280 18 U.S.C. § § 3553(f); Shebesta, supra note 22, at 554.
281 Matos, 328 F.3d at 36; Brigham, 977 F.2d at 317-18; United States v. Evans, 970 F.2d 663, 676-78 & n.19 (10th Cir. 1992); H.R. REP. NO. 103-460, at 5 (1994); Shebesta, supra note 22, at 554.
283 Views from the Sentencing Commission, 12 REP. FED. SENT. R. 347 (JUNE 1, 2000); see H.R. REP. NO. 103-460, at 5 (1994); United States v. Thompson, 76 F.3d 166, 171 (7th Cir. 1996); Acosta-Olivas, 71 F.3d at 378; United States v. Tournier, 171 F.3d 645, 647 (8th Cir. 1999); Matos, 328 F.3d at 36.
284 Villa, supra note 230, at 121.
CONFERENCE, CONCILIATION, AND PERSUASION: THE SEVENTH CIRCUIT’S GROUNDBREAKING APPROACH TO ANALYZING THE EEOC’S PRE-SUIT OBLIGATIONS

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INTRODUCTION

In 2013, the Seventh Circuit became the first circuit to explicitly reject an employer’s contention that an employment discrimination lawsuit should be dismissed because the Equal Employment Opportunity Commission (EEOC) failed to engage in out-of-court negotiation efforts with the employer before filing suit.¹ In *EEOC v. Mach Mining, LLC*, the Seventh Circuit addressed the provision contained in Title VII of the Civil Rights Act of 1964 that requires the EEOC to satisfy certain conditions before it can file a discrimination lawsuit against an employer.² One of these conditions is that the EEOC must engage in “informal methods of conference, conciliation, and persuasion.”³ The purpose of these pre-suit

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¹ EEOC v. Mach Mining, LLC, 738 F.3d 171, 172–73 (7th Cir. 2013).
² Id.
³ Id. at 175.
negotiations, or “conciliation,” is to provide an opportunity for the EEOC to reach an out-of-court agreement with an employer to end the employer’s discriminatory practices without seeking a judicial remedy.⁴ The court held, however, that an employer’s claim that the EEOC failed to engage in conciliation is “not an affirmative defense to the merits of an employment discrimination suit.”⁵ That is, the EEOC’s alleged failure to comply with Title VII’s conciliation requirement is not grounds for dismissal of an employment discrimination lawsuit on the merits.⁶

The crux of the court’s reasoning in Mach is that the EEOC’s conciliation process is not—and should not be—judicially reviewable.⁷ The court stated that “[i]f the EEOC has pled on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient . . . our review of those procedures is satisfied.”⁸ In rendering this decision, the court stressed that the language of Title VII does not authorize judicial review of the conciliation process.⁹ Furthermore, the court found that there is no meaningful standard by which to evaluate conciliation, especially because Title VII’s confidentiality requirement prohibits disclosure of the details of the conciliation process in subsequent hearings.¹⁰ As such, it would be impossible for a court to make any meaningful determinations regarding the EEOC’s conciliation efforts because the court would not have access to relevant information regarding what happened during the conciliation process.¹¹ The Mach court also asserts that Title VII contraindicates judicial review of conciliation because it grants the EEOC absolute discretion in deciding whether to accept an employer’s offer of

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⁵ Mach, 738 F.3d at 172.
⁶ Id.
⁷ Id. at 177.
⁸ Id. at 184.
⁹ Id. at 174–75.
¹⁰ Id. at 174–76.
¹¹ Id.
compliance.\textsuperscript{12} In other words, courts do not have the authority to
determine the sufficiency of the conciliation process because Title VII
delegates that authority exclusively to the EEOC.\textsuperscript{13} The court also
noted that, contrary to Mach Mining’s contention, the EEOC’s alleged
failure-to-conciliate was not grounds for dismissal on the merits
because “letting one party off the hook entirely” would be “too final
and drastic a remedy for any procedural deficiency in conciliation.”\textsuperscript{14}

Thus, the \textit{Mach} court held that courts may not conduct any
investigation whatsoever into the adequacy of the EEOC’s conciliation
efforts.\textsuperscript{15} Indeed, the court even refused to recognize, as other circuits
have, an implied “good faith” requirement in the EEOC’s conciliation
efforts.\textsuperscript{16} The court stated that it is too difficult to enforce a good faith
obligation upon the EEOC because it would run contrary to the
EEOC’s unilateral authority to reject even the most generous
conciliation offers.\textsuperscript{17} Ultimately, the result of the Seventh Circuit’s
holding is that the EEOC need not engage in extensive or thorough
conciliation efforts.\textsuperscript{18} In fact, its efforts need not even be made in good
faith.\textsuperscript{19} So long as the EEOC pleads, in its complaint, that it complied
with Title VII’s requirements, the court will deem the requirement
fulfilled.\textsuperscript{20}

At first glance, it seems as though the Seventh Circuit, in its
sharp divergence with every other circuit that has considered this
issue, took an extreme approach to interpreting Title VII, and that the
\textit{Mach} decision has rendered the conciliation requirement utterly
toothless. Upon closer examination, however, it becomes apparent that
the Seventh Circuit’s interpretation of the conciliation requirement is
fully consistent with the text and purpose of Title VII. As the court
noted, Title VII gives the EEOC full discretion in defining and

\begin{itemize}
\item \textsuperscript{12}Id. at 175.
\item \textsuperscript{13}Id.
\item \textsuperscript{14}Id. at 184.
\item \textsuperscript{15}Id. at 184.
\item \textsuperscript{16}Id. at 182–83.
\item \textsuperscript{17}Id.
\item \textsuperscript{18}See id. at 184.
\item \textsuperscript{19}Id. at 176–77.
\item \textsuperscript{20}Id. at 184.
\end{itemize}
executing the conciliation process and effectively ensures that the conciliation process is insulated from judicial scrutiny by guaranteeing that the substance of the process remain confidential.\textsuperscript{21} Furthermore, as the Supreme Court noted in \textit{Occidental Life Insurance of California v. EEOC}, “the individual’s rights to redress are paramount under the provisions of Title VII” and it is therefore “necessary that all avenues be left open for quick and effective relief.”\textsuperscript{22} With the individual’s right to redress in mind, it would be counterintuitive to permanently bar an aggrieved employee’s discrimination claim based upon a mere procedural deficiency.\textsuperscript{23} Title VII’s conciliation requirement, then, does not, and should not, create a hurdle that the EEOC must overcome before it can file an employment discrimination lawsuit. Rather, the requirement is best characterized as a procedural formality that gives \textit{the employer} an opportunity to avoid litigation by voluntarily complying with Title VII’s requirements.\textsuperscript{24}

The first section of this note provides general background information regarding the conciliation requirement and Title VII. The second section provides an overview of how other circuits have addressed judicial reviewability of conciliation. The third section analyzes the Seventh Circuit’s holding in \textit{Mach Mining} and examines how the court’s reasoning relates to other Seventh Circuit case law involving EEOC litigation. And finally, the fourth section argues that that the Seventh Circuit’s decision in \textit{Mach} is supported by the statutory text and overall purpose of Title VII.

\textsuperscript{21} \textit{Id.} at 173.
\textsuperscript{22} \textit{Occidental Life Ins. Co. v. EEOC}, 432 U.S. 355, 366 (U.S. 1977) (quoting 118 CONG. REC. 1068-1069 (1972)).
\textsuperscript{23} \textit{See Mach}, 738 F.3d at 172.
I. THE CONCILIATION REQUIREMENT AND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Under Title VII of the Civil Rights Act of 1964, the EEOC may bring suit against employers who engage in discriminatory employment practices. Before filing suit, however, the EEOC must engage in conciliation efforts with the employer. That is, once the EEOC has reasonable cause to believe an employer is engaging in discriminatory practices, it must try to reach an out-of-court agreement with the employer to end such practices. If the EEOC is unable to reach a conciliation agreement that is acceptable to the Commission, the Commission may then file an employment discrimination lawsuit against the employer.

Section 2000e-5 of Title VII explains the process by which the EEOC handles allegations of employment discrimination and reads, in relevant part:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . and shall make an investigation thereof. . . . If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or

25 42 U.S.C., § 2000e-5(b); see Note, Judicial Responses to the EEOC’s Failure to Attempt Conciliation, 81 MICH. L. REV. 433, 441 (1982).
done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. . . . If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent. . . .

Either an aggrieved employee or a member of the Commission may file a “charge” of discrimination with the EEOC. 30 When the EEOC receives such a charge, it must notify the employer of the grievance within ten days. 31 Then, the EEOC must investigate whether reasonable cause exists to support the allegation. 32 If, after investigating, the EEOC determines there is not reasonable cause to believe that the allegation is true, it must dismiss the charge. 33 If, however, the EEOC determines that reasonable cause exists that the allegation is true, the conciliation process is triggered. 34 The EEOC must then “endeavor to eliminate . . . unlawful employment practices by informal methods of conference, conciliation, and persuasion.” 35 If the EEOC is “unable to secure from the respondent a conciliation agreement acceptable to the Commission,” the Commission may then file a lawsuit against the employer within thirty days after the date that the charge was filed. 36

29 Id. (emphasis added).
31 Zana, supra note 30.
33 Id.
34 Id.
35 Id.
36 Id.
Additionally, Section 2000e(f)(1) of Title VII provides an alternative remedy by which an aggrieved employee can seek relief if the employee is dissatisfied with the EEOC’s progress in investigating, conciliating, or prosecuting his or her charge.\(^{37}\) This section reads, in relevant part:

If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge[,] . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, . . . a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.\(^{38}\)

That is, a complainant may circumvent the EEOC’s procedures and seek relief through a private action in district court.\(^{39}\) This private right of action, however, does not arise until the employee receives a “right to sue” letter from the EEOC, which states that the EEOC does not intend to file suit against the employer.\(^{40}\) The EEOC is required to send this letter within 180 days after the date the charge was filed.\(^{41}\) The Supreme Court examined this provision in *Occidental Life Insurance of California v. EEOC*, wherein the Court held that the 180-day limitation was not a statute of limitations on EEOC enforcement suits, but rather addressed an alternative enforcement procedure.\(^{42}\) The Court stated that “[t]he retention of the private right of action . . . is designed to make sure that the person aggrieved does not have to

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\(^{37}\) *Id.*  
\(^{38}\) *Id.*  
\(^{39}\) *Id.*  
\(^{40}\) Doe v. Oberweis Dairy, 456 F.3d 704, 708 (7th Cir. 2006).  
\(^{41}\) Stewart v. EEOC, 611 F.2d 679, 682 (7th Cir. 1979).  
endure lengthy delays if the Commission . . . does not act with due diligence and speed.” 43 The Court added that this provision “allow[s] the person aggrieved to elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution.” 44

Notably, as originally enacted, Title VII only granted individual employees the right to sue an employer for discrimination, and the EEOC could only seek voluntary compliance through conciliation. 45 Over time, however, voluntary compliance proved elusive, as more than half of the EEOC’s conciliation efforts were unsuccessful. 46 Consequently, Congress enacted the Equal Opportunity Act of 1972, which amended Title VII to permit the EEOC to sue employers for engaging in discriminatory practices. 47 Under the revised Act, the EEOC’s power to sue employers is conditioned on its inability to “secure from the respondent a conciliation agreement acceptable to the EEOC.” 48 In other words, the EEOC must make conciliation efforts, and may only sue an employer if it is unsatisfied with the results of the conciliation process. Title VII also requires that the conciliation process remain confidential, stating that “nothing said or done and as part of such informal endeavors may be made public by the Commission, its officers or employers, or used as evidence in a subsequent proceeding without the written consent of the person concerned.” 49 The statute provides no additional information about the requirements of the conciliation process. 50

The conciliation process itself has several benefits. 51 It gives the employer an opportunity to explain or justify its conduct before

43 Id. at 365–66 (quoting 118 Cong. Rec. 1068–1069 (1972)).
44 Occidental Life, 432 U.S. at 365.
45 Judicial Responses to the EEOC’s Failure to Attempt Conciliation, supra note 25, at 441–42.
46 EEOC v. CRST Van Expedited, 679 F.3d 657, 682 (8th Cir. 2012) (quoting EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 947 (8th Cir. 1974)).
47 42 U.S.C. § 2000e(f); see CRST Van Expedited, 679 F.3d at 682.
48 CRST Van Expedited, 679 F.3d at 682.
litigation receives widespread public attention.\textsuperscript{52} Additionally, conciliation is generally less expensive and less time consuming than litigation.\textsuperscript{53} As the Seventh Circuit noted, the purpose of conciliation and other pre-suit requirements is to “encourage the complainant and the employer . . . to resolve their dispute informally.”\textsuperscript{54} The court also noted that informal resolutions aid in “reducing the burden on the courts of enforcing Title VII.”\textsuperscript{55} Despite the theoretical advantages of conciliation, however, EEOC conciliation has been less than a complete success.\textsuperscript{56} To date, the EEOC has been unable to achieve even partially successful conciliation in more than half the cases in which it was attempted.\textsuperscript{57}

While conciliation undoubtedly has multiple benefits and is clearly a prerequisite to the EEOC’s authority to file a lawsuit against an employer, the EEOC is granted great deference in defining the parameters and procedures that comprise conciliation. In fact, commentators have noted that the EEOC’s conciliation and investigation process, “probably require the most discretion by EEOC officers and, not coincidentally, are often the most vulnerable for an employer to challenge.”\textsuperscript{58} Indeed, the conciliation process has been the subject of much litigation, and circuit courts sharply split on whether, and to what extent, the conciliation process is subject to judicial review.\textsuperscript{59} The Seventh Circuit’s holding in \textit{Mach} deepened and complicated the circuit split, as explained below.\textsuperscript{60}

\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Doe v. Oberweis Dairy, 456 F.3d 704, 708 (7th Cir. 2006).
\textsuperscript{55} Id. at 708–09.
\textsuperscript{56} \textit{III. Procedure Under Title VII, supra} note 51, at 1200.
\textsuperscript{57} Id.
\textsuperscript{58} Zana, \textit{supra} note 30, at 292–94.
\textsuperscript{59} \textit{See} EEOC v. Mach Mining, 738 F.3d 171, 182 (7th Cir. 2013).
\textsuperscript{60} Id.
II. CIRCUIT SPLIT

The Seventh Circuit stands alone in holding that the EEOC’s conciliation process is not subject to any level of judicial review. 61 Eight circuits have examined this issue, and each held or, at a minimum, assumed that the conciliation process is subject to some level of judicial review. 62 Of these eight circuits, six have articulated specific standards of review, falling into two camps. 63 The first camp, comprised of the Fourth, Sixth, and Tenth Circuits, evaluates the conciliation process by asking generally whether the EEOC acted “reasonably” or in “good faith.” 64 The second camp, comprised of the Second, Fifth and Eleventh Circuits, evaluates the conciliation under a more searching three-part inquiry. 65 This latter standard requires the

61 Id.
63 Id. at 12-19. The Eighth and Ninth Circuits have found that the conciliation process is judicially reviewable, but neither Circuit has explicitly adopted a precise standard by which courts should review the process. See, e.g., EEOC v. CRST Van Expedited, Inc., 679 F.3d 657, 676–77 (8th Cir. 2012) (reviewing the adequacy of the EEOC’s conciliation and investigation processes to determine whether the EEOC’s case should be dismissed); EEOC v. Trans States Airlines, 462 F.3d 987, 996 (8th Cir. 2006) (permitting judicial review into the “EEOC’s failure to satisfy its obligation to conciliate” to decide whether to award attorney’s fees against the EEOC); EEOC v. Bruno’s Rest., 13 F.3d 285, 288–89 (9th Cir. 1993) (reviewing adequacy of conciliation efforts in context of request for attorney’s fee award against the agency).
EEOC: 1) to outline to the employer the reasonable cause for its belief that Title VII has been violated; 2) to offer an opportunity for voluntary compliance; and 3) to respond in a reasonable and flexible manner to the reasonable attitudes of the employer. 66

These eight circuits allow courts to review the EEOC’s conciliation process, 67 even though Title VII mandates that the details of the conciliation process remain confidential. 68 This begs the question: how can a court make a determination regarding any aspect of the conciliation process if the court cannot probe into the details of that process? The eight circuits that allow for judicial review answer this question by drawing a distinction between review of the conciliation process, which they permit, and review of the substance of the EEOC’s position, which they supposedly prohibit. 69 In EEOC v. Zia Co., for example, the Tenth Circuit acknowledged that “a court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide.” 70 Nevertheless, the court determined that the EEOC’s conciliation process was insufficient because the EEOC refused to reopen conciliation to resolve a dispute over the proposed conciliation agreement. 71 In Mach, the Seventh Circuit stated that drawing this type of distinction between process and substance is “too fine a thread on which to hang judicial review” 72 because it “slide[s] easily from review of the form of conciliation toward more substantive scrutiny.” 73 The Mach court stated that review of the EEOC’s conciliation efforts “would almost inevitably find itself engaged in a prohibited inquiry into the substantive reasonableness of particular offers, not to mention using confidential and inadmissible materials as evidence—unless its review were so cursory as to be meaningless.” 74

66 Petition for Writ of Certiorari, supra note 62, at 18.
67 Id. at 13.
69 EEOC v. Mach Mining, 738 F.3d 171, 175 (7th Cir. 2013).
70 582 F.2d 527, 533 (10th Cir. 1978).
71 Id. at 534.
72 Mach Mining, 738 F.3d at 184.
73 Id.
74 Id. at 177.
To the extent that circuits have attempted to justify their allowance of judicial review of the conciliation process, most have pointed generally to Congress’s intention that the EEOC address discrimination through voluntary settlement. The Eleventh Circuit, for example, has highlighted that Title VII’s conciliation requirement “clearly reflects a strong congressional desire for out-of-court settlements of Title VII violations.” The Eighth Circuit echoed this sentiment, reasoning that “[a]lthough the EEOC enjoys wide latitude in investigating and filing lawsuits related to charges of discrimination, Title VII limits that latitude to some degree by plac[ing] a strong emphasis on administrative, rather than judicial, resolution of disputes.” The Seventh Circuit, however, was unpersuaded by these justifications, stating it was “skeptical that court oversight is necessary or that it encourages compliance rather than strategic evasion on the part of employers.” On the contrary, it would undermine conciliation by tempting employers “to turn what was meant to be an informal negotiation into the subject of endless disputes over whether the EEOC did enough before going to court.” The court also pointed out that, even without judicial review, the conciliation process is subject to meaningful scrutiny. Namely, Congress can exert its influence on the EEOC through oversight hearings, adjustments to appropriations, and statutory amendments.

75 Id. at 183.
76 EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256, 1260 (11th Cir. 2003) (citing Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir.1970)).
78 Mach Mining, 738 F.3d at 183.
79 Id. at 178–79.
80 Id.
81 Id. at 180.
82 Id.
Furthermore, the Seventh Circuit expressly rejected the “good faith” requirement imposed by the Fourth, Fifth, and Tenth Circuits. \(^{83}\) In *Mach*, the defendant-employer argued that the National Labor Relations Act (NLRA) offers a template for how courts should analyze good faith in this context. \(^{84}\) The Seventh Circuit rejected this argument because, unlike the NLRA, Title VII does not contain an explicit statutory command to employers and unions to negotiate in good faith. \(^{85}\) Further, the *Mach* court stated that it is “difficult . . . to enforce such a duty, because it jostles uneasily with the right of each party to a labor negotiation to refuse an offer by the other even if a neutral observer would think it a fair, or even a generous offer.” \(^{86}\)

Additionally, in *Mach*, the EEOC cited to the Congressional record in both its appellate brief and its motion for certification to support its argument that a “good faith” requirement is inconsistent with the language and intent of Title VII. \(^{87}\) In both its brief and motion, the EEOC highlighted that a majority of senators who considered the matter disfavored judicial review of conciliation. \(^{88}\) Senator Samuel Ervin, for example, found such a suggestion to be “inconceivable,” stating “I do not know . . . how a court could probe into the minds of the Commission [to determine] whether they did or did not, in good faith, decide that they would or would not work out a conciliation agreement.” \(^{89}\) Senator Jacob Javits added that allowing

\[^{83}\text{Id. at 176}\]  
\[^{84}\text{Id.}\]  
\[^{85}\text{Id.}\]  
\[^{86}\text{Id. at 176 (citing Doe v. Oberweis Dairy, 456 F.3d 704, 711 (7th Cir. 2006)).}\]  
\[^{87}\text{Brief of Appellant at 11–17, *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013) (No. 13-2456); Plaintiff EEOC's Motion to Reconsider or to Certify Under 1292(b) at 10–11, *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (No. 11–cv–00879–JPG–PMF).}\]  
\[^{88}\text{Brief of Appellant, *supra* note 87, at 13–16; Plaintiff EEOC's Motion to Reconsider or to Certify Under 1292(b), *supra* note 87, at 10–11.}\]  
judicial review would “introduce a totally different standard than anything encompassed by our laws or practice.”

By rejecting the “good faith” requirement, and refusing to subject conciliation to any level of judicial scrutiny, the Mach court sharply disagreed with its sister circuits. The court’s reasoning for this divergence is reviewed and analyzed below.

III. EEOC v. MACH MINING, LLC.

In E.E.O.C. v. Mach Mining, an employer-defendant sought dismissal of a discrimination suit on the grounds that the EEOC failed to comply with Title VII’s requirements. Namely, the employer alleged that the EEOC failed to engage in good faith conciliation before filing suit. The court held, however, that failure-to-conciliate was not grounds for dismissal on the merits because the conciliation process is not subject to judicial review. This decision is consistent with the Seventh Circuit’s reluctance to allow courts to review and evaluate the adequacy of the EEOC’s pre-suit processes. In Mach, the court defended its reasoning, stating that it was “consistent with our earlier cases rejecting similar attempts by employers to change the

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91 Mach Mining, 738 F.3d at 171.
92 Id.
93 Id. at 171–72.
94 See Doe v. Oberweis Dairy, 456 F.3d 704, 709 (7th Cir. 2006) (refusing to review whether an employee cooperated during pre-suit proceedings); EEOC v. Caterpillar, Inc. 409 F.3d 831, 833 (7th Cir. 2005) (the “existence of probable cause to sue is generally and in this instance not judicially reviewable.”); EEOC v. Elgin Teachers Assoc., 27 F.3d 292, 294 (7th Cir. 1994) (stating that the decision to file suit is within the sole discretion of the EEOC “rather than the judiciary); McCottrell v. EEOC, 726 F.2d 350, 351 (7th Cir. 1984) (refusing to review the EEOC’s “no reasonable cause” determination); Stewart v. EEOC, 611 F.2d 679, 682 (7th Cir. 1979) (refusing to review the adequacy or timeliness of the EEOC’s pre-suit investigation and “reasonable cause” determination).
focus from their employment practices to the agency’s pre-suit processes.”

A. Facts and Procedural History

In early 2008, the EEOC received a charge of discrimination from a woman who claimed Mach Mining did not hire a number of coal miner applicants based on gender. The EEOC investigated the charge and determined that there was reasonable cause to believe Mach Mining had, in fact, discriminated against a class of female job applicants at its mine near Johnston City, Illinois. According to the EEOC, Mach Mining had never hired a single female for a mining-related position and did not even have a women’s bathroom at its mining site. In late 2010, the EEOC notified Mach Mining of its intent to begin formal conciliation efforts. The parties discussed possible resolutions, but ultimately, the EEOC and Mach Mining did not reach a conciliation agreement.

In September 2011, the EEOC informed Mach Mining that the conciliation process was unsuccessful and that further conciliation efforts would be futile. Two weeks later, the EEOC filed its complaint against Mach Mining. The complaint alleged that Mach Mining violated Title VII by engaging in a pattern or practice of unlawful employment practices since at least January 1, 2006.

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95 Mach Mining, 738 F.3d at 181.
96 Id. at 173.
97 Id.
99 Mach Mining, 738 F.3d at 173.
100 Id.
101 Id.
102 Id.
complaint also stated that the action was “authorized and instituted pursuant to Sections 706(f)(1) and (3) and 707 of Title VII of the Civil Rights Act of 1964, as amended.”

Mach Mining’s answer to the complaint denied unlawful discrimination and asserted several affirmative defenses, one of which claimed that the suit should be dismissed because the EEOC failed to conciliate in good faith. The EEOC moved for summary judgment solely on the issue of whether, as a matter of law, an alleged failure to conciliate is a valid affirmative defense to an employment discrimination suit. The EEOC’s motion did not address the sufficiency of its conciliation efforts – rather, the EEOC only argued that Title VII did not authorize judicial review of the EEOC’s conciliation efforts.

The district court denied the EEOC’s motion, holding that courts should evaluate conciliation to the extent needed to “determine whether the EEOC made ‘a sincere and reasonable effort to negotiate.’” The EEOC then filed a Motion to Reconsider or Certify for immediate appellate review. In its motion, the EEOC characterized Mach Mining’s failure-to-conciliate defense as “an attempt to whittle away the class of women for whom the EEOC may obtain relief” for unlawful employment practices. Although the district court denied the EEOC’s Motion to Reconsider, it granted the EEOC’s Motion to Certify because the EEOC established the four

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105 *Mach Mining*, 738 F.3d at 173.
107 *Mach Mining*, 738 F.3d at 173.
110 Plaintiff EEOC’s Motion to Reconsider or to Certify Under 1292(b), *supra* note 87, at 1.
statutory criteria for certification. Accordingly, the court certified the following questions for immediate appellate review: whether courts may review the EEOC’s informal efforts to secure a conciliation agreement acceptable to the EEOC before filing suit? If courts may review the EEOC’s conciliation efforts, should the reviewing court apply a deferential or heightened scrutiny standard of review?

The Seventh Circuit issued its opinion on December 20, 2013, holding that conciliation is not subject to any level of judicial review, and thus failure-to-conciliate is not a valid affirmative defense to the EEOC’s unlawful employment discrimination suit. The Seventh Circuit’s reasoning is explained and analyzed below.

On February 25, 2014, Mach Mining filed a Petition for Writ of Certiorari for the Seventh Circuit’s decision to be reviewed by the United States Supreme Court.

B. The Language of Title VII Does Not Authorize Judicial Review of the Conciliation Process

The Mach court stressed that Title VII contains no express provisions for judicial review of the EEOC’s conciliation process and does not provide for an affirmative defense based on an alleged defect in the EEOC’s conciliation efforts. Highlighting the “precise,
complex, and exhaustive nature”\textsuperscript{117} of Title VII, the court stated “this silence itself is compelling.”\textsuperscript{118} In the absence of an express authorization for judicial review, the court refused to read an implied authorization into Title VII because it is “incorrect to infer that Congress meant anything than what the text does say.”\textsuperscript{119} The EEOC also highlights this silence in its appellate brief, pointing out:

No provision specifically articulates what the EEOC must do besides attempt conciliation and decide whether the employer offered a conciliation agreement acceptable to the Commission. No provision authorizes judicial review of that decision. No provision declares what venue would hear challenges based on alleged failures to conciliate. No provision establishes what standard of review would apply in assessing the validity of that decision. And no provision articulates what the remedy should be if the EEOC fails to fulfill its duty to engage in conciliation.\textsuperscript{120}

Because the EEOC neither expressly authorizes judicial review, nor provides guidance as to how the conciliation process should be reviewed, the court infers Congress did not intend conciliation to be reviewable. Rather, the court need only verify whether the EEOC pleaded on the face of its complaint that it complied with Title VII’s requirements.\textsuperscript{121}

The EEOC also argued that Title VII’s failure to require a formalized record of the conciliation process is further evidence that Congress did not intend to authorize judicial review of conciliation.\textsuperscript{122}

\textsuperscript{117} Id. (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2530, (2013)).
\textsuperscript{118} Mach Mining, 738 F.3d at 174.
\textsuperscript{119} Id.
\textsuperscript{120} Brief of Appellant, supra note 87, at 7–8
\textsuperscript{121} Mach Mining, 738 F.3d at 184.
\textsuperscript{122} Brief of Appellant, supra note 87, at 10.; see ICC v. Locomotive Eng’rs, 482 U.S. 270, 283-84 (1987) (rejecting judicial review of denials of reconsideration because of the lack of consistent recordkeeping, reasoning that review was not
The EEOC used the Congressional record to support this argument, noting that Senator Williams voiced concern that review of conciliation would be problematic because there would be no record of the informal conferences, phone calls, and meetings\textsuperscript{123}. Thus, courts would be forced to review an incomplete record that does not accurately represent what occurred\textsuperscript{124}. This reasoning is consistent with the Seventh Circuit’s previous refusals to review the adequacy of the EEOC’s statutorily-required pre-suit actions, especially when statutory text is contraindicative of such review\textsuperscript{125}.

1. \textit{Stewart v. EEOC}

In \textit{Stewart v. EEOC}, several employees sought review of the EEOC’s alleged failure to make timely reasonable cause determinations of their charges\textsuperscript{126}. The employees claimed that the EEOC failed to satisfy the procedural requirements of Title VII by neglecting their charges of employment discrimination by allowing the charges to remain “uninvestigated, unprocessed, and without reasonable cause determinations for one to more than two years.”\textsuperscript{127} The Seventh Circuit, however, refused to probe into the EEOC’s pre-suit procedures, reasoning that Title VII does not authorize review of the challenged agency actions by the EEOC\textsuperscript{128}. The Court relied heavily on the language of Title VII, stating that “[h]ad Congress intended a remedy of enforcement against the EEOC, the provisions of workable because “the vast majority of denials of reconsideration . . . are made without a statement of reasons”).

\textsuperscript{123} 118 Cong. Rec. 3806 (Feb. 14, 1972).
\textsuperscript{124} Brief of Appellant, \textit{supra} note 87, at 10.
\textsuperscript{125} \textit{See} EEOC \textit{v. Mach Mining, LLC}, 738 F.3d 171, 181 (7th Cir. 2013) (“[The Seventh Circuit’s] rejection of the [failure-to-conciliate] defense is consistent with [the Seventh Circuit’s] earlier cases rejecting similar attempts by employers to change the focus from their employment practices to the agency’s pre-suit processes.”)
\textsuperscript{126} \textit{Stewart v. EEOC}, 611 F.2d 679, 683 (7th Cir. 1979).
\textsuperscript{127} \textit{Id.} at 681.
\textsuperscript{128} \textit{Id.}
[Title VII] would have so indicated.”129 This reasoning is consistent with the court’s reasoning in Mach. In both cases, the Seventh Circuit adhered to the plain text of Title VII and refused to read an implied remedy into the statute.130

2. McCottrell v. EEOC

In McCottrell v. EEOC, the Seventh Circuit refused to review the EEOC’s finding that there was no reasonable cause to believe that an employee’s discrimination charge was true.131 After the EEOC made its “no reasonable cause” determination, the employee filed suit against his employer and eventually reached a settlement.132 The employee then sued the EEOC, arguing that the settlement was evidence that the EEOC’s “no reasonable cause” determination was erroneous.133 The Seventh Circuit, however, refused to review the EEOC’s finding, holding that “Title VII does not provide either an express or implied cause of action against the EEOC to challenge its investigation and processing of a charge.”134 This reasoning illustrates the Seventh Circuit’s continued refusal to allow for judicial review of the EEOC’s pre-suit processes where Title VII does not expressly allow for such review.

3. Doe v. Oberweis Dairy

In Doe v. Oberweis Dairy, twenty-seven years after McCottrell, the Seventh Circuit rejected a defendant-employer’s argument that an employee’s failure to cooperate with the EEOC “in good faith” during pre-suit proceedings entitled the employer to summary judgment.135 Although Title VII requires that complainants

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129 Id. at 682.
130 Id.; EEOC v. Mach Mining, LLC, 738 F.3d 171, 174 (7th Cir. 2013).
131 McCottrell v. EEOC, 726 F.2d 350, 351 (7th Cir. 1984).
132 Id.
133 Id.
134 Id.
135 Doe v. Oberweis Dairy, 456 F.3d 704, 709 (7th Cir. 2006).
cooperate with investigations, the court refused to accept that the “good faith” cooperation was a prerequisite to suit or that alleged failure to cooperate could be an affirmative defense.\textsuperscript{136} The court refused to review the employee’s pre-suit activities, reasoning that Title VII provided no basis to review whether the employee cooperated in “good-faith.”\textsuperscript{137} The court added that reading a good-faith requirement into the statute in the absence of express statutory language authorizing such a requirement would be “adventurous” and would “distress originalists.”\textsuperscript{138} The court also warned that, “[t]o allow employers to inject such an issue by way of defense in every Title VII case would cast a pall over litigation under that statute.”\textsuperscript{139}

In \textit{Mach}, the EEOC cited the reasoning of \textit{Oberweis} in its appellate brief, stating that the Seventh Circuit “could have been writing about review of conciliation when it offered its reasons for rejecting review of an employee’s pre-suit activities.”\textsuperscript{140} Just as there is no statutory basis for a “good faith” requirement regarding an employee’s cooperation with the EEOC, there is also no basis for a “good faith” requirement regarding the EEOC’s conciliation efforts.\textsuperscript{141} The \textit{Oberweis} court opined that any risk that employees will fail to cooperate with the EEOC, thereby “thwart[ing] the conciliation process and . . . thrust[ing] additional cases on the federal court is a slight one.”\textsuperscript{142} Similarly, refusal to subject conciliation to judicial scrutiny will not substantially thwart conciliation.\textsuperscript{143} As the \textit{Mach} court noted, the EEOC is constrained by the “practical limitations of budget and personnel,” and thus “has its own powerful incentives to conciliate.”\textsuperscript{144}

The Seventh Circuit consistently refuses to permit judicial review of the EEOC’s statutorily-mandated processes when Title VII

\textsuperscript{136} Id.
\textsuperscript{137} Id. at 711.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Brief of Appellant, \textit{supra} note 87, at 14.
\textsuperscript{141} See EEOC v. Mach Mining LLC, 738 F.3d 171, 176–77 (7th Cir. 2013).
\textsuperscript{142} \textit{Oberweis Dairy}, 456 F.3d at 710.
\textsuperscript{143} \textit{Mach Mining}, 738 F.3d at 180.
\textsuperscript{144} Id.
does not expressly authorize such review. Nevertheless, the Mach court does not rest solely upon statutory silence. On the contrary, the court argues that Title VII effectively prohibits such review.

More specifically, the court reasoned that Title VII’s requirement that the details of the conciliation process remain confidential in combination with its provision that the EEOC retain complete deference in the conciliation process, are contraindicative of judicial review.

C. Title VII’s Confidentiality Provision Contraindicates Judicial Review of Conciliation

The Mach court reasoned that judicial review of the conciliation process conflicts directly with the confidentiality provision of Title VII. The court concluded that Title VII effectively prohibits judicial review of the conciliation process because it requires the details of conciliation to remain confidential. Title VII states “[n]othing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.” In fact, violators of this strict confidentiality requirement may even be subject to criminal prosecution.

The Mach court reasoned that, because of this provision, a court would not have access to any of the relevant information necessary to evaluate any aspect of the process, and thus Title VII contraindicates judicial review. The court pointed out that Title VII contains no exception allowing information about conciliation to be

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145 See EEOC v. Mach Mining, LLC, 738 F.3d 171 (7th Cir. 2013).
146 Id. at 174.
147 Id.
148 Id. at 174–75.
149 Id.
150 Id.
153 Mach Mining, 738 F.3d 174–75 (7th Cir. 2013).
ad(274,522),(640,675)
including settlement offers, would later be used against them during litigation.\textsuperscript{162} The EEOC further argued that, “[i]f Congress envisioned judicial review, it would make no sense to proscribe parties from disclosing conciliation information to the court.”\textsuperscript{163} The Seventh Circuit agreed with the EEOC, and reasoned that Title VII’s confidentiality requirement renders judicial review of the conciliation process impractical because a court would not have access to the information necessary to make a meaningful determination.\textsuperscript{164}

D. The EEOC’s Broad Discretion in Defining and Administering the Conciliation Process is Contraindicative to Judicial Review of Conciliation

The Mach court also stressed that Title VII gives great deference to the EEOC regarding the conciliation process.\textsuperscript{165} While the statute requires the EEOC engage in conciliation efforts prior to filing a lawsuit, it essentially allows the EEOC to internally define and administer its conciliation efforts.\textsuperscript{166} The court stated “Title VII includes express statutory language making it clear that conciliation is an informal process entrusted solely to the EEOC’s expert judgment.\textsuperscript{167} The court reasoned that such an “open-ended” grant of power to an administrative agency is not subject to judicial review.\textsuperscript{168}

Title VII uses general language that only requires that the EEOC “endeavor to eliminate” discriminatory practices through “informal methods of conference, conciliation, and persuasion.”\textsuperscript{169} As the court noted, the statute does not further define the conciliation process, nor does it address “just how many offers, counteroffers, conferences, or phone calls” would be necessary to satisfy the

\textsuperscript{162} Id.
\textsuperscript{163} Id. at 9.
\textsuperscript{164} EEOC v. Mach Mining, LLC, 738 F.3d 171, 175 (7th Cir. 2013).
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id. at 174.
\textsuperscript{168} Id. at 175.
statute. Further, Title VII “says nothing about the informal methods the EEOC is required to use...or how hard the agency should ‘endeavor’ to pursue them.” The statute also “gives no description of what a negotiated settlement should look like beyond eliminating the discriminatory conduct.” Furthermore, the court reasoned that the word “informal” indicates that Congress intended to maintain flexibility in the conciliation process and that the Commission would determine the substantive details of the process.

The court also stressed that Title VII gives the Commission complete discretion to accept or reject an employer’s offer for any reason. The EEOC can bring suit when it is “unable to secure from the respondent a conciliation agreement acceptable to the Commission.” Thus, the EEOC is the sole arbiter of whether a proposed conciliation agreement is “acceptable.” Accordingly, even if the EEOC engaged in extensive conciliation efforts, and the employer complied throughout the process, the EEOC could still file suit if, for any reason at all, it was unsatisfied with outcome of the conciliation process.

The Mach court characterized the statute as “an instruction to the EEOC to try, by whatever methods of persuasion it chooses short of litigation, to secure an agreement that the agency in its sole discretion finds acceptable.” Further, as the EEOC argued in its appellate brief, the statute’s command that the conciliation process be “informal,” indicates that the conciliation process is completely within the EEOC’s domain. The Mach court agreed, stating “[i]t would be difficult for Congress to have packed more deference to agency decision-making into so few lines of text.”

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170 Mach Mining, 738 F.3d at 175.
171 Id.
172 Id.
173 Id. at 174.
174 Id.
175 Id. (emphasis added).
176 Id.
177 Id. at 176.
178 Id.
179 Brief of Appellant, supra note 86, at 10.
180 Mach, 738 F.3d at 174.
court’s reasoning is consistent with other Seventh Circuit cases that highlight the EEOC’s broad discretion and authority regarding pre-suit proceedings.181

1. EEOC v. Elgin Teachers Association

In EEOC v. Elgin Teachers Association, the EEOC sued a teachers union for damages related to a collective bargaining agreement that the Commission believed was discriminatory.182 Even though the school district voluntarily changed the objectionable portions of the agreement, the EEOC still filed suit, seeking damages.183 The union claimed the EEOC “lacked the right” to file suit because the union voluntarily complied with the requirements of Title VII during the conciliation process.184 The court rejected this argument, stating that the decision to file suit was within the sole discretion of the EEOC.185

The court found that the EEOC had authority to file suit merely because “it failed to get all of what it wanted” during the conciliation process.186 Namely, the EEOC sought monetary relief, which the teachers association was unwilling to provide.187 In rendering its decision, the court noted that the EEOC’s decision to sue the teachers association was a “peculiar choice.”188 The court found the decision to be peculiar because, in addition to the fact that the teachers association had already changed the objectionable provisions of the collective bargaining agreement, success in litigation for monetary relief would “ensure that back pay would come from the teachers’ own pockets.”189 Still, the court unambiguously stated that “[w]hether litigating to back

181 See, e.g., EEOC v. Elgin Teachers Assoc., 27 F.3d 292, 293 (7th Cir. 1994); EEOC v. Caterpillar, Inc. 409 F.3d 831, 832–33 (7th Cir. 2005).
182 Elgin Teachers Assoc., 27 F.3d at 293.
183 Id.
184 Id. at 294.
185 Id.
186 Id.
187 Id.
188 Id. at 293–94.
189 Id.
up its demand was prudent is . . . a matter for the conscience of the person who authorized the suit, rather than for the judiciary.”

In Mach, the court cited its reasoning in Elgin Teachers Association, and stated that “the same reasoning applies to judicial review of conciliation efforts.” That is, the conciliation process is subject to judicial review because the entire process is within the sole discretion of the EEOC. Furthermore, the EEOC has full authority to file suit after conciliation, even when, as in Elgin Teachers Association, the employer voluntarily complies with Title VII. Accordingly, the Mach court reasoned that it would be futile to probe into the adequacy of conciliation when the EEOC has full authority to reject even the most generous conciliation offers. Rather, the EEOC need only plead its compliance with Title VII in its complaint, and provide the employer with an opportunity to make offers of voluntary compliance.

2. EEOC v. Caterpillar, Inc.

Similarly, in EEOC v. Caterpillar, Inc., the Seventh Circuit held that the EEOC’s pre-suit investigation and reasonable cause determination regarding a discrimination charge were not judicially reviewable. In Caterpillar, a female employee filed a charge with the EEOC, claiming that she was fired for spurning her supervisor’s sexual advances. The EEOC sent a notice to the employer, stating that the EEOC had “reasonable cause to believe that Caterpillar, the employer, discriminated against [the claimant] and a class of female

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190 Id. at 294.
191 EEOC v Mach Mining, LLC, 738 F.3d 171, 181 (7th Cir. 2013).
192 Id. at 176 (“The parties here agree that . . . the EEOC is free to refuse an offer that might appear fair or even generous to a neutral observer.”).
193 Id. at 184 (“all parties acknowledge that the statute grants the EEOC discretion to reject any particular settlement offer . . . ”).
194 Id. at 175.
195 Id. at 184.
196 EEOC v. Caterpillar, Inc. 409 F.3d 831, 833 (7th Cir. 2005).
197 Id. 831.
employees." Caterpillar argued that the latter class-wide allegation was unrelated to the claimant’s original charge, and moved for summary judgment on the theory that the EEOC’s lawsuit went beyond the scope of the investigation required by Title VII. The Seventh Circuit affirmed denial of summary judgment, holding that the “existence of probable cause to sue is generally and in this instance not judicially reviewable.”

The court reasoned that a nexus between the initial charge and an EEOC’s suit is only a concern when the suit is brought by a private party, not when the suit is brought by the EEOC itself. This is because, “if a private party were permitted to add claims that had not been presented in the administrative charge filed with the EEOC, the Commission’s informal procedures for resolving those charges . . . would be bypassed, in derogation of the statutory scheme.” That is, if the EEOC was unaware of certain allegations of discriminatory conduct, it could not investigate or conciliate those allegations before filing suit as required by Title VII. When the EEOC is the plaintiff, however, this is not a concern. As the court noted, if the EEOC’s “investigation turns up additional violations, the Commission can add them to its suit.” Therefore, when the suit is brought by the EEOC itself, “the suit is not confined to claims typified by those of the charging party.”

The court’s reasoning in Caterpillar reflected the Commission’s wide discretion and considerable authority when deciding whether to file suit against an employer. The Commission is free to determine the parameters of its investigation and to decide, based on that investigation, which claims to include in a complaint if it decides to file suit. Citing the reasoning in Caterpillar, the Mach

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198 Id. at 832 (emphasis added).
199 Id.
200 Id. at 833.
201 Id. at 832–33.
202 Id.
203 Id. at 833.
204 Id. at 832.
205 Id. at 833.
206 Id. at 832.
court stated “[n]othing in the language of Title VII or our past case law invites courts to review the agency’s finding of probable or reasonable cause, and the same is true of its approach to conciliation.”\textsuperscript{207} Conciliation, like the EEOC’s other pre-suit procedures, is within the discretion of the EEOC, and is thus not subject to judicial review.\textsuperscript{208} Accordingly, the Seventh Circuit characterized the conciliation process as an opportunity for the employer to make offers of voluntarily compliance with EEOC standards, with the EEOC retaining complete discretion over whether such offers are sufficient to preclude litigation.\textsuperscript{209} This type of process, in which one party has absolute final authority, does not lend itself to judicial review.\textsuperscript{210}

IV. CONCLUSIONS

The purpose of Title VII’s conciliation requirement is not to create a hurdle that the EEOC must overcome before it can file an employment discrimination lawsuit.\textsuperscript{211} Rather, the requirement is best characterized as a procedural formality that gives the employer an opportunity to avoid litigation by voluntarily complying with Title VII’s requirements.\textsuperscript{212} Furthermore, allowing judicial review of the conciliation process would invite employers to “use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute.”\textsuperscript{213} The court warned that “the potential gains of escaping liability altogether will, in some cases, more than make up for the risks of not engaging in serious attempts at conciliation.”\textsuperscript{214} Employers would thus be tempted to “turn what was meant to be an informal

\textsuperscript{207} EEOC v Mach Mining, LLC, 738 F.3d 171, 181 (7th Cir. 2013).
\textsuperscript{208} Id.
\textsuperscript{209} See id. at 176–79.
\textsuperscript{210} Id. at 175 (“Such an open-ended provision looks nothing like a judicially reviewable prerequisite to suit.”).
\textsuperscript{211} See id. at 180.
\textsuperscript{212} See id. at 176–79.
\textsuperscript{213} Id. at 178.
\textsuperscript{214} Id. at 179.
negotiation into the subject of endless disputes over whether the EEOC did enough before going to court.”

As the EEOC’s Appellate Attorney Eric Harrington stated, the Mach decision “permit[s] the district court to address the actual merits of this case, and enable the Commission to focus its efforts and resources on enforcing the laws against discrimination."

Gregory Gochanour, the EEOC’s supervisory trial attorney for the Chicago District Office, echoed this sentiment, stating that the Mach decision “will compel all parties to focus on the issue of whether or not there actually was employment discrimination.” Additionally, even without judicial review, the EEOC’s conciliation efforts are still subject to meaningful scrutiny because “Congress can exert its influence on the EEOC through oversight hearings, adjustments appropriations, and statutory amendments.”

Moreover, Title VII already provides an “all-purpose remedy” by which the EEOC’s alleged shortcomings may be addressed. Namely, Title VII provides that, if an employee-complainant is dissatisfied with the EEOC’s progress regarding the employee’s charge of discrimination, the employee can “circumvent the EEOC procedures and seek relief through a private enforcement action in a district court.” This remedy does not include judicial review of the EEOC’s pre-suit procedural actions. Indeed, the Seventh Circuit has explicitly refused to read any additional remedies into the statute, stating “we do not think Congress could have been more clear in expressing its intent that the private right of action . . . is an adequate remedy in a court for the alleged shortcomings in the EEOC’s

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215 Id. at 178–79.
217 Id.
218 Id. at 180.
219 Stewart v. EEOC, 611 F.2d 679, 683 (7th Cir. 1979).
220 Id. at 682.
221 Id. at 683.
handling of the plaintiffs’ charges.”

Therefore, Title VII already provides a means by which the EEOC’s alleged shortcomings may be remedied—namely, the private right of action conditioned upon a 180-day waiting period. This is the sole remedy for addressing the EEOC’s shortcomings, and it does not include judicial review of conciliation.

Notably, while Title VII provides a remedy for employee-complainants who are dissatisfied with the EEOC’s execution of its administrative procedures, it provides no such a remedy for employers who are dissatisfied with the same procedures. This omission indicates that Congress never intended an employer to have such a remedy. As the Supreme Court stated in Occidental Life, “the individual’s rights to redress are paramount under the provisions of Title VII [so] it is necessary that all avenues be left open for quick and effective relief.”

The purpose of Title VII is to protect employees, not employers, especially when the EEOC has already investigated the employer and has found reasonable cause to believe that the employer is engaging in discriminatory employment practices.

As the Mach court noted, “[t]here is no indication that Title VII’s directive to conciliate was for the special benefit of the employers or that they have a right to conciliation.” Rather, “Congress was focused on effective enforcement of the anti-discrimination standards of Title VII, not creating new rights for employers.” Simply put, judicial review

\[222\] Id. (quoting Hall v. EEOC, 456 F.Supp. 695, 701 (N.D.Cal.1978)) (internal quotation marks omitted).

\[223\] Id.

\[224\] Id.

\[225\] Id. at 682 (“[h]ad Congress intended a remedy of enforcement against the EEOC, the provisions of [Title VII] would have so indicated.”).

\[226\] EEOC v Mach Mining, LLC, 738 F.3d 171, 180 (7th Cir. 2013).


\[228\] Mach Mining, 738 F.3d at 180.

\[229\] Id.

\[230\] Id.
of the conciliation process “does not fit well with the broader statutory scheme of Title VII.”\textsuperscript{231}

Moreover, the \textit{Mach} court also noted that dismissal of a case on its merits would be “too final and drastic a remedy for any procedural deficiency in conciliation.”\textsuperscript{232} This reasoning is consistent with the Supreme Court’s acknowledgement that the individual’s right to redress is “paramount” under Title VII.\textsuperscript{233} Title VII’s conciliation requirement was not meant to insulate employers from litigation. Rather, Title VII’s conciliation requirement provides another “avenue” by which an employee may obtain “quick and effective relief.”\textsuperscript{234} As the EEOC’s General Counsel, David Lopez, stated in regards to the \textit{Mach} decision, the Seventh Circuit “carefully applied the letter of the law . . . in a way that promotes Title VII’s goals, protects victims of discrimination, and preserves the EEOC’s critical law-enforcement prerogatives.”\textsuperscript{235}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{231} \textit{Id.} at 178.
\item \textsuperscript{232} \textit{Id.} at 184.
\item \textsuperscript{233} \textit{Id.} at 180.
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