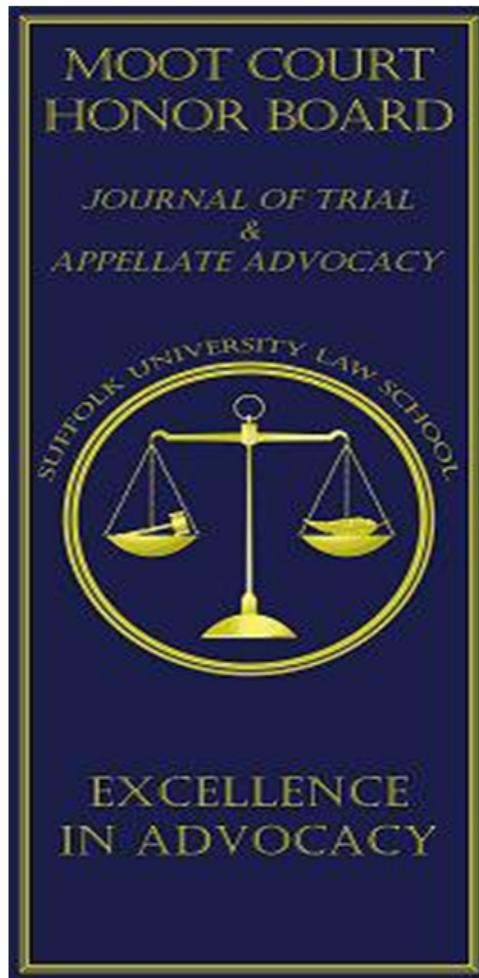

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**Volume XXVI
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EDITOR'S NOTE

Dear Reader:

On behalf of the Suffolk University Law School Moot Court Honor Board, I am honored to present the first issue in Volume XXVI of the *Suffolk Journal of Trial & Appellate Advocacy*. This issue contains one lead article and eight student-written pieces. Each piece is designed to provide insight and be of practical use to lawyers and judges at both the trial and appellate levels. Due to the ongoing global pandemic, this volume was edited and compiled remotely by our authors and editorial staff. Covid-19 provided unique challenges for journal, as we were unable to collaborate with each other in person. I am incredibly proud of our staff's hard work, dedication, and perseverance during this difficult time.

The lead article, *The Demise of the Law-Developing Function: A Case Study of the Wisconsin Supreme Court*, was written by Skylar Reese Croy. Attorney Croy is the Executive Assistant to the Honorable Patience Drake Roggensack, Chief Justice of the Wisconsin Supreme Court. He formerly served as her law clerk. He graduated from the University of Wisconsin Law School in 2019, magna cum laude and Order of the Coif. There, he served as Editor-in-Chief of the Wisconsin Law Review. His published work has appeared in several legal periodicals, including the Wisconsin Law Review, the Marquette Law Review, and the Georgetown Journal of Legal Ethics.

The Demise of the Law-Developing Function: A Case Study of the Wisconsin Supreme Court examines an increase in Wisconsin Supreme Court decisions with no majority opinion. This increase is partially due to conservative justices with an anti-consensus building philosophy joining the court. Pursuant this philosophy, a justice will refuse to join an opinion if the opinion does not state almost precisely what the justice believes. In this Article, Attorney Croy addresses (1) the problems associated with this philosophy, (2) how it conflicts with the law-developing function of the Wisconsin Supreme Court, and (3) proposes solutions for minimizing the number of decisions issued without a majority opinion.

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

- An examination of the Supreme Court's most recent affirmation of an overlooked loophole to the Double Jeopardy Clause that undermines the Clause's guaranteed protections (Ross Ballantyne);
- An analysis of upholding the right to choose through the right to physician-assisted suicide if *Roe v. Wade* is overturned (Jennifer McCoy);
- A forecast of the California Consumer Privacy Act's impact on nationwide data breach class actions (Brendan Chaisson);
- An analysis of excessive force and whether a police officer can be held civilly liable for tasing a mentally ill person after resisting arrest (Brandon Vallie);
- A discussion of how Supreme Court jurisprudence has determined the content neutral classification for buffer zone ordinances that restrict speech near abortion facilities (Jamie Wells);

- An analysis of the cat’s paw liability doctrine and its expansion to include the discriminatory intent of non-employees in case analysis (Kendra Lena);
- An examination of the shifting landscape of federal anti-LGBT discrimination protections, centering on a landmark case that used Title VII precedent to insulate queer Americans from housing discrimination (Cayla Keenan); and
- An inspection of the Second Circuit’s interpretation of § 230 of the Communications Decency Act and the need to revise the statute in light of social media’s advanced capabilities (Alison Eleey).

I sincerely appreciate the twenty-seven staff members of the Moot Court Honor Board, who worked diligently to edit and cite-check throughout the semester. Special thanks to our Executive Editor, Katherine Marshall, whose hard work was vital throughout the editing process; our Managing Editor, Christina Gregg, who helped solicit and polish an exceptional Lead Article; and our Associate Managing Editor, Julia Caccavo, who worked tirelessly to format this issue. I would also like to thank our Associate Executive Editors, Brinhley Alviarez, Meaghan Callahan, Kendra Lena, Jennifer McCoy, and Marissa Persichini, for providing quality editorial feedback and encouraging staff members throughout the editing process; and our Lead Article Editors, Symin Charpentier, Alexandra Sissons, and Jamie Wells, for their excellent Lead Article revisions. Finally, I extend my utmost gratitude to our Board’s advisor, Professor Richard G. Pizzano, the Board’s Staff Assistant, Janice Quinlan, and the Deans and Faculty of Suffolk University Law School for their continued support of the *Suffolk Journal of Trial & Appellate Advocacy*.

Thank you for reading our first issue in Volume XXVI of the *Suffolk Journal of Trial & Appellate Advocacy*. I am confident that judges, practitioners, professors, and students will benefit from our scholarship. I hope that you will find this issue to be compelling, relevant, and useful during these challenging times.

Sincerely,

A handwritten signature in black ink, appearing to read "Diana Hurtado". The signature is written in a cursive, flowing style with a large initial "D" and "H".

Diana Hurtado

Editor-in-Chief

IN SICKNESS AND IN HEALTH . . . AND EVEN ON THE STAND: ANALYZING CIRCUIT SPLIT REGARDING THE ADOPTION OR REJECTION OF THE JOINT PARTICIPATION EXCEPTION AND ITS FUTURE IN LITIGATION

I. INTRODUCTION

Marriage is one of society's oldest and most celebrated institutions.¹ The importance of this long-standing institution has been highly regarded by the United States judiciary.² The significance of the marital relationship to the courts is illustrated by the creation of an evidentiary privilege that serves to protect the intimacy of the marital relationship and promote society's interest in the institution.³ The government has a strong interest in truth finding at trial, and this interest has also been considered to be of great importance to the courts.⁴ These two divergent interests have

¹ See Katherine M. Forbes, Note, *Time for a New Privilege: Allowing Unmarried Cohabiting Couples to Claim the Spousal Testimony Privilege*, 40 SUFFOLK U. L. REV. 887, 887-88 (2007) (highlighting importance of marriage in society and judiciary); see also Ashley Crossman, *The Definition of Marriage in Sociology: Types, Characteristics, and the Social Function of the Institution*, THOUGHTCO. (Nov. 1, 2019), <https://www.thoughtco.com/marriage-3026396> (outlining social characteristics and social functions of marriage).

² See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (recognizing fundamental importance of marriage); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (identifying fundamental right to privacy in marital relationship). The Supreme Court in *Griswold* regarded marriage as highly important and highly intimate, stating:

We deal with a right of privacy older than the Bill of Rights . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, no causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.

Griswold, 381 U.S. at 486; *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (characterizing marriage as most important relationship).

³ See *Trammel v. United States*, 445 U.S. 40, 53 (1980) (explaining transformed adverse testimonial privilege). Under *Trammel*, the Supreme Court modernized and reshaped the adverse testimonial privilege, permitting a spouse to voluntarily testify in court against the defendant spouse or choose not to testify. *Id.*

⁴ See *United States v. Pineda-Mateo*, 905 F.3d 13, 15-16 (1st Cir. 2018) (introducing joint participation exception and noting its controversial nature); Amy G. Bermingham, Note, *Partners in Crime: The Joint Participants Exception to the Privilege Against Adverse Spousal Testimony*, 53 FORDHAM L. REV. 1019, 1021-22 (1985) (providing description of joint participation exception); David Medine, *The Adverse Testimony Privilege: Time to Dispose of a 'Sentimental Relic'*, 67 OR. L. REV. 519, 535 (1988) (examining joint participation exception). The joint participation

been a point of friction in the adoption of different rules regarding who may testify: the adverse testimonial privilege and the joint participation exception.⁵ The adverse testimonial privilege allows the witness spouse to refuse to testify or voluntarily testify at their spouse's trial, while the joint participation exception asserts that, when both spouses have jointly participated in a crime, the adverse testimonial privilege should not be available.⁶

First, this Note examines the circuit split between the treatment of the joint participation exception and the adverse testimonial privilege.⁷ Despite the Supreme Court's decision in *Trammel v. United States*, which modernized the adverse testimonial privilege, the Court did not touch the joint participation exception—meaning the exception may still be used in litigation.⁸ The question of adoption or rejection of the joint participation exception has been the epicenter of judicial tension, leading courts to weigh the importance of protecting marital harmony against the cost of losing valuable evidence at trial, and raising questions of whether a marriage between co-conspirators is even worth protecting at all.⁹ This tension between the adverse testimonial privilege and the joint participation exception raises an important question for future litigation: even if the joint participation exception can be adopted in future litigation, should it be?¹⁰

To answer this question, this Note explores the justifications for using the adverse testimonial privilege and the joint participation exception.¹¹

exception specifically argues that, where both spouses have jointly participated in a crime, the adverse testimonial privilege should not be available. See Medine, *supra* note 4, at 535.

⁵ See *Trammel*, 445 U.S. at 53 (explaining transformed adverse testimonial privilege); see also Medine, *supra* note 4, at 535 (explaining joint participation exception).

⁶ See *Trammel*, 445 U.S. at 53-54 (explaining modernized test for adverse testimonial privilege); Medine, *supra* note 4, at 535 (explaining joint participation exception and juxtaposing exception to adverse testimonial privilege).

⁷ See Medine, *supra* note 4, at 535 (addressing circuit split between two testimonial approaches).

⁸ See *Trammel*, 445 U.S. at 53 (1980) (noting Court did not mention joint participation exception in decision). Specifically, the Supreme Court in *Trammel* modernized the adverse testimonial privilege by allowing a witness spouse to voluntarily testify if they so choose; previously, the witness spouse was completely prohibited from testifying if their spouse did not want them to testify. See *id.*; *Pineda-Mateo*, 905 F.3d at 21 (finding *Trammel* Court did not preclude possibility of recognizing joint participation exception in future litigation).

⁹ See Medine, *supra* note 4, at 536-37 (highlighting tension between joint participation exception to the adverse testimonial privilege to understand circuit split).

¹⁰ See *Pineda-Mateo*, 905 F.3d at 26 (provoking question regarding adopting or rejecting exception).

¹¹ See *In re Malfitano*, 633 F.2d 726, 280 (3rd Cir. 1980) (rejecting joint participation exception because courts cannot define social worthiness of marriage); see also *United States v. Pineda-Mateo*, 905 F.3d 153 26 (1st Cir. 2018) (rejecting exception because value of marriage outweighed government's interest in evidence); *In re Grand Jury Subpoena v. United States*, 755 F.2d 1022, 1025-27 (2nd Cir. 1985) (rejecting joint participation exception because of societal value of marriage); *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1042 (9th Cir. 1997) (re-

A backdrop of relevant caselaw is provided to better understand how the adverse testimonial privilege has shifted over time, especially the transformation after the Supreme Court's decision in *Trammel*.¹² Ultimately, the *Trammel* Court struck the proper balance between preserving marital harmony and lowering the burden on the prosecution.¹³ This Note then delves into the circuit split between the Seventh and Tenth Circuits—who adopted the joint participation exception—and the First, Second, Third, and Ninth Circuits—which all expressly rejected the joint participation exception and upheld the adverse testimonial privilege.¹⁴ Next, this Note analyzes the arguments in favor and against adopting or rejecting the joint participation exception using relevant case law, arguments from critics, and modern rationales regarding the evolving realities of marriages, finding that both are similarly compelling and persuasive.¹⁵

Finally, this Note concludes by explaining how the circuits are clearly leaning toward the rejection of the joint participation exception and that the *Trammel* Court struck the right balance between preserving marital harmony and lessening the burden on the prosecution; ultimately, they con-

jecting joint participation exception because spouses should not be compelled to testify). *Contra* Amy Bermingham, Note, *Partners in Crime: The Joint Participants Exception to the Privilege Against Adverse Spousal Testimony*, 53 *FORDHAM L. REV.* 1019, 1026-27 (1985) (setting out three justifications for joint participation exception).

¹² See *Hawkins v. United States* 358 U.S. 74, 75 (1958) (explaining common law grip on historical version of adverse testimonial privilege); *Trammel*, 445 U.S. at 44 (1980) (explaining origins of adverse testimonial privilege).

¹³ See *Trammel*, 445 U.S. at 53 (highlighting ideal balance *Trammel* Court established by reworking adverse testimonial privilege).

¹⁴ Compare *United States v. Van Drunen*, 501 F.2d 1393, 1397 (7th Cir. 1974) (recognizing joint participation exception to adverse testimonial privilege), and *United States v. Trammel*, 583 F.2d 1166, 1170-71 (10th Cir. 1978) (recognizing joint participation exception to adverse testimonial privilege), with *In re Malfitano*, 633 F.2d at 280 (rejecting joint participation exception because courts cannot define social worthiness of marriage), *In re Grand Jury Subpoena*, 755 F.2d at 1025 (rejecting joint participation exception because of value of marriage to society), *Ramos-Oseguera*, 120 F.3d at 1042 (rejecting joint participation exception because spouses should not be compelled to testify), and *Pineda-Mateo*, 905 F.3d at 26 (rejecting exception because value of marriage outweighed government's evidentiary interest).

¹⁵ See *Van Drunen*, 501 F.2d at 1396-97 (explaining privilege should be narrowly construed because collusive marriages do not warrant protection); Amanda Frost, *Updating the Marital Privileges: A Witness Centered Rationale*, 14 *WIS. WOMEN'S L.J.* 1, 23-24 (1999) (questioning rationale for marital privilege); Donald Slesinger & Robert Hutchins, *Some Observations on the Law of Evidence: Family Relations*, 13 *MINN. L. REV.* 675, 679 (1929) (noting change in social views of marriage makes privilege counterproductive to "individual justice"); *In re Malfitano*, 633 F.2d at 280 (rejecting joint participation exception because courts cannot define social worth of marriage); *In re Grand Jury Subpoena*, 755 F.2d at 1025 (rejecting joint participation exception because of value of marriage to society); *Ramos-Oseguera*, 120 F.3d at 1042 (rejecting joint participation exception because spouses should not be compelled to testify); *Pineda-Mateo*, 905 F.3d at 26 (rejecting exception because value of marriage outweighed government's evidentiary interest).

clude that that courts should not engage in value judgements regarding the marital relationship and the future outcome of litigation should continue to protect and promote the marital relationship, rather than set it aside for the government's interest of truth finding at trial.¹⁶

II. FACTS

A. *The Adverse Testimonial Privilege*

1. Common Law

The adverse testimonial privilege is an evidentiary privilege that protects the defendant's spouse from having to take the witness stand and testify against their husband or wife.¹⁷ The privilege has "deep and 'ancient roots' in the history of common law" for the promotion of marital harmony.¹⁸ Traditionally, the privilege allowed the defendant to completely bar their spouse from providing any testimony in a criminal case.¹⁹ The privilege "sprang from two canons of medieval jurisprudence:" disqualification and incompetency.²⁰ The justification for the disqualification theory was that a spouse's testimony should be disqualified where the spouse has a strong interest in the case.²¹ The justification for the theory of incompe-

¹⁶ See *Trammel v. United States*, 445 U.S. 40, 53 (1980) (highlighting balance *Trammel* court struck in reworking adverse testimonial privilege); *In re Malfitano*, 633 F.2d at 280 (rejecting joint participation exception because courts cannot define social worthiness of marriage); *In re Grand Jury Subpoena*, 755 F.2d at 1025 (rejecting joint participation exception because of value of marriage to society); *Ramos-Oseguera*, 120 F.3d at 1042 (rejecting joint participation exception because spouses should not be compelled to testify); *Pineda-Mateo*, 905 F.3d at 26 (rejecting exception because value of marriage outweighed government's evidentiary interest).

¹⁷ See *Pineda-Mateo*, 905 F.3d at 15 (describing basics workings of adverse testimonial privilege).

¹⁸ See *id.* (highlighting history behind adverse testimonial privilege); see also Jeffrey Eugene Jones, *Federal Marital Privileges in a Criminal Context: The Need for Further Modification Since Trammel*, 43 WASH. & LEE L. REV. 197, 203 (1986) (explaining common rationale for adverse testimonial privilege).

¹⁹ See *Pineda-Mateo*, 905 F.3d at 15 (explaining history behind adverse testimonial privilege). Historically, the privilege was so strong and broad that it even barred testimony from a spouse that would "support the defendant's cause." See *id.*; Medine, *supra* note 4, at 520-21 (explaining history behind adverse testimonial privilege). The *Trammel* Court traced the adverse testimonial privilege back to 1628 when Lord Coke wrote where "it hath beene [sic] resolved by the Justices that a wife cannot be produced either against or for her husband." See *Trammel v. United States*, 445 U.S. 40, 43-44 (1980) (citing 1 E. Coke, A Commentarie upon Littleton 6b (1628)).

²⁰ See Medine, *supra* note 4 at 522-23 (articulating origins of adverse testimonial privilege); Jones, *supra* note 18, at 201 (detailing origins of adverse testimonial privilege).

²¹ See Jones, *supra* note 18, at 201 ("[J]ustification for the adverse spousal testimony privilege was that courts disqualified a party's testimony in a case in which the party had an interest.")

tency then reasoned that a husband and wife were incompetent witnesses against each other because they are seen as one unit.²² At the time, the courts were concerned with fostering marital harmony and disruption of the marital unit; they were reluctant to “provide forums for the display of one spouse testifying against the other,” finding that this display would be “la-beled a sight of natural repugnance” both legally and socially.²³

2. Federal Law

In 1958, the Supreme Court decided *Hawkins v. United States*, which maintained the common law’s structure of adverse testimonial privilege.²⁴ The *Hawkins* Court found it important to protect the marital relationship, felt voluntary testimony “by one spouse would likely cause *more* bitterness on the part of the other spouse,” and such testimony would “dis-turb marital harmony.”²⁵ Rule 501 of the Federal Rules of Evidence was then adopted by Congress in 1974 in an effort to continue the development

²² See *Trammel*, 445 U.S. at 44 (1980) (explaining origins of privilege and incompetence theory); Jones, *supra* note 18, at 201 (explaining incompetence theory); see also Forbes, *supra* note 1, at 890 (reviewing common law theory of incompetence as reason why spouses could not testify at trial). Under the incompetency theory, the husband and wife were considered the same person because the wife did not possess a separate legal or social identity from her husband. See Forbes, *supra* note 1, at 890. Therefore, if the wife were to testify against her husband, then the husband was considered to be testifying against himself, which invaded the Fifth Amendment protection against self-incrimination. See Forbes, *supra* note 1, at 890; see also Medine, *supra* note 4 at 522-23 (highlighting complexities of incompetence theory and restraint theory placed on wives).

²³ See Jones, *supra* note 18, at 203 (detailing rationale for disqualification and incompetence theories underlying privilege); Steven Gofman, Note, “*Honey, The Judge Says We’re History*”: *Abrogating the Marital Privilege Via Modern Doctrines of Marital Worthiness*, 77 CORNELL L. REV. 843, 847 (1992) (explaining courts’ emphasis on martial harmony as justification for disqualification theory); *Funk v. United States*, 290 U.S. 371, 386-87 (1933) (ending rule incompe-tence theory by allowing witness spouse to testify favorably for defendant spouse). The rule re-garding incompetency survived until the 1930s, when the United States Supreme Court in *Funk v. United States* held that finding the wife incompetent to testify favorably for her husband was “er-roneous.” See *Funk*, 290 U.S. at 386-87 (ending rule incompetence theory by allowing witness spouse to testify favorably for defendant spouse).

²⁴ See *Hawkins v. United States*, 358 U.S. 74, 77 (1958) (explaining Court’s objective to maintain historical version of adverse testimonial privilege). The Court in *Hawkins* maintained the privileges structure by continuing to allow the defendant spouse to prevent the witness spouse from testifying, even when the witness spouse wished to testify. See *Id.* The Court notably de-cided against modifying the common law adverse testimonial privilege because of the privileges vital role in maintaining society’s ideal marital relationship. See *Id.*; Gofman *supra* note 23, at 856 (recalling structure of adverse testimonial privilege prior to 1980); Jones, *supra* note 18, at 207 (noting *Hawkins* Court found common law justification for adverse testimonial privilege still viable).

²⁵ See *Hawkins*, 358 U.S. at 77 (emphasis added) (explaining aversion to voluntary martial testimony).

of testimonial privileges.²⁶ Under this rule, the courts were given the ability to control the existence of the adverse testimonial privilege and mold it, based on their reason and experience.²⁷

In 1980, the Supreme Court significantly transformed the adverse testimonial privilege in *Trammel v. United States*.²⁸ After *Trammel*, a defendant could not preclude his spouse from voluntarily testifying.²⁹ The Court weighed the government's interest in discerning the truth at trial against the societal interest of preserving the marital relationship and found that narrowing the privilege struck an appropriate balance between both interests.³⁰ This shift in rationale reflected a movement away from justifying the privilege because spouses operated as one unit speaking with one voice to considerations of marital harmony and a marriage's broader impact on society.³¹ The modern rationale for the privilege is grounded in the promotion of the marital relationship and the belief that "permitting one spouse to

²⁶ See *Trammel*, 445 U.S. at 47 (noting Congress' intent to develop privileges though Rule 501); Forbes, *supra* note 1, at 890-91 (pointing to Congress' adoption of Rule 501).

²⁷ See FED. R. EVID. 501 (stating rule); *United States v. Pineda-Mateo*, 905 F.3d 13, 21 (1st Cir. 2018) (noting Court's authority to mold adverse testimonial privilege according to their professional judgement). In cases regarding the adverse testimonial privilege, some state governments have argued that Rule 501's text "in the light of reason and experience" requires the federal courts to engage in a balancing analysis regarding government interests versus the underlying policy of the adverse testimonial privilege. *Pineda-Mateo*, 905 F.3d at 21; see also Bruce L. McDaniel, *Marital Privilege under Rule 501 of Federal Rules of Evidence*, 46 A.L.R. Fed. 735 § 1(c), (1980) ("[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."); Jones, *supra* note 18 at 204 (noting Court's authority to mold privilege by reason and experience). "Rule 501 does not codify the marital privilege [but it] does allow federal courts to apply the privileges as the privileges exist at common law" and mold them "as changing circumstances warrant." Jones, *supra* note 18 at 204.

²⁸ See 445 U.S. 40, 53 (1980) (announcing alteration of adverse testimonial privilege). In *Trammel*, the government indicted defendant, Otis Trammel, for importing heroin and for conspiracy to import heroin. *Id.* at 42. The government agreed not to prosecute Mr. Trammel's wife if she testified against her husband. *Id.* at 42-43. Mrs. Trammel testified and defendant, Mr. Trammel, asserted the historical version of the adverse testimonial privilege. *Id.* at 53. The district court denied Mr. Trammel's claim and the Tenth Circuit invoked the joint participation exception against the privilege to admit Mrs. Trammel's testimony. *United States v. Trammel*, 583 F.2d 1116, 1167-69 (10th Cir. 1978), *aff'd*, 445 U.S. 40 (1980).

²⁹ See *Trammel*, 445 U.S. at 53 (explaining modern privilege under *Trammel*). Before *Trammel*, the defendant spouse had an absolute right to bar the witness spouse from offering testimony. *Id.*; Medine, *supra* note 4, at 520 (contrasting historical structure of adverse testimonial privilege).

³⁰ See *Trammel*, 445 U.S. at 50 (explaining Court's reasoning for altering scope of privilege); see also Jones, *supra* note 18, at 209 (noting why court adjusted scope of privilege).

³¹ See *Pineda-Mateo*, 905 F.3d at 15 (contrasting historical and modern rationales for adverse testimonial privilege).

testify against the other is disfavored because it may damage the relationship[.]”³²

B. *The Joint Participation Exception*

The joint participation exception is a modern theory which challenges the adverse testimonial privilege and has sparked debate in courts regarding its adoption or rejection.³³ Courts apply the joint participation exception when both spouses have participated in a crime and are considered co-conspirators, precluding the spouses from invoking the adverse testimonial privilege.³⁴ Proponents argue three popular justifications to support the Court’s adoption of the joint participation exception.³⁵ The first justification asserts that spouses who engage in joint criminal activity do not have a harmonious marriage, so the purpose of the adverse testimonial privilege—which promotes marital harmony—would not be properly served by allowing adverse testimonial privilege.³⁶ The second justification finds that marriages between spouses who jointly commit crimes together do not deserve protection.³⁷ The third—and likely the most persuasive—justification acknowledges the difficulty in obtaining evidence when spouses jointly commit a crime, finding that the use of the adverse testimonial privilege in these cases has “adverse effect on truthfinding.”³⁸

³² See Gofman, *supra* note 23, at 847 (asserting rationale that “courts should not provide forums for the display of one spouse testifying against the other.”)

³³ See *Pineda-Mateo*, 905 F.3d at 15 (introducing joint participation exception and noting its controversial nature).

³⁴ See Medine, *supra* note 4, at 535 (explaining joint participation exception’s structure and application against adverse testimonial privilege).

³⁵ See Birmingham, *supra* note 4, at 1026-27 (identifying three justifications for joint participation exception).

³⁶ See *id.* (explaining common rationale behind joint participation exception). Critics argue that the justification regarding a non-harmonious marriage is too subjective and would require “a case-by-case determination” of a couple’s marriage, which is an inappropriate inquiry for the courts. *Id.* at 1029; Medine, *supra* note 4, at 536 (finding marriage is “likely to disintegrate because of the joint participation” in crimes). Additionally, critics have argued that there is no evidence showing spouses who commit crimes together do not have a happy marriage. Medine, *supra* note 4, at 536.

³⁷ See *United States v. Van Drunen*, 501 F.2d 1393, 1397 (7th Cir. 1974) (reasoning marriages between criminals are not worthy of legal protections). This justification for the joint participation exception also asserts the marriage is not worth protecting because it does not possess rehabilitative potential. *Id.* at 1397; Birmingham, *supra* note 4, at 1029 (explaining argument claiming, “marriage has no value to society” and does not further public interest); Medine, *supra* note 4 at 534 (explaining lack of value of criminal’s marriage to society).

³⁸ See Birmingham, *supra* note 4, at 1031 (acknowledging difficulty in obtaining evidence when spouses may prevent each other from testifying); Medine, *supra* note 4, at 536 (explaining marital privileges make conspiracies even more difficult to prove). The third justification is arguably the most persuasive because the application of the adverse testimonial privilege to cases

III. HISTORY

Multiple jurisdictions have considered whether to adopt or reject the joint participation exception to the adverse testimonial privilege.³⁹ Several circuits are split on this question.⁴⁰ The Seventh and Tenth Circuits both recognize the joint participation exception, while the Third, Second, Ninth, and First Circuits agree that the rationale of marital harmony and protection of the marital relationship prevails, and therefore, the adverse testimonial privilege is not subject to the joint participation exception.⁴¹

A. Recognizing the Joint Participation Exception

In 1974, in *United States v. Van Drunen*, the Seventh Circuit became the first circuit to recognize the joint participation exception in 1974.⁴² Ultimately, the Seventh Circuit decided not to apply the adverse testimonial privilege and instead recognized the joint participation exception.⁴³ The court found the joint participation exception appropriately lim-

where co-conspiring spouses may “silence the best, and perhaps only, witness to the crime.” *Medine*, *supra* note 4, at 536.

³⁹ See *Medine*, *supra* note 4 at 535 (introducing circuit split regarding adverse testimonial privilege and joint participation exception).

⁴⁰ See *id.* (noting circuit split regarding joint participation exception).

⁴¹ See *United States v. Trammel*, 583 F.2d 1166, 1170-71 (10th Cir. 1978) (recognizing joint participation exception to adverse testimonial privilege), *aff'd*, 445 U.S. 40 (1980); *Van Drunen*, 501 F.2d at 1397 (applying joint participation exception to facts at hand). Cf. *Appeal of Malfitano*, 633 F.2d 276, 280 (3rd Cir. 1980) (rejecting joint participation exception because courts cannot define social worthiness of marriage); *In re Grand Jury Subpoena v. U.S.*, 755 F.2d 1022, 1025 (2d Cir. 1985) (rejecting joint participation exception because of societal value of marriage), *vacated sub nom. United States v. Koecher*, 475 U.S. 133 (1986); *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1042 (9th Cir. 1997) (rejecting joint participation exception because spouses should not be compelled to testify), *overruled by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000); *United States v. Pineda-Mateo*, 905 F.3d 13, 26 (1st Cir. 2018) (rejecting exception because value of marriage outweighed government’s interest in evidence).

⁴² See 501 F.2d at 1397 (noting Court developed specific rule disallowing spouses to not testify against each other at trial).

⁴³ See *id.* at 1397 (setting out facts of *Van Drunen* case). In *Van Drunen*, the defendant spouse was charged with two counts of transporting alien across state lines. *Id.* at 1394. The “alien” in the first count “became defendant’s wife a month after his indictment.” *Id.* The defendant’s wife entered the United States with her children at the Texas border, where the defendant was waiting to pick them up and take them to Chicago. *Id.* at 1395. The defendant took the “alien” in the second count across the Texas border at night in a rowboat. *Id.* The defendant was found guilty of both counts. *Id.* The defendant argued that the trial judge should have applied the adverse testimonial privilege and excluded his wife’s testimony. *Id.* at 1396. In deciding whether to not apply the adverse testimonial privilege, the court acknowledged *Hawkins v. United States* as a possible barrier because the case reaffirmed the common law structure of the privilege. *Id.* The court reviewed the underlying rationales for the privilege, such as the preservation of family and the preventing “the ‘unforgiveable act’ of [spouses] testifying against the other in a criminal

ited the adverse testimonial privilege “to those cases where it makes most sense, namely, where a spouse who is neither a victim nor a participant observes evidence of the other spouse’s crime.”⁴⁴ The Seventh Circuit additionally adopted the joint participation exception to prevent “collusive marriages” which did not have the “rehabilitative aspect that worthwhile marriages possess.”⁴⁵

In 1978, in *United States v. Trammel*, the Tenth Circuit followed the Seventh Circuit’s lead in adopting the joint participation exception in 1978.⁴⁶ The Tenth Circuit held the trial court did not err in allowing the defendant’s wife to testify and did not allow the defendant to assert the adverse testimonial privilege.⁴⁷ Similar to the Seventh Circuit, the court denied the defendant the use of the adverse testimonial privilege and adopted the joint participation exception.⁴⁸ The court reached its conclusion by finding a lack of “domestic harmony” in marital relationships where the spouses jointly commit crimes.⁴⁹ Additionally, the court found it impera-

case.” *Id.* The court ultimately did not find the *Hawkins* decision, or the historical rationales of the adverse testimonial privilege convincing and refused to read *Hawkins* as foreclosing exceptions to the adverse testimonial privilege. *Id.* at 1397. The court justified its reasoning by looking to other established exceptions to the privilege, such as when one spouse commits a crime against another. *Id.*

⁴⁴ See *id.* (explaining why Seventh Circuit chose to adopt joint participation exception despite adverse testimonial privilege).

⁴⁵ See *id.* (deciding collusive spouses lack privilege to not testify against spouse at trial). The Seventh Circuit, however, strongly believes that when spouses jointly commit a crime, the marriage lacks this rehabilitative aspect and is not worth preserving. *Id.*; see also Jones, *supra* note 18, at 212 (explaining why marriages between co-conspirators lack rehabilitative qualities). The “rehabilitative aspect” refers to “a situation in which the marriage rocked by the criminal activity of one’s spouse is still worth preserving, since the marriage still provides comfort, solace and tranquility for the spouses.” See Jones, *supra* note 18, at 212.

⁴⁶ See 583 F.2d 1166, 1170-71 (10th Cir. 1978) (adopting joint participation exception). It should be noted that this Tenth Circuit case went to the Supreme Court as *Trammel v. United States*, 445 U.S. 40 (1980). The circuit court decision is used in this Note for the purpose of explaining the tension between the circuits regarding the adoption or rejection of the joint participation exception.

⁴⁷ See *Trammel*, 583 F.2d at 1168-69 (setting out facts of Tenth Circuit’s decision). In *Trammel*, the defendant spouse was convicted of importing heroin and conspiracy to import heroin from the Philippines to the United States. *Id.* at 1167. The defendant’s wife was a co-conspirator in the heroin transactions but was granted immunity in return for her testimony. *Id.* at 1167-68. The defendant tried to prevent his wife from testifying by asserting the adverse testimonial privilege and argued the trial court erred by allowing his wife to testify despite his strong objections and lack of consent. *Id.* at 1167.

⁴⁸ See *id.* at 1170-71 (finding a “compelling need to alter or amend the common-law rule enunciated in *Hawkins*” because of the uniqueness of co-conspiring spouses). *Id.* at 1168-69. The court acknowledged the decision in *Hawkins* which “reaffirmed . . . the marital testimonial privilege [which was] grounded on the policy of preserving or fostering family peace [but found *Hawkins*] must give ground to greater, more compelling public need” *Id.* at 1168.

⁴⁹ See *id.* at 1170 (explaining Tenth Circuit’s skepticism surrounding preservation of marital harmony between criminals). The court found that marital relationships where spouses jointly

tive to weigh the government ability to “grant of immunity is to reach the truth” against the adverse testimonial privilege and held the government’s interest outweighed the long-standing privilege.⁵⁰

B. Rejecting the Joint Participation Exception

Conversely, in *Appeal of Malfiano*, the Third Circuit refused to recognize the joint participation exception.⁵¹ On appeal, the Third Circuit found that marriages where spouses jointly commit crimes still deserve protection.⁵² The court rejected the idea that spouses who jointly commit crimes have unstable marriages.⁵³ The Third Circuit postulated that these spouses, despite jointly committing crimes, “in fact may be very happy” together.⁵⁴ The Third Circuit refused to believe these marriages lacked social value and felt it was important to protect all marriages “from the discord . . . when one spouse testifies against the other” regardless of the joint crimes committed.⁵⁵

commit crimes lack marital harmony because the “nature of the criminal activities pursued are despicable and completely alien to anything conducive to the preservation of a family relationship . . .” *Id.*

⁵⁰ *See id.* at 1168 (highlighting Tenth Circuit’s focus on truth finding as rationale for adopting joint participation exception). The Tenth Circuit ultimately reasoned the joint participation exception should be adopted because “[the] goal (that of preserving the family) does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or coconspirator he is creating another potential witness.” *Id.* at 1169-70.

⁵¹ *See Appeal of Malfitano*, 633 F.2d 276, 280 (3rd Cir. 1980) (refusing to recognize joint participation exception). In *Malfitano*, the defendant and his wife were involved in a conspiracy with several corporate entities to secure a loan and receive kickbacks. *Id.* at 276. The defendant’s wife refused to answer questions when appearing before a grand jury, asserting the adverse testimonial privilege. *Id.* The district court found the wife’s attempt to assert the privilege was invalid and ordered her to answer the questions. *Id.* She again refused and was held in contempt. *Id.*

⁵² *See id.* at 278, 280 (disagreeing with Seventh and Tenth Circuit’s rationales). The Third Circuit declared that the adverse testimonial privilege’s “traditional rule . . . has been that all valid marriages, even those with existing difficulties, should be protected[.]” and that there was no evidence of existing public policy that when spouses jointly commit a crime, they are not worthy of protection and should therefore be dissolved. *Id.* at 278.

⁵³ *See id.* (disagreeing with rationale purported specifically by Seventh Circuit).

⁵⁴ *See id.* (explaining idea that co-conspiring couples may still maintain marital harmony).

⁵⁵ *See id.* at 277-79 (defending social value of marriages between conspiring spouses). The Third Circuit felt it was inappropriate for courts to subjectively “assess the social worthiness of particular marriages . . .” *Id.* at 279. The court felt marriages where spouses jointly commit crimes still maintain their social value because:

Marriage is a social bond that not only ties the individuals together but also can tie the individuals into certain social norms and behavioral patterns. Thus the marriage may well serve as a restraining influence on couples against future antisocial acts and may tend to help future integration of the spouses back into society.

The Second Circuit agreed with the Third Circuit's rejection of the joint participation exception five years later in *In Re Grand Jury Subpoena*.⁵⁶ The Second Circuit held that the adverse testimonial privilege "is not subject to a joint participation exception."⁵⁷ In refusing to adopt the joint participation exception, the Second Circuit took issue with the *Van Drunen* court's stress on the lack of "rehabilitative potential" in marriages where spouses jointly commit crimes, asserting rehabilitation of marriage has never been an interest furthered by the adverse testimonial privilege.⁵⁸ The court acknowledged, like the Third Circuit, that marriages where spouses jointly commit crimes can still be devoted and happy, and not necessarily unstable.⁵⁹ Finally, the Second Circuit highlighted the value of the marital relationship in society and the need to protect and promote the marital relationship through the adverse testimonial privilege, ultimately finding it appropriate to "leave the creation of exceptions to the Supreme Court or to Congress."⁶⁰

Id. at 278.

⁵⁶ See 755 F.2d 1022, 1025 (2d Cir. 1985), *vacated sub nom.* United States v. Koecher, 475 U.S. 133 (1986) (asserting Second Circuit's rejection of joint participation exception). It should be noted that *In re Grand Jury Subpoena U.S.* has been overturned but is used in this Note to demonstrate the history of the circuit split, the contention amongst the courts regarding the adoption or rejection of the joint participation exception and weighing of the importance of marriage versus the government's interest in gathering evidence. See also *Appeal of Malfitano*, 633 F.2d 276, 280 (3rd Cir. 1980) (highlighting Second Circuit's agreement with Third Circuit's decision to reject joint participation exception).

⁵⁷ See *In re Grand Jury Subpoena*, 755 F.2d at 1025 (refusing to adopt joint participation exception). In *In re Grand Jury Subpoena*, the defendant was arrested and charged with conspiring with other persons, including his wife, to communicate national defense documents to a foreign government. *Id.* at 1022. The defendant's wife was subpoenaed before a grand jury but refused to answer questions, claiming the adverse testimonial privilege. *Id.* at 1023. The case then transferred judges and the wife asserted "she would rather die in prison than testify against her husband" and was held in contempt. *Id.* at 1024-25. Compare *Appeal of Malfitano*, 633 F.2d at 280 (refusing to adopt joint participation exception); with *United States v. Trammel*, 583 F.2d 1166, 1170-71 (10th Cir. 1978) (recognizing joint participation exception to adverse testimonial privilege); and *United States v. Van Drunen*, 501 F.2d 1393, 1397 (7th Cir. 1974) (recognizing joint participation exception to adverse testimonial privilege).

⁵⁸ Compare *In re Grand Jury Subpoena*, 755 F.2d at 1026 (disagreeing with Seventh Circuit's rationale for rejecting adverse testimonial privilege); with *Van Drunen*, 501 F.2d at 1397 (explaining marriages between co-conspirators lack rehabilitative potential and are not worth preserving).

⁵⁹ See *In re Grand Jury Subpoena*, 755 F.2d at 1026 (agreeing with Third Circuit's rationale regarding upholding of joint participation exception); see also *Appeal of Malfitano*, 633 F.2d at 278 (reiterating rationale of privilege for devoted and happy marriages between conspiring spouses).

⁶⁰ See *In re Grand Jury Subpoena*, 755 F.2d at 1028 (highlighting importance of marital relationship and only allowing Congress or Supreme Court to alter privilege). By recognizing the value of the marital relationship and the adverse testimonial privilege's role in protecting it, the Second Circuit conceded that other valuable relationships—such as the attorney-client relationship—can be subject to an exception when communications in furtherance of crimes are made to

The Ninth Circuit in *United States v. Ramos-Oseguera* also refused to recognize the joint participation exception in 1997.⁶¹ Similar to the Seventh and Tenth Circuits, the district court chose to recognize the joint participation exception and held the defendant's wife in contempt when she refused to testify.⁶² However, the Ninth Circuit refused to recognize the joint participation exception because the court found it inappropriate to compel a spouse to testify by forcing them to choose between contempt charges or testifying against their spouse.⁶³

Most recently, in 2018, the First Circuit sided with the Third, Second, and Ninth Circuits in refusing to adopt the joint participation exception; it affirmed the adverse testimonial privilege and its role in promoting and protecting the marital relationship.⁶⁴ In this case, the First Circuit con-

an attorney. *Id.* at 1027. Even so, the Second Circuit justified rejecting the joint participation exception and asserted that the husband-and-wife relationship had superior social importance over the attorney-client relationship. *Id.* Therefore, the marital relationship should not be subject to this exception. *Id.*

⁶¹ See *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1042 (1997) (noting Ninth Circuit refused to adopt joint participation exception). *Ramos-Oseguera* was overturned, but for reasons unrelated to the adoption or rejection of the joint participation exception but is used to demonstrate the split among the circuits. *Id.* at 1029.

⁶² See *id.* at 1032 (stating holding of Ninth Circuit case). The defendant spouse was convicted of conspiracy to possess and distribute heroin. *Id.* The wife was involved in the heroin organization and handled most of the communications as the only bilingual speaker in the organization. *Id.* The defendant's wife was acquitted of conspiracy but convicted of heroin distribution. *Id.* at 1031, 1034. She claimed the adverse testimonial privilege in order to not testify against her husband. *Id.*

⁶³ See *id.* at 1042 (noting Ninth Circuit's rationale for refusing to adopt joint participation exception). The Ninth Circuit relied on the Supreme Court's ruling in *Trammel*, which held that the "witness spouse may neither be compelled for foreclosed from testifying" when taking issue with the defendant's wife either facing contempt or testifying against her husband. *Id.*; see also *Trammel v. United States*, 445 U.S. 40, 53 (1980) (highlighting *Trammel* Court's vesting of privilege in witness spouse).

⁶⁴ See *United States v. Pineda-Mateo*, 905 F.3d 13, 26 (1st Cir. 2018) (rejecting exception because value of marriage outweighed government's evidentiary interest). In this case, the defendant's wife attempted to not be called to testify against her spouse by claiming the adverse testimonial privilege. *Id.* at 19. The defendant's wife was called by the informant regarding the drug transaction and recorded by the prosecution without her knowledge. *Id.* at 18. The wife was allegedly consulting with her husband regarding the drug transaction, and they appeared together at the agreed upon location with the informant to finalize the transaction. *Id.* The prosecution found twenty-five grams of fentanyl in the car registered to the defendant. *Id.* A federal grand jury initially indicted the defendant's wife on one count of conspiracy and two counts of distribution of heroin. *Id.* at 18-19. The defendant's wife pleaded guilty and her husband elected to go to trial. *Id.* at 19. The defendant's wife moved to quash the subpoena by claiming the adverse testimonial privilege, however, the government moved to compel the defendant wife's testimony using the joint participation exception. *Id.*; see also *Ramos-Oseguera*, 120 F.3d at 1042 (rejecting joint participation exception because spouses should not be compelled to testify); *In re Grand Jury Subpoena*, 755 F.2d 1022, 1025 (2d Cir. 1985) (rejecting joint participation exception because marriage is valuable to society); *Appeal of Malfitano*, 633 F.2d 276, 280 (3rd Cir. 1980)

sidered the adoption of the joint participation exception by thoughtfully weighing the government's interest in obtaining important evidence against the underlying policy of the adverse testimonial privilege.⁶⁵ While the government made a strong argument in favor of their important evidentiary interests—especially in cases of conspiracy—the balance ultimately weighed in favor of the adverse testimonial privilege.⁶⁶

The First Circuit found that the interests the adverse testimonial privilege serve continue to “be substantial compared to . . . the Government's evidentiary interests.”⁶⁷ Additionally, the court highlighted the significance of the marital relationship in society and the relationship's inherent intimacy, concluding the joint participation exception would force the court to “engage in value judgments about which marriages are worth of protection and which are not.”⁶⁸ Finally, the First Circuit found that their balancing analysis weighed in favor of rejecting the joint participation ex-

(rejecting joint participation exception because courts cannot define social worthiness of marriage).

⁶⁵ See *Pineda-Mateo*, 905 F.3d at 26 (weighing importance of truth finding against importance of preserving marital relationship).

⁶⁶ See *id.* at 21, 26 (finding balance weighs in favor of preserving marital relationship). The First Circuit rationalized the government's arguments by looking to the Supreme Court's decision in *Trammel*. *Id.* at 21. The First Circuit found that *Trammel* did not “completely preclude the possibility of recognizing the joint participation exception if the appropriate balancing analysis weighs in its favor.” *Id.* The government asserted Rule 501, which allows for the development of evidentiary privileges “in light of reason and experience,” required the First Circuit to balance the government's need for evidence against the adverse testimonial privilege. *Id.* The government further argued their need to gather evidence, especially in cases involving conspiracy, because:

[A] collective criminal agreement . . . presents a greater potential threat to the public. Not allowing the Government to abrogate the privilege . . . ‘wrongly places the law on the side of protecting conspiracies within a marriage’ and the government has a strong need for evidence so that it can dismantle the conspiracy before it inflicts additional harms on the public.

Id. at 22.

⁶⁷ See *id.* at 23 (reiterating value of marriage over government's interest in evidence at trial). In the beginning of the case, the First Circuit outlined the adverse testimonial privilege, finding that it had “deep and ‘ancient roots’ in the history of common law” and serves to “[foster] the harmony and sanctity of the marriage relationship and the broader societal interest in ‘avoiding the unseemliness of compelling one spouse to testify against the other in a criminal proceeding.’” *Id.* at 15.

⁶⁸ See *id.* at 24 (refusing to engage in “value judgments” as court of law). The First Circuit found engaging in value judgments to be an inappropriate and subjective decision for a court to be making. *Id.* To highlight the importance of marriage to individuals and greater society, the First Circuit relied on seminal marriage cases such as *Obergefell v. Hodges*, which described marriage as a profound union which “embodies the highest ideals of love, fidelity, devotion, sacrifice and family. In forming a marital union, two people become something greater than once they were.” *Id.* at 24 (quoting *Obergefell v. Hodges*, 135, S.Ct. 2584, 2608 (2015)).

ception, concluding that “[t]he time-honored evidentiary privilege is no less deserving of protection when the witness whose testimony it seeks to compel is alleged to be a co-conspirator than when he or she is not.”⁶⁹

IV. ANALYSIS

Both arguments from the circuits are compelling and rational.⁷⁰ The sanctity and social value of marriage are strong justifications for upholding the post-*Trammel* adverse testimonial privilege and refusing to adopt the joint participation exception.⁷¹ Yet, the argument regarding the government’s need for evidence, especially in conspiracy cases, opposed to protecting the marital relationship at the cost of this vital evidence is just as compelling; it is clear why the circuits are split.⁷²

It appears that the circuits are leaning toward upholding the post-*Trammel* adverse testimonial privilege and refusing to adopt the joint participation exception.⁷³ However, the option to adopt the joint participation exception moving forward has not been precluded.⁷⁴ Indeed, courts recog-

⁶⁹ See *id.* at 26 (defending protection of marital relationship even if spouses are co-conspiring criminals).

⁷⁰ See *United States v. Trammel*, 583 F.2d 1166, 1170-71 (10th Cir. 1978) (recognizing joint participation exception to adverse testimonial privilege); *United States v. Van Drunen*, 501 F.2d 1393, 1397 (7th Cir. 1974) (recognizing joint participation exception to adverse testimonial privilege); compare *United States v. Pineda-Mateo*, 905 F.3d 15, 26 (1st Cir. 2018) (rejecting exception because value of marriage outweighed government’s interest in evidence); *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1042 (9th Cir. 1997) (rejecting joint participation exception because spouses should not be compelled to testify); *In re Grand Jury Subpoena v. United States*, 755 F.2d 1022, 1025 (2d Cir. 1985) (rejecting joint participation exception because of value of marriage to society); *Appeal of Malfitano*, 633 F.2d 726, 280 (3rd Cir. 1980) (rejecting joint participation exception because courts cannot define social worthiness of marriage).

⁷¹ See *Pineda-Mateo*, 905 F.3d at 26 (rejecting exception because value of marriage outweighed government’s interest in evidence); *Ramos-Oseguera*, 120 F.3d at 1042 (rejecting joint participation exception as spouses should not be compelled to testify); *Appeal of Malfitano*, 633 F.2d at 280 (rejecting joint participation exception because courts cannot define social worthiness of marriage); *In re Grand Jury Subpoena*, 755 F.2d at 1025 (rejecting joint participation exception because of marriage is valuable to society).

⁷² See *Van Drunen*, 501 F.2d. at 1397 (explaining marriages between co-conspirators lack rehabilitative potential and are not worth preserving); *Pineda-Mateo*, 905 F.3d at 22 (highlighting importance of government’s interest in truth finding at trial, especially concerning co-conspirators).

⁷³ See *Pineda-Mateo*, 905 F.3d at 26 (rejecting exception, reasoning value of marriage outweighed government’s interest in evidence); *Appeal of Malfitano*, 633 F.2d at 280 (rejecting joint participation exception because courts cannot define social worthiness of marriage); *Ramos-Oseguera*, 120 F.3d at 1042 (rejecting joint participation exception because spouses should not be compelled to testify); *In Re Grand Jury Subpoena*, 755 F.2d at 1025 (rejecting joint participation exception because of value of marriage to society).

⁷⁴ See *United States v. Pineda-Mateo*, 905 F.3d 15, 21 (1st. Cir. 2018) (finding *Trammel* Court did not preclude possibility of recognizing joint participation exception in future litigation).

nize that the joint participation exception could be recognized if the balance weighs in favor of uncovering evidence at the cost of protecting the marital relationship.⁷⁵ Even if the court adopts the joint participation exception in future litigation, should it?⁷⁶

A more detailed look at the arguments given by courts and critics of the adverse testimonial privilege reveal that obtaining evidence at trial at the cost of protecting the marital relationship is a strong rationale for adopting the joint participation exception.⁷⁷ Courts would be remiss in not, at least, considering the notion absent a Supreme Court ruling.⁷⁸ Despite the strength and persuasiveness of this argument, courts should continue to follow the Second, Third, Ninth, and First Circuit's lead because refusing to adopt the joint participation exception and continuing to uphold the post-*Trammel* adverse testimonial privilege remains the stronger argument.⁷⁹

A. *Argument for Adopting the Joint Participation Exception in Future Litigation*

The Seventh and Tenth Circuits adopted the joint participation exception, as they were troubled by the potential for co-conspirator spouses to be insulated from the requirement of truthful testimony at trial.⁸⁰ Ultimately, they found that the “underlying goal of the [adverse testimonial privi-

⁷⁵ See *id.* at 21.

⁷⁶ See *id.* at 26 (rejecting exception because value of marriage outweighed government's interest in evidence). The *Pineda-Mateo* case underscores the importance of weighing the value of marriage versus the government's interest in truth finding. *Id.* It provokes the question regarding adopting the exception or rejecting the exception, but ultimately lays out a compelling argument for why the marital relationship ultimately trumps the government's interest in evidence at trial. *Id.*

⁷⁷ See *United States v. Van Drunen*, 501 F.2d 1393, 1396-97 (7th Cir. 1974) (stating privilege should be narrowly construed because collusive marriages do not warrant protection); *Frost*, *supra* note 16, at 23-24 (noting importance of gathering evidence versus importance of marital relationship); *Jones*, *supra* note 19 at 218-19 (weighing truth finding at trial versus marital interests); *Slesinger and Hutchins*, *supra* note 16, at 679 (pointing to arguments by critics of adverse testimonial privilege).

⁷⁸ See *Pineda-Mateo*, 905 F.3d at 26 (noting strong argument in favor of truth finding at trial).

⁷⁹ See *id.* (rejecting exception because value of marriage outweighed government's interest in evidence); *Appeal of Malfitano*, 633 F.2d 726, 280 (3rd Cir. 1980) (rejecting joint participation exception because courts cannot define social worthiness of marriage); *In re Grand Jury Subpoena v. United States*, 755 F.2d at 1025 (2nd Cir. 1985) (rejecting joint participation exception because marriage is valuable to society).

⁸⁰ See *Van Drunen*, 501 F.2d at 1396 (recognizing joint participation exception because marriages between criminals cannot be rehabilitated); *United States v. Trammel*, 583 F.2d 1166, 1170-71 (10th Cir. 1978) (finding joint participation exception because marriages between criminals have little value to society).

lege] to preserve the sanctity and harmony of the family” did not outweigh the government’s interest in its “ability to reach the truth.”⁸¹ The circuits also found that where marriages are “collusive,” they do not warrant protection.⁸²

In addition to those arguments made by recent case law, there are three issues that should also be considered to better understand the argument in favor of adopting the joint participation exception: (1) the danger of conspiracy and the need for evidence,⁸³(2) the ascertainment of evidence outweighs the preservation of collusive marriages,⁸⁴ and (3) the new era of divorce.⁸⁵

1. The Need for Preventing the Dangers of Co-conspiring Spouses

The crime of conspiracy between husband and wife creates the same danger to society as any other “unlawful combination.”⁸⁶ A partnership in crime creates a higher risk of danger than a person committing a crime alone and presents a greater threat to the public.⁸⁷ It has been argued that shielding conspiring spouses through adverse testimonial privilege si-

⁸¹ See *Van Drunen*, 501 F.2d at 1396 (holding truth finding at trial to outweigh marital relationship); *Trammel*, 583 F.2d at 1168 (determining fact finding at trial to outweigh marital relationship).

⁸² See *Van Drunen*, 501 F.2d at 1397 (asserting collusive marriages do not warrant protection); see also *Jones*, *supra* note 12, at 212 (holding that collusive marriages did not possess rehabilitative potential and were not worth protecting).

⁸³ See Maltzman, *Criminal Law- Conspiracy Between Husband and Wife*, 15 U. MIAMI L. REV. 312, 314 (1961) (noting danger of conspiracy even between husband and wife).

⁸⁴ See *United States v. Van Drunen*, 501 F.2d 1393, 1396-97 (7th Cir. 1974) (noting ascertainment of evidence at trial outweighs protection of collusive marriages); *Trammel*, 583 F.2d at 1168-69 (finding where spouses conspire marriage is not worth saving in face of gathering evidence).

⁸⁵ See *Frost*, *supra* note 16, at 23-24 (highlighting that “the goal of preserving marriage at the expense of reaching a correct outcome in a criminal proceeding is difficult to justify at a time when marriages . . . frequently end in divorce.”)

⁸⁶ See Maltzman, *supra* note 83, at 314 (noting danger of conspiracy even between husband and wife). The crime of conspiracy is a serious crime and one that the Seventh and Tenth Circuits would likely like to avoid through a limitation such as the joint participation exception. *Id.*

⁸⁷ See *Callanan v. United States*, 364 U.S. 587, 593-94 (1961) (outlining dangers of conspiracy). Justice Frankfurter stated that:

Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish.

Id. at 593.

lences “the best, and perhaps only, witness to the crime.”⁸⁸ The Seventh and Tenth Circuits were arguably justified in prioritizing evidence over protecting a marriage because protected co-conspirators can greatly impede the ascertainment of truth at trial.⁸⁹ In addition, the conspiring spouses’ ability to hide behind the adverse testimonial privilege could have additional negative influences, such as an increased likelihood of threats to public safety and decreased deterrence in the justice system for such dangerous crimes.⁹⁰ Indeed, other courts acknowledge that the government’s need for evidence is heightened in cases of conspiracy because dismantling the conspiracy will prevent harm to the public.⁹¹

2. Are Collusive Marriages Worth Preserving?

The Seventh and Tenth Circuits also considered whether collusive marriages were worth preserving.⁹² The circuits concluded that collusive marriages had no rehabilitative aspects, lacked social importance, and ultimately, were not worth preserving.⁹³ Beyond these circuit decisions, it has been argued that courts should evaluate the worth of a marriage and deter-

⁸⁸ See *Medine*, *supra* note 4, at 536 (noting adverse testimonial privileges hinders attainment of pertinent evidence at trial).

⁸⁹ See *Van Drunen*, 501 F.2d at 1396 (ruling interest in preserving marital relationship not enough to justify protection of spousal criminal enterprise); *United States v. Trammel*, 583 F.2d 1166, 1168 (10th Cir. 1978) (ruling “reason and experience” justify alerting exception to evidentiary privilege); see also *Callanan*, 364 U.S. at 593-94 (reiterating dangers of partnerships in crime); *Medine*, *supra* note 4, at 536 (noting argument regarding gathering evidence at trial versus preserving marital relationship).

⁹⁰ See *United States v. Pineda-Mateo*, 905 F.3d 15, 22 (1st Cir. 2018) (outlining Government’s argument for adopting exception to prevent public harms); *Maltzman*, *supra* note 83, at 314 (highlighting conspiracy and conspiring actors, even spouses, as danger to society). *Maltzman* notes that “a criminal conspiracy between husband and wife presents the same degree of danger to society as any other unlawful combination.” See *Maltzman*, *supra* note 83, at 314. *Maltzman* further argues that collusive spouses should not be able to hide behind the adverse testimonial privilege because it could increase the rate of dangerous conspiracies by married couples. See *Maltzman*, *supra* note 83, at 314.

⁹¹ See *Pineda-Mateo*, 905 F.3d at 22 (highlighting Government’s argument in favor of ascertaining truth during trial).

⁹² See *United States v. Van Drunen*, 501 F.2d 1393, 1396-97 (7th Cir. 1974) (indicating collusive marriages lack rehabilitative aspect and are not worth preserving); *Trammel*, 583 F.2d at 1170 (finding marriage is not worth saving in face of gathering evidence where spouses conspire). The Tenth Circuit went on to state that these marriages were not worth preserving because there is “no domestic harmony in their relationship and the nature of criminal activities pursued are despicable and completely alien to anything conducive to the preservation of a family relationship.” *Trammel*, 583 F.2d at 1170.

⁹³ See *Trammel*, 583 F.2d at 1170-71 (setting out reasoning for applying joint participation exception to case at bar); *Birmingham*, *supra* note 4 at 1027 (noting marriage between joint criminals do not deserve protection) (citing *Van Drunen*, 501 F.2d at 1397).

mine if saving the marriage outweighs preventing the admission of evidence.⁹⁴ If—after the evaluation—the marriage is deemed not worth saving, the joint participation exception to adverse testimonial privilege should be applied.⁹⁵

3. Modern Realities of Divorce Versus Upholding the Marital Relationship

A modern rationale concerning the divorce rate in the United States has been postulated as a motive for adopting the joint participation exception.⁹⁶ This argument acknowledges the modern era by considering whether it is worth preserving the “marital union” when it is likely it will end in divorce.⁹⁷ It is possible the Seventh and Tenth Circuits took this into consideration, as the argument attempts to abruptly withdraw support from under the adverse testimonial privilege’s greatest justification: the social importance of the marital relationship.⁹⁸ This argument concerning divorce

⁹⁴ See Birmingham, *supra* note 4, at 1027-28 (expressing doubt as to whether courts should determine marriage’s worth). Some critics argue that “[a] case-by-case inquiry into the nature of the marriage” is inappropriate because it is an entirely subjective observation made by the court to say a marriage is not worth preserving and therefore the admission of evidence is more important. See Birmingham, *supra* note 4, at 1027-28; Jones, *supra* note 18, at 217-18 (discussing courts’ evaluation of a marriage’s social worth). It is argued that courts should evaluate the social worthiness of a marriage “in order to determine whether protection of the spouse from adverse testimony legitimizes preventing the admission of evidence.” Jones, *supra* note 18, at 218. This argument proposes that the courts should weigh the importance of a marital relationship against the need to ascertain the truth at trial. Jones, *supra* note 18, at 218.

⁹⁵ See Jones, *supra* note 18, at 219 (stating courts should apply exception when court determines marriage is not worth preserving).

⁹⁶ See Frost, *supra* note 15, at 23-24 (exploring divorce rates in United States as rationale for adoption of joint participation exception). Frost argues that the goal of “preserving marriage at the expense of reaching a correct outcome in a criminal proceeding is difficult to justify at a time when marriages in the United States frequently end in divorce.” *Id.* at 23-24.

⁹⁷ See Slesinger & Hutchins, *supra* note 15, at 679 (asserting there is “no reason for sacrificing individual justice . . . to a mythical family unit”); Frost, *supra* note 15, at 23-24 (noting correct outcome in trial is more important than protecting doomed marriages). Further, Frost argues:

Legal rules designed to preserve marriage reflect the priorities of an earlier era, when marriage was almost always a life-long union and when relationships outside of marriage were unacceptable Does it make sense to allow the defendant to escape criminal or civil penalty simply to preserve a marital union that is more than likely to end in divorce?

Frost, *supra* note 15, at 24.

⁹⁸ See *Trammel*, 583 F.2d at 1170-71 (10th Cir. 1978) (indicating collusive marriages are not worth preserving). The Tenth Circuit in *Trammel* underscored that collusive marriages lack “domestic harmony” and ruled that preserving the marital relationship “does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or coconspirator he is creating another potential witness.” *Id.* at 1169-70.

follows logic, and therefore strengthens the argument to adopt the joint participation exception.⁹⁹

B. *Argument for Rejecting the Joint Participation Exception in Future Litigation*

While the arguments in favor of adopting the joint participation exception are convincing, the argument in favor of continuing to uphold the post-*Trammel* adverse testimonial privilege remains the strongest argument.¹⁰⁰ Courts should continue to follow the Second, Third, Ninth and First Circuits and consider the arguments supporting the adoption of the joint participation exception, but ultimately uphold the deeply rooted adverse testimonial privilege.¹⁰¹

1. *Trammel* Court Struck the Right Balance

The importance of truth-finding at trial is an important concern and an appropriate justification for adopting the joint participation exception.¹⁰²

In the eyes of the Tenth Circuit, these marriages were lost causes, likely to fall apart due to their instability, and not worth protecting while letting valuable evidence slip away. *Id.*; *Van Drunen*, 501 F.2d at 1397 (7th Cir. 1974) (implying collusive marriages lack rehabilitative aspect and are not worth preserving).

⁹⁹ See *Frost*, *supra* note 15, at 23-24 (questioning prioritization of protecting marriages in light of high divorce rates); *Slesinger & Hutchins*, *supra* note 15, at 679 (claiming justice more important than protecting marriages that might end in divorce).

¹⁰⁰ See *Trammel v. United States*, 445 U.S. 40, 53 (1980) (noting “existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying.”) Importantly, the *Trammel* Court continued, stating that by “vesting the privilege in the witness-spouse— [the modification of the rule] furthers the important public interest in marital harmony without unduly burdening legitimate prosecution needs.” *Id.*; see also *Appeal of Malfitano*, 633 F.2d at 276, 278-79 (1980) (noting courts should not engage in value judgements concerning marriages); Brief for Appellee at 29, *United States v. Pineda Mateo*, 905 F.3d 13 (1st Cir. 2018) (No. 17-1857) (noting exception is based on common law).

¹⁰¹ See *Trammel*, U.S. 445 at 53 (highlighting *Trammel* Court’s important modification of adverse testimonial privilege); see also *Appeal of Malfitano*, 633 F.2d at 279 (asserting courts should not make marital value judgements); *In re Grand Jury Subpoena U.S.*, 755 F.2d 1022, 1028 (2d Cir. 1985) (acknowledging importance of marital relationship and only allowing Congress or Supreme Court to alter privilege); *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1042 (9th Cir. 1997) (rejecting exception because spouses should not be compelled to testify); *Pineda-Mateo*, 905 F.3d at 26 (rejecting exception because value of marriage outweighs Government’s interest in obtaining evidence).

¹⁰² See *Pineda-Mateo*, 905 F.3d at 21-22 (pointing to Government’s argument regarding importance of gathering evidence at trial). Regarding conspiracies, the Government in *Pineda-Mateo* offered two reasons why their argument for gathering evidence was stronger than preserving the marital relationship. *Id.* at 22. First, the Government highlighted that:

However, this concern should be assuaged because the post-*Trammel* adverse testimonial privilege struck the proper balance between preserving marital harmony and lessening the burden on the prosecution and the courts at trial.¹⁰³ In *Trammel*, the Supreme Court altered the privilege from an absolute bar for spouses providing any testimony in a criminal case to vesting the privilege in the witness spouse.¹⁰⁴ The *Trammel* court was equally focused on marital harmony and the admission of evidence in its latest alteration of the adverse testimonial privilege.¹⁰⁵ By vesting the privilege in the witness spouse, the *Trammel* Court found that the adverse testimonial privilege furthered “the important public interest in marital harmony” without unduly preventing the ascertainment of evidence at trial because there was no longer an absolute bar spouses could place on each other for testifying.¹⁰⁶

2. Maintaining a Level Playing Field

The government’s argument that the adoption of the joint participation exception would aid in the prosecution of conspirators is noteworthy.

“[The] collective criminal agreement . . . presents a greater potential threat to the public. Not allowing the Government to abrogate the privilege . . . ‘wrongly places the law on the side of protecting conspiracies within a marriage’ and therefore the Government has a particularly strong need for evidence so that it can dismantle the conspiracy before it inflicts additional harms on the public.”

Id. Second, the Government argued that the public’s interest in preserving the marital relationship is “diminished in the particular context of conspiracy prosecutions . . . [because] [m]arried couples who conspire to commit crimes . . . ‘have abused the marital privilege granted to them by the state.’” *Id.* Further, the Government argued that “[i]t would be odd to permit a spouse to invoke the spousal testimonial privilege . . . to protect a criminal conspiracy formed within the marriage that is harmful to the state.” *Id.*

¹⁰³ See *Trammel*, 445 U.S. at 53 (noting Court’s important modification of adverse testimonial privilege).

¹⁰⁴ See *id.* (vesting privilege in witness spouse to support marital harmony). The policy rationale behind vesting the privilege in the witness spouse is to support marital harmony by preventing the defendant spouse from dictating the testimony of the witness spouse. *Id.* at 52-53. Vesting the privilege in the witness spouse would also prevent extending privilege to marriages that need no protection. *Id.* at 52.

¹⁰⁵ See *id.* at 53 (pointing to *Trammel* Court’s modification of adverse testimonial privilege). The Court stated that the testimonial privilege should be construed narrowly and strictly because the privileges prevent the admission of evidence and consequently burden the quest for truth. *Id.* at 50. The *Trammel* court found balance between the need for evidence and marital preservation. *Id.* at 50-51.

¹⁰⁶ See *id.* (noting *Trammel* Court’s alteration of testimonial privilege with goal of balancing marital harmony against evidence).

thy.¹⁰⁷ However, adopting the joint participation exception would tip the scale in favor of the government and place an unnecessary burden on marital interests.¹⁰⁸ Prosecutors may abuse the exception by forcing unwilling witnesses to testify against their spouses simply by alleging joint participation in a crime.¹⁰⁹ Additionally, adopting the exception would provide the government with an unfair advantage largely because the *Trammel* Court already struck a proper balance between the government's interest and preserving the marital relationship.¹¹⁰ Furthermore, numerous exceptions to the adverse testimonial privilege have been carved out since the Supreme Court's decision in *Trammel*; providing the government significant aid in prosecuting certain conspiracies with greater ease.¹¹¹ Therefore, adopting the joint participation exception would create an unlevel playing field in a system that already caters toward the government's interest.¹¹²

3. The Social Worthiness of Marriage—Yes, Even Collusive Marriages

An important justification for the adoption of the joint participation exception is the lack of social worthiness in a marriage between co-conspirators.¹¹³ While conspiracy is a dangerous crime and must be taken seriously, this does not mean that marriages between co-conspirators are

¹⁰⁷ See Brief for Appellee, *supra* note 101, at 29 (noting prosecution gains unfair advantage during trials through adoption of joint participation exception).

¹⁰⁸ See *id.* (arguing marital interests outweigh prosecution's job of gathering evidence).

¹⁰⁹ See Birmingham, *supra* note 4, at 1033 (discussing possible government abuse of exception); Frost, *supra* note 15, at 23 (highlighting potential increase in Government power through exception). Those critical of adopting the joint participation exception have accused prosecutors of taking advantage of the adverse testimonial privilege's post-*Trammel* form "by bringing trumped-up charges against a witness-spouse simply to pressure him into waiving the privilege." See Frost, *supra* note 15, at 23. Under this rule, prosecutors can simply suggest joint participation and, furthermore, bring severe charges under an assumption of joint participation, which then implicates marital interest and providing the individuals have no leverage against the government. See Frost, *supra* note 15, at 23.

¹¹⁰ See *Trammel*, 445 U.S. at 53 (describing balance of interests); Brief for Appellee, *supra* note 104 at 29 (noting *Trammel* Court already provided government with aid in prosecuting conspiracy cases).

¹¹¹ See *United States v. Allery*, 526 F.2d 1362, 1366 (8th Cir. 1975) (noting exception where offense against spouse or child's trust disrupts familial bond); *Wyatt v. United States*, 362 U.S. 525, 526 (1960) (noting injured spouse exception).

¹¹² See Birmingham, *supra* note 4, at 1033 (noting consequences of adopting joint participation exception); Frost, *supra* note 16, at 23 (highlighting how joint participation exception will create unlevel playing field for marital interest).

¹¹³ See *United States v. Trammel*, 583 F.2d 1166, 1168-70 (10th Cir. 1978) (noting Seventh and Tenth Circuits declined to find social worthiness of collusive marriages); *United States v. Van Drunen*, 501 F.2d 1393, 1396-97 (7th Cir. 1974) (indicating collusive marriages lack rehabilitative aspect and are not worth preserving).

automatically unstable and of less value to society.¹¹⁴ As the Third Circuit correctly identified, spouses who commit crimes together still may be “very happy” and their marriages still deserve protection.¹¹⁵ Therefore, courts should not engage in value judgments over which marriages are socially worthy and which are not.¹¹⁶ The only actors who should make this determination are the spouses themselves.¹¹⁷ Despite the crime in concert, these marriages still may be of social value and deserve protection under the adverse testimonial privilege.¹¹⁸

V. CONCLUSION

The circuits are clearly leaning toward the continued rejection of the joint participation exception and upholding the post-*Trammel* adverse testimonial privilege. Even so, the arguments in favor of adopting the joint participation exception are compelling and logical. The government’s need for evidence at trial, the skepticism surrounding the social worthiness of marriages between co-conspirators, and the modern rationale which considers divorce rates are all persuasive factors in favor of the joint participation exception.

Certainly, courts would be remiss to not consider these factors until the Supreme Court says otherwise. Nevertheless, courts should continue to follow the Second, Third, Ninth and First Circuit’s lead in refusing to adopt the joint participation exception and should abstain from engaging in marital value judgments. Ultimately, the *Trammel* Court struck the proper balance between these competing viewpoints of preserving marital harmony and lessening the burden on the prosecution and trial courts.

Margaret Quick

¹¹⁴ See *Appeal of Malfitano*, 633 F.2d 276, 277-79 (3d Cir. 1980) (defending social value of marriages between conspiring spouses). The court noted “[t]here is nothing . . . to indicate that marriages with criminal overtones disintegrate and dissolve.” *Id.* at 278.

¹¹⁵ See *id.* at 278 (highlighting marriages between co-conspirators can still be happy and valuable).

¹¹⁶ See *id.* at 278-79 (highlighting worthiness of marriage despite any crimes that may have been jointly committed); *United States v. Pineda-Mateo*, 905 F.3d 13, 24 (1st Cir. 2018) (noting argument for preserving adverse testimonial privilege and refusing “to engage in value judgments”).

¹¹⁷ See *Birmingham*, *supra* note 4, at 1027-28 (asserting court marital value judgments are subjective and inappropriate).

¹¹⁸ See *Appeal of Malfitano*, 633 F.2d at 278 (asserting social worthiness of marriage and positive effects of integration of spouses back into society).

FEDERAL LEGISLATION NEEDED TO SETTLE STUDENT-ATHLETE NAME, IMAGE, LIKENESS ISSUE*

I. INTRODUCTION

On September 30, 2019, California Governor Gavin Newsom signed the Fair Pay to Play Act (“the Act”) into law, allowing California college athletes to profit off their own “names, images, and likenesses” (“NIL”) beginning in 2023.¹ Following the bill’s enactment, many states introduced similar legislation, fearing that prospective athletes may flock to California schools where they can be fairly compensated.² These proposed pieces of legislation fundamentally challenge the century-old system of collegiate athletics established by the National Collegiate Athletic Association (“NCAA”), which holds a monopoly and monopsony over the various markets that comprise the college athletics industry.³ The NCAA currently jus-

**Editor’s Note: This piece was written before the emergence of COVID-19 in the fall of 2019. It does not address how the pandemic has since effected the administration of college sports.*

¹ See S.B. 206, Reg. Sess. (Cal. 2019) (“It is the intent of the Legislature to continue to develop policies to ensure appropriate protections are in place to avoid exploitation of student athletes, colleges, and universities.”); see also Steve Berkowitz, *California Gov. Gavin Newsom at Center of Perfect Storm for NCAA on Name, Image, Likeness*, USA TODAY (Sept. 30, 2019, 4:15 PM), <https://www.desmoinesregister.com/story/sports/2019/09/30/gavin-newsom-ncaa-athletes-law/3824040002/> (discussing NCAA’s pushback to S.B. 206). The Act does not require that athletes be paid by the institutions they attend, but allows for negotiations and deal making with third-party companies. Berkowitz, *supra* note 1. The Act restricts an athlete’s ability to sign deals with companies that conflict with their school’s sponsorship and agents not licensed by the state of California. Berkowitz, *supra* note 1; Michael McCann, *California’s New Law Worries NCAA, but a Federal Law Is What They Should Fear*, SPORTS ILLUSTRATED (Oct. 4, 2019), <https://www.si.com/college/2019/10/04/ncaa-fair-pay-to-play-act-name-likeness-image-laws> (“[T]he Act shouldn’t be confused or conflated with legal efforts to require colleges to pay their athletes—the Act is about contractual relationships between college athletes and companies that wish to use the players’ names, images and likenesses.”)

² See McCann, *supra* note 1 (identifying states that have introduced similar legislation). New York State Senator Kevin Parker (D) has introduced legislation that would allow student athletes to hire agents and receive compensation for use of their NIL. *Id.* Similar bills in Florida and Illinois have been introduced as well. *Id.*

³ See *NCAA v. Miller*, 795 F. Supp. 1476, 1485 (D. Nev. 1992) (discussing how legislation establishing due process protections for student athletes will prompt states to create own versions of bill). The district court notes that, should other states adopt legislation inconsistent with the Nevada statute, the NCAA would be deprived of “a uniform rule and procedural basis for conducting its investigation and review of member institutions.” *Id.*; *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1109 (N.D. Cal. 2019) (concluding NCAA operates as monopsony).

tifies its stronghold by maintaining that student-athletes' amateur status prevents them from participating in the free market.⁴

This Note will first address the issues underlying the movement for furthering collegiate-athlete rights, and the fallacy of the NCAA's notion of "amateurism" as its reason for denying those rights.⁵ Next, this Note will discuss how the NCAA is in violation of the Sherman Act and antitrust law.⁶ Additionally, it will explain how state legislation, though necessary to help build consensus and draw general attention to the issue, will not withstand a Commerce Clause challenge brought by the NCAA.⁷ This Note will then explore the repercussions of multiple state bills, such as the Act, on college athletics.⁸ Finally, this Note will argue that a federal NIL bill is the best avenue for providing college athletes the right to profit off their NIL and participate in the free market.⁹

II. FACTS

In 2018, the Department of Education reported that college sports programs collected a total annual revenue of fourteen billion dollars—a number surpassing any other sports league except for the National Football League ("NFL").¹⁰ The Division I Men's Basketball Tournament alone, known colloquially as *March Madness*, attracts over 100 million viewers and generates one billion dollars in media revenue—more than the NFL's

⁴ See GERALD GURNEY ET AL., UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT 11-24 (2017) (explaining origins of "amateurism" and NCAA model).

⁵ See *O'Bannon v. NCAA*, 802 F.3d 1049, 1072 (9th Cir. 2015) (noting NCAA's argument that amateurism is essential to "increasing consumer demand for college sports"); see also *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1257 (9th Cir. 2020) (discussing NCAA's amateurism argument).

⁶ See GURNEY, *supra* note 4, at 216 (discussing how NCAA's pay restrictions violate Sherman act).

⁷ See McCann, *supra* note 1 (explaining state-by-state approach will be ineffective); *Miller*, 795 F. Supp at 1488 (providing example of NCAA's successful Dormant Commerce Clause argument).

⁸ See McCann, *supra* note 1 (noting options for future legislation at state and federal level); see also Sherman Antitrust Act, 15 U.S.C. § 1 (making unreasonable restraints on interstate commerce illegal).

⁹ See Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12> (discussing possibility of Dormant Commerce Clause defense); see also U.S. CONST. art. 1, § 8, cl. 3 (reserving regulation of interstate commerce to Congress).

¹⁰ See Chris Murphy, *Madness, Inc.: How Everyone is Getting Rich Off College Sports — Except the Players*, www.murphy.senate.gov/download/madness-inc (last visited Apr. 16, 2021) (reporting Department of Education statistic regarding college athletics industry and revenues).

total revenue collected during the entirety of the league's post-season playoffs.¹¹ The college system mirrors professional sports leagues operation and revenue practices, but is distinct in that it is overseen by the NCAA, an organization created in 1906 to preserve the notion of “amateurism[.]”¹² Under the amateur system, student-athletes are barred from receiving compensation, and instead are offered monetary benefits through scholarships and grants.¹³ The NCAA has purported that restricting fair compensation fosters a character essential to the commercial potential of the industry.¹⁴ The NCAA's argument has spurned controversy and has been the subject of legal dispute over the last forty years.¹⁵

It is undeniable that every key player in the college athletics ecosystem reaps significant profit from their involvement in the industry—except the actual players.¹⁶ Grandiose and sport-specific facilities have be-

¹¹ See *id.* (reporting revenue figures for college sports compared to professional counterparts); Tim Baysinger, *Advertisers Bet Big on March Madness as Live Sports Ratings Wane*, REUTERS (Mar. 17, 2017, 3:22 PM), <https://www.reuters.com/article/us-ncaa-basketball-advertising-idUSKBN16K2G9> (reporting revenue generated by different sports leagues); *The Tools You Need for Equity in Athletics Analysis*, U.S. DEP'T OF EDUC., <https://ope.ed.gov/athletics/#/> (last visited Apr. 16, 2021) (reporting revenue generated by different sports leagues); Steven Kutz, *NFL Took in \$13 Billion in Revenue Last Season — See How it Stacks Up Against Other Pro Sports Leagues*, MARKETWATCH (July 2, 2016, 10:53 AM), <https://www.marketwatch.com/story/the-nfl-made-13-billion-last-season-see-how-it-stacks-up-against-other-leagues-2016-07-01> (comparing NFL revenue to other sports leagues).

¹² See Murphy, *supra* note 10 (arguing “amateur” players exploited because of their profitable NIL).

¹³ See Cork Gaines, *Chart Shows How Little Of College Sports Revenue Goes To The Athletes*, BUS. INSIDER (Sept. 24, 2014 5:03 PM), <https://www.businessinsider.com/college-sports-revenue-athlete-scholarships-2014-9> (surveying evolving benefits in athletic scholarships over time).

¹⁴ See Murphy, *supra* note 10 (“Commercialism has always been embedded in college athletics, and the tension between the business-side and the amateurism of the industry is largely why the National Collegiate Athletic Association (NCAA) formed in the early 1900s . . .”)

¹⁵ See *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1247 (9th Cir. 2020) (detailing suit against NCAA and eleven power conferences that “sought to dismantle the NCAA’s entire compensation framework”); *O’Bannon v. NCAA*, 802 F.3d 1049, 1055 (9th Cir. 2015) (outlining suit brought by college basketball and football players after their depiction in video game); Patrick Hruby, *Amateurism Isn’t Educational: Debunking the NCAA’s Dumbest Lie*, VICE (June 14, 2017, 9:00 AM), https://www.vice.com/en_us/article/kzqevz/amateurism-isnt-educational-debunking-the-ncaas-dumbest-lie (noting NCAA “paint[s] itself as an academic guardian, and that tactic is working, at least in federal antitrust court.”)

¹⁶ See Murphy, *supra* note 10 (reporting average salaries of college coaches and administrators); see also Andrea Adelson et al., *The Perks of Being a College Football Coach: Cars, Planes and . . . Good Behavior Bonuses?*, ESPN (Aug. 16, 2017), https://www.espn.com/college-football/story/_/id/20176937/college-football-coaches-perks-sweeten-deals-nick-saban-daboswinney-jim-harbaugh-urban-meyer-jimbo-fisher-mike-leach (discussing evolving benefits included in coaching contracts). The Department of Education reported \$14 billion in total revenue collected by college sports program in 2018. Adelson, *supra* note 16. David Grenardo, an attorney, associate professor at St. Mary’s School of Law, and former Rice University football player,

come the industry standard, resulting in skyrocketing athletic-coaching and administration salaries.¹⁷ Annual coaching salaries, and even some assistant coaching positions, regularly reach multimillion-dollar figures like their professional counterparts.¹⁸ Pointedly, in thirty-nine out of fifty states, college football or men's basketball coaches are the highest paid public employees in the state.¹⁹ Between 2004 and 2014—when adjusted for inflation—the cumulative per-year facilities spending of a forty-eight school sample-size increased by 89% from \$408 million to \$772 million.²⁰ These numbers demonstrate the value states see in the business of collegiate sports, which is evidently beyond that of a mere venue for amateur athletics.²¹

Athletics apparel companies, such as Nike, Adidas, and Under Armour, account for 97% of all program sponsorships and regularly invest hundreds of millions of dollars in universities where student athletes act as uncompensated representatives of their brands.²² The support of these companies went beyond fiscal investment; in fact, these same apparel companies were recently exposed for engaging in federal crimes, including

claimed that during his time in college he struggled financially because his \$385 monthly stipend from Rice barely covered the \$300 monthly rent associated with sharing an apartment with two other student-athletes. Adelson, *supra* note 16; Hruby, *supra* note 15 (highlighting lucrative college athletics revenues and denial of fair compensation to athletes).

¹⁷ See Murphy, *supra* note 10 (outlining increase in facility expenditures by universities over past two decades); see also Will Hobson & Steven Rich, *College Spend Fortunes on Lavish Athletic Facilities*, CHI. TRIBUNE (Dec. 23, 2015), <https://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html> (addressing how certain schools are providing state-of-the-art facilities for its athletes at high cost). These college athletics facilities are often outfitted with high budget amenities, such as barber shops or video game rooms, and massive locker and weight rooms; construction costs of these facilities can be as high as fifty million dollars or more. See Hobson & Rich, *supra* note 17.

¹⁸ See Adelson, *supra* note 16 (noting coaches receive large bonuses for merely winning games). For example, “Iowa State’s Matt Campbell gets \$500,000 for winning six games, while in-state rival Ferentz pockets \$500,000 for eight or more wins and \$100,000 for any bowl appearance.” *Id.*

¹⁹ See Richard Johnson, *A History of Skyrocketing College Football Coach Salaries, from Camp to Dabo*, BANNER SOC’Y (Aug. 15, 2019, 11:53 AM), <https://www.bannersociety.com/2019/8/15/20732192/coach-salaries-history-highest> (discussing increasing coaching salaries); see also *Who’s the Highest-Paid Person in Your State?*, ESPN (Mar. 20, 2018), http://www.espn.com/espn/feature/story/_/id/22454170/highest-paid-state-employees-include-ncaa-coaches-nick-saban-john-calipari-dabo-swinney-bill-self-bob-huggins (reporting highest paid public employee in thirty-nine out of fifty states were athletics coaches).

²⁰ See Hobson & Rich, *supra* note 17 (noting increase in expenditures on sport-specific athletic facilities).

²¹ See *id.* (noting lavish expenditures are financed, in part, by state governments).

²² See Murphy, *supra* note 10 (reporting statistics for athletic sponsorship agreements between apparel companies and universities). Murphy identifies several large collegiate athletic programs sponsored by Nike, Under Armour, and Adidas. *Id.* The University of California at Los Angeles alone received a record breaking \$280 million contract with Under Armour. *Id.*

bribery and wire fraud, and schemes directing high-school athletes to sign with the company's school of choice.²³ The relationship between Louisville Men's Basketball Head Coach, Rick Pitino, and Adidas is the paradigm example of the correlation between exorbitant coaching salaries and apparel company investment.²⁴ Pitino received 98% of the Adidas sponsorship deal with the University of Louisville and was later accused of improperly funneling money to Brian Bowen, an incoming freshman on the Louisville team.²⁵ The scheme implicated Pitino and high-ranking executives within Adidas and the sports agency ASM Sports, and was part of a continued pattern of activity inducing recruits to join various universities through illegal payments to players and their families.²⁶

Although student-athletes are compensated with full scholarships, most do not reap the value of a free college education due to the conditions of their athletic involvement on campus.²⁷ The most profitable programs—overwhelmingly football and men's basketball programs within the Power Five conferences—regularly graduate student athletes at rates much lower than their non-athletic peers.²⁸ Beginning their freshman year, university

²³ See Tyler Tynes, "Money, Bribes, and Basketball": *The Trial of Christian Dawkins*, THE RINGER (May 10, 2019, 5:45 AM), <https://www.theringer.com/2019/5/10/18563524/christian-dawkins-college-basketball-bribery-trial> (reporting multiple criminal acts in paying student athletes to join university basketball programs). The athletics apparel company coordinated with the university to pay high-school athletes to join their program, and later, when that student matriculated to a professional league, the coaching staff from the university would encourage the student to sign a sponsorship agreement with the athletics company. *Id.*

²⁴ See Dan Gartland, *Rick Pitino got 98% of the Money From Louisville's Apparel Deal With Adidas*, SPORTS ILLUSTRATED (Oct. 5, 2017), <https://www.si.com/college/2017/10/05/rick-pitino-louisville-adidas-contract-money> (describing problematic relationship between Pitino, Adidas, and Louisville). Adidas and the University of Louisville agreed to the sponsorship, worth millions. *Id.*; see also Murphy, *supra* note 10 (explaining shocking apparel contract between Pitino and Adidas).

²⁵ See Gartland, *supra* note 24 (reporting amount paid to Rick Pitino was part of Louisville's Adidas deal); see also Press Release, U.S. Attorney's Office, Southern District of New York, *U.S. Attorney Announces the Arrest of 10 Individuals, Including Four Division I Coaches, for College Basketball Fraud and Corruption Schemes*, U.S. DEP'T OF JUST. (Sept. 26, 2017), <https://www.justice.gov/usao-sdny/pr/us-attorney-announces-arrest-10-individuals-including-four-division-i-coaches-college> (finding bribery and wire fraud committed in continuing payment scheme).

²⁶ See Michael Powell, *The Most Honest Man in College Basketball is Going to Prison*, N.Y. TIMES (May 3, 2019), <https://www.nytimes.com/2019/05/03/sports/college-basketball-trial.html> (reporting Dawkins' candid comments about payments he arranged for players).

²⁷ See Murphy, *supra* note 10 (identifying different ways in which athletes are deprived full value of their scholarships).

²⁸ See *id.* (reporting graduation rate averages from Power Five colleges ranging from 20% to 35%). The term "Power Five" refers to the five most profitable and visible athletic conferences within the Football Bowl Subdivision of NCAA Division I: the Atlantic Coast Conference, the Big Ten Conference, the Big 12 Conference, the Pac-12 Conference, and the Southeastern Conference. *Id.*

athletic departments often guide players into either “easy” majors or “paper” courses to increase players’ graduation rates.²⁹ Moreover, the ordinary demands of participation in a Division 1 athletic program leave little room for the requisite amount of study and class time necessary for a traditionally high-profiting major.³⁰ Chris Murphy, U.S. senator from Connecticut, argued in his multi-part report “Madness, Inc.” that “the refusal to compensate college athletes is a modern civil rights issue, as black teenagers are kept poor in order to enrich white adults.”³¹

Additionally, athletic departments such as the University of North Carolina, Chapel Hill (“UNC”) employ fraudulent tactics to keep their students eligible for competition.³² In the late 1980’s, UNC granted two independent study courses to two UNC basketball players with mediocre academic records—courses that were normally only granted to students with outstanding academic records.³³ The courses, commonly referred to as “paper classes”, required only a research paper at the end of the semester, on which the student athletes were guaranteed at least a “B” grade regardless of quality or paper length.³⁴ In the later years of the scheme, these

²⁹ See Chris Murphy, *Madness, Inc.: How colleges keep athletes on the field and out of the classroom*,

https://www.murphy.senate.gov/imo/media/doc/FINAL_Sen.%20Murphy%20NCAA%20Madness%20Inc.%20Report%202%20-%20How%20Colleges%20Keep%20Athletes%20on%20the%20Field%20and%20Out%20of%20the%20Classroom.pdf (last visited June 6, 2021) (describing academic fraud within “paper classes”). From a schoolwork or schedule perspective, these “easier” majors hold less value than comparable majors, which require more work or a more demanding schedule (such as engineering, finance, or science-based fields of study). *Id.*; see also Marc Tracy, *N.C.A.A.: North Carolina Will Not Be Punished for Academic Scandal*, N.Y. TIMES (Oct. 13, 2017), <https://www.nytimes.com/2017/10/13/sports/unc-north-carolina-ncaa.html> (discussing history of “paper classes” and role in collegiate athletics). The “paper classes,” which are outright fraudulent in nature, were championed and promoted by coaches and athletic administrators alike in hopes of increasing academic metrics and graduation rates associated with athletics programs. See Tracy, *supra* note 29.

³⁰ See Hruby, *supra* note 15 (discussing varying limitations on majors athletes must choose from).

³¹ See Murphy, *supra* note 29 (noting general constraints on athletes which deprive them of full value of scholarship). Murphy adds: “The failure of so many black athletes to graduate, especially in the program that makes the most money is another aspect of the growing civil rights crisis in college athletics.” *Id.*

³² See JAY SMITH & MARY WILLINGHAM, CHEATED: THE UNC SCANDAL, THE EDUCATION OF ATHLETES, AND THE FUTURE OF BIG-TIME COLLEGE SPORTS 20-24 (2015) (finding UNC engaged in ongoing scheme to keep athletes eligible using fraudulent classes).

³³ See Tracy, *supra* note 29 (recounting origins of cheating scandal and its evolution).

³⁴ See *id.* (detailing widespread academic fraud throughout university athletic programs); see also Jake New, *Academic Fraud at Syracuse*, INSIDE HIGHER ED (Mar. 9, 2015), <https://www.insidehighered.com/news/2015/03/09/ncaa-suspends-syracuse-u-basketball-coach-vacates-108-wins> (noting Coach Jim Boheim’s suspension for enabling academic fraud); Jake New, *Two Decades of ‘Paper Classes’*, INSIDE HIGHER ED (Oct. 23, 2014),

“paper classes” expanded to include “lecture” courses, which never actually met despite appearing in the course catalog as meeting on a weekly basis.³⁵ The scheme quickly grew to hundreds of students in only ten years.³⁶ The scheme proved to be successful as it prevented 170 athletes from falling below the GPA-eligibility point and allowed eighty students to receive diplomas who otherwise would not have graduated.³⁷ After the scheme was uncovered, the university received a mere NCAA probation, while student-athletes bore the brunt of the punishment through NCAA competition bans.³⁸ The highly-profitable UNC men’s basketball program and head coach Roy Williams, on the other hand, were not punished—despite being one of the school programs with the highest number of athletes participating in the scheme.³⁹

The NCAA has yet to take a hardline stance on what role the furtherance of education plays in their governance structure and overall mission.⁴⁰ In *O’Bannon v. National Collegiate Athletic Association*, the organization claimed that education was the core reason for preventing student athletes from profiting off their “Name, Image, and Likeness rights.”⁴¹ However, in response to a lawsuit over the UNC academics scandal, the NCAA asserted it has no legal duty to ensure that a quality education is effectively delivered to student athletes.⁴² This admission speaks volumes to the association’s disregard for student-athlete’s best interests, while allowing others to profit off their participation in competitions.⁴³

<https://www.insidehighered.com/news/2014/10/23/report-finds-academic-fraud-u-north-carolina- lasted-nearly-20-years> (discussing mechanics of “paper classes”).

³⁵ See Murphy, *supra* note 29 (detailing evolution of fraud scandal to include classes that never met); see also Tracy, *supra* note 29 (reporting lack of meaningful discipline for UNC’s academic fraud scheme).

³⁶ See Tracy, *supra* note 29 (describing specifics of UNC academic fraud scheme).

³⁷ See New, *supra* note 34 (reporting specifics on how academic fraud scheme kept athletes eligible).

³⁸ See Murphy, *supra* note 29 (detailing disparity in punishment handed down as result of scandal). “Further, despite widespread participation by men’s basketball players, neither the program nor its Hall of Fame coach, Roy Williams, received any punishment and went on to win multiple national championships in the aftermath.” *Id.*

³⁹ See *id.* (reporting lack of specific sanctions on UNC’s mens basketball program).

⁴⁰ See Hruby, *supra* note 15 (detailing NCAA’s contradictory legal arguments).

⁴¹ See *O’Bannon v. NCAA*, 802 F.3d 1049, 1058-59 (9th Cir. 2015) (detailing NCAA’s argument that amateurism is essential to marketability of college sports); see also Hruby, *supra* note 15 (refuting amateurism argument with statistical analysis).

⁴² See Hruby, *supra* note 16 (discussing NCAA’s argument that there is no duty to provide comprehensive education to student athletes); Sara Ganim, *NCAA: It’s Not our Job to Ensure Educational Quality*, CNN (Apr. 2, 2015), <https://www.cnn.com/2015/04/01/sport/ncaa-response-to-lawsuit/> (noting NCAA not responsible for academic standards at member schools).

⁴³ See Ganim, *supra* note 42 (discussing hypocrisy of duty argument given NCAA’s history). Ganim argues that it makes little sense for an organization that provides detailed information

Despite the many issues that have beguiled the current collegiate system, the federal government has taken a markedly hands-off approach in its regulation of such a massive interstate commercial industry, and has allowed wide discretion over the administration of collegiate sports.⁴⁴ While Title IX regulates some aspects of collegiate athletics, there is little federal guidance on labor standards for student-athletes.⁴⁵ Instead, the NCAA operates as a de facto cartel, and its rulebook includes several anti-competitive regulations in violation of the Sherman Act.⁴⁶ Despite a growing public consensus that the current model takes advantage of student-athletes, the NCAA has refused to consider alternative approaches that would create a more equitable framework for the collegiate-athletic industry.⁴⁷

III. HISTORY

The NCAA was founded in 1906, but its role and scope of operations in managing collegiate sports has evolved over the course of its history.⁴⁸ The NCAA functionally operates as a trade association, comprised of athletic and coaching officials and conference administrators, whose main

about academic standards to claim it has no legal duty to ensure that those standards are actually met, especially when it has a history of imposing punishment as a result of academic related issues. *See id.*

⁴⁴ *See* NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984) (discussing wide berth of discretion accorded to NCAA in managing intercollegiate athletics); *see also* *See* Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200, 207-09 (1922) (holding professional baseball league exempt from antitrust law). The Supreme Court has consistently used a hands-off approach when considering whether organizations such as the NCAA are subject to antitrust law. *See* Fed. Baseball Club of Baltimore, 259 U.S. at 207-09.

⁴⁵ *See* 20 U.S.C. § 1681 (1972) (requiring universities to provide equal funding for men and women's athletics programs). Title IX regulates the equality of funding and availability of sports programs and addresses sexual discrimination and sexual violence issues – but it fails to proscribe any standards relating to athlete labor standards. *See id.*

⁴⁶ *See* Sherman Antitrust Act, 15 U.S.C. § 1 (making unreasonable restraints on interstate commerce illegal); *see also* O'Bannon v. NCAA, 802 F.3d 1049, 1079 (2015) (holding NCAA's rules on student athletes NIL violate § 1 of Sherman Act); Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 80-81 (2013) (discussing cases where NCAA violated Sherman Act).

⁴⁷ *See* Edelman, *supra* note 46, at 66-67 (outlining NCAA's unwillingness to change model). The NCAA has consistently argued that amateurism is essential to the marketability of their product, despite varying standards for compensation allowances based on sport participation. *Id.*; *see also* *See* Hruby, *supra* note 15 (addressing amateurism argument). If this were the case, college sports that permit athletes to keep some cash prizes, such as tennis, skiing, and golf, should be disproportionately less popular and have a different fan-base demographically than those sports where cash prizes are restricted. *See* Hruby, *supra* note 15.

⁴⁸ *See* GURNEY, *supra* note **Error! Bookmark not defined.**, at 16-21 (detailing NCAA's evolution during 20th century).

interests are to enhance their own profits in relation to collegiate athletics.⁴⁹ In 1996, the NCAA abandoned its previous democratic system of governance for a committee model with sixteen members, eight of which are members from Division 1 football programs.⁵⁰ The overrepresentation of Division 1 football programs shaped the overarching policy, strategy, and decisionmaking of the association over the next twenty years.⁵¹ A crucial component of this structure led to the creation of the term “student-athlete”—aimed at both insulating the programs from liability, and preventing working class players from sharing in the profits in any meaningful capacity.⁵²

The term “student-athlete” was created by the NCAA’s legal team as a defense to a workers’ compensation claim brought by a late college football player’s widow.⁵³ Ray Dennison died from a head injury sustained while playing football for the Fort Lewis A&M Aggies.⁵⁴ When his wife sought compensation under the Colorado workers’ compensation statute, the Colorado Supreme Court accepted the school’s argument that Dennison was not a traditional employee because the school was “not in the football business.”⁵⁵ The court found there was no contractual obligation that Dennison play football, and consequently, the employer-employee relationship did not exist.⁵⁶ Congress’ failure to close similar loopholes through the

⁴⁹ See *id.* at 16 (detailing NCAA’s functionality as trade organization). While the NCAA oversees all collegiate athletics, an emphasis on profits led to the organization’s investment focus on football, and to a lesser extent, men’s basketball programs. *Id.*

⁵⁰ See *id.* at 18 (discussing change to governance model to allow for more influence by football).

⁵¹ See *id.* (detailing influence of football on overarching strategy, policy, and marketing); see also Edelman, *supra* note 46, at 76-78 (noting NCAA financial structure).

⁵² See Chuck Slothower, *Fort Lewis’ First ‘Student-Athlete’*, THE DURANGO HERALD (Sept. 25, 2014, 2:58 PM), <https://durangoherald.com/articles/79431> (reporting first use of term “student-athlete”).

⁵³ See Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single_page=true (detailing NCAA’s creation of term “student-athlete” to insulate itself from liability); see also Hruby, *supra* note 15 (discussing worker’s compensation case brought by Ernest Nemeth against NCAA). In 1953, Ernest Nemeth, a former University of Denver football player, was found eligible for workers’ compensation by the Colorado Supreme Court. See Hruby, *supra* note 15. The NCAA used the term “student-athlete” as a way to shield member institutions from liability for workers’ compensation claims and other similar claims which threatened to upend the amateurism system. See Hruby, *supra* note 15.

⁵⁴ See Branch, *supra* note 53 (detailing Dennison’s injuries).

⁵⁵ See Slothower, *supra* note 52 (explaining court’s holding in Dennison case).

⁵⁶ See Slothower, *supra* note 52 (finding players are “student-athletes” and have no employer-employee rights).

legislative process has enabled the NCAA to profit at the player's expense.⁵⁷

Under the Commerce Clause, Congress may regulate channels of interstate commerce, instrumentalities of interstate commerce, and those activities which have a substantial effect on interstate commerce.⁵⁸ This third category is interpreted broadly in application and, as a result, the commerce power is considered both profound and wide reaching.⁵⁹ Under the Dormant Commerce Clause theory, the Commerce Clause grants jurisdiction over interstate commerce exclusively to the legislature—precluding states from enacting legislation that has a substantial effect on interstate commerce.⁶⁰ Given the exorbitant revenues collected by universities through athletics programs, and the necessity that teams travel across interstate lines to compete, it is logical to classify collegiate sports as activities which substantially affect interstate commerce.⁶¹ However, the NCAA has successfully challenged state legislation regulating restrictions on student athletes under Dormant Commerce Clause actions.⁶² In *National Collegiate Athletic Association v. Miller*, the U.S. District Court for the District of Nevada held that a Nevada law which created procedural rights for student-athletes was unconstitutional under the Commerce Clause.⁶³ Consequently, future state-level legislation invading the NCAA's sphere of power will likely incur similar challenges.⁶⁴

⁵⁷ See Murphy, *supra* note 10 (discussing NCAA's use of free labor to increase program profits); see also Branch, *supra* note 53 (noting NCAA's use of free labor).

⁵⁸ See U.S. CONST. art. I, § 8, cl. 3 (granting Congress power to regulate interstate commerce).

⁵⁹ See *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (finding Congress reserves exclusive right to regulate activities that substantially affect interstate commerce); see also *Gonzales v. Raich*, 545 U.S. 1, 18-19 (2005) (noting Congress may regulate production of marijuana taken together for effect on interstate commerce). *But see* *United States v. Lopez*, 514 U.S. 549, 561 (1995) (finding statute regulating gun possession near schools exceeded congressional Commerce Clause authority).

⁶⁰ See U.S. Const. art. I, § 8, cl. 3 (granting power to regulate interstate commerce to legislative branch); see also sources cited *supra* note 59 (noting limits of congressional power through commerce clause).

⁶¹ See McCann, *supra* note 1 (asserting college athletics is properly regulated under Commerce Clause).

⁶² See *id.* (discussing legal risk of state-by-state approach).

⁶³ See *NCAA v. Miller*, 795 F. Supp. 1476, 1488 (D. Nev. 1992) (holding Nevada statute in question violated Commerce Clause). Cases like *Miller* call into question whether the NCAA will challenge future state-level regulations under the Dormant Commerce Clause theory. *Id.*

⁶⁴ See McCann, *supra* note 9 (describing why state-by-state approach will be easily challenged by NCAA). State-level legislation will be susceptible to challenge as long as universities within that state continue to operate within the NCAA model or schedule games against other schools who are NCAA members. *Id.*

The Sherman Act allows Congress to exercise its power under the Commerce Clause to regulate interstate commercial activity.⁶⁵ The Sherman Act works to maintain a competitive balance in the marketplace by outlawing activities which seek to restrict trade and competition.⁶⁶ Section 1 of the Sherman Act states “every contract, combination[,] . . . or conspiracy, in the restraint of trade or commerce . . . is declared to be illegal[,]” and lays out a framework, which instructs that “unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress.”⁶⁷ In evaluating whether a restraint on trade is in violation of the Sherman Act, courts apply a two-part test.⁶⁸ A court will first determine whether the restraint involves “concerted action between two legally distinct economic entities,” and then whether that restraint affects “trade or commerce among the several states.”⁶⁹ If the initial two-part test is satisfied, a court then will apply one of three tests to evaluate the competitive effects caused by the restraint: (1) a per se test; (2) a rule of reason test; or (3) a quick look test.⁷⁰ A court applies the per se test when it presumes, on first impression, that a restraint depresses competition and applies the quick look test when it presumes that the restraint has a competitive benefit.⁷¹ The rule of reason test is employed when a court must distinguish “between restraints with anti-competitive effect that are harmful to the consumer and restraints stimulating competition in the consumers best interest.”⁷² The rule of reason test requires courts to consider every aspect of the restraint in question, including: whether the parties to the restraint have any power to control the relevant market (known as “market power”); whether the restraint has an overall effect of encouraging or suppressing competition; and whether the

⁶⁵ See Sherman Antitrust Act, 15 U.S.C. § 1 (2004) (outlawing unreasonable restraints on free market).

⁶⁶ See *Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, BONA LAW PC, <https://www.businessjustice.com/antitrust-standards-of-review-the-per-se-rule-of-reason-and-quick.html> (last visited May 27, 2021) (balancing pro-competitive and anti-competitive restraints).

⁶⁷ See *Antitrust Standards of Review*, *supra* note 66 (finding free and unrestrained market most beneficial to consumers); see also *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 7-8 (1958) (establishing framework for identifying illegal restraints on interstate commerce).

⁶⁸ See Edelman, *supra* note 46, at 71 (identifying framework applied in antitrust cases).

⁶⁹ See *id.* at 71-72 (outlining initial two-pronged test to be applied in cases brought under Sherman Act).

⁷⁰ See *id.* at 73-74 (noting different tests developed by SCOTUS to evaluate restraints on commerce).

⁷¹ See *id.* (describing test used to evaluate presumptive benefit or depression to competitor).

⁷² See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (holding court must weigh effects of restraint in question to determine potential benefit to consumer).

restraint caused any “antitrust harm.”⁷³ Using the Sherman Act as a vehicle for remedy, parties have brought claims against the NCAA relative to restraints on name, image, and likeness rights of students-athletes.⁷⁴

In *O’Bannon v. National Collegiate Athletic Association*, the Ninth Circuit found that NCAA rules prohibiting student-athletes from profiting off their names, images, and likenesses were subject to antitrust law and, accordingly, violate § 1 of the Sherman Act.⁷⁵ Applying the rule of reason test, the court held that the NCAA’s rules had an anticompetitive effect on the college education market.⁷⁶ The court reasoned that, because colleges effectively colluded to set the value of a player’s labor and NIL rights at zero, the NCAA rules constituted a price-fixing agreement.⁷⁷ The court accepted two of the NCAA’s arguments, in part, finding that there were some procompetitive justifications for the restraint—specifically, increasing consumer demand for college sports by promoting amateurism and preventing the formation of a “wedge” between student athletes and their peers who did not participate in sports.⁷⁸ The court then found there were at least two viable, less-restrictive alternatives that would not undermine procompetitive justifications and subsequently affirmed the district court’s judgment that universities provide grants-in-aid up to the full cost of attendance.⁷⁹ In summation, the Ninth Circuit declared that the NCAA regulations are subject to antitrust scrutiny and are appropriately evaluated under the rule of reason test, but should be treated with deference if they are found to be serving a procompetitive effect.⁸⁰

IV. ANALYSIS

While *O’Bannon* is the seminal case regarding collegiate athletics NIL, the Ninth Circuit arguably erred in validating both NCAA arguments

⁷³ See Marc Edelman, *Upon Further Review: Will the NFL’s Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of American Needle v. Nat’l Football League*, 16 STAN. J.L. BUS. & FIN. 183, 197 (2011) (illustrating court’s analysis in determining whether restraint benefitted or harmed consumer).

⁷⁴ See *O’Bannon v. NCAA*, 802 F.3d 1049, 1052 (9th Cir. 2015) (outlining argument that NCAA restrictions on athletes’ NIL rights violate Sherman Act).

⁷⁵ See *id.* at 1079 (holding NCAA video game agreement violated Sherman Act).

⁷⁶ See *id.* at 1057 (holding restriction of NIL rights depressed market for college education in United States).

⁷⁷ See *id.* at 1057-58 (holding NCAA barring compensation for NIL rights constituted illegal price-fixing).

⁷⁸ See *id.* at 1058 (evaluating legitimacy of NCAA offered pro-competitive benefits).

⁷⁹ See *O’Bannon*, 802 F.3d at 1053 (affirming district court’s decision that NCAA schools must provide full cost of attendance in grant-in-aid).

⁸⁰ See *id.* at 1079 (holding NCAA bylaws are subject to regulation under Sherman Act).

pertaining to the procompetitive effects of amateurism; rather, the evolution of NIL rights indicates there is increasing support for student athlete claims, and similar decisions in the future may lean in favor of athletes rather than the NCAA.⁸¹ State-level legislation addressing college athletics NIL, however, creates a difficult problem, as it is susceptible to a Dormant Commerce Clause challenge brought by the NCAA.⁸² The Commerce Clause under the U.S. Constitution dictates that Congress regulates interstate commerce.⁸³ Given that collegiate athletics qualify as interstate commerce, Congress is the appropriate body to consider NIL and amateurism issues.⁸⁴ The Dormant Commerce Clause is a legal doctrine that forbids states from discriminating or unduly burdening interstate commerce.⁸⁵ In fact, the NCAA successfully brought a Dormant Commerce Clause challenge against a Nevada state regulation affecting intercollegiate play in *National Collegiate Athletic Association v. Miller*.⁸⁶ In the aforementioned case, the NCAA argued that they could not effectively operate as a national organizing body if they were forced to comply with conflicting laws in different states.⁸⁷

⁸¹ See Edelman, *supra* note 46, at 91-95 (supporting why *O'Bannon* might be decided differently if it were reconsidered today).

⁸² See McCann, *supra* note 1 (describing how NCAA can easily challenge state-level approach).

⁸³ See U.S. CONST. art. I, § 8, cl. 3 (identifying Congress as appropriate branch to regulate interstate commerce).

⁸⁴ See McCann, *supra* note 1 (suggesting Congress should step in to handle NIL issue under commerce clause).

⁸⁵ See *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 98 (1994) (outlining Dormant Commerce Clause doctrine). The Dormant Commerce Clause “denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.” *Id.*; see also Norman R. Williams, *Why Congress May Not “Overrule” the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 187 (2005) (explaining legislative silence cannot overrule Dormant Commerce Clause).

⁸⁶ See *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993) (holding Nevada law substantially interfered with regulation of interstate commerce by legislative branch).

⁸⁷ See *id.* at 639 (arguing NCAA would be unable to operate if subjected to conflicting state laws). In reality, the NCAA cited issues in adhering to individual state laws are not administrative in nature. *Id.* Rather, these issues are tied directly to the continued propagation of the amateurism model. *Id.*; see also Vincent J. DiForte, *Prevent Defense: Will The Return Of The Multi-year Scholarship Only Prevent The Ncaa's Success In Antitrust Litigation?*, 79 BROOK. L. REV., 1333, 1355 (2014) (stating that “[c]ritics admonish the NCAA’s antiquated notion of amateurism, argue that commercialization permeates NCAA, and indicate that the only individuals prevented from benefitting from the system are the student-athletes who generate billions of dollars in revenue for the NCAA’s member institution.”) While varying NIL laws would possibly lead to recruiting advantages and disadvantages among member schools, there is nothing stopping the NCAA from changing their bylaws to allow for the type of compensation explicitly made legal by proposed state-level legislation. DiForte, *supra* note 87, at 1355.

Regardless of the NCAA's ability to mount legal challenges, enacting state-level legislation is an inefficient approach to address the NIL issue because such legislation would only control college athletes participating in programs in states where these bills were enacted.⁸⁸ In response to California's bill, states with single or multiple "powerhouse" athletic programs will be incentivized to pass legislation to create a competitive advantage—or at the very least, mitigate against California's competitive advantage for the universities in their state.⁸⁹

While a number of states have already introduced laws mirroring the Act, their passage will likely deemphasize the need for national reform.⁹⁰ If such an approach was widely utilized by several states, it would likely turn college athletics into an intrastate commercial activity, as out-of-state schools may be unwilling to schedule games or participate in conferences with those schools with state laws that are more favorable to student athletes' NIL rights.⁹¹ A widespread state-level approach might also concentrate college athletics to the few states that pass NIL legislation—relegating states that do not effectively operate to the D3 level.⁹² Congress must pass legislation to maintain the current, national interstate market for college athletics.⁹³

Putting aside the possibility of voluntarily changes to NCAA by-laws, a federal law addressing student-athletes' NIL rights would be the

⁸⁸ See McCann, *supra* note 1 (identifying issues with state-by-state approach to student-athlete compensation quandary).

⁸⁹ See *id.* (listing states which have introduced their own NIL legislation). Each additional state that passes NIL legislation—independent of a federal bill—will simultaneously bolster the NCAA's legal argument that the association cannot effectively administer its rules. *Id.*; see also *NCAA v. Miller*, 795 F. Supp 1476, 1488 (D. Nev. 1992) (noting additional legislation will disrupt uniformity).

⁹⁰ See McCann, *supra* note 1 (predicting California legislation will prompt other states to create own versions of California's bill). The states that introduced this type of legislation after California legislation include: New York, Ohio, Florida, Illinois, Nevada, Pennsylvania, and South Carolina. *Id.*

⁹¹ See McCann, *supra* note 9 (discussing ramification of state-by-state approach). States with expansive NIL rights for athletes might create their own league made up of schools only in states with similar legislation and leave behind the NCAA model entirely. *Id.* Other states who choose to continue with the NCAA's amateurism model may be prevented from scheduling games against schools in states with NIL legislation. *Id.*

⁹² See McCann, *supra* note 9 (discussing further ramifications of state-by-state approach). This change could come as a result of NCAA action, such as removing those schools in states with NIL legislation, or through market equilibrium, as the vast majority of talented players will look to sign with schools in states where they will be allowed to participate in the free market regarding their NIL rights. *Id.*

⁹³ See McCann, *supra* note 9 (discussing how college athletics landscape will change as result of Act). Once California's act goes into effect, California-based NCAA member schools will no longer be allowed to participate in NCAA sanctioned events. *Id.* As more states follow suit, the structure of the NCAA model will be in jeopardy. *Id.*

most effective means for reform, and would also attract widespread, bipartisan support.⁹⁴ Not only would a federal law preclude a Dormant Commerce Clause challenge by the NCAA, but it would also eliminate states' desire to seek the passage of NIL legislation to obtain a competitive advantage in college athletics.⁹⁵ In a political climate where across-the-aisle work between Republicans and Democrats is minimal, there still remains bipartisan consensus on the need to reconsider compensation and NIL rights for college athletes.⁹⁶ Because most athletes participating in the revenue-producing sports of football and basketball are African American, many consider compensation rights for student-athletes an important civil rights issue in the modern era.⁹⁷ Revaluation of compensation is also necessary considering that for the vast majority of student athletes, the marketability and value of their NIL rights are at their peak in college—a time when they are also subsequently the most vulnerable to a career-altering injury.⁹⁸

The NCAA's no-pay rules for student athletes restrict their access to a free market for their services and are subject to scrutiny under § 1 of the Sherman Act.⁹⁹ Section 1 provides “a comprehensive charter of eco-

⁹⁴ See McCann, *supra* note 1 (discussing how California legislation will prompt other states to create their own versions of Act). Legislation introduced in the House of Representatives, known as the “Student-Athlete Equity Act[.]” would condition the NCAA’s status as a non-profit organization on their allowing student athletes to be compensated for the NIL. *Id.*

⁹⁵ See *id.* (discussing how federal law would supplant state law because of supremacy clause); see also Murphy, *supra* note 10 (noting incessant need to compete among athletic programs).

⁹⁶ See Matt Gaetz (@mattgaetz), TWITTER (Oct. 2, 2019, 10:46 AM), <https://twitter.com/mattgaetz/status/1179407308801089538?lang=en> (commenting on unity between political ideologies for collegiate athletes). Representative Gaetz (R-FL), tweeted “The NCAA has devised a system where predominantly young, black adult student-athletes create value at huge cost to their bodies. Then, predominantly old, white administrators see the benefit. BS!.” *Id.*

⁹⁷ See Murphy, *supra* note 10 (identifying restrictions on student-athletes in revenue-generating sports as modern-day civil rights concern).

⁹⁸ See Branch, *supra* note 53 (discussing prevalence of injuries in college football industry). There are 20,000 college football injuries alone per year in the NCAA, including 4,000 knee injuries and 1,000 spinal injuries. *Id.* Forty student-athletes have died while playing college football since the year 2000. *Id.*; Paula Lavigne, *Documents, Claims Bring NCAA Medical Care Issues into Question*, ESPN (Nov. 26, 2019), https://www.espn.com/espn/otl/story/_/id/28116817/documents-claims-bring-ncaa-medical-care-issues-question (discussing prevalence of death in college football); Chris Murphy, *Madness, Inc., How College Sports Can Leave Athletes Broken and Abandoned*, <https://www.murphy.senate.gov/imo/media/doc/Madness%203...pdf> (last visited Jun. 6, 2021) (providing statistics of football-related student deaths and injuries). College football players are 4.5 times more likely to die during training session than while competing in practice or a game, and are 3.6 times more likely to die than high-school football players. Murphy, *supra* note 10.

⁹⁹ See Sherman Act, 15 U.S.C. §§ 1-7 (2006) (providing restrictions on free market competition subject to scrutiny under Act); see also *NCAA v. Bd. of Regents*, 468 U.S. 85, 99 (1984)

conomic liberty aimed at preserving free and unfettered competition as the rule of trade[.]” and prohibits those contracts which “unreasonably” restrain trade.¹⁰⁰ In making this determination, a court examines if the restraint in question involves a “concerted action between at least two legally distinct economic entities” in a way that affects “trade or commerce among the several States[.]”¹⁰¹ Where the threshold burden has been met, a court will examine the restraint under a number of factors, including whether or not it unreasonably suppresses free competition within a relevant market.¹⁰² The issue in bringing a Sherman Act claim on behalf of student athletes is not in meeting the two-prong test to determine if a restraint is illegal, but rather in the NCAA’s classification of student athletes as different than employees—a classification mistakenly accepted by the courts.¹⁰³ Moreover, courts have incorrectly implied that the NCAA and intercollegiate athletics operate in a manner similar to other educational programs, and should therefore be exempt from the analysis.¹⁰⁴ However, given the revenues associated with running these programs, particularly men’s basketball

(“By participating in an association which prevents member institutions from competing against each other . . . the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another. A restraint of this type has often been held to be unreasonable as a matter of law.”)

¹⁰⁰ See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (interpreting Sherman Act’s purpose and Congress’ objective in enacting it); see also *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342-43 (1979) (describing Congressional understanding of what constitutes “business” under Sherman Act).

¹⁰¹ See *Primetime 24 Joint Venture v. Nat’l Broad. Co.*, 219 F.3d 92, 103 (2d Cir. 2000) (quoting *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 542 (2d Cir. 1993)) (defining threshold burden of proof for determining illegal restraint on trade).

¹⁰² See *Banks v. NCAA*, 746 F. Supp. 850, 858 (N.D. Ind. 1990) (“Whether a particular arrangement violates the Sherman Act depends upon the arrangement’s effects upon competition in the relevant marketplace.”)

¹⁰³ See *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 197 (2010) (“An ongoing § 1 violation cannot evade scrutiny simply by giving the ongoing violation a name and label.”); *NCAA v. Miller*, 795 F. Supp. 1476, 1487 (D. Nev. 1992) (considering students and employees in same classification); see also Slothower, *supra* note 52 (introducing classifications among students and employees); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete As Employee*, 81 WASH. L. REV. 71, 129 (2006) (identifying how NCAA member schools do not consider student athletes as victims of wage fixing).

¹⁰⁴ See *Jones v. NCAA*, 392 F. Supp. 295, 303-04 (D. Mass. 1975) (classifying intercollegiate ice hockey as educational program); see also *Hennessey v. NCAA*, 564 F.2d 1136, 1151 (5th Cir. 1977) (holding NCAA bylaws that have sufficient impact on commerce subject to Sherman Act); Erin Guruli, Article, *Commerciality Of Collegiate Sports: Should The IRS Intercept?*, 12 SPORTS LAW J. 43, 61 (2005) (noting that “while the NCAA has not agreed to compensate college athletes, university athletic programs, namely those associated with NCAA Division I athletics and the BCS, look very similar to for-profit entities.”)

and football, it would be inconsistent to find that these activities do not constitute interstate economic activity.¹⁰⁵

If a court finds that both the threshold requirements and competitive effects tests are satisfied, it subsequently examines the competitive effects created by the restraint under one of three “rule of reason” test.¹⁰⁶ This per se test is applied when a restraint is “so nefarious” that it is unlikely to have any redemptive value and would be declared illegal, unless a special antitrust exemption applies.¹⁰⁷ If a court believes there may be some benefit to the restriction, it will apply the rule of reason analysis, and examine whether: the parties to the restraint have any power to control market power and the restraint either suppresses or encourages free market competition—consequently causing “antitrust harm.”¹⁰⁸ If a plaintiff successfully shows anticompetitive effects in their complaint, the court will apply a “‘quick-look’ analysis under the rule of reason[,]” which requires a less comprehensive analysis because a court relies on the presumption of illegality.¹⁰⁹ In most cases involving the NCAA, the courts will employ a “full” rule of reason test—citing the common interest of NCAA member institutions in “making the entire league successful and profitable.”¹¹⁰

¹⁰⁵ See *O’Bannon v. NCAA*, 802 F.3d 1049, 1065 (9th Cir. 2015) (finding non-commercial activity argument “not credible”).

¹⁰⁶ See *id.* at 1070 (articulating different tests under rule of reason); see also Marc Edelman & Brian Doyle, *Antitrust and “Free Movement” Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT’L. L. & BUS. 403, 414-15 (2009) (describing “rule of reason” test).

¹⁰⁷ See Edelman & Doyle, *supra* note 106, at 415 (“In the context of professional sports . . . the two most applicable defenses or exemptions to Section 1 of the Sherman Act are the statutory labor exemption and the non-statutory labor exemption.”)

¹⁰⁸ See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (explaining rule of reason is “an inquiry into market power and market structure”); see also *Worldwide Basketball, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004) (“Under the rule of reason analysis, the plaintiff bears the burden of establishing that the conduct complained of ‘produces significant anticompetitive effects within the relevant product and geographic markets.’”) (quoting *NHL v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003)).

¹⁰⁹ See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999) (directing quick look test be used when there is conclusion of anticompetitive effect). When applying a quick-look test, the court will require evidence of overwhelming pro-competitive effects of a restraint to determine that it withstands scrutiny under the Sherman Act. *Id.* at 764.

¹¹⁰ See *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 202 (2010) (finding common interest of NFL Teams “provides a perfectly sensible justification for making a host of collective decisions”); see also *Texaco Inc. v. Dagher*, 547 U.S. 1, 3 (2006) (finding it is not per se illegal under Sherman Act for “a lawful, economically integrated joint venture to the set prices” at which it sells its products); *Justice v. NCAA*, 577 F. Supp. 356, 380 (D. Ariz. 1983) (observing that “[a] clear trend has emerged in recent years under which courts have been extremely reluctant to subject the rules and regulations of sports organizations to the group boycott *per se* analysis.”)

V. CONCLUSION

To fully address the issue of NIL rights for student athletes, Congress must exercise its Commerce Clause power and pass federal legislation establishing a nation-wide standard for student-athlete rights. Students deserve marketplace rights equal to those enjoyed by workers in non-athletic industries—specifically, the ability to pursue the fair market value of licensing their likeness. Given the racial identities of a majority of collegiate football and basketball athletes and the fact that coaches and administrators reap the rewards of their fruitful labor, the NIL issue could be considered one of the more prominent modern-day civil rights issues. Further, because of the immense public interest in college athletics, the current system of “amateurism” does more to constrain the rights of athletes than it does to serve the marketability or revenue-generating ability of the industry. If college athletics is to remain a flourishing industry that profits from its amateur athletes, Congress must enact legislation that abolishes the NCAA’s reliance on amateurism, empowers student-athletes regarding their NIL rights, and catapults the industry into an unrestrained era of college sports.

Dylan Akers

[REDACTED]: ADDRESSING THE DISCLOSURE OF MEDICAL CONDITIONS, MENTAL HEALTH TREATMENT, AND SUBSTANCE ABUSE HISTORY IN THE ONLINE PUBLICATION OF COURT DOCUMENTS IN MASSACHUSETTS

I. INTRODUCTION

Posting personal information online—whether by choice or through unwilling participation—paints a “detailed picture” of who people are for the public.¹ The risks of exposing sensitive information to the general public have increased drastically as more personal data becomes digitized.² Data regarding people’s mental health, substance use, and medical

¹ See Abdullah Shihpar, *Data for the Public Good*, N.Y. TIMES, (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/opinion/data-privacy-research.html> (indicating benefits of online accessibility for personal data).

Part of the reason so many of us are nervous about our data and who has access to it is that pieces of our data can be combined to paint a detailed picture of our lives: how much money we make, what we’re interested in, what car we drive. But in a similar way, individual experiences become data points in sets that shape our understanding of what’s happening in this country.

Id. But see *Disclosing Personal Information*, REACHOUT.COM, <https://schools.au.reachout.com/articles/disclosing-personal-information> (last visited May 20, 2021) (discussing criminal use of personal information).

Some identity thieves have stolen personal information from many people at once, by hacking into large databases managed by businesses or government agencies. While you can’t enjoy the benefits of the Internet without sharing some personal information, you can take steps to share only with organizations you know and trust.

Disclosing Personal Information, *supra* note 1.

² See *Internet Privacy*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/privacy-technology/internet-privacy> (last visited Nov. 11, 2019) (“With more and more of our lives moving online, these intrusions have devastating implications for our right to privacy. But more than just privacy is threatened when everything we say, everywhere we go, and everyone we associate with are fair game.”); see also Liz Mineo, *On Internet Privacy, be very Afraid*, THE HARVARD GAZETTE (Aug. 24, 2017), <https://news.harvard.edu/gazette/story/2017/08/when-it-comes-to-internet-privacy-be-very-afraid-analyst-suggests> (discussing limited protections internet privacy laws provide for user information online). “Unfortunately, we live in a world where most of our data is out of our control.” Mineo, *supra* note 2; *Internet Privacy Laws Revealed - how your Personal Information is Protected Online*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/insights/articles/how-your-personal-information-is-protected-online> (last visited Nov. 11, 2019) (discussing risk of personal data exposure through digital footprints).

conditions are of particular concern.³ The troubling reality is that many companies collect and store data about an individual's medical and psychiatric histories based on online searches.⁴ Digitized medical records, genetic information, and mental health data pose a greater risk of privacy breaches than similar data stored as physical records.⁵ When an individual's identifiable medical or mental health information is made public on an online forum, such exposure may lead to stigma, isolation, and discrimination.⁶ These consequences can negatively impact individuals' lifestyles and their

³ See *Mental Health Information 'Sold to Advertisers,'* BBC NEWS (Sept. 4, 2019), <https://www.bbc.com/news/technology-49578500> (noting how European mental health websites use cookies to track users for third party companies); see also Angus Chen, *How Your Health Data Lead A Not-So-Secret Life Online,* NPR (July 30, 2016, 5:00 AM), <https://www.npr.org/sections/health-shots/2016/07/30/487778779/how-your-health-data-lead-a-not-so-secret-life-online> (demonstrating how third-party companies may access personal health information through apps). "A recent report from the Department of Health and Human Services showed that the vast majority of mobile health apps on the marketplace aren't covered by the Health Information Portability and Accountability Act." Chen, *supra* note 3; Brian Merchant, *Looking Up Symptoms Online? These Companies are Tracking You,* VICE (Feb. 23, 2015, 10:25 AM), https://www.vice.com/en_us/article/539qzk/looking-up-symptoms-online-these-companies-are-collecting-your-data (identifying risks to user privacy).

⁴ See Chen, *supra* note 3 (highlighting how third-party mobile apps collect medical data based on user search history). Online search terms, location, and any other identifiable data can be used to create online profiles for third-party companies. *Id.*; see also Merchant, *supra* note 3 (outlining how third parties track users' internet search history regarding medical symptoms). Many online pages collect private data about user health concerns before sending it to third-party corporations. Merchant, *supra* note 3.

⁵ See *Medical And Genetic Privacy,* AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/privacy-technology/medical-and-genetic-privacy> (last visited Nov. 12, 2019) (explaining risks associated with digital medical and genetic records). "As medical records are increasingly digitized and genetic sequencing becomes faster and cheaper, threats to our privacy and autonomy intensify." *Id.*; *Genetic Genealogy Site is Vulnerable to Compromised Data,* TECH. NETWORKS (Oct. 30, 2019), <https://www.technologynetworks.com/genomics/news/genetic-genealogy-site-is-vulnerable-to-compromised-data-326577> (describing risks associated with genetic information available online through genealogy sites); see also Jenn Shanz, *'I Felt So Betrayed.' Woman Sues Beaumont After Medical Records Turn up on Social Media,* WXYZ DETROIT (Nov. 11, 2019, 6:25 PM), <https://www.wxyz.com/news/i-felt-so-betrayed-woman-sues-beaumont-after-medical-records-turn-up-on-social-media> (discussing harm patient experienced after medical provider posted sexual assault exam results on social media).

⁶ See *Mental Health Conditions in the Workplace and the ADA,* ADA NAT'L NETWORK, <https://adata.org/factsheet/health> (last updated Mar. 2021) ("Because mental health conditions are so highly stigmatized and misunderstood, workers with psychiatric disabilities are more likely than others to experience workplace harassment."); Felicia Gould, *It's Time to Remove the Stigma Of Anxiety, Depression, and Mental Illness,* THE MIAMI HERALD (Oct. 28, 2019, 4:24 PM), <https://www.miamiherald.com/living/health-fitness/article236668203.html> ("[S]tigma with respect to mental illness is far less widely discussed."); Nicola J. Reavley, *People with a Mental Illness Discriminated Against when Looking for Work and when Employed,* THE CONVERSATION (Feb. 3, 2016, 2:05 PM), <http://theconversation.com/people-with-a-mental-illness-discriminated-against-when-looking-for-work-and-when-employed-52864> (introducing survey findings of discrimination against mentally ill employees).

ability to find or maintain work.⁷ As a result, people may be dissuaded from seeking professional help or continuing their medications.⁸ With 47.6 million adults in the United States experiencing mental illness, 20.3 million struggling with substance abuse disorders, and approximately 133 million suffering from chronic illness, it is impossible to ignore the negative impact of this stigma.⁹

In Massachusetts, the risk of exposing information about someone's mental illness, substance abuse, or medical history online encompasses more than digital medical records and social media posts.¹⁰ In the

⁷ See Kate Cronin, *Removing the Stigma of Opioid Addiction is a Corporate Responsibility*, STAT NEWS (Sept. 6, 2019), <https://www.statnews.com/2019/09/06/reducing-stigma-opioid-addiction-corporate-responsibility> (“[R]esearch suggests that workers battling substance use disorder miss nearly 29 days of work each year, and nearly 9 of 10 overdose deaths are among working-age people.”); Reavley, *supra* note 6 (quoting participants’ negative experiences with employers upon disclosing mental illness). “Survey participants mentioned negative responses after disclosing their mental illness: ‘Once they heard that word that’s it. Sometimes I think it’s worse than telling them you’ve been in jail. Once you mention that their face changes and their body language changes and you know you won’t get the job’. [sic]” Reavley, *supra* note 6.

⁸ See Sadie F. Dingfelder, *Stigma: Alive and Well*, 40 AM. PSYCHOL. ASS’N 56 (June 2009), <https://www.apa.org/monitor/2009/06/stigma> (“Stigma can also keep people from taking their medications.”) Stigma may also harm an individual’s physical health as they are less likely to report symptoms of physical illness out of fear. *Id.*; Mayo Clinic Staff, *Mental Health: Overcoming the Stigma of Mental Illness*, MAYO CLINIC (May 24, 2017), <https://www.mayoclinic.org/diseases-conditions/mental-illness/in-depth/mental-health/art-20046477> (addressing discrimination and listing methods individuals facing stigma use to cope); see also *Mental Health Medications*, NAT’L ALL. ON MENTAL ILLNESS, <https://www.nami.org/learn-more/treatment/mental-health-medications> (last visited Apr. 1, 2020) (providing overview of psychiatric medications); *Psychotherapy*, NAT’L ALL. ON MENTAL ILLNESS, <https://www.nami.org/learn-more/treatment/psychotherapy> (last visited Apr. 1, 2020) (presenting forms of psychotherapeutic treatment used to treat mental illness in conjunction with medication).

⁹ See Substance Abuse and Mental Health Services Administration, *Key Substance Use and Mental Health Indicators in the United States: Results from the 2018 National Survey on Drug Use and Health* (Aug. 2019), <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.pdf> (presenting findings from national survey of drug use and health in United States); National Health Council, *About Chronic Diseases*, <https://www.nationalhealthcouncil.org/sites/default/files/AboutChronicDisease.pdf> (last updated July 29, 2014) (providing statistics for U.S. adults affected by chronic diseases); *Alcohol and Drug Abuse Statistics*, AM. ADDICTION CTR., <https://americanaddictioncenters.org/rehab-guide/addiction-statistics> (last updated Apr. 7, 2021) (summarizing statistics for drug abuse for U.S. adults and adolescents); *Chronic Diseases in America*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/chronicdisease/resources/infographic/chronic-diseases.htm> (last updated Jan. 12, 2021) (presenting graphics on chronic disease statistics in United States); *Mental Health By The Numbers*, NAT’L ALL. ON MENTAL ILLNESS, <https://www.nami.org/mhstats> (last updated Dec. 2020) (referencing studies and statistics compiled by organizations like Substance Abuse and Mental Health Services Administration).

¹⁰ See MASS. GEN. LAWS ch. 4, § 7 para. 26 (2019) (introducing definition of public records). Public records include documentary materials or data “regardless of physical form or characteristics.” *Id.* Electronic materials and data available online fall under this provision. *Id.*;

sphere of public records, the Commonwealth only recently recognized digital records.¹¹ The term “public records” now includes records produced “by electronic means” as of the 2017 amendment to the public records law.¹² Additionally, the amendment introduced new requirements for designing, maintaining, and servicing electronic record keeping systems.¹³ Now, agencies must provide searchable electronic copies for certain types of records.¹⁴ These records include final opinions and decisions from agency proceedings, annual reports, and any “public record information of significant interest that the agency deems appropriate to post.”¹⁵ The Commonwealth also requires agencies to maintain online electronic records to “provide maximum public access.”¹⁶ Individuals have the right to inspect the public records of “any Commonwealth agency, executive office, department, board, commission, bureau, division or authority, or any of their political subdivisions [and] any authority established by the general court to serve a public purpose.”¹⁷ These agencies and offices must also

MASS. GEN. LAWS ch. 66, § 3 (2016) (defining public records and their various forms); *see also Access to Public Records in Massachusetts*, DIG. MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/access-public-records-massachusetts> (last visited Nov. 5, 2019) [hereinafter *Access to Public Records*] (“The term ‘public records’ is broadly defined to include all documents, including those in electronic form, generated or received by any government body.” (quoting MASS. GEN. LAWS ch. 4, § 7 para. 26)).

¹¹ *See* MASS. GEN. LAWS ch. 66, § 3 (emphasizing amendment to statutory language). As of 2017, public records now include those made by “handwriting, or by typewriting, or in print, or . . . by electronic means, or by any contribution of the same.” *Id.*

¹² *See id.* (presenting newly adopted definition of electronic media for public records purposes).

¹³ *See id.* § 19 (presenting requirements of electronic record keeping systems).

¹⁴ *See id.* § 19(b) (requiring agencies to provide digital copies of certain records in commonly available electronic formats).

¹⁵ *See id.* (outlining requisite types of records that must be available to public subject to redaction). The complete list of applicable records include:

[F]inal opinions, decisions, orders or votes from agency proceedings; annual reports; notices of regulations proposed under chapter 30A; notices of hearings; winning bids for public contracts; awards of federal, state, and municipal government grants; minutes of open meetings; agency budgets; and any public record information of significant interest that the agency deems appropriate to post.

Id.

¹⁶ *See* MASS. GEN. LAWS ch. 66, § 19 (2016) (requiring ease of public accessibility to greatest extent possible).

¹⁷ *See* MASS. GEN. LAWS ch. 4, § 7 para. 26 (2019) (identifying public records available to public and organizations that create them); *Access to Public Records*, *supra* note 10 (indicating right to access public records). An individual does not have to disclose the purpose of their request unless it relates to “building and infrastructure plans, vulnerability assessments, security measures, or other such requests that may raise terrorism-related concerns . . .” *Access to Public Records*, *supra* note 10.

designate a “records access officer” to comply with all public record requests.¹⁸

While the public has access to records covered under the statute, the right to view all the information contained within them is not absolute.¹⁹ Records access officers may refuse disclosure or release redacted copies of records to ensure public safety and protect an individual’s personal information.²⁰ The public records law and its exemptions do not apply to the Commonwealth’s legislature, its committees, or its courts—despite the public’s interest in their records.²¹ Court records accessible to the public include “docket information, the pleadings and motions of the parties to a lawsuit, decisions and orders of the court, evidence introduced

¹⁸ See 950 MASS. CODE REGS. 32.02 (2019) (defining “records access officer”). Public records officers are “designated within a governmental entity to perform duties . . . including coordinating a response to requests for access to public records, assisting individuals seeking public records in identifying the records requested, and preparing guidelines that enable requesters to make informed requests regarding the availability of such public records electronically or otherwise.” *Id.*; MASS. GEN. LAWS ch. 66, §6A (2016) (outlining obligations for records access officers); MASS. GEN. LAWS ch. 66, §10A (2016) (outlining consequences if agency fails to comply with request for public records access under §10).

¹⁹ See MASS. GEN. LAWS ch. 4, § 7 para. 26 (introducing exemptions to release of information in public records); see also *Massachusetts State Court Records*, DIG. MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/massachusetts-state-court-records> (last visited Nov. 14, 2019) [hereinafter *State Court Records*] (emphasizing right to inspect records filed in Massachusetts state courts is not absolute).

²⁰ See MASS. GEN. LAWS ch. 4, § 7 para. 26 (outlining exemptions to public records release). Information that may jeopardize public safety or cyber security may not be released to the public. *Id.*; MASS. GEN. LAWS ch. 66, § 10(b) (2016) (noting officer may redact and withhold information from requesting party); MASS. GEN. LAWS ch. 66, §19 (permitting redaction of exempt information “in order to provide maximum public access”).

²¹ See *Lambert v. Exec. Dir. Of the Jud. Nominating Council*, 681 N.E.2d 285, 287 (Mass. 1997) (ruling Massachusetts judiciary and legislature not required to comply with public records law). The court determined that “court records and ‘all else properly part of the court files were outside the range’ of inspection based on the text of [MASS. GEN. LAWS ch. 4, § 7 para. 26].” *Id.* (quoting *Ottaway Newspapers, Inc. v. Appeals Court*, 362 N.E.2d 1189, 1193 (Mass. 1977); *Westinghouse Broad. Co. v. Sergeant-At-Arms of Gen. Court*, 375 N.E.2d 1205, 1208 (Mass. 1978) (explaining why MASS. GEN. LAWS ch. 4, § 7 does not cover legislative records). “[E]ven if the introductory language of [the public records law] might be viewed as applying to legislative records, these records are not open to public inspection because they are records ‘specifically or by necessary implication exempted from disclosure by statute.’” *Westinghouse Broad. Co.*, 375 N.E.2d at 1208 (quoting MASS. GEN. LAWS ch. 4, § 7); William Francis Galvin, *A Guide To The Massachusetts Public Records Law*, 39, <https://www.sec.state.ma.us/pre/prepdf/guide.pdf> (last updated Mar. 2020) (explaining courts, legislature, and legislative committees are exempt). “The Public Records Law does not apply to records held by federal agencies, the legislature or the courts of the Commonwealth. Accordingly, the Supervisor of Records is unable to assist requesters seeking such records.” See Galvin, *supra* note 21, at 39; Coleman M. Herman, *Guide To The Public Records Law*, COMMONWEALTH MAGAZINE, <https://commonwealthmagazine.org/guide-to-the-public-records-law/> (last visited Nov. 19, 2019) (explaining that Massachusetts legislature and judiciary not subject to public records law).

in court by either side, and transcripts of hearings.”²² While not bound by the public records law, the Supreme Judicial Court of Massachusetts provides direction for protecting personal information through impoundment and redaction proceedings.²³

This note seeks to analyze Massachusetts’s public records law and the exemptions intended to protect sensitive medical, mental health, and substance abuse information in public records. This note also suggests how Massachusetts courts could utilize these exemptions to protect personal information in court documents published online.²⁴

II. THE FREEDOM OF INFORMATION ACT AND MASSACHUSETTS’ PUBLIC RECORDS LAW

A. *The Freedom of Information Act*

The Commonwealth’s public record exemptions are based in part on the federal Freedom of Information Act.²⁵ The Freedom of Information Act (“FOIA”) was enacted in 1966 and requires government agencies to

²² See *State Court Records*, *supra* note 19 (identifying some court records available to public access). Other records may include “the index of the parties in both pending and closed civil and criminal cases, case fields, certain juvenile records, documents filed with the court in connection with a settlement, search warrants once returned to the court, and names and addresses of jurors and jury questionnaires.” *Id.*

²³ See S.J.C. Rule 1:25 (2018) (outlining procedures for protecting information within electronic files used by Supreme Judicial Court); S.J.C. Rule 1:24 (2016) (providing guidance for filing Supreme Judicial Court documents and protecting personal information). To prevent the “unnecessary inclusion of certain personal identifying information in publicly accessible documents filed with or issued by the Courts,” the Supreme Judicial Court requires those filing the documents to black out certain information such as government-issued identification numbers and account numbers. S.J.C. Rule 1:24 § 1. Filers—not the court nor its clerks—are responsible for redacting the information in a way that makes it invisible and illegible. S.J.C. Rule 1:24 § 7. For court orders and other court-issued documents, the court is expected to avoid inclusion of personal identifying information unless “specifically covered by law, court rule, standing order, or court-issued form.” S.J.C. Rule 1:24 § 9.

²⁴ See MASS. GEN. LAWS ch. 4, § 7 (2019) (outlining public records exemptions courts could consider for decision redaction practices); MASS. GEN. LAWS ch. 66, § 19 (2019) (indicating possibility of redaction that may maintain public accessibility to record information); MASS. GEN. LAWS ch. 66, §10B (2019) (emphasizing how information may be redacted for record requests).

²⁵ See 5 U.S.C. § 552(b) (providing statutory exemptions for federal public records law); MASS. GEN. LAWS ch. 4, § 7 para. 26 (2019) (presenting Massachusetts’ exemptions in similar language to federal counterpart); *What is FOIA?*, U.S. DEP’T OF JUSTICE, <https://www.foia.gov/about.html> (last visited Mar. 7, 2021) (providing overview of FOIA and rights afforded to public through it). “Since 1967, the Freedom of Information Act (FOIA) has provided the public the right to request access to records from any federal agency. It is often described as the law that keeps citizens in the know about their government.” *Id.*

make certain records available to the public.²⁶ To ensure public access, FOIA also requires agencies to post certain categories of records online.²⁷ These electronic records include final opinions made in the adjudication of cases, agency statements of policy and interpretations, administrative staff manuals, and copies of all previously released records.²⁸

It should be noted, however, that federal agencies are not required to disclose nine types of information explicitly exempted under FOIA.²⁹ These exemptions, found under 5 U.S.C. § 552(b)(1)-(9), include health information that “would constitute a clearly unwarranted invasion of personal privacy,” arguably including an individual’s psychological history, medical conditions, and substance use.³⁰ The exemption was designed to prevent the “unnecessary disclosure of files” from agencies, such as the Veterans Administration, because the records could contain “intimate details of a highly personal nature.”³¹

Courts across the United States have held that the FOIA medical-records exemption goes beyond health records and other documents detailing medical information.³² A decision from the Court of Appeals for District of Columbia Circuit (D.C. Circuit), *Rural Housing Alliance v. U.S.*

²⁶ See 5 U.S.C. § 552(f) (noting federal agencies subject to FOIA compliance include “any executive department, military department, Government corporation . . . or any independent regulatory agency . . .” *Id.*; Ivan Boatner, *Supreme Court Ruling Changes FOIA Standard To Better Protect Confidential Information*, JD SUPRA (June 27, 2019), <https://www.jdsupra.com/legalnews/supreme-court-ruling-changes-foia-59032/> (discussing FOIA’s enactment and purposes).

²⁷ See U.S. Dep’t of Justice, *supra* note 25 (“The FOIA also requires agencies to proactively post online certain categories of information, including frequently requested records.”)

²⁸ See 5 U.S.C. § 552(a)(2)(A)-(E) (listing records that must be made available online under FOIA).

²⁹ See § 552(b) (outlining explicit federal exemptions to public records law). Exempt information includes internal personnel rules and agency practices; trade secrets and commercial or financial information that is privileged or confidential; certain agency memoranda. *Id.*; information compiled for law enforcement purposes; data found in the reports for agencies regulating and supervising financial institutions; and information specifically barred from disclosure by statute. *Id.*; Boatner, *supra* note 26 (“FOIA contains nine exemptions which protect certain categories of government records from release.”)

³⁰ See 5 U.S.C. § 552(b)(6) (exempting “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . .”)

³¹ See *Getman v. NLRB*, 450 F.2d 670, 675 (D.C. Cir. 1971) (explaining rationale for exemption and its language choices). The House and Senate reports for early drafts of the FOIA bill emphasized the need to “guard against unnecessary disclosure of files of such agencies as the Veterans Administration or the Welfare Department or Selective Service or Bureau of Prisons, which would contain ‘intimate details’ of a ‘highly personal’ nature.” *Id.* (first quoting H.R. Rep. No. 89-1497, at 2428 (1966); and then quoting S. Rep. No. 89-813, at 44 (1965)).

³² See *Rural Hous. All. v. U.S.D.A.*, 498 F.2d 73, 77 (D.C. Cir. 1974), *supplemented*, 511 F.2d 1347 (D.C. Cir. 1974) (presenting one instance of courts expanding protections available under FOIA exemption).

Department of Agriculture, emphasized that the exemption “was designed to protect individuals from public disclosure of intimate details of their lives, whether the disclosure be of personnel files, medical files, or other similar files.”³³ The court reasoned that the exemption was phrased broadly to protect individuals from a “wide range of embarrassing disclosures.”³⁴ Information protected under the extensive coverage of the exemption includes intimate details such as “marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, [and] reputation.”³⁵

The D.C. Circuit previously dissected the exemption’s “clearly unwarranted invasion” provision in *Getman v. NLRB*.³⁶ Here, the court determined that a balancing test was necessary to determine whether the disclosure constituted an “unwarranted invasion” of personal privacy.³⁷ Under the test, a court must balance the individual’s right of privacy against the public’s right to be informed.³⁸ When applying the balancing test, the court should first inquire whether the disclosure would constitute an invasion of

³³ See *id.* (presenting court’s rationale for applying FOIA medical-records exemption); see also *Joseph Horne Co. v. NLRB*, 455 F. Supp. 1383, 1386 (W.D. Pa. 1978) (explaining Congressional rationale for protecting personal information under FOIA). In *Horne*, the court ordered the release of documents the plaintiff requested and recognized that the FOIA exemption only protects personnel and medical files where disclosure would result in “a clearly unwarranted invasion of personal privacy.” *Id.*

³⁴ See *Rural Hous. All.*, 498 F.2d at 77 (identifying expansive list of personal details protected under exemption).

³⁵ See *id.* (noting exemptions broad coverage). The court held that the files in question contained “sufficiently intimate details” to warrant protection under the FOIA exemption. *Id.* These details were enough to classify the report as a “similar file” under the exemption because its release could constitute an unwarranted invasion of privacy. *Id.*; see also *Joseph Horne Co.*, 455 F. Supp. at 1386 (affirming that exemption covers information about marriage, children, welfare payments, and family); *Mylan Pharm., Inc. v. NLRB, Region 6*, 407 F. Supp. 1124, 1126 (W.D. Pa. 1976) (recognizing “marital status, legitimacy of children, identity of fathers of children, medical conditions, welfare payments, alcohol consumption, and family fights” are covered); *Wine Hobby USA, Inc. v. I.R.S.*, 520 F.2d 133, 135 (3d Cir. 1974) (declaring home addresses and family status are protected under exemption).

³⁶ 450 F.2d 670, 674 (D.C. Cir. 1971) (describing balancing of interests Exemption 6 requires).

³⁷ See *id.* (introducing balancing test to assess questionable data); *Rural Hous. All.*, 498 F.2d at 77 (remanding FOIA request and reminding district court to apply balancing test established in *Getman*).

³⁸ See *Getman*, 450 F.2d at 674 (“Exemption (6) requires a court reviewing the matter *de novo* to balance the right of privacy of affected individuals against the right of the public to be informed”) The court explained that the statutory language of “clearly unwarranted” suggests the court should favor disclosure unless there is a serious threat to an individual’s privacy. *Id.*

privacy, and if so, assess the severity of the invasion.³⁹ The second inquiry requires the court to determine whether the public interest in the information outweighs the severity of disclosure.⁴⁰ This balancing test is unique for a FOIA exemption, as “normally no inquiry into the use of information is made” for the other FOIA exemptions.⁴¹

FOIA and subsequent amendments to the statute provide guidance for redacting both physical and electronic copies of records.⁴² Updates to federal public record redaction practices emerged after President Obama signed the FOIA Improvement Act of 2016 into law.⁴³ One notable amendment included codification of the Department of Justice’s “Foreseeable Harm Standard.”⁴⁴ Agencies are required to redact information “only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”⁴⁵ The amendments also state that agencies must consider partial disclosure when full disclosure of a record is not possible.⁴⁶ The agency must then take reasonable steps to “segregate and release nonexempt information.”⁴⁷ For electronic and online records, FOIA states that agencies may redact information as needed to prevent an “unwarranted invasion of personal privacy”

³⁹ See *id.* (introducing first element of balancing test); see also *Rural Hous. All.*, 498 F.2d at 77 (“Specifically we suggested that in balancing interests the court should first determine if disclosure would constitute an invasion of privacy, and how severe an invasion.”)

⁴⁰ See *Getman*, 450 F.2d at 675 (presenting second element of balancing test); *Rural Hous. All.*, 498 F.2d at 77 (“Second, the court should weigh the public interest purpose of those seeking disclosure, and whether other sources of information might suffice.”)

⁴¹ See *Rural Hous. All.*, 498 F.2d at 77 (noting unique attributes of balancing test for FOIA exemption).

⁴² See 5 U.S.C. § 552(a)(2)(E) (outlining redaction procedures for agencies); *OIP Summary of the FOIA Improvement Act of 2016*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016> (last updated Aug. 17, 2016) (introducing amendments made to FOIA in 2016 under Obama administration).

⁴³ See U.S. DEP’T OF JUSTICE, *supra* note 42 (discussing 2016 amendments in depth). The 2016 amendments addressed gaps in FOIA’s previous agency requirements. *Id.* Other changes included adjustments to procedures for processing requests, establishing new duties for chief FOIA officers, and the creation of a “Chief FOIA Officer Council” among others. *Id.*

⁴⁴ See *id.* (discussing codification of “Foreseeable Harm Standard”).

⁴⁵ See *id.* (highlighting language and new emphasis on potential harm); U.S. DEP’T OF JUSTICE, *supra* note 25 (reiterating agencies shall not disclose where harm to an interest protected by exemption exists).

⁴⁶ See U.S. DEP’T OF JUSTICE, *supra* note 25 (“Agencies should also consider whether partial disclosure of information is possible whenever they determine that full disclosure is not possible . . .”). Agencies may also consider partial disclosure and take steps to separate nonexempt information prior to release. *Id.*

⁴⁷ See U.S. DEP’T OF JUSTICE, *supra* note 45 (emphasizing agent’s duty to assess and identify questionable information prior to release).

prior to publication.⁴⁸ Where technically feasible, agencies shall indicate the extent of the deletion where it was made in the document.⁴⁹ These provisions only require mandatory redaction for the nine explicit exemptions, which does not include information that results in unwarranted invasions of privacy.⁵⁰ When agencies choose to redact information to protect the privacy of an individual, they should also consider whether the redacted portions are “sufficient to protect the privacy of individuals” before disclosing it the public.⁵¹

B. Massachusetts Public Records Law - Mass. Gen. Laws ch. 4, § 7 para. 26(c)

The Massachusetts Public Records Law is described as the “Commonwealth’s counterpart” to FOIA.⁵² This comparison is appropriate, as the exemptions in the Commonwealth’s public records law adopts the FOIA’s statutory language.⁵³ Like FOIA, the list of public record exemptions for the Commonwealth are strictly construed.⁵⁴ The Massachusetts exemptions similarly provide a basis for agencies to withhold records

⁴⁸ See § 552(a)(2)(E) (“To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D).”) All redactions must be explained in writing and the extent of the deletion must be noted on the portion of the record. *Id.* However, the extent of the deletion does not have to be included if disclosure may harm an interest protected by an exemption. *Id.*; § 552(b)(9) (stating that segregable portion of record shall be released after deleting exempt portions).

⁴⁹ See § 552(b)(9) (noting mandatory duty to indicate where redactions are made in record); see also § 552(a)(2)(E) (providing redaction procedure).

⁵⁰ See § 552(a)(2)(E) (explaining exemptions under FOIA to redacting requirement). Deletion of information that could constitute an unwarranted invasion of privacy is merely permissive. *Id.*

⁵¹ See *Rural Hous. All. v. U.S.D.A.*, 498 F.2d 73, 78 (D.C. Cir. 1974) (noting how courts consider agency deletions as means to protect individual privacy).

⁵² See Herman, *supra* note 21 (“The Massachusetts Public Records Law – the Commonwealth’s counterpart to the federal Freedom of Information Act – allows citizens to inspect and obtain copies of documents in the possession of state and municipal agencies as well as other government entities such as boards, commissions and authorities.”)

⁵³ See MASS. GEN. LAWS ch. 4, § 7 para. 26 (2019) (defining public records and exemptions under Massachusetts law using similar language to FOIA); *Wakefield Tchr. Ass’n v. School Comm.*, 731 N.E.2d 63, 66-67 (Mass. 2000) (citing *Globe Newspaper Co. v. Boston Retirement Bd.*, 446 N.E.2d 1051, 1054 (Mass. 1983) (“We concluded . . . based on the structure, language, legislative history, and comparison with the analogous Federal public records exemption on which it is based, 5 U.S.C. §552(b)(6) (1994), the Massachusetts exemption . . . creates two categories of records exempt from public disclosure.”)

⁵⁴ See *Att’y Gen. v. Assistant Comm’r of Real Prop. Dep’t of Bos.*, 404 N.E.2d 1254, 1256 (Mass. 1980) (“Given the statutory presumption in favor of disclosure, exemptions must be strictly construed.”)

wholly, or in part, before disclosing to the public.⁵⁵ Also like FOIA, non-exempt portions of the record must be released once exempt portions are removed.⁵⁶ Paragraph 26(c) of the Massachusetts Public Records Law also provides a privacy exemption with similar language to its federal counterpart in § 552(b)(6).⁵⁷ The exemption requires mandatory non-disclosure for “medical files or information and other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy”⁵⁸

Over the years, Massachusetts courts parsed the medical files exemption into two distinct clauses.⁵⁹ The first clause provides an absolute exemption for medical files and related data.⁶⁰ For this first clause, Massachusetts courts generally hold that medical information is always sufficiently personal to warrant the protection of the exemption.⁶¹ The second clause applies to other record requests that may negatively impact an individual’s privacy interests.⁶² Additionally, the second clause protects non-medical records that contain “intimate details of a highly personal nature[,]” and re-

⁵⁵ See Galvin, *supra* note 21, at 14 (citing Mass. Gen. Laws ch. 4, § 7 para. 26 (2019) (“The statutory definition of ‘public records’ contains exemptions providing the basis for withholding records completely or in part.”))

⁵⁶ See *id.* (“Where exempt information is intertwined with non-exempt information, the non-exempt portions are subject to disclosure once the exempt portions are deleted.”)

⁵⁷ See MASS. GEN. LAWS ch. 4, § 7 para. 26(c) (2019) (presenting similar language to FOIA exemption). Like the federal statute, Massachusetts provides an exemption for medical records and information contained within those records. *Id.* The exemption places all other personal information under an “unwarranted invasion of personal privacy” standard as in § 552(b)(6). *Id.*

⁵⁸ See *id.* (quoting statutory language). This exemption also applies to personnel information found in public records. *Id.*

⁵⁹ See *Wakefield Tchr. Ass’n v. School Comm.*, 731 N.E.2d 63, 66-67 (Mass. 2000) (noting two categories of records existing under Massachusetts exemption). “[B]ased on the structure, language, legislative history . . . the Massachusetts exemption . . . creates two categories of records exempt from public disclosure” *Id.*; see also Galvin, *supra* note 21, at 16-18 (explaining how state courts have deconstructed medical files exemption into separate clauses).

⁶⁰ See MASS. GEN. LAWS ch. 4, § 7 para. 26(c) (2019) (exempting “personnel and medical files or information”); Galvin, *supra* note 21, at 16-17 (“Exemption (c) is made up of two separate clauses, the first of which exempts personnel and medical files.”)

⁶¹ See *Globe Newspaper Co. v. Chief Med. Exam’r*, 533 N.E.2d 1356, 1358 (Mass. 1989) (noting strong public policy to protect an individual’s medical information); *Globe Newspaper Co. v. Boston Ret. Bd.*, 446 N.E.2d 1051, 1060 (Mass. 1983) (concluding that medical statements are not subject to mandatory disclosure under exemption); Galvin, *supra* note 21, at 17 (“As a general rule, medical information related to an identifiable individual will always be of a sufficiently personal nature to warrant exemption.”); see also MASS. GEN. LAWS ch. 123, § 36 (2019) (presenting example of statute that holds mental health information must remain private). Records about “admission, treatment, and periodic review” of individuals admitted to mental health facilities must remain private subject to a few exemptions. *Id.*

⁶² See Galvin, *supra* note 21, at 18 (“The second clause of the privacy exemption applies to requests for records that implicate privacy interests.”)

late to a specifically-named individual.⁶³ Massachusetts courts have recognized that such details include “marital status, paternity, substance abuse, government assistance, family disputes, and reputation.”⁶⁴ Other personal information Massachusetts courts have classified as “intimate details” include:

[A] resident’s first name and last name or first initial and last name in combination with any [one] or more of the following data elements that relate to such resident . . . social security number, driver’s license number or state issued identification card number . . . [and] financial account number⁶⁵

Similar to the FOIA balancing test presented in both *Rural Housing Alliance* and *Getman*, Massachusetts courts perform a two-step analysis for information covered under the second clause.⁶⁶ The court must determine: (1) whether the information is “an intimate detail;” and (2) whether the public’s interest in the information outweighs the individual’s privacy interest.⁶⁷ The courts must apply this balancing test on a case-by-case basis.⁶⁸

While the Massachusetts courts are not subject to the Public Records Law’s exemptions themselves, they have established policies to pro-

⁶³ See *Wakefield Tchr. Ass’n*, 731 N.E.2d at 67 (“We concluded further that the phrase ‘relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy’ modifies *only* the second category.”); Att’y Gen. v. Assistant Comm’r of the Real Prop. Dep. Of Boston, 404 N.E.2d 1254, 1256 (Mass. 1980) (noting disclosure should not publicize “‘intimate details’ of a ‘highly personal nature’”) (quoting Att’y Gen. v. Collector of Lynn, 385 N.E.2d 505 (1979)).

⁶⁴ See *Assistant Comm’r of the Real Prop. Dep’t of Boston*, 404 N.E.2d at 1257 n.2 (referring to federal privacy exemption articulated in *Rural Hous. All.*).

⁶⁵ See MASS. GEN. LAWS ch. 93H, § 1 (2020) (defining personal information in context of data breaches). Personal information that does not receive additional protection includes “information that is lawfully obtained from publicly available information, or from federal, state, or local government records lawfully made available to the general public.” *Id.*

⁶⁶ See Galvin, *supra* note 21, at 18 (presenting balancing test).

⁶⁷ See *People for the Ethical Treatment of Animals v. Dep’t of Agric. Res.*, 76 N.E.3d 227, 238 (Mass. 2017) (articulating factors court must address in its assessment of privacy interests). The factors Massachusetts courts consider are: “(1) whether disclosure would result in personal embarrassment to an individual of normal sensibilities; (2) whether the materials sought contain intimate details of a highly personal nature; and (3) whether the same information is available from other sources.” *Id.*; see also Galvin, *supra* note 21, at 18 (describing balancing test). “[The exemption] requires a balancing test which provides that where the public interest in obtaining the requested information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield.” *Id.*

⁶⁸ See Galvin, *supra* note 21, at 18 (detailing how Massachusetts’ courts address each case’s unique circumstances).

tect the “unnecessary inclusion” of personal and identifying information in publicly accessible court documents (excluding case opinions).⁶⁹ In the Supreme Judicial Court, publicly accessible documents filed in civil or criminal cases—offered as evidence in any trial or hearing, and any order, decision, or other document issued by the court—are subject to the rule.⁷⁰ For court filings, the burden of redacting personal identifying information is placed on the document filer rather than the record holder.⁷¹ As a result, the rule permits the individual filing the documents to request more or less protection of such information as they see fit.⁷² Additionally, courts may provide further protection for personal information covered under the rules.⁷³

When filing a publicly accessible court document, filers must not include personal identifying information, such as government-issued identification numbers, parents’ birth surnames, and financial account numbers unless permitted under the rule.⁷⁴ Proper redaction procedures for such in-

⁶⁹ See S.J.C. Rule 1:24 (prohibiting “the unnecessary inclusion of certain personal identifying information in publicly accessible documents filed with or issued by the Courts, in order to reduce the possibility of using such documents for identity theft, the unwarranted invasion of privacy, or other improper purposes.”) The filer must ensure that they redact from briefs and other filings the personal identifying information listed in the rule. See S.J.C. Rule 1:24 § 3; S.J.C. Rule 1:25 § 12 (providing that electronic filings should comply with Rule 1:24); Mass. R. APP. P. 21 (providing that appellate court filings should comply with Rule 1:24); see also Peter Sacks, *The New Interim Guidelines for the Protection of Personal Identifying Data in Publicly-Accessible Court Documents*, BOSTON B.J., Winter 2010, at 12 (discussing Supreme Judicial Court 2009 interim guidelines for protection of personal data in publicly accessible documents).

⁷⁰ See S.J.C. Rule 1:24, § 1 (outlining documents subject to rule); see also *Interim Guidelines For The Protection Of Personal Identifying Data In Publicly Accessible Court Documents*, MASSACHUSETTS LAWYERS WEEKLY (Aug. 31, 2009), <https://masslawyersweekly.com/2009/08/31/interim-guidelines-for-the-protection-of-personal-identifying-data-in-publicly-accessible-court-documents/> (introducing guidelines that ensured protection of personal information in publicly accessible court documents). The Supreme Judicial Court approved interim guidelines in August 2009 to protect personal information in criminal and civil court documents. See MASSACHUSETTS LAWYERS WEEKLY, *supra* note 72.

⁷¹ See S.J.C. Rule 1:24, § 3 (“When filing a document in court that will be publicly accessible, a filer may not, unless otherwise allowed by this rule, include personal identifying information, except when the filer redacts it [according to subsections (a), (b), and (c)].”); S.J.C. Rule 1:24, § 7 (“The filer is responsible for redacting personal identifying information. The clerk will not review each filed document for compliance.”) Clerks, however, are still responsible for reviewing selected documents to ensure filer met redaction responsibilities. S.J.C. Rule 1:24, § 7.

⁷² See S.J.C. Rule 1:24, § 1 (“The rule does not prevent a document’s filer from requesting more or less protection of personal identifying information than this rule requires.”)

⁷³ See *id.* (“[T]he rule does not prohibit any Department of the Trial Court, or any appellate court, from adopting a rule or standing order providing additional protections for personal identifying information covered by this rule, or protecting additional categories of personal identifying information.”)

⁷⁴ See *id.* at § 3 (identifying what filer may not disclose). Government-issued identification numbers include “a social security number, taxpayer identification number, driver’s license number, state-issued identification card number, or passport number . . .” *Id.*

formation includes redacting all but the last four digits of a number or first initial of the birth surname.⁷⁵ For any documents drafted for court filing, the filer must redact the information in a way “that prevents the redacted information from being read or made visible” in the document.⁷⁶ However, these redactions are subject to the courts’ unique exemptions.⁷⁷ Unless the court orders otherwise, personal identifying information may be included in file documents when: the law requires it; the document is a transcript of the court proceeding filed by a court reporter or transcriber; the document is a record of administrative adjudicatory or quasi-adjudicatory proceedings filed by the administrative agency; the document includes personal identifying information produced by a nonparty in response to a subpoena; the document contains a financial account number necessary to identify an account in the proceeding; and if the documents are related to criminal and youthful offender cases.⁷⁸ Non-compliance may require corrective action, including:

[S]triking and returning to the filer any noncompliant document, with or without an order that a properly redacted copy be filed in its place . . . requiring the filer to file a redacted version of the document and move to impound the unredacted version . . . forfeiting any protection under this rule for the filer’s own personal identifying information, if the information has become public or if other parties or persons would be unduly prejudiced by treating the information as protected. . . entering orders to ensure the filer’s future compliance or to protect the interests under this rule

⁷⁵ See *id.* at § 4 (explaining proper redaction procedures for government-identification numbers, financial numbers, and surnames). All mandatory redactions must be sufficiently obscured and clearly marked in the document. *Id.*

⁷⁶ See *id.* (indicating how filer must redact personal identifying information). Omitted information may be done by replacing the information with three “x” characters. *Id.*

⁷⁷ See SJC Rule 1:24, at § 5 (“Unless the court orders otherwise, unredacted personal identifying information may be included in documents filed with the court”)

⁷⁸ See *id.* at §§ 5-6 (listing exemptions to redaction for certain documents filed with court). For criminal and youthful offender cases, court filings may not include the following:

[Data] related to the criminal matter or investigation and that is prepared before the filing of a criminal case or is not filed as part of any docketed criminal case; an arrest or search warrant; or a charging document, including an application for a criminal complaint, and supporting documents filed in support of any charging document.

Id.

of other parties and persons; and . . . imposing monetary sanctions⁷⁹

These rules, however, fail to address whether certain court documents should be made publicly available online or how an individual's personal data can be protected.⁸⁰ Furthermore, the rule lacks guidance for redacting information that does not fall neatly into its established categories of personal information.⁸¹

III. JUDICIAL INTERPRETATION OF MASS. GEN. LAWS CH.4, §7 PARA. 26(C) EXEMPTION

Massachusetts' courts have determined that state agencies must show "with specificity" that an exemption applies to the information in question to avoid disclosure.⁸² The agency with custody of the record shall not refuse disclosure unless it falls under one of the nine statutory exemptions.⁸³ Furthermore, in a situation where an exemption applies and the information is disclosed, the agency must justify the release of the information.⁸⁴ If only a portion of the record falls under the exemption, all non-exempt portions are subject to disclosure and public access.⁸⁵

⁷⁹ See *id.* at § 8 ("In the event of a filer's noncompliance with this rule, the court, on its own initiative or on motion of a party or the person whose personal identifying information is at issue, may require corrective action.") The filer has the ultimate burden to prove that noncompliance was inadvertent. *Id.*

⁸⁰ See *id.* at § 1 ("This rule does not govern the separate question whether various court documents should be made publicly available on the Internet.")

⁸¹ See *id.* at § 3 (establishing personal information as limited to three categories). While protecting government issued identification numbers, financial account numbers, and parent surnames are important to prevent identity theft, these categories do not encompass all forms of sensitive personal information. *Id.* There are various types of sensitive personal information that an individual does not want disclosed to the public and the current rule does not provide sufficient guidance to ensure protection. *Id.* Rather, the rule relies heavily on the filer knowing what information should be redacted. *Id.* at § 1.

⁸² See *Worcester Tel. Gazette Corp. v. Chief of Police of Worcester*, 787 N.E.2d 602, 605 (Mass. App. Ct. 2003) ("The burden is upon the custodian of the requested record to prove, with specificity, the applicability of the relevant exemption."); *Globe Newspaper v. Police Comm'r*, 648 N.E.2d 419, 424 (Mass. 1995) ("[A] government agency which refuses to comply with an otherwise proper request for disclosure has the burden of proving 'with specificity' that the information requested is within one of nine statutory exemptions to disclosure."); *Torres v. Att'y Gen.*, 460 N.E.2d 1032, 1037-38 (Mass. 1984) ("In an action to obtain information under the public records law, the burden is placed on a holding agency seeking to withhold that information to prove that one of the exemptions in the definition of the public record applies.")

⁸³ See *Police Comm'r*, 648 N.E.2d at 424 (suggesting agency may face penalties if it refuses to comply).

⁸⁴ See *Torres*, 460 N.E.2d at 1038 (explaining agency must argue why disclosure was warranted).

The courts gradually defined “medical records” and related information through the application of exemption (c) and interpretation of legislative intent.⁸⁶ For exemption (c), the Supreme Judicial Court of Massachusetts recognized that the legislature had a “clear intent . . . to establish an absolute exemption for personnel or medical files or information.”⁸⁷ In *Globe Newspaper Company v. Boston Retirement Board*,⁸⁸ the Supreme Judicial Court analyzed the legislative intent for the medical files exemption by comparing its language to FOIA.⁸⁹ In their assessment, the court determined the Massachusetts exemption differs from its federal counterpart in several material aspects.⁹⁰ First, the Massachusetts exemption substitutes “files” in FOIA for the all-encompassing phrase “files or information.”⁹¹ Second, the exemption distinguishes personal information from medical information through the use of a semi-colon—which is something

When a data subject shows that information falls within the definition of personal data, but for the exemption for public records, and further shows that the disclosure . . . in fact is, an invasion of privacy, the State agency seeking to justify the disclosure has the burden of showing that an invasion of privacy is warranted.

Id.

⁸⁵ See *Worcester Tel. Gazette Corp.*, 787 N.E.2d 602 at 605 (“To the extent that only a portion of a public record may fall within an exemption to disclosure, the nonexempt ‘segregable portion’ of the record is subject to public access.”) (quoting *Worcester Tel. Gazette Corp. v. Chief of Police of Worcester*, 764 N.E.2d 847, 852 (Mass. App. Ct. 2002)).

⁸⁶ See *Globe Newspaper Co. v. Chief Med. Exam’r*, 533 N.E.2d 1356, 1357-58 (Mass. 1989) (defining what information is considered part of medical record). “Autopsies performed by physicians are diagnostic in nature and yield detailed, intimate information about the subject’s body and medical condition. Therefore, they are medical records.” *Id.*; *Brogan v. Sch. Comm. of Westport*, 516 N.E.2d 159, 161 (Mass. 1987) (“Information as to a named individual’s medical condition inherently is ‘of a personal nature.’”); *Globe Newspaper Co. v. Boston Ret. Bd.*, 446 N.E.2d 1051, 1056 (Mass. 1983) (explaining holding that “medical files or information are absolutely exempt from disclosure.”); *Logan v. Comm’r of the Dep’t of Indus. Accidents*, 863 N.E.2d 559, 562 (Mass. App. Ct. 2007) (“[U]nredacted IME reports . . . which provide detailed medical information on identified individuals, clearly fit within the absolute exemption and are not subject to production or review.”); *Viriyahiranpaiboon v. Dep’t of State Police*, 756 N.E.2d 635, 639 (Mass. App. Ct. 2001) (reiterating legislature’s desire to protect medical information).

⁸⁷ See *Boston Ret. Bd.*, 446 N.E.2d at 1056 (noting that exemption’s language indicated “clear intent of the Legislature to establish an absolute exemption for personnel or medical files or information”).

⁸⁸ 446 N.E.2d 1051 (Mass. 1983).

⁸⁹ See *id.* at 1055 (highlighting that SJC “continue[d] with a comparison of the exemption with its Federal counterpart” for its analysis).

⁹⁰ See *id.* (providing differences between Massachusetts exemption and FOIA that would aid in interpreting legislative intent).

⁹¹ See *id.* (explaining how Massachusetts exemption “substitutes the phrase ‘files or information’ for the word ‘files’ in the Federal statute.”)

absent from the federal exemption.⁹² Finally, the exemption replaces the phrase “similar files” in FOIA with the phrase “also any other materials or data relating to a specifically named individual.”⁹³ Based on these key differences, the Supreme Judicial Court determined the state legislature made a conscious decision to deviate from FOIA’s definition of medical information and produce an absolute exemption.⁹⁴ The court determined the legislature’s word choice was “intended to ensure that the scope of the exemption turn on the character of the information sought rather than on the question whether the documents containing the information constituted a [medical] file.”⁹⁵ Thus, all medical files or related information found in public records must be exempt from mandatory disclosure.⁹⁶

The Massachusetts courts have since defined the scope of the phrase “medical files or information.”⁹⁷ Court opinions determined medical files and information must contain data “of a personal nature and relate

⁹² See *Globe Newspaper Co. v. Boston Ret. Bd.*, 446 N.E.2d 1051, 1055 (Mass. 1983) (“[T]he Massachusetts statute contains a semicolon after the word ‘information’; the Federal statute contains no such punctuation.”) In their analysis of the statutory language, the court’s primary concern was to determine if modification of the first clause produced an absolute exemption. *Id.* at 1055.

⁹³ See *id.* (highlighting significant discrepancy from federal statutory language).

⁹⁴ See *id.* (explaining court’s rationale for interpretation of state legislative intent). Based on the Massachusetts statute’s structure and choice of phrasing, the court determined that there was a “conscious decision by the Legislature to deviate from the standard embodied in the Federal statute concerning the disclosure of medical and personnel information.” *Id.* at 1055; *Chief Medical Examiner*, 533 N.E.2d at 1358 (“The Legislature has made such medical files or information absolutely exempt without need for further inquiry as to whether their disclosure constitutes ‘a clearly unwarranted invasion of personal privacy.’”); *Viriyahiranpaiboon v. Dep’t of State Police*, 756 N.E.2d 635, 639 (Mass. App. Ct. 2001) (“In contrast to material covered by the clause after the semi-colon, medical files or information permit no balancing; the Legislature has made the ‘decision that medical files or information are absolutely exempt from disclosure.’”)

⁹⁵ See *Boston Ret. Bd.*, 446 N.E.2d at 1057 (indicating state legislature wanted to avoid narrow interpretation of term “files” for medical information).

⁹⁶ See *id.* at 1058 (emphasizing there is absolute exemption “where the files or information of a personal nature and related to a particular individual.”); *Globe Newspaper Co. v. Chief Med. Exam’r*, 533 N.E.2d 1356, 1358 (Mass. 1989) (confirming scope of medical records exemption as absolute). But see *Boston Ret. Bd.*, 446 N.E.2d at 1058 (quoting *United States Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 602 & no.4 (1982)). The court explains that—while medical information and records are absolute—any “information which does not permit the identification of any individual is not exempt.” *Boston Ret. Bd.*, 446 N.E.2d at 1058.

⁹⁷ See *Chief Med. Exam’r*, 533 N.E.2d at 1357-8 (defining autopsy reports as within scope of “medical files or information”); *Logan v. Comm’r of the Dep’t of Indus. Accidents*, 863 N.E.2d 559, 561-62 (Mass. App. Ct. 2007) (finding impartial medical examiner reports as falling under exemption); *Brogan v. Sch. Comm. of Westport*, 516 N.E.2d 159, 161 (Mass. 1987) (highlighting information surrounding serious medical condition is exempt); *Boston Ret. Bd.*, 446 N.E.2d at 1058 (identifying how court classified “medical files or information”); *Viriyahiranpaiboon*, 756 N.E.2d at 639 (presenting definition of medical information within scope of exemption).

to a particular individual” to warrant mandatory non-disclosure.⁹⁸ Medical statements, “even without particular identifying details,” still possess a risk of indirect identification.⁹⁹ The courts recognize the importance of classifying this sensitive data because public policy has a strong interest in protecting an individual’s medical information.¹⁰⁰ *Globe Newspaper Company v. Chief Medical Examiner*¹⁰¹ explains that this public policy covers the confidentiality of hospital records, records discussing venereal diseases, and records pertaining to infectious diseases among others.¹⁰² The public favors confidentiality in these circumstances because they discuss intimate information about an individual’s body.¹⁰³ The court held that if the records are “diagnostic in nature and yield detailed, intimate information about the [individual’s] body and medical condition . . . they are medical records”

⁹⁸ See *Brogan*, 516 N.E.2d at 160 (presenting examples of information not of “a personal nature”). Information such as the names of school committee employees, paired with days marked as “sick day” or “personal day[.]” was not considered to be intimate details of a highly personal nature. *Id.* The court agreed that this data did not constitute the “kinds of private facts” the legislature sought to exempt from mandatory disclosure as it was incredibly general in nature and did not provide the medical reason for the absences. *Id.*; *Boston Ret. Bd.*, 446 N.E.2d at 1058 (presenting one view of medical files and information scope). The court found that the “particular identifying details” found in the records must meet this “personal nature” standard to receive protection. *Boston Ret. Bd.*, 446 N.E.2d at 1058; *Logan*, 863 N.E.2d at 562 (emphasizing how attributing medical information to identifiable individuals classifies data as “of a personal nature”). The court found that the unredacted IME reports provided detailed medical information that was attributed to explicitly identified individuals. *Logan*, 863 N.E.2d at 562. The court ruled that these reports were of a “personal nature” that “relate[d] to a particular individual” because the individuals could be attributed to the extensive and detailed medical information provided in the reports. *Logan*, 863 N.E.2d at 562.

⁹⁹ See *Boston Ret. Bd.*, 446 N.E.2d at 1058 (“We conclude that the release of the medical statements, even without other particular identifying details, creates a grave risk of indirect identification. The information is, therefore, exempt from disclosure by virtue of G. L. c. 4, § 7, Twenty-sixth (c).”); *Logan*, 863 N.E.2d at 562-63 (discussing how redaction of identifying details may bring documents outside exemption). “Where ‘indirect identification’ of the individual is still possible, such redaction is insufficient [to bring document outside the scope of exemption].” *Logan*, 863 N.E.2d at 562.

¹⁰⁰ See *Chief Med. Exam’r*, 533 N.E.2d at 1358 (identifying public policy reasons for protecting medical data from disclosure); *Viriyahiranpaiboon*, 756 N.E.2d at 639 (“[T]here is a strong public policy in Massachusetts that favors confidentiality as to medical data about a person’s body.” Numerous statutes were cited indicating legislative concern for privacy in medical matters.)

¹⁰¹ 533 N.E.2d 1356 (Mass. 1989).

¹⁰² See *id.* at 1358 (showing how public policy mandates protection for various kinds of medical information). “This policy can be seen in the confidentiality of hospital records . . . of HTLV [AIDS] testing . . . of records pertaining to venereal disease . . . of records concerning Reyes Syndrome . . . of reports of infectious diseases . . . and in many other instances.” *Id.* (citations omitted).

¹⁰³ See *id.* at 1357-58 (identifying character of information found in autopsy reports).

worthy of protection.¹⁰⁴ Based on this definition, the Supreme Judicial Court held that autopsy reports, independent medical examiner reports, and blood tests qualify as “medical files or information.”¹⁰⁵ Other court interpretations suggest that medical information does not have to contain intimate details to bar disclosure.¹⁰⁶ Cursory medical statements—like “bad back, heart problem, [and] hypertension” that can be traced to identifiable persons—fall within the exemption, even if the statements are not typically considered “sensitive.”¹⁰⁷ Accordingly, the court must assess whether deleting particularly identifying details from the medical records may place it outside the exemption.¹⁰⁸

¹⁰⁴ See *id.* (characterizing information found in medical records). The court determined that these characteristics are key in classifying information as medical data rather than personal information. *Id.*

¹⁰⁵ See *id.* at 1358 (identifying autopsy reports as medical records under exemption); *Logan v. Comm’r of the Dep’t of Indus. Accidents*, 863 N.E.2d 559, 562 (Mass. App. Ct. 2007) (explaining why independent medical examiner reports are considered medical records). The redacted reports in question provided “detailed medical information on identified individuals.” *Logan*, 863 N.E.2d at 562. The reports explained whether an individual’s disability existed and the nature of the disability. *Id.* Therefore, there was enough medical information to classify the reports as “medical files and information.” *Id.*; *Viriyahiranpaiboon*, 756 N.E.2d at 640 (explaining how exemption covers blood tests).

Based on the strong legislative policy reviewed in [*Globe Newspaper Co. v. Chief Med. Exam’r*], and the cursory nature of the materials held in [*Globe Newspaper Co. v. Boston Ret. Bd.*], as well as the routine use of blood tests to obtain diagnostic information, [the court held] that blood tests in general, and particularly those which reveal genetic markers, are ‘medical data about a person’s body.’ Accordingly . . . [blood grouping tests] are absolute exempt from disclosure under the first clause of exemption (c)

Viriyahiranpaiboon, 756 N.E.2d at 640.

¹⁰⁶ See *Viriyahiranpaiboon*, 756 N.E.2d at 639 (indicating “medical information need not concern intimate details of a highly personal nature to bar disclosure.”)

¹⁰⁷ See *id.* (highlighting how cursory medical statements are exempt); see also *Globe Newspaper Co. v. Boston Ret. Bd.*, 446 N.E.2d 1051, 1060 (Mass. 1983) (noting cursory medical statements describing medical reasons for granting disability pension are exempt). The court barred the release of “‘a cursory statement of the medical reason for granting the disability pension’ and . . . ‘giving any medical information whatsoever concerning persons receiving disability pensions’” by virtue of the exemption. *Boston Ret. Bd.*, 446 N.E.2d at 1060.

¹⁰⁸ See *Boston Ret. Bd.*, 446 N.E.2d at 1058 (“We must therefore consider whether the deletion of particular identifying details from the documents sought . . . may bring the documents outside the exemption.”) *Logan*, 863 N.E.2d at 562-63 (considering whether “deletion of particular identifying details from the documents sought . . . may bring the documents outside the exemption.”). Portions of the medical record may be released if the identifying information is redacted sufficiently to protect the individuals discussed. See *Logan*, 863 N.E.2d at 563. Redactions are considered insufficient if those familiar with the individual could still identify the individual and the medical condition. *Logan*, 863 N.E.2d at 563. . This poses a “grave risk” of exposure otherwise. *Logan*, 863 N.E.2d at 563.

The second clause of exemption (c) applies to sensitive information that does not fit within the scope of “medical files or information.”¹⁰⁹ It prevents the disclosure of data that relates to a particular individual that may result in an unwarranted invasion of privacy.¹¹⁰ The court must determine whether this information would identify a certain individual.¹¹¹ The standard for identification is not only from the viewpoint of the public, but from the view of those familiar with the individual.¹¹² The greatest privacy concern is often attributed to records that contain a questionable amount of personal information—the disclosure of which would affect large groups of individuals.¹¹³ Records that pair various kinds of intimate details have an increased privacy interest because identification of the da-

¹⁰⁹ See *Boston Globe Media Partners, LLC v. Dep’t of Pub. Health*, 124 N.E.3d 127, 137-38 (Mass. 2019) (“Where the second category under exemption (c) is implicated, a court should first determine whether there is a privacy interest in the requested records. If there is not, then the requested material does not fall under exemption (c).”); *Champa v. Weston Pub. Sch.*, 39 N.E.3d 435, 444 (Mass. 2015) (providing guidance to determine impact of disclosure on privacy interest); *Att’y Gen. v. Assistant Comm’r of the Real Prop. Dep. of Boston*, 404 N.E.2d 1254, 1256 (Mass. 1980) (reiterating exemption’s coverage of “any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of privacy.”); *Georgiou v. Comm’r of the Dep’t of Indus. Accidents*, 854 N.E.2d 130, 134 (Mass. App. Ct. 2006) (“This clause exempts from the expansive statutory definition of ‘public record’ those ‘materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of privacy.’”)

¹¹⁰ See *Torres v. Att’y Gen.*, 460 N.E.2d 1032, 1038 (Mass. 1984) (explaining exemption’s coverage for personal data). Where the information disclosed is determined to be personal data as defined by the exemption, it is not subject to disclosure. *Id.*; *Doe v. Registrar of Motor Vehicles*, 528 N.E.2d 880, 885 (Mass. App. Ct. 1988) (“The only relevant provision is (c), which excludes from public record status any ‘data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy.’”)

¹¹¹ See *Champa*, 39 N.E.3d at 445 (quoting *Dep’t of the Air Force v. Rose*, 425 U.S. 352 (1976)). The court must perform the following analysis to determine if the available information is enough to identify a particular individual:

[T]he pertinent inquiry is whether the deletion of particular identifying information from the documents sought places the documents outside the exemption. In assessing whether the documents contain identifying information, the inquiry must be considered “not only from the viewpoint of the public, but also from the vantage of those who [are familiar with the individual].

Id. (citation omitted).

¹¹² See *id.* (providing standard by which information may be classified as “identifying”).

¹¹³ See *Dep’t of Pub. Health*, 124 N.E.3d at 139-41 (identifying where courts find greatest concern for individual privacy). “But where requested records include a fair amount of personal information, it matters how many individuals the records implicate: the more people affected by disclosure, the greater the privacy concerns.” *Id.* at 139. *But see Torres*, 460 N.E.2d at 1037 (“[T]he same information about a person, such as his name and address, might be protected from disclosure as an unwarranted invasion of privacy in one context and not in another.”) The courts, however, recognize an individual’s privacy interest may be protected under certain circumstances and not others. *Torres*, 460 N.E.2d at 1037.

ta's subject is more likely.¹¹⁴ As a result, the Massachusetts courts recognize an increased privacy interest in records that compile various personal details.¹¹⁵ Additionally, the Supreme Judicial Court recognized in its 1995 decision, *Globe Newspaper Company v Police Commissioner*, that an individual's involvement with drugs, whether true or purported by a witness, should nevertheless be protected through the privacy exemption.¹¹⁶

The court may consider several factors to determine whether an individual's privacy interest in the information exists.¹¹⁷ Courts may assess whether disclosure would cause personal embarrassment to an "individual of normal sensibilities", whether the information sought contains highly personal details, if the information is available from other sources, and the risk of identity fraud.¹¹⁸ Other factors include the extent multiple indices can be compared to reveal personal information, the extent disclosures of the record would cause an unwarranted intrusion of privacy, and the individual's expectation of privacy.¹¹⁹ The Supreme Judicial Court noted that information previously available online does not automatically decrease an

¹¹⁴ See *Dep't of Pub. Health*, 124 N.E.3d at 139 (explaining increased privacy interest in compilations of intimate data). The court found that records that may be conjoined with other details to identify an individual include medical records. *Id.*

¹¹⁵ See *id.* at 138 (noting how indices provide increased privacy interests). The court determined that there was a greater privacy interest in records containing data about individuals that are stored in collective indices (i.e. marriage records). *Id.*

¹¹⁶ See *Globe Newspaper Co. v. Police Comm'r of Bos.*, 648 N.E.2d 419, 426 (Mass. 1995) (identifying drug use as personal and sensitive information protected under exemption). "The revelation by a citizen witness that another person is a drug addict, for example, is precisely the type of 'intimate' and 'highly personal' information that the privacy exemption would protect . . . We conclude that this information also should be redacted prior to release of the citizen witness statements." *Id.*

¹¹⁷ See *People for the Ethical Treatment of Animals v. Dep't of Agric. Res.*, 76 N.E.3d 227, 238 (Mass. 2017) (providing three factors to assess privacy interests at stake). "We have also said that 'other case-specific factors' may influence the calculus." *Id.*; *Champa v. Weston Pub. Sch.*, 39 N.E.3d 435, 444 (Mass. 2015) ("In identifying the existence of privacy interests, we consider . . . whether disclosure would result in personal embarrassment to an individual of normal sensibilities, whether the materials sought contain intimate details of a highly personal nature, and whether the same information is available from other sources.")

¹¹⁸ See *Dep't of Pub. Health*, 124 N.E.3d at 138 (adding identity fraud to factors presented in *People for the Ethical Treatment of Animals*); *People for the Ethical Treatment of Animals*, 76 N.E.3d at 238 ("[T]hree factors to assess the . . . the privacy interest at stake: (1) whether disclosure would result in personal embarrassment to an individual of normal sensibilities; (2) whether the materials sought contain intimate details of a highly personal nature; and (3) whether the same information is available from other sources."); *Champa*, 39 N.E.3d at 444 (presenting how courts may address personal information during factual assessment).

¹¹⁹ See *Dep't of Pub. Health*, 124 N.E.3d at 138-39 (explaining how comparing indices may increase privacy interest); *Torres v. Att'y Gen.*, 460 N.E.2d 1032, 1037 (Mass. 1984) ("Certainly the expectations of the data subject are relevant in determining whether disclosure of information might be an invasion of privacy.")

individual's privacy interest.¹²⁰ Additionally, the Supreme Judicial Court found that the information falls within the scope of exemption (c) if its disclosure could lead to stigma.¹²¹ All of these factors must be considered within the unique circumstances presented for each case.¹²²

Once the information is classified as sufficiently personal under the exemption, the individual's privacy interest must be balanced with the public's right to know.¹²³ The second clause of exemption (c) calls "for a balancing of interests rather than for an objective determination of fact."¹²⁴ The Supreme Judicial Court held that public interest in information found in public records may be considered outside the scope of government operations.¹²⁵ If a requesting party provides a public interest—even one that is unrelated to government activities—it may strengthen the public interest portion of the balancing test.¹²⁶ The Supreme Judicial Court recognized

¹²⁰ See *Dep't of Pub. Health*, 124 N.E.3d at 141 (holding that previous availability of information in public forum does not impact protective interest). "[O]therwise private information does not necessarily lose that character by having been at one time placed in the public domain." *Id.* (quoting *Police Comm'r*, 648 N.E.2d at 426).

¹²¹ See *Champa*, 39 N.E.3d at 444-45 (stating embarrassment and potential stigma are enough to protect information under exemption). The court determined that records detailing identifying a child and their disabilities contained information that was incredibly sensitive, as the information was "highly personal, and disclosure may result in embarrassment and potentially lead to stigma bringing it within the scope of exemption (c)." *Id.*

¹²² See *People for the Ethical Treatment of Animals*, 76 N.E.3d at 239 (highlighting importance of addressing unique circumstances of each case). "Exemptions to the public records laws must be applied on a case-by-case basis." *Id.*

¹²³ See *Dep't of Pub. Health*, 124 N.E.3d at 147 (identifying balancing test for exemption (c)); *People for the Ethical Treatment of Animals*, 76 N.E.3d at 238 (stating information covered by exemption (c) requires a balancing test); *Champa*, 39 N.E.3d at 444 (explaining privacy exemption must be balanced with public's right to know); *Att'y Gen. v. Assistant Comm'r of the Real Prop. Dep. of Boston*, 404 N.E.2d 1254, 1256 (Mass. 1980) (noting public interest should prevail absent significant privacy interests).

¹²⁴ See *Torres*, 460 N.E.2d at 1037 (introducing balancing test as one balancing interests over determination of facts).

The word "unwarranted," added by the 1977 amendment, particularly suggests a weighing of the circumstances of the data subject—a balancing of the public's right to know as reflected in the Commonwealth's public records law, and the individual's right to protection against an unwarranted intrusion into his privacy. The exemption of subclause (c) appears to be the only exemption in the definition of "public records" calling for a balancing of interests rather than for an objective determination of fact.

Id.

¹²⁵ See *Dep't of Pub. Health*, 124 N.E.3d at 145 ("However, the parties have not pointed to, and we have not found, any published Massachusetts case that expressly limits the public interest analysis. In fact, Massachusetts courts have considered public interests other than the interest in government operations.")

¹²⁶ See *id.* at 146-47 ("To ensure that the public-private balancing test reflects the various uses to which government information may be put, we conclude that where a requester articulates

that the balancing test acknowledges both the public right of access and the legislature's intent to restrict access in certain circumstances.¹²⁷ For personal information, the court must balance "the public interest in disclosure [and] the legitimate interest in personal privacy of individuals about whom the government maintains information."¹²⁸ Additionally, the court must establish whether public interest "substantially outweighs the seriousness of an invasion of privacy."¹²⁹ The court's determination about the severity of an invasion of privacy may consider several factors, such as: the different privacy interests held between private parties and public employees, the impact of such disclosure on the individual, and the availability of information in other sources.¹³⁰ Ultimately, the public's right of access should prevail unless disclosure would be substantially harmful.¹³¹

IV. ANALYSIS

While guidelines exist for redacting publicly accessible documents filed with, or issued by, the Massachusetts courts, additional precautions are necessary to protect personal information from unwarranted disclosure.¹³² With the emergence of publicly accessible court documents readily

with specificity a public interest, even one unrelated to government operations" can add weight to the public interest aspect.")

¹²⁷ See *Globe Newspaper Co. v. Boston Ret. Bd.*, 446 N.E.2d 1051, 1057 (Mass. 1983) (stressing right of public access is not absolute). "We agree that the dominant purpose of the law is to afford the public broad access to governmental records. But this purpose should not be used as a means of disregarding the considered judgment of the Legislature that the public right of access should be restricted in certain circumstances." *Id.* (citations omitted).

¹²⁸ See *id.* (declaring public interest is subject to the individual's interest in personal privacy); *People for the Ethical Treatment of Animals*, 76 N.E.3d at 28 (identifying where disclosure is permissible under balancing test). "Exemption (c) requires a balancing test: where the public interest in obtaining the requested information substantially outweighs the seriousness of an invasion of privacy, the private interest in preventing disclosure must yield." See *People for the Ethical Treatment of Animals*, 76 N.E.3d at 23.

¹²⁹ See *Att'y Gen. v. Collector of Lynn*, 385 N.E.2d 505, 508 (Mass. 1979) (presenting instances where public interest outweighs individual's privacy interest). "Where the public interest in obtaining information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield to the public interest." *Id.*

¹³⁰ See *Dep't of Pub. Health*, 124 N.E.3d at 139 (construing reasonable expectations of privacy for balancing test); *People for the Ethical Treatment of Animals*, 76 N.E.3d at 239 (explaining nuanced analysis); *Collector of Lynn*, 385 N.E.2d at 509 (addressing concerns that emerge with disclosure of information in the context of tax delinquency records).

¹³¹ See *Att'y Gen. v. Assistant Comm'r of the Real Prop. Dep. of Boston*, 404 N.E.2d 1254, 1256 (Mass. 1980) (concluding that public's right to know must triumph over privacy interests to permit disclosure).

¹³² See S.J.C. Rule 1:24 (2016) (explaining how rule seeks to prevent "the unnecessary inclusion of certain personal identifying information in publicly accessible documents files or issued

available online, developing well-defined redaction policies have become increasingly important.¹³³ Most court redaction policies focus on preventing identity theft and other unscrupulous uses of an individual's personal information—often neglecting information that may trigger discrimination or stigma.¹³⁴ As a result, redaction policies created for publicly accessible court documents should consider Mass. Gen. Laws ch. 4, § 7 para. 26(c) as a point of reference to protect mental health, medical, and substance use information from public exposure.¹³⁵ Existing precedent for Mass. Gen. Laws ch. 4, § 7 para. 26(c) provides additional categories of sensitive data that may be integrated into existing policies and procedural guidance to prevent the indirect identification of individuals.¹³⁶

by the Courts, in order to reduce the possibility of using such documents for identity theft, the unwarranted invasion of privacy, or other improper purposes.”)

¹³³ See *Doe v. Registrar of Motor Vehicles*, 528 N.E.2d 880, 886 (Mass. App. Ct. 1988) (“There is a negative public interest in placing the private affairs of so many individuals in computer banks available for public scrutiny.”) The court emphasized that—generally—there is negative public interest in keeping private information in online banks open to the public. *Id.* If this information is aggregated in online data banks—like those maintained by the Division of Motor Vehicles—it increases the risk of identity theft and exposing private data, such as social security numbers. *Id.*

¹³⁴ See S.J.C. Rule 1:24 at § 1 (expressly mentioning identity theft and other improper purposes as reason for implementing proper redaction policies).

¹³⁵ See MASS. GEN. LAWS ch. 4, § 7 para. 26(c) (2019) (setting forth foundation for record redaction policies to prevent unwarranted disclosure of personal information). The statute's well-defined medical records and personal information exemption clauses establish absolute exemptions that may supplement existing redaction policies. *Id.*

¹³⁶ See *Boston Globe Media Partners, LLC v. Dep't of Pub. Health*, 124 N.E.3d 127, 137 (Mass. 2019) (providing guidelines for judges to establish privacy interest in public record); *People for the Ethical Treatment of Animals v. Dep't of Agric. Res.*, 76 N.E.3d 227, 238 (Mass. 2017) (addressing factors courts may use to assess privacy interests at stake in public records); *Champa v. Weston Pub. Sch.*, 39 N.E.3d 435, 444 (Mass. 2015) (addressing risk of indirect identification and how it may lead to stigma); *Globe Newspaper v. Police Comm'r*, 648 N.E.2d 419, 426 (Mass. 1995) (highlighting drug use and other sensitive details are protected under exemption); *Globe Newspaper Co. v. Chief Med. Exam'r*, 533 N.E.2d 1356, 1358 (Mass. 1989) (emphasizing exclusion of certain types of medical files and information within them); *Brogan v. Sch. Comm. of Westport*, 516 N.E.2d 159, 161 (Mass. 1987) (defining scope of medical statements protected under exemption); *Torres v. Att'y Gen.*, 460 N.E.2d 1032, 1038 (Mass. 1984) (assessing protections available for individual's personal data in public records); *Globe Newspaper Co. v. Boston Ret. Bd.*, 446 N.E.2d 1051, 1056 (Mass. 1983) (explaining Legislature's intent to establish absolute exemption for medical files or information); *Assistant Comm'r of the Real Prop. Dep't of Boston*, 404 N.E.2d at 1256 (declaring exemption covers certain categories of information that constitute unwarranted invasion of privacy); *Logan v. Comm'r of the Dep't of Indus. Accidents*, 863 N.E.2d 559, 561-62 (Mass. App. Ct. 2007) (providing guidance to redact identifying information so record may fall outside exemption); *Georgiou v. Comm'r of the Dep't of Indus. Accidents*, 854 N.E.2d 130 (Mass. App. Ct. 2006) (establishing protections available for personal information that falls outside of medical record exemption); *Viriyahiranpaiboon v. Dep't of State Police*, 756 N.E.2d 635, 639 (Mass. App. Ct. 2001) (defining medical records as absolutely exempt and rejecting need for public interest balancing test); *Doe*, 528 N.E.2d at 885 (reiterating importance of balancing test in conjunction with objective determination of fact).

Court redaction policies should continue to exclude the following information: social security numbers, taxpayer identification number, state-issued identification card numbers, financial information, addresses, parent's birth surnames, welfare information, marital status, driver's license numbers, and passport numbers.¹³⁷ However, considering the existing precedent surrounding Mass. Gen. Laws ch. 4, § 7 para. 26(c), courts should consider integrating protective measures for information about an individual's mental health, substance use, and medical conditions.¹³⁸ Information about an individual's medical conditions—like chronic illnesses and venereal diseases, among others—has consistently received protection from disclosure under Mass. Gen. Laws ch. 4, § 7.¹³⁹ Additionally, the Massachusetts judiciary has consistently recognized the strong public policy favoring confidentiality of information about a person's body.¹⁴⁰ How-

¹³⁷ See S.J.C. Rule 1:24, § 3 (listing categories of information redaction); *Rural Hous. All.*, 498 F.2d at 77 (“[I]nformation regarding marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights . . .”)

¹³⁸ See *Rural Hous. All.*, 498 F.2d at 77 (identifying medical conditions as sufficiently intimate to fall under medical record exemption); *Champa*, 39 N.E.3d at 444 (advocating that information surrounding an individual's disabilities deserves protection from disclosure); *Police Comm'r*, 648 N.E.2d at 426 (arguing drug use, whether true or alleged, deserves protection); *Chief Med. Exam'r*, 533 N.E.2d at 1358 (presenting one instance where judiciary recognized protecting sensitive information about human body); *Boston Ret. Bd.*, 446 N.E.2d at 1058 (arguing cursory statements describing medical conditions deserve protection if attributable to identified individual); *Logan*, 863 N.E.2d at 562 (“The Supreme Judicial Court has held that ‘medical . . . files or information are absolutely exempt from mandatory disclosure where the files or information are of a personal nature and relate to a particular individual.’”); *Viriyahiranpaiboon*, 756 N.E.2d at 639 (classifying information found in medical records according to Mass. Gen. Laws ch. 4, § 7(26)(c)).

While neither the statute nor case law defines medical information, the material held to be within the absolute exemption in [Mass. Gen. Laws ch. 4, § 7(26)(c)] is instructive. Even cursory medical statements such as “bad back, heart problem, hypertension,” if related to identifiable persons, were held to be within the absolute exemption.

Viriyahiranpaiboon, 756 N.E.2d at 639.

¹³⁹ See MASS. GEN. LAWS ch. 4, § 7 (providing explicit instruction that medical records must be exempt); see also *Chief Med. Exam'r*, 533 N.E.2d at 1358 (indicating public policy favoring confidentiality of medical data “can be seen in the confidentiality of hospital records . . . of HTLV [AIDS] testing . . . of records pertaining to venereal disease . . . of reports of infectious diseases . . . and many other instances.”); *Boston Ret. Bd.*, 446 N.E.2d at 1058 (presenting judiciary's conclusion that medical statements with identifying details warrant additional protection); *Viriyahiranpaiboon*, 756 N.E.2d at 639 (arguing even cursory statements about medical conditions deserve protection under medical files exemption).

¹⁴⁰ See *Chief Med. Exam'r*, 533 N.E.2d at 1358 (“There is a strong public policy in Massachusetts that favors confidentiality as to medical data about a person's body.”); *Boston Ret. Bd.*, 446 N.E.2d at 1058 (recognizing “that medical and personnel files or information are absolutely exempt from mandatory disclosure where the files or information are of a personal nature and relate to a particular individual.”); *Viriyahiranpaiboon*, 756 N.E.2d at 639-40 (upholding privacy for sensitive data found in blood grouping tests and other genetic research).

ever, existing court redaction policies—such as the Supreme Judicial Court’s—fail to extend the same protection in their own publicly accessible court records.¹⁴¹ Therefore, to best address sensitive medical information, redaction policies should provide an absolute exemption for information directly transcribed from medical files, data acquired through research or medical testing, information about an individual’s treatment for substance abuse, and cursory statements about an identifiable individual’s medical condition or diagnosis (i.e. “bad back[,]” “hypertension[,]” “diabetic[,]” etc.).¹⁴² Records discussing an individual’s medical history or condition should remain absolutely exempt based on existing Legislative intent and the nature of the materials.¹⁴³

This rationale should also extend to mental health records, treatment plans, and related data.¹⁴⁴ Psychiatric diagnoses and treatment information pertain to the human body just as much as any other chronic illness recognized by the Massachusetts judiciary.¹⁴⁵ Psychiatric conditions are

¹⁴¹ See S.J.C. Rule 1:24, § 1 (presenting scope of rule to protect certain personal identifying information). The rule presents the intent to prevent embarrassing disclosures but provides a limited scope of information covered. *Id.* Despite a history of the judiciary protecting such data from disclosure in public records, the categories presented fail to address sensitive information like medical records, mental health conditions, and substance use. *Id.* § 3. This gap in a court’s redaction policy exposes a host of sensitive information that may lead to stigma for an identified individual. *Id.*

¹⁴² See *Police Comm’r*, 648 N.E.2d at 426 (presenting rationale for redacting substance use information and substance abuse treatment from records). While the court has not explicitly addressed substance abuse treatment, the decision in *Police Comm’r* indicates the Commonwealth’s courts recognize the sensitive and stigmatizing nature of such information. *Id.* Therefore, it would be in the courts best interests to redact substance abuse treatment information as well as substance abuse. *Id.*; see also *Boston Ret. Bd.*, 446 N.E.2d at 1058 (advocating for medical record redaction where information can lead to indirect identification of patient); *Viriyahiranpaiboon*, 756 N.E.2d at 639 (explaining how cursory statements should be redacted and advocating for protecting medical test results); *Chief Med. Exam’r*, 533 N.E.2d at 1358 (presenting rationale for protecting medical data—such as venereal test results—from public scrutiny).

¹⁴³ *Chief Med. Exam’r*, 533 N.E.2d at 1358 (“The Legislature has made such medical files or information absolutely exempt without need for further inquiry as to whether their disclosure constitutes ‘a clearly unwarranted invasion of personal privacy.’”); see also *Boston Ret. Bd.*, 446 N.E.2d at 1058 (upholding medical records exemption for medical files and information); *Viriyahiranpaiboon*, 756 N.E.2d at 639 (reiterating strong legislative policy for exempting medical information). *But see Boston Ret. Bd.*, 446 N.E.2d at 1056 (“Not every bit of information which might be found in a personnel or medical file is necessarily personal so as to fall within the exemption’s protection.”)

¹⁴⁴ See *Logan v. Comm’r of the Dep’t of Indus. Accidents*, 863 N.E.2d 559, 563 (Mass. App. Ct. 2007) (“[records] which provide detailed medical information on identified individuals, clearly fit within the absolute exemption and are not subject to production or review.”) Mental health information and records may also be characterized as falling under the medical records exemption as a result. *Id.*

¹⁴⁵ See *Chief Med. Exam’r*, 533 N.E.2d at 1358 (listing various medical conditions recognized by Legislature and judiciary to be protected under exemption). While the *Chief Med. Exam’r* decision doesn’t discuss psychiatric disorders, the rationale applicable to other disorders

ailments that affect the human body both physically and emotionally.¹⁴⁶ They affect an individual’s neurological functions and are classified as medical disorders.¹⁴⁷ Additionally, mental health problems may trigger other chronic illnesses, such as heart disease.¹⁴⁸ Undoubtedly—in order to remain consistent with current judiciary practices—redaction policies should exempt diagnoses of psychiatric conditions, cursory statements discussing an individual’s mental health condition, prescriptions for psychiatric medication, and discussions of psychiatric treatment (i.e. cognitive behavioral therapy) from public disclosure.¹⁴⁹ Psychiatric records or mental

may still apply. *Id.* Psychiatric disorders can also be considered sensitive data pertaining to the human body, as they produce neurological and physical ailments like other chronic illnesses. *Id.*; see also *Viriyahiranpaiboon*, 756 N.E.2d at 639 (addressing non-invasive medical statements and protection under exemption). Diagnosis information for psychiatric disorders—even as cursory as “diagnosed with obsessive compulsive disorder”—should be treated as medical statements under the exemption. *Viriyahiranpaiboon*, 756 N.E.2d at 639 (recognizing legitimacy of psychiatric disorders as medical statements).

¹⁴⁶ See *Mental Health Conditions in the Workplace and the ADA*, *supra* note 6 (identifying mental illness as physical ailment). “The term mental illness is typically used in a medical context to refer to a wide range of conditions related to emotional and mental health.” *Id.*

¹⁴⁷ See *id.* (classifying mental health problems as physical ailments that affect the brain). “Mental health conditions are brain disorders.” *Id.*; see also Gould, *supra* note 6 (“Mental illness results from complex physical changes in the brain like many other diseases. Therefore, mental illnesses require assessment, monitoring and treatment by a skilled provider — just like any other medical illness.”)

¹⁴⁸ See *Mental Health By The Numbers*, *supra* note 9 (linking mental illness to other chronic diseases). “People with depression have a 40% higher risk of developing cardiovascular and metabolic diseases than the general population. People with serious mental illness are nearly twice as likely to develop these conditions.” *Id.*

¹⁴⁹ See *Chief Med. Exam’r*, 533 N.E.2d at 1357 (presenting characteristics of medical information exempt from disclosure). The court deemed data that is “diagnostic in nature and yield[s] detailed, intimate information about the subject’s body and medical condition” as exempt from public disclosure. *Id.* Based on this argument, records detailing psychiatric diagnoses and treatment should be included. *Id.*; see also *Viriyahiranpaiboon*, 756 N.E.2d at 639-40 (protecting blood tests and genetic information). The court in *Viriyahiranpaiboon* determined that blood tests and genetic markers constituted “medical data about a person’s body” and were exempt from disclosure. *Viriyahiranpaiboon*, 756 N.E.2d at 639-40. Based on this rationale and public policy, research and testing results for psychiatric disorders should also be protected from public disclosure. *Viriyahiranpaiboon*, 756 N.E.2d at 639-40; *Mental Health Medications*, *supra* note 8 (describing intimacies of psychotherapy and related medications). Medications specifically used to target psychiatric disorders—when attributed to a specifically identified individual—should be exempt from disclosure. See *Mental Health Medications*, *supra* note 8. Medication prescriptions and their effects are considered intimate information of the human body, regardless of if they are for psychiatric or other physical ailments. See *Mental Health Medications*, *supra* note 8; *Psychotherapy*, *supra* note 8 (defining various forms of psychotherapeutic treatment). In conjunction with medication, psychotherapy may help patient manage their mental health issues. *Psychotherapy*, *supra* note 8. While other forms of treatment—such as physical therapy—have not been discussed in context of the exemption, it may be considered exempt by virtue of its relationship to the body. *Psychotherapy*, *supra* note 8. Cognitive behavioral therapy—for example—helps patients address their mental health problems by targeting unhealthy thought patterns. *Psychotherapy*, *supra* note 8. Through a combination of therapeutic sessions and medication, patients learn

health data which “provide[s] detailed medical information on identified individuals, clearly fit within the absolute exemption” and should be an explicitly protected class of information within court record redaction policies.¹⁵⁰ The judiciary recognizes the importance of protecting data related to the human body; mental health data should be no different.¹⁵¹

Although information about substance abuse disorders is not explicitly mentioned in the statute, the judiciary recognizes that such information also deserves protection.¹⁵² However, like mental health data, the judiciary fails to extend protection to publicly accessible court documents.¹⁵³ The Massachusetts judiciary has previously classified drug and alcohol use as “intimate” and “highly personal” information that should be protected from public scrutiny.¹⁵⁴ *Globe Newspaper v. Police Commissioner* addressed the risks surrounding substance abuse stigma.¹⁵⁵ The court explained that the “revelation by [another person] that [an individual] is a drug addict, for example, is precisely the type of ‘intimate’ and ‘highly personal’ information that the privacy exemption would protect.”¹⁵⁶ Accordingly, the court determined that the stigma related to drug addicts and

to address negative thoughts. *Psychotherapy*, *supra* note 8. Research shows that “[i]ndividuals who undergo CBT show changes in brain activity, suggesting that this therapy actually improves your brain functioning as well.” *Psychotherapy*, *supra* note 8. Therefore, information about an identifiable patient’s psychotherapy treatment should be excluded. *Psychotherapy*, *supra* note 8.

¹⁵⁰ See *Logan v. Comm’r of the Dep’t of Indus. Accidents*, 863 N.E.2d 559, 562-63 (Mass. App. Ct. 2007) (arguing that unredacted medical examiner reports should be exempt). Unredacted reports, so long as they provide detailed medical information pertaining to an identifiable individual, should be exempt. *Id.* Therefore, courts should extend this protection within their own redaction policies. *Id.*

¹⁵¹ See *Chief Med. Exam’r*, 533 N.E.2d at 1357 (reiterating judiciary classification of medical data); see also *Viriyahiranpaiboon*, 756 N.E.2d at 639-40 (summarizing judicial and legislative desire to protect sensitive information about individuals’ bodies).

¹⁵² See *Rural Hous. All. v. U.S. Dep’t of Agric.*, 498 F.2d 73, 77 (D.C. Cir. 1974) (identifying alcohol consumption as sensitive information warranting protection); see also *Globe Newspaper Co. v. Police Comm’r*, 648 N.E.2d 419, 426 (Mass. 1995) (explaining why drug use is considered highly personal information).

¹⁵³ See S.J.C. Rule 1:24 (presenting information protected under court filing procedures); see also *supra* note 143 and accompanying text (discussing gaps in court redaction policies that fail to cover various types of sensitive information).

¹⁵⁴ See *Rural Hous. All.*, 498 F.2d at 77 (identifying individuals’ alcohol consumption as data as sensitive information warranting protection); see also *Police Comm’r*, 648 N.E.2d at 426 (arguing exemption “protects from public scrutiny information that would lead to an unwarranted invasion of privacy of any person mentioned in the requested materials.”) The court emphasizes that statements about an identifiable individual’s drug use—whether fabricated, alleged, or true—may lead to stigma. See *Police Comm’r*, 648 N.E.2d at 426. Therefore, substance is exempt due to its potential harm. See *Police Comm’r*, 648 N.E.2d at 426.

¹⁵⁵ 648 N.E.2d at 426 (explaining stigma in context of citizen witness statements describing individual’s drug use).

¹⁵⁶ *Id.* (citations omitted) (classifying an individual’s real and purported drug use as sensitive information)

alcoholics was sufficient to justify exemption from public disclosure.¹⁵⁷ Therefore, redaction policies should expressly call for the redaction of statements describing an individual's present substance use, substance use history, and substance abuse treatment.¹⁵⁸

Court record redaction policies should provide guidance for obscuring details that may result in indirect identification.¹⁵⁹ Court redaction procedures should ensure that "any order, memorandum of decision, or other document issued by the court that will be publicly accessible" is free of medical, mental health, and substance abuse information of an *identifiable* person unless required by law.¹⁶⁰ Redacting exempt information may be accomplished through traditional methods like "blacking out" the offending text, or replacing the text with "x" characters.¹⁶¹ For the names of parties and locations, complete omission or use of pseudonyms may help protect an individual's identity.¹⁶² Sufficiently redacting information, how-

¹⁵⁷ See *id.* ("We conclude that this information also should be redacted prior to release of the citizen witness statements."); see also Cronin, *supra* note 7 (addressing stigma associated with opioid addicts and its impact on addicts seeking treatment); Thomas, *supra* note 9 (outlining substance use disorder statistics).

¹⁵⁸ See *Police Comm'r*, 648 N.E.2d at 426 (calling for redaction of information describing an individual's real or purported drug use).

¹⁵⁹ See S.J.C. Rule 1:24, § 1 (presenting current protections in place for personal information in court documents). Currently, there are some procedures in place to protect personal information in court filings; however, the listed categories are lacking when compared to the types of information recognized under case law. *Id.*

¹⁶⁰ See *id.* at § 9 (addressing how to approach redaction if disclosure is required by law). Redaction of sensitive information is recommended "unless including it (a) is specifically required by law, court rule, standing order, or court-issued form or (b) is necessary to serve the document's purpose." *Id.* But see *id.* at § 5 (providing general exemptions for unredacted personal information that may be included in court documents).

¹⁶¹ See S.J.C. Rule 1:24 at § 4 (explaining methods of redaction for court documents filed in Supreme Judicial Court). The rule provides some requirements for redacting sensitive personal information. *Id.* These redaction standards may be used to formulate or improve other court redaction policies. *Id.* The Supreme Judicial Court's standards provide excellent guidance for obscuring text and clearly tagging the location of each redaction. *Id.* These redaction techniques should be extended to documents published online. *Id.* But see *id.* at comment § 9 (explaining exemption does not always allow for complete redaction of all personal identifying information). Personal identifying information may be included in court documents when it is "necessary to serve the document's purpose." See *id.* at comment § 9. However, the rule reminds document filers that the inclusion of personal identifying information "should be minimized when drafting such documents, [because] sometimes, unredacted information will be necessary to serve the purpose of the document." *Id.* at comment § 9.

¹⁶² See *People for the Ethical Treatment of Animals v. Dep't of Agric. Res.*, 76 N.E.3d 227, 240 (Mass. 2017) (recognizing importance of redacting names and addresses to protect individual privacy interests); *Torres v. Attorney Gen.*, 460 N.E.2d 1032, 1037 (Mass. 1984) (emphasizing how "information about a person, such as his name and address" warrant protection). If there is a valid privacy interest, names and other information should be given protection. *Torres*, 460 N.E.2d at 1037; see also S.J.C. Rule 1:24 at § 9 (suggesting how courts can avoid exposure of personal identifying details through alternative redaction procedures). Applying pseudonyms for party

ever, presents its own unique challenges.¹⁶³ Following all redactions, it is imperative that the redacting party ensures that indirect identification of an individual is not possible.¹⁶⁴ The redacting party must consider the information from the viewpoint of the public and those familiar with the individual and their career.¹⁶⁵ It will be challenging to create a bright-line rule, as each case will have unique circumstances and varied interests in privacy.¹⁶⁶ However, some explicit guidelines—such as an absolute exemption for removing names and locations—can help ensure parties are not directly identified.¹⁶⁷

names, locations, and occupations may ensure court documents do not “[include] a complete version of any personal identifying information” in the document. S.J.C. Rule 1:24 at § 9.

¹⁶³ See *Rural Hous. All. v. U.S. Dep’t of Agric.*, 498 F.2d 73, 78 (D.C. Cir. 1974) (emphasizing deletions must protect individuals’ privacy); *Champa v. Weston Pub. Sch.*, 39 N.E.3d 435, 444-45 (Mass. 2015) (explaining how failure to sufficiently redact may lead to stigma for identifiable party); *Globe Newspaper Co. v. Boston Ret. Bd.*, 446 N.E.2d 1051, 1058 (Mass. 1983) (stressing disclosure, even without specific identifying details, may create risk of indirect identification); *Logan v. Comm’r of the Dep’t of Indus. Accidents*, 863 N.E.2d 559, 562-63 (Mass. App. Ct. 2007) (noting how “indirect identification” indicates insufficient redaction of records).

¹⁶⁴ See *Boston Ret. Bd.*, 446 N.E.2d at 1058-59 (highlighting risk of indirect identification through release of medical statements); *Logan*, 863 N.E.2d at 562-63 (discussing methods to eliminate indirect identification of individual).

¹⁶⁵ See *Boston Ret. Bd.*, 446 N.E.2d at 1058-59 (“The inquiry as to what constitutes identifying information regarding an individual . . . must be considered not only from the viewpoint of the public but also from the vantage of those who are familiar with the individual and his career.”); *Logan*, 863 N.E.2d at 562-63 (reiterating how courts determine indirect identification).

Where “indirect identification” of the individual is still possible, such redaction is insufficient. In determining whether the individual can be indirectly identified, [the court reviews] the documents not from the vantage point of the public at large but from those familiar with the individual. Therefore, removing the name of the employee . . . is not enough.

Logan, 863 N.E.2d at 562-63.

¹⁶⁶ See *People for the Ethical Treatment of Animals*, 76 N.E.3d at 239-40 (addressing exemptions considering case’s unique circumstances). The Supreme Judicial Court explained that a case-by-case analysis of privacy interests are critical, as “the same information about a person, such as his name and address, might be protected from disclosure as an unwarranted invasion of privacy in one context and not in another.” (quoting *Torres v. Attorney Gen.*, 460 N.E.2d 1032, 1037 (Mass. 1984). As such, the Supreme Judicial Court recognizes that a bright line rule is unlikely to evaluate privacy interests in a given situation. *Id.*

¹⁶⁷ See S.J.C. Rule 1:24 at § 1 (declaring filer should avoid “unnecessary inclusion of certain personal identifying information in publicly accessible documents.”) Redacting information—such as names and discernable locations—could ensure no unnecessary, identifiable information emerges in publicly accessible court documents. *Id.*; see also S.J.C. Rule 1:24, § 3 (calling for redaction of personal identifying information). In addition to the listed categories of exempt information, redaction policies could implement explicit instructions to completely redact names, occupations, and locations unless required by law. See S.J.C. Rule 1:24, § 3; *People for the Ethical Treatment of Animals*, 76 N.E.3d at 240 (supporting conclusion that case-specific factors should play role in classifying identifiable information). Additionally, the analysis of identifying

Even after names, locations, occupations, and other specific identifying details are removed, redactions must prevent even *indirect* identification.¹⁶⁸ Inadequate redactions may enable the public or those familiar with the individual to identify them, especially if the record is publicly available online.¹⁶⁹ It is imperative that redactions of publicly accessible records discussing medical conditions, mental illness, or substance abuse, prevent indirect identification because the consequences of the related stigma can be devastating.¹⁷⁰ Following all necessary redactions, the redaction policy should require the public release of all non-exempt portions of the record.¹⁷¹

V. CONCLUSION

While cultural attitudes about mental illness, substance abuse, and chronic illness are becoming more sympathetic, stigma remains a real threat to the wellbeing of millions of Americans who suffer from those afflictions. The internet's ease of access and push for digital documents presents concerns for protecting a party's information. Online records may unnecessarily expose an individual to stigma if they are identified in a public forum. In an age where internet privacy matters most, the Massachu-

information should consider any "risks to the personal safety of individuals from the release of certain requested information." *People for the Ethical Treatment of Animals*, 76 N.E.3d at 240.

¹⁶⁸ See *Rural Hous. All.*, 498 F.2d at 78 (emphasizing importance of thorough redactions). It is important to consider "whether the deletions [at the time of review] are sufficient to protect the privacy of the individuals." *Id.*

¹⁶⁹ See *id.* (warning how others may indirectly identify individual). Insufficient redaction of highly confidential material may "enable people with knowledge of the area to determine the identity of the individuals involved." *Id.*; see also *Logan*, 863 N.E.2d at 563 (explaining grave risk associated with indirect identification). Failing to redact information about an employee's work duties or his workplace, even if the party's name is removed, could lead to indirect identification. See *Logan*, 863 N.E.2d at 563. If this unredacted information is paired with sensitive data, like information surrounding an individual's medical condition, the individual is at risk of exposure and stigma. See *Logan*, 863 N.E.2d at 563.

¹⁷⁰ See *Champa v. Weston Pub. Sch.*, 39 N.E.3d 435, 444-45 (Mass. 2015) (explaining risks associated with indirect identification in context of disabilities). The failure to redact information sufficiently to prevent identification "may result in embarrassment and potentially lead to stigma." *Id.*

¹⁷¹ See *id.* at 445 (noting how redaction subjects publicly accessible records to disclosure). "[Documents] may be redacted to remove personally identifiable information they contain, after which they become subject to disclosure." *Id.* at 437; see also *Globe Newspaper Co. v. Boston Ret. Bd.*, 446 N.E.2d 1051, 1058 (Mass. 1983) (noting remaining unredacted record must be disclosed); *Globe Newspaper Co. v. Police Comm'r*, 648 N.E.2d 419, 424 (Mass. 1995) ("[T]he existence of some exempt information in a document will not 'justify cloture as to all of it,' because the right to access extend[s] to any nonexempt 'segregable portion' of a public record.") (second alteration in original) (citations omitted); Galvin, *supra* note 21, at 14 ("[T]he non-exempt portions are subject to disclosure once the exempt portions are deleted.")

setts' courts must adapt to best protect personal information as court documents become available online. Massachusetts expanded the universe of public records with the inclusion of electronic records, but no guidelines exist for the courts to sufficiently redact publicly accessible, electronic court documents.

It would be in the courts' best interest to update existing redaction policies with new categories of protected information and redaction techniques to protect parties from discrimination. Redaction policies currently in place provide some guidance, but they ultimately fail to address information that may lead to stigma. The gaps allow stigmatizing information to slip through the cracks, which can lead to the suffering of individuals whose private information was inadvertently disclosed to the public.

While the public records law does not apply to the courts, case law provides guidance for what information should receive protection—even when balanced against public interest. The courts themselves have determined that certain kinds of information should receive additional protection, but these decisions are not reflected in court redaction policies. Medical information, psychiatric information, and substance abuse disorder information deserve protection in publicly accessible court documents, just as in other public records. It may be difficult to create a universal policy, especially due to the unique circumstances of each case and public interest in the information. However, this should not deter the courts from facilitating additional protective measures for parties and their sensitive information. By establishing clear guidelines for questionable information, the courts may aid in both meeting the public's interest in the information and the individuals' interest in protection from debilitating stigma.

Diana Hurtado

**CONSTITUTIONAL LAW—FOURTH
AMENDMENT COMMUNITY CARETAKING
EXCEPTION ANALYSIS AGAINST THE
COMMUNITY—*CANIGLIA V. STROM*, 953 F.3D 112
(1ST CIR. 2020).**

The Fourth Amendment of the United States Constitution protects individuals from unreasonable searches and seizures conducted by the State.¹ These unreasonable searches and seizures generally occur when government officials enter homes without warrants; however, this general rule is subject to a few exceptions.² As a matter of first impression, the United States Court of Appeals for the First Circuit in *Caniglia v. Strom* (“Case-in-Chief”),³ considered whether Fourth Amendment protections apply where police officers, acting as community caretakers, conduct a warrantless search of a home and seize items from the private premises.⁴ The

¹ See U.S. CONST. amend. IV (outlining Fourth Amendment protections). Such protections include “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]” *Id.*; see also *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (noting Fourth Amendment protections only apply against “governmental action”); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (highlighting Fourth Amendment’s purpose to safeguard privacy of individuals against government interference).

² See *Payton v. New York*, 445 U.S. 573, 586-88 (1980) (stating warrantless searches and seizures of home are unreasonable unless exception applies); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016) (recognizing warrant requirement “is subject to a number of exceptions”); David Fox, Note, *The Community Caretaking Exception: How the Courts Can Allow the Police to Keep Us Safe Without Opening the Floodgates to Abuse*, 63 WAYNE L. REV. 407, 409-13 (2018) (defining Fourth Amendment warrant requirement and exceptions); see also 22 C.J.S. *Criminal Procedure and Rights of Accused* § 266 (2020) (“The ‘community caretaking doctrine’ is a judicially created exception to the warrant requirement of the Fourth Amendment and allows police with a non-law enforcement purpose to seize or search a person or property in order to ensure the safety of the public or the individual, regardless of any suspected criminal activity.”)

³ 953 F.3d 112 (1st Cir. 2020).

⁴ See *id.* at 118 (addressing whether community caretaker protections extend to police officer activity on private premise). After acknowledging the existing circuit split, the court announced its stance of joining those courts who have expanded the community caretaking doctrine beyond the motor vehicle context. *Id.* at 124. The court outlined three questions that were necessary to address and assess whether the community caretaking doctrine extended to the defendants’ conduct:

First, we must consider the involuntary seizure of an individual whom officers have an objectively reasonable basis for believing is suicidal or otherwise poses an imminent risk of harm to himself or others. Second, we must consider the temporary seizure of firearms and associated paraphernalia that police officers have an objectively reasonable basis for thinking such an individual may use in the immediate future to harm himself or others. Third, we must consider the appropriateness of a warrantless entry into

court held that the constitutional protections did not apply because the officers were acting as community caretakers, which justified their warrantless search and seizure.⁵

On August 20, 2015, a disagreement arose between Edward Caniglia (“Caniglia”) and his wife, Kim (“Kim”) which resulted in Caniglia retrieving a handgun from their bedroom, tossing it on the table, and stating to Kim “shoot me now and get it over with.”⁶ Caniglia subsequently left the residence, while Kim returned the gun to a location in the bedroom and decided that she was going to stay in a hotel for the night if Caniglia returned upset.⁷ Caniglia’s return ultimately “sparked a second spat[,]” so Kim left for the hotel; later that evening, she spoke to Caniglia on the phone, who still “sounded upset and [a] little angry.”⁸ The next morning, Kim called Caniglia but she became worried when he did not answer; consequently, she called the police “on a non-emergency line and asked that an officer accompany her to the residence.”⁹ Kim explained to the officer what happened the night before, and stressed that she was not concerned for her safety, but she was fearful that her husband might have committed suicide.¹⁰ The officer then contacted Caniglia, who said he was willing to speak with the police in person.¹¹

Four officers arrived at the residence and spoke with Caniglia, while Kim waited in the car.¹² Three of the four officers on scene thought

an individual’s home when that entry is tailored to the seizure of firearms in furtherance of police officers’ community caretaking responsibilities.

Id. at 124-25.

⁵ See *id.* at 132-33, 139 (finding police officers’ conduct reasonable under community caretaking exception).

⁶ See *id.* at 119 (recounting couple’s disagreement). The gun was unloaded, which was unknown to Kim at the time of the argument. *Id.* There is some dispute about what exactly was said, but ultimately Caniglia confirmed that he brought the firearm to Kim and asked her to shoot him because “he was sick of the arguments’ and ‘couldn’t take it anymore.’” *Id.*; see also Brief for Defendant at 2, *Caniglia v. Strom*, 953 F.3d 112 (1st Cir. 2020) (No. 19-1764) (claiming Caniglia said “why don’t you shoot me and put me out of my misery.”)

⁷ See *Caniglia*, 953 F.3d at 119 (noting Kim returned gun to “its customary place” and hid ammunition).

⁸ See *id.* (identifying Kim’s concerns for Caniglia’s safety); see also Brief for Appellant Ex. A at 3, *Caniglia v. Strom*, 953 F.3d 112 (1st Cir. 2020) (No. 19-1764) (indicating Caniglia called Kim and “asked her to come home and that he misse[d] her. Kim stated that she told him that she wasn’t [coming home] and [that] he sounded upset on the phone.”)

⁹ See *Caniglia*, 953 F.3d at 119 (explaining Kim was worried “about what [she] would find” when she arrived home).

¹⁰ See *id.* (highlighting that Kim was not worried about her safety). The court noted that Kim mentioned to an officer that the gun Caniglia gave to her during their dispute was unloaded. *Id.*

¹¹ See *id.* (describing how officers met with Caniglia “on the back porch” of his residence).

¹² See *id.*; see also *Caniglia v. Strom*, 396 F. Supp 3d, 227, 231 (D.R.I. 2019) (outlining lower court’s perception of events). One of the officers asked Caniglia if they could speak in person.

Caniglia was fine; however, the ranking officer believed that Caniglia seemed “[a]gitated’ and ‘angry[.]’”¹³ Consequently, the ranking officer determined that Caniglia was “imminently dangerous to himself and others[.]” and requested that an ambulance transport Caniglia for a psychiatric evaluation, to which Caniglia reluctantly agreed.¹⁴ When Caniglia was transported, the officers, accompanied by Kim, entered the home and seized Caniglia’s firearms, magazines, and ammunition—despite their awareness of Caniglia’s disapproval.¹⁵ Following a psychiatric evaluation, Caniglia was not admitted into the hospital and returned home.¹⁶

After multiple, unsuccessful attempts to retrieve his firearms from the police department, Caniglia’s attorney formally requested their return.¹⁷ The firearms were not returned until four months after the incident.¹⁸ Caniglia subsequently filed a lawsuit with multiple claims in the federal district court against the City of Cranston, the Finance Director of Cranston, the Cranston police chief, and six officers.¹⁹ Both parties filed cross-motions for summary judgement, and the lower court granted the defendants’ motion for summary judgment on several counts.²⁰ Caniglia ap-

Caniglia, 396 F. Supp 3d. at 231. While the officer told Kim that “her husband sounded fine” over the phone, he still instructed her to stay in the car during the encounter. *Caniglia*, 396 F. Supp 3d. at 231.

¹³ See *Caniglia*, 953 F.3d at 119 (indicating officers’ varying evaluations of Caniglia). After speaking with Caniglia in person, one officer “subsequently reported that the plaintiff ‘appeared normal’ during this encounter [while a different officer] described the plaintiff’s demeanor as calm and cooperative.” *Id.* The sergeant on scene, however, thought Caniglia seemed somewhat ‘agitated’ and angry[.]” *Id.*

¹⁴ See *id.* at 119-20 (establishing priority of ranking officer’s opinion). The sergeant “determined, based on the totality of the circumstances, that the plaintiff was imminently dangerous to himself and others.” *Id.*; see also Brief for Appellant Ex. A at 4, *Caniglia v. Strom*, 953 F.3d 112 (1st Cir. 2020) (No. 19-1764) (indicating officers asked Caniglia “to get checked out by rescue and to talk to someone at the hospital which he willingly agreed to do.”) Caniglia maintains that he only agreed to go to the hospital to get an evaluation because the officers told him they would confiscate his firearms if he did not agree to go. *Caniglia*, 953 F.3d at 120.

¹⁵ See *Caniglia*, 953 F.3d at 120 (highlighting officers took Caniglia’s firearms after he was transported by ambulance). The court further explained that “there was no dispute . . . that the officers understood that the firearms belonged to the plaintiff and that he objected their seizure.” *Id.* The court noted, however, that there was a dispute as to whether Kim told the officers that she wanted the guns removed or whether the officers “secured her cooperation by telling her that her husband had consented to confiscation of the firearms.” *Id.* In light of the “factual disputes surrounding the representations made to [Kim] . . . [the court] assumed[d] that the officers’ entry into the home was not only warrantless but also nonconsensual.” *Id.* at 122.

¹⁶ See *id.* at 120 (elucidating Caniglia was not admitted into hospital).

¹⁷ See *id.* (outlining attempts to retrieve firearms).

¹⁸ See *id.* (explaining firearms were not returned until lawsuit was filed).

¹⁹ See *id.* at 118, 120 (indicating claims arose from alleged seizures of Caniglia’s person and firearms).

²⁰ See *Caniglia*, 953 F.3d at 120 (identifying defendants and basis of lawsuit); see also *Caniglia v. Strom*, 396 F. Supp. 3d 227, 242 (D.R.I. 2019) (setting forth court’s conclusion);

pealed and the United States Court of Appeals for the First Circuit affirmed the lower court's ruling.²¹ After a *de novo* review, the First Circuit upheld the police officers' conduct as justified acts under the Fourth Amendment community caretaking doctrine.²² Caniglia appealed and filed a writ of certiorari, which was granted.²³ The Supreme Court later vacated the First Circuit's holding and held police acting as community caretakers, does not justify warrantless searches and seizures in homes (“*Caniglia 2021*”).²⁴

The Fourth Amendment of the Constitution declares “[t]he right of the people to be secure in their person, *houses*, papers, and effects, against unreasonable searches and seizures, shall not be violated”²⁵ The Amendment prohibits searches and seizures that are conducted without a warrant; however, this requirement is subject to “a few specifically established and well-delineated exceptions.”²⁶ In *Cady v. Dombrowski*, the Supreme Court of the United States established a new standard called the community caretaking exception, which allows officers acting apart from their investigatory functions, to bypass the warrant requirement when conducting searches and seizures.²⁷ The Court justified the warrantless search

Brief for Appellant at 8, *Caniglia v. Strom*, 953 F.3d 112 (1st Cir. 2020) (No. 19-1764) (outlining substance of counts). Caniglia's amended complaint alleges:

[V]iolation of the Rhode Island Firearms Act (Count I), [Caniglia's] right to keep arms (Count II), violation of [Caniglia's] due process (Count III), and violation of [Caniglia's] right to equal protection (Count IV), violation of [Caniglia's] rights under the Fourth Amendment and Art. I, Sec. 6 of the Rhode Island Constitution (Count V); violation of [Caniglia's] rights under the Rhode Island Mental Health Law (Count VI), and trover and conversion (Count VII).

Brief for Appellant at 8.

²¹ See *Caniglia*, 953 F.3d 118, 139 (affirming lower court's ruling).

²² See *id.* at 118, 120 (interpreting court's holding after “*de novo* review”). Despite multiple counts within the complaint, the crux of the action revolves around the Fourth Amendment and the community caretaking exception to the warrant requirement. *Id.* at 118.

²³ See *Caniglia v. Strom*, 141 S. Ct. 1596, 1599 (2021).

²⁴ See *id.* at 1597 (“Neither the holding nor logic of *Cady* justifies such warrantless searches and seizures in the home.”)

²⁵ See U.S. CONST. amend. IV (emphasis added); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (“The basic purpose of this Amendment, as recognized in countless decisions of [the Supreme Court], is to safeguard the privacy and security of individuals against arbitrary invasion by government officials.”)

²⁶ See *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (“[T]he most basic constitutional rule in this area is that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.’” (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))

²⁷ See 413 U.S. 433, 447-48 (1973) (“[T]he type of caretaking . . . conducted here . . . was not unreasonable solely because a warrant had not been obtained.”) In *Cady*, the Wisconsin police responded to a car crash, where the defendant identified himself as a Chicago police officer.

by relying on the fact that the police officers were engaged in conduct that “may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”²⁸ Prior to the *Cady* decision in 2021, the Supreme Court had only mentioned community caretaking in two subsequent cases—both involving automobile searches.²⁹ In each case, the Court remained silent as to whether the exception applies to homes, causing ambiguity around its scope.³⁰

The Supreme Court has distinguished homes from automobiles and consistently held that homes deserve special protection under the Fourth Amendment.³¹ Despite this special protection, the government is allowed

Id. at 435-36. The Wisconsin police “believed that Chicago police officers were required by regulation to carry their service revolvers at all times.” *Id.* at 436. When the Wisconsin police did not find a revolver on the defendant’s person, “one of the officers looked into the front seat and glove compartment of that car for respondent’s service revolver. No revolver was found.” *Id.* Unable to locate the revolver, one officer went to the third-party garage where the defendant’s car had been towed to look for it and according to the officers “the efforts to find the revolver was ‘standard procedure in [their] department.’” *Id.* at 437. Once there, the officer seized potentially incriminating evidence without a warrant. *Id.*

²⁸ See *id.* at 441, 443 (explaining “community caretaking functions” and rationale). The Court relied on the fact that the officer was “concern[ed] for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle.” *Id.* at 447. In his dissent, Justice Brennan noted that the officer’s intention to search the vehicle “was to protect the public safety rather than to gain incriminating evidence does not of itself eliminate the necessity for compliance with the warrant requirement.” *Id.* at 453-54 (Brennan, J., dissenting); see also Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485, 1491 (2009) (stating community caretaking functions are different from law enforcement functions, yet “ironically coupled with” standard police procedure).

²⁹ See Fox, *supra* note 2, at 414 (noting community caretaking exception mentioned twice by Supreme Court in automobiles cases); see also *Colorado v. Bertine*, 479 U.S. 367, 381 (1987) (Marshall, J., dissenting) (determining warrantless inventory search did not violate Fourth Amendment “because [it was] conducted by the government as part of a ‘community caretaking’ function” (quoting *Cady*, 413 U.S. at 441)); *South Dakota v. Opperman*, 428 U.S. 364, 368-69 (1976) (identifying “caretaking functions” involving automobiles (quoting *Cady*, 413 U.S. at 441)); *Caniglia*, 141 S. Ct. at 1599 (detailing community caretaking scope forty-eight years after its adoption).

³⁰ See Fox, *supra* note 2, at 414 (recognizing neither case clarified ambiguity); Valerie Moss, Comment, *The Community Caretaking Doctrine: The Necessary Expansion of the New Fourth Amendment Exception*, 85 MISS. L.J. 9, 16 (2017) (acknowledging no language in *Cady* strictly limits community caretaking exception to automobiles); Megan Pauline Marinos, Comment, *Breaking and Entering or Community Caretaking? A Solution to the Overboard Expansion of the Inventory Search*, 22 GEO. MASON. U. CIV. RTS. L.J. 249, 258 (2012) (accentuating ambiguity with application of community caretaking exception in *Cady*).

³¹ See *Opperman*, 428 U.S. at 367 (“This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are ‘effects’ and thus within the reach of the Fourth Amendment, warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not.”); *Cady*, 413 U.S. at 442 (“The constitutional difference between searches of and seizures

to enter a home without a warrant in limited circumstances.³² Police officers acting as community caretakers was one of these special exceptions, and this exception permitted warrantless searches and searches in the home.³³ Searches and seizures of automobiles are also subjected to Fourth Amendment protections, but the characteristics of automobiles have justified its lower constitutional safeguards in comparison to a home.³⁴ Therefore, the community caretaking exception established in *Cady* caused confusion amongst the circuit courts due to the uncertainty as to whether the community caretaking exception applies beyond automobiles.³⁵ Prior to *Caniglia* 2021, some circuits strictly followed the Supreme Court's application and only applied the community caretaking exception to vehicles.³⁶

from houses and similar structures and from vehicles stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband."); *see also, e.g.,* *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) ("Fourth Amendment's protection of curtilage has long been black letter law."); *Payton v. New York*, 445 U.S. 573, 573 (1980) (noting Fourth Amendment protects "invasion of the sanctity of the home, which is too substantial an invasion to allow without a warrant"); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967) (emphasizing fundamental purpose of Fourth Amendment is to protect against warrantless searches of private property).

³² *See Kentucky v. King*, 563 U.S. 452, 459-60 (2011) (acknowledging warrantless search and seizures of homes are allowed in certain circumstances); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (explaining warrantless searches of homes may be allowed in some situations "because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions").

³³ *See* cases cited *infra* note 37 and accompanying text (outlining circuits justified warrantless searches and seizures under community caretaking exception).

³⁴ *See California v. Carney*, 471 U.S. 386, 390 (1985) (explaining "the ready mobility of the automobile" subjects vehicles to lesser Fourth Amendment protection); Brent E. Newton, *The Real-World Fourth Amendment*, 43 HASTINGS CONST. L.Q. 759, 762 (2016) (underscoring Fourth Amendment analysis applies in many contexts including homes and automobiles); *cf.* Gregory T. Holding, Comment, *Stop Hammering Fourth Amendment Rights: Reshaping the Community Caretaking Exception with the Physical Intrusion Standard*, 97 MARQ. L. REV. 123, 133 (2013) (characterizing Fourth Amendment reasonableness test as "malleable standard").

³⁵ *See Corrigan v. District of Columbia*, 841 F.3d 1022, 1034 (D.C. Cir. 2016) ("Because the Supreme Court's reasoning in *Cady* focused on attributes unique to vehicles, some circuits have confined the community caretaking exception to automobiles."); *see also* Fox, *supra* note 2, at 419 (acknowledging circuits different approaches when applying community caretaking exception); Marinos, *supra* note 30, at 263-64 (observing circuits have either expanded or restricted application of community caretaking exception).

³⁶ *See, e.g., Ray v. Twp. of Warren*, 626 F.3d 170, 177 (3d Cir. 2010) ("The community caretaking doctrine cannot be used to justify warrantless searches of a home."); *United States v. Bute*, 43 F.3d 532, 535 (10th Cir. 1994) (deciding community caretaking exception only applicable in automobile context); *United States v. Erickson*, 991 F.2d 529, 531 (9th Cir. 1993) (declining to extend community caretaking exception to homes); *United States v. Pichany*, 687 F.2d 204, 209 (7th Cir. 1982) (ruling against expansion of community caretaking exception beyond automobiles); *see also* Andrea L. Steffan, Note, *Law Enforcement Welfare Checks and the Community Caretaking Exception to the Fourth Amendment Warrant Requirement*, 53 LOY. L.A. L. REV.

Other circuits took a relaxed approach and extended the exception to justify warrantless searches and seizures in homes.³⁷

The community caretaking exception created in *Cady* is still used as a valid exemption from the warrant requirement of the Fourth Amendment; however, it is important to note that the Supreme Court recently narrowed the exception's scope and stressed that the exception applies only to warrantless searches and seizures of *homes*.³⁸ Although no framework has been implemented to guide the application of this exception, the circuits have relied on the traditional Fourth Amendment reasonableness standard.³⁹ Prior to *Caniglia* 2021, circuit courts considered principles established in precedent and looked to all of the facts when analyzing whether the community caretaking exception applies beyond the context of automobiles.⁴⁰

The United States Court of Appeals for the First Circuit, as an issue of first impression, expanded the community caretaking exception to apply

1071, 1085-91 (2020) (discussing circuits that narrowly applied community caretaking exception by holding it inapplicable to homes).

³⁷ See, e.g., *United States v. Rohrig*, 98 F.3d 1506, 1521-23 (6th Cir. 1996) (extending community caretaking exception beyond automobile context); *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006) (adopting broad application of community caretaking exception); *United States v. York*, 895 F.2d 1026, 1030 (5th Cir. 1990) (applying community caretaking exception to home when residents have reduced expectation of privacy); see also *Castagna v. Jean*, 955 F.3d 211, 220 (1st Cir. 2020) (justifying warrantless home search based on community caretaking exception when officers respond to noise complaint); Steffan, *supra* note 36, at 1091-99 (discussing circuits that loosely apply community caretaking exception).

³⁸ See Steffan, *supra* note 36, at 1077 nn. 47-48 (identifying circuits that used community caretaking exception); Mary Elisabeth Naumann, Note, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 AM. J. CRIM. L. 325, 357 (1999) (noting community caretaking doctrine is new area of law that courts are still applying); *Caniglia v. Strom*, 141 S. Ct. 1596, 1600 (2021) (emphasis added) (clarifying community caretaking doctrine scope). But see *MacDonald v. Town of Eastham*, 745 F.3d 8, 12 (1st Cir. 2014) (describing exception as “evolving principle”); *United States v. Rodriguez-Morales*, 929 F.2d 780, 785 (1st Cir. 1991) (noting community caretaking doctrine “is a catchall for the wide range of responsibilities that police officers must discharge aside from their criminal enforcement activities.”)

³⁹ See *Maryland v. Buie*, 494 U.S. 325, 331 (1990) (“Our cases show that in determining reasonableness, we have balanced the intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”); see also *Lockhart-Bembery v. Sauro*, 498 F.3d 69, 75 (2007) (“The community caretaking doctrine gives officers a great deal of flexibility in how they carry out their community caretaking functions. The ultimate inquiry is whether, under the circumstances, the officer acted ‘within the realm of reason.’” (quoting *Rodriguez-Morales*, 929 F.2d at 786)); Fox, *supra* note 2, at 435 (noting community caretaking exception implicates two important interests).

⁴⁰ See *Cady v. Dombrowski*, 413 U.S. 433, 440 (1973) (“[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case” (quoting *Cooper v. California*, 386 U.S. 58, 59 (1967))); see also *South Dakota v. Opperman*, 428 U.S. 364, 375 (1975) (highlighting Fourth Amendment protection analysis requires case by case inquiry).

to warrantless searches and seizures from homes in the Case-in-Chief.⁴¹ The court first looked to the exception's history outlined in *Cady*, and subsequently considered precedent cases within the circuit that applied the community caretaking doctrine.⁴² Although the *Cady* Court did not consider whether the exception applies to searches and seizures of homes, the court in the Case-in-Chief acknowledged that the First Circuit has previously extended the scope of the exception beyond vehicle searches and impoundment.⁴³ After acknowledging different scopes of the doctrine, the First Circuit announced that it joined its sister circuits in allowing the community caretaking exception to apply outside of the automobile context.⁴⁴ The court's decision to broaden the scope of the doctrine was supported by "the doctrine's core purpose, its gradual expansion since *Cady*, and the practical realities of policing."⁴⁵ After the court expanded the scope of the exception, it then assessed whether the community caretaking doctrine encompassed the police activity in question.⁴⁶

The court concluded that the community caretaking exception permitted the police to conduct warrantless searches and seizures without violating the Fourth Amendment.⁴⁷ Specifically, the court characterized

⁴¹ See 953 F.3d 112, 130 (1st Cir. 2020) (outlining holding). Although the court had considered the community caretaking exception in the past, those cases involved motor vehicles, not homes. *Id.* at 123.

⁴² See *id.* at 123 (describing history of community caretaking doctrine as "evolving principle" (quoting *MacDonald*, 745 F.3d at 12)). "Since *Cady*, the community caretaking doctrine has become 'a catchall for the wide range of responsibilities that police officers must discharge aside from their criminal enforcement activities.'" *Id.* at 123 (quoting *Rodriguez-Morales*, 929 F.2d at 785). In *Cady*, the Court held that a search or seizure by police, acting as community caretakers, does not "offend the Fourth Amendment so long as it is executed in a reasonable manner." *Id.* at 123 (citing *Cady*, 413 U.S. at 446-48). The *Caniglia* court went on to compare its precedent with *Cady* and explained "we have held that the Fourth Amendment's imperatives are satisfied when the police perform 'noninvestigatory duties, including community caretaker tasks, so long as the procedure employed (and its implementation) is reasonable.'" *Id.* (quoting *Rodriguez-Morales*, 929 F.2d at 785).

⁴³ See *id.* at 123-24 ("But on one notable occasion, we have recognized a community caretaking function extending beyond vehicle searches and impoundment, holding that the temporary seizure of a motorist for the purpose of alleviating dangerous roadside conditions could be a reasonable exercise of the community caretaking function.")

⁴⁴ See *id.* at 118, 124 (announcing community caretaking exception extends to conduct on private premises).

⁴⁵ See *id.* at 124 (explaining reason to broaden scope of exception is to allow officers "to preserve and protect community safety" (quoting *Rodriguez-Morales*, 929 F.2d at 784-85)). The court explained "[u]nderstanding the core purpose of the doctrine leads inexorably to the conclusion that it should not be limited to the motor vehicle context." *Id.*

⁴⁶ See *Caniglia*, 953 F.3d at 124-25 (acknowledging "[t]his holding does not end our odyssey.") The court outlined three questions that were necessary to address and determine whether the police officers' conduct fell within the community caretaking exception. *Id.*

⁴⁷ See *id.* at 126 (holding police activities within "this case fall comfortably within the ambit of the community caretaking exception to the warrant requirement.")

the actions of the police as “a natural fit for the community caretaking exception[,]” and further explained that the exception may lessen police second-guessing in situations where police reasonably believe that they are dealing with a mentally ill person.⁴⁸ In its reasoning, the court also considered the Fourth Amendment reasonableness standard and balanced “the need for the caretaking activity and the affected individual’s interest in freedom from government intrusions.”⁴⁹ Although the court concluded that the police’s conduct fell within the community caretaking exception, the court acknowledged that the exception is not a “free pass” to bypass the warrant requirement, and outlined some limitations.⁵⁰ Ultimately, police may invoke the community caretaking exception so long as they engage in caretaking activities that are “justified on objective grounds,” drawn from “state law or from sound procedure[,]” and considered to be “within the realm of reason.”⁵¹ Therefore, because the police officers were acting as community caretakers and following “sound police procedures” that were viewed as reasonable among the available options, the court held that the warrantless search of the home and seizures of Caniglia and his firearms were reasonable under the Fourth Amendment.⁵²

⁴⁸ See *id.* at 125 (stressing police realities and police responding to individual “who present[s] an imminent threat to themselves or others” falls within community caretaking function). The court reasoned, in this context, the police are acting to “preserve and protect community safety” and “aid those in distress.” *Id.* (quoting *Rodriguez-Morales*, 929 F.2d at 784-85). When the police deal with a person who they reasonably believe to be mentally ill, officers are confronted with the “damned-if-you-do, damned-if-you-don’t conundrum that the community caretaking doctrine can help to alleviate.” *Id.*

⁴⁹ See *id.* (explaining competing interests that must be balanced when assessing validity of community caretaking exception). The individual’s “robust interests in preserving his bodily autonomy, the sanctity of his home, and his right to keep firearms within the home for self-protection” must be balanced with “the public’s powerful interest” of protecting mentally ill individuals from harming themselves or others. *Id.*

⁵⁰ See *id.* at 126 (emphasizing exception does not allow complete freedom because law enforcement face limitations). The court noted the restrictions are “especially pronounced in cases involving warrantless entries into the home.” *Id.*

⁵¹ See *Caniglia*, 953 F.3 at 126 (quoting *Rodriguez-Morales*, 929 F.2d at 780, 785-87) (indicating requirements and restrictions of exception). The doctrine may only be used if the police have “noninvestigatory reasons” for their conduct, supported by “specific articulable facts,” which are sufficient to prove that their conduct objectively fell within the caretaking function. *Id.* Furthermore, these actions must stem from “state law or sound police procedure[,]” which is broadly defined to encompass the reasonable decisions of the options available to the police rather than “established protocols or fixed criteria.” *Id.* The last standard the court invoked to determine if the community caretaking exception applies is “whether decisions made and methods employed in pursuance of the community caretaking function are ‘within the realm of reason.’” *Id.* (quoting *Rodriguez-Morales*, 929 F.2d at 780, 786).

⁵² See *Caniglia*, 953 F.3 at 130, 132-33 (outlining searches and seizures within home are within community caretaking exception).

The ambiguity surrounding the application of the community caretaking exception led the First Circuit to expand the exception to homes, without correctly considering existing precedent.⁵³ The court properly pointed to the reasonableness standard as the test to determine whether a search or seizure invoked the Fourth Amendment, but ultimately disregarded key facts and principles that guide the analysis.⁵⁴ The first concept the circuit court failed to focus on was the different privacy interests at stake between an automobile and a home.⁵⁵ While the First Circuit acknowledged the distinction, it ultimately favored the government's interests over the individual's right to be free from arbitrary invasions by not properly considering the "sanctity of a home."⁵⁶ Another key principle the court neglected is the weight precedent placed on police following standard police procedure.⁵⁷ The court recognized standard procedure as a requirement to invoke the exception, but construed the term so broadly that it diminished

⁵³ See *Marinos*, *supra* note 30, at 280-81 (underscoring *Cady* rationale displays intention to keep community caretaking exception narrow in scope); *Naumann*, *supra* note 38, at 327 (highlighting doctrine is unclear and inconsistently applied).

⁵⁴ See *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (emphasizing reasonableness as ultimate standard to assess Fourth Amendment searches and seizures); see also *Cady v. Dombrowski*, 413 U.S. 433, 440 (1973) (citing *Preseton v. United States*, 376 U.S. 364, 366-67 (1964)) (noting reasonableness standard requires consideration of all facts and circumstances surrounding case at bar).

⁵⁵ See *Caniglia*, 953 F.3d at 125 (acknowledging court's "assessment of the reasonableness of caretaking functions requires the construction of a balance between the need for the caretaking activity and the affected individual's interest in freedom from government intrusions.") However, when considering the interests of the parties, the court placed much weight on the fact that one of the four officers considered *Caniglia* to be "mentally ill and imminently dangerous." *Id.* at 119. Without much explanation the court justified the warrantless search of *Caniglia*'s home and seizure of *Caniglia* and his firearms by holding the interest in "ensuring a swift response to individuals who are mentally ill and imminently dangerous" outweighed *Caniglia*'s interest in "preserving his bodily autonomy, the sanctity of his home, and his right to keep firearms within the home." *Id.*; see also *Fox*, *supra* note 2, at 422 (explaining different interests at stake pertaining to community caretaking exception); *Naumann*, *supra* note 38, at 327 (noting expansive interpretation of exception in favor of law enforcement results in Fourth Amendment infringements).

⁵⁶ See *Caniglia*, 953 F.3d at 123, 125 (recognizing difference between homes and vehicles but concluding public's interest outweighs individual's interest in preserving "the sanctity of his home"); *Fox*, *supra* note 2, at 422 (observing courts applying community caretaking exception have chosen to protect either "the interest of the police in performing their duties and keeping citizens safe" or interest individuals have in their homes).

⁵⁷ See *South Dakota v. Opperman*, 428 U.S. 364, 374-75 (1976) (noting following "standard procedure" is "a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function."); *Dimino*, *supra* note 28, at 1524-25 (identifying "standard procedure" requirement limits police discretion when executing search and seizures); see also *Marinos*, *supra* note 30, at 280-81 (interpreting Supreme Court intended to "refrain from creating an overly broad exception to the Fourth Amendment" when they created community caretaking exception).

the original intention, which was to limit the discretion given to officers when acting as community caretakers.⁵⁸

The court attempted to minimize the discretion given to officers by imposing its own boundaries to prevent the doctrine from becoming a “free pass.”⁵⁹ Nonetheless, the restrictions implemented by the court did nothing other than to duplicate the reasonableness standard, given that the limitations only require police officers acting as community caretakers to act “within the realm of reason.”⁶⁰ Despite the expansive interpretation of the exception, the court’s ultimate conclusion that the community caretaking doctrine should extend beyond motor vehicles is both plausible and practical based on both the purpose of the exception and societal interests.⁶¹ Additionally, the court’s reasoning in the Case-in-Chief to support its holding may be logical, if it is also flawed.⁶² The court’s neglect of key facts, and failure to provide guidance regarding how future courts should balance the individual’s interest’s against the government’s, contributed to its faulty analysis.⁶³

At the time of its decision, the First Circuit appeared to depart from existing precedent because of its broad interpretation of the doctrine; how-

⁵⁸ See *Caniglia*, 953 F.3d at 126 (“We have defined sound police procedure broadly and in practical terms; it encompasses police officers’ ‘reasonable choices’ among available options.” (quoting *United States v. Rodriguez-Morales*, 929 F.2d 780, 787 (1st Cir. 1991))); Dimino, *supra* note 28, at 1524-25 (explaining “standard procedure” requirement restricts community caretaking exception scope).

⁵⁹ See *Caniglia*, 953 F.3d at 126 (illustrating use of exception requires compliance with limitations).

⁶⁰ See *id.* at 126-27 (quoting *Rodriguez-Morales*, 929 F.2d at 780, 786) (outlining limitations and reasonableness standard used to assess each boundary). The outlined “guardrails” that confine the use of the community caretaking doctrine are all assessed by reasonableness. *Id.* at 126. The first guidepost requires police that are acting as community caretakers to provide “specific articulable facts” that their community caretaking activities are “justified on objective grounds” and furthermore, these actions must “draw their essence either from state law or from sound police procedure[.]” which is determined by looking to the officer’s “reasonable choices.” *Id.* (first quoting *United States v. King*, 990 F.2d 1552, 1560 (10th Cir. 1993); and then quoting *Rodriguez-Morales*, 929 F.2d at 780, 787). Second, officers that are acting as community caretakers must make decisions and choose methods that are “within the realm of reason” under the circumstances. *Id.* (quoting *Rodriguez-Morales*, 929 F.2d at 786)).

⁶¹ See Fox, *supra* note 2, at 435 (outlining societal privacy expectations in regard to community caretaking exception); Dimino, *supra* note 28, at 1529 (defining purpose of exception); see also Marinos, *supra* note 30, at 280 (noting genuine public interest and need for community caretaking exception).

⁶² See Marinos, *supra* note 30, at 280 (explaining need for exception to apply to homes although Supreme Court precedent implies limited application); see also Dimino, *supra* note 28, at 1549 (discussing doctrine should not apply unless person wants help).

⁶³ See *Cady v. Dombrowski*, 413 U.S. 433, 440 (1973) (noting community caretaking exception analysis requires consideration of all facts and circumstances); Dimino, *supra* note 28, at 1498 (delineating lack of consistency in in courts’ analysis regarding whether search is reasonable).

ever, *Cady* neither implied nor expressly restricted the exception to apply only in the motor vehicle context.⁶⁴ In addition to this ambiguous scope, the only consistent standard used to assess whether the doctrine applies is the reasonableness test, which has been described as a “malleable standard” because it “allow[s] for less certain and more varied outcomes.”⁶⁵ Both of these factors may have contributed to the inconsistent approaches of the doctrine throughout state and federal courts, but the unsettled scope should not serve as justification for Fourth Amendment violations.⁶⁶ Therefore, the Supreme Court’s decision to vacate the First Circuit’s extension of the community caretaking doctrine, and explain the scope of the exception in *Caniglia* 2021, was necessary to uphold the purpose of the Fourth Amendment because—without this guidance—individuals’ right to be free from arbitrary government intrusion remained at the mercy of the uncertain and subjective reasonableness test.⁶⁷

The right to be free from government intrusion within one’s home is guaranteed under the Constitution. However, this right should not be diminished because of the ambiguity surrounding the community caretaking exception. For the past 34 years, courts had the discretion to extend the community caretaking exception to homes, which essentially created arbitrary invasions that the Fourth Amendment attempts to prevent. Ultimately, the Supreme Court decision to overturn the First Circuit’s ruling and provide more guidance on this doctrine was the essential remedy necessary to uphold the Constitution.

⁶⁴ See Marinos, *supra* note 30, at 258 (“[I]n *Cady*, the Supreme Court never explicitly stated or implied an intention to extend the [community caretaking doctrine] to the home.”)

⁶⁵ See Holding, *supra* note 34, at 160 (describing reasonableness as “malleable” because of inconsistent results); Marinos, *supra* note 30, at 250-51 (“While the Supreme Court has continually expressed the importance of maintaining the sanctity of the home, it has neglected to specify whether an officer may enter a person’s private home while acting in his community caretaking capacity.”)

⁶⁶ See *Caniglia v. Strom*, 953 F.3d 112, 124 (1st Cir. 2020) (finding scope of doctrine beyond vehicles “ill-defined”); Fox, *supra* note 2, at 435 (acknowledging inconsistent application of doctrine); Naumann, *supra* note 38, at 327 (pinpointing inconsistencies in courts’ interpretations of exception threatens Fourth Amendment rights); see also *Castagna v. Jean*, 955 F.3d 211, 218-19 (1st Cir. 2020) (justifying warrantless entry because of community caretaking exception). The First Circuit’s decision in *Caniglia*, which expanded the scope of the community caretaking doctrine beyond automobiles, has already impacted succeeding litigation. *Castagna*, 955 F.3d at 218-19.

⁶⁷ See *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (citing purpose of Fourth Amendment is to “safeguard the privacy and security of individuals against arbitrary invasion by government officials”); Fox, *supra* note 2, at 428 (“Given the sanctity of the home under the Fourth Amendment, one must wonder why the Supreme Court has not applied further protection in addition to the reasonableness requirement . . .”); Dimino, *supra* note 28, at 1494 (emphasizing community caretaking doctrine needs more “precision”).

Bianca Tomassini

**CONSTITUTIONAL LAW—NARROWLY READING
LAW ENFORCEMENT ACTIVITY EXCEPTION TO
PRIVACY ACT IN FAVOR OF PRIVACY RIGHTS—
GARRIS V. FBI, 937 F.3D 1284 (9TH CIR. 2019)**

One of the core civil rights granted by the Constitution is the First Amendment’s protection of free speech and expression.¹ To further safeguard First Amendment rights and protect citizens’ right to privacy, Congress passed the Privacy Act in 1974, which states in part: “[e]ach agency that maintains a system of records shall . . . maintain no record describing how any individual exercises rights guaranteed by the First Amendment . . . unless pertinent to and within the scope of an authorized law enforcement activity.”² In *Garris v. FBI*,³ the Ninth Circuit considered whether a government agency can maintain such a record, if its creation is permissible under the Privacy Act’s law enforcement activity exception.⁴ The court held that “unless a record is pertinent to an ongoing authorized law enforcement activity, an agency may not maintain [this type of record]” under the law enforcement activity exception of the Privacy Act.⁵

¹ See U.S. CONST. amend. I (stating “Congress shall make no law . . . abridging the freedom of speech . . .”); see also Nicholas G. Karambelas, *Where the First Amendment Comes From*, 50 MD. B.J. 4, 10-13 (2017) (describing First Amendment and reasoning behind freedom of expression).

² See 5 U.S.C. § 552a(e)(7) (restricting record maintenance regarding citizens’ exercise of their First Amendment rights); see also S. REP. NO. 93-1183, at 6916 (1974) (explaining purpose of Privacy Act as “promot[ing] governmental respect for the privacy of citizens by requiring all departments and agencies . . . to observe certain constitutional rules in the computerization, collection, management, use, and disclosure of personal information about individuals.”)

³ 937 F.3d 1284 (9th Cir. 2019).

⁴ See *id.* at 1288 (introducing issue of first impression in Ninth Circuit).

⁵ See *id.* at 1300 (holding continued maintenance of records must be relevant to ongoing law enforcement activity). The Ninth Circuit stated:

[W]e hold that to maintain a record, the government must demonstrate that the maintenance of the record is pertinent to a specific authorized law enforcement activity. We want to be exceedingly clear. We are *not* holding that whenever an agency closes an investigation, the agency must expunge the file because the law enforcement activity for which the record was created (or received) has ended. What we are holding is that, if the investigation is closed (or even if it is not), and if the government cannot articulate a sufficient law enforcement activity to which the *maintenance* of the record is pertinent, the maintenance of the record violates the Privacy Act. The reason for maintenance, so long as it is valid and not pretextual, need not be the same reason the record was created.

Id.

Eric Anthony Garris is the founder, managing editor, and webmaster of Antiwar.com, a news platform serving as an alternative outlet to mainstream media.⁶ In 2011, Garris learned of a memo, created in 2004 (“2004 Memo”) by the Federal Bureau of Investigation’s (“FBI”) Newark, New Jersey office, which detailed an investigation into Antiwar.com.⁷ The FBI created the 2004 Memo after the agency discovered a twenty-two-page Excel spreadsheet from October 2001, which had been posted on Antiwar.com and appeared to be a potential FBI watchlist.⁸ Although FBI analysts recommended in the 2004 Memo that the FBI’s San Francisco Field Office further monitor Antiwar.com and open a preliminary investigation to determine if the website was a threat to national security, the San Francisco Field Office declined this recommendation and ultimately determined that Antiwar.com was not a threat.⁹ The 2004 Memo included Anti-

⁶ See *id.* at 1288 (describing Garris’s role at Antiwar.com and purpose of website as “an anti-interventionist, pro-peace, non-profit news website”). Antiwar.com’s mission is “to publish news, information and analysis on the issues of war and peace, diplomacy, foreign policy, and national security” and the website “self-describes as advocating for ‘non-interventionism.’” *Id.* Antiwar.com’s “about us” page further describes its mission:

This site is devoted to the cause of non-interventionism and is read by libertarians, pacifists, leftists, “greens,” and independents alike, as well as many on the Right who agree with our opposition to imperialism. . . . Our politics are libertarian: our opposition to war is rooted in Randolph Bourne’s concept that “War is the health of the State.” With every war, America has made a “great leap” into statism, and as Bourne emphasized, “it is during war that one best understands the nature of that institution [the State].” At its core, that nature includes an ever increasing threat to individual liberty and the centralization of political power.

About Us, MISSION, ANTIWAR.COM, <https://www.antiwar.com/who.php> (last visited Dec. 1, 2020); see also Lyndsey Wajert, *RFCP Analysis: Court Orders FBI to Expunge Website Records Under Privacy Act*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Jan. 16, 2020), <https://www.rcfp.org/fbi-antiwar-privacy-act/> (reporting on *Garris* decision); Antiwar Staff, *Justin Raimondo, RIP (1951-2019)*, ANTIWAR.COM (June 27, 2019), https://original.antiwar.com/antiwar_staff/2019/06/27/justin-raimondo-rip-1951-2019/ (paying tribute to Justin Raimondo—prominent libertarian who co-founded Antiwar.com). Justin Raimondo was the former editorial director of Antiwar.com and a party to the suit against the FBI; sadly, he passed away in 2019. See Antiwar Staff, *supra* note 6.

⁷ See *Garris*, 937 F.3d at 1289 (noting Garris learned about memo in August 2011 from partially redacted version online).

⁸ See *id.* at 1288-89 (describing discovery of possible FBI watch list on Antiwar.com). In March 2004, the FBI warned all field offices that a post-9/11 suspect list called “Project Lookout” had been posted on the internet with identifying information of people of interest. *Id.* at 1288. An FBI agent then discovered the Excel spreadsheet on Antiwar.com, which contained names and identifying information. *Id.* After further investigation, a second twenty-two-page spreadsheet was discovered on Antiwar.com dated May 2002 and was marked “FBI SUSPECT LIST.” *Id.*

⁹ See *id.* at 1289 (noting recommendation to San Francisco Field Office and declination to investigate further). The FBI’s San Francisco Field Office noted that the information on Antiwar.com was public information and that Garris was exercising his right to free speech. *Id.*

war.com’s mission and information on Garris—specifically, his political views and his “articles, opinions, statements, or speeches[.]”¹⁰

In May 2013, Garris’s request that the FBI expunge all records that detailed his First Amendment activities was denied; he subsequently filed a complaint and alleged that the creation and maintenance of the 2004 Memo violated the law enforcement activity exception of the Privacy Act.¹¹ Additionally, Garris sought disclosure of the FBI’s documents about him under the Freedom of Information Act.¹² The United States District Court for the Northern District of California granted summary judgment to the FBI for Garris’s Privacy Act claim; however, because of Garris’s continued Freedom of Information Act claims, he later learned of the Halliburton Memo (“Halliburton Memo”).¹³ The Halliburton Memo, created in 2006 by the FBI’s Oklahoma City Field Office, contained information about an annual Halliburton shareholders’ meeting that Antiwar.com had previously posted information about.¹⁴ Garris consequently moved for reconsideration of his Privacy Act claims, given the new information cited in the Halliburton Memo; however, the district court denied his motion for reconsideration and granted summary judgment for the FBI.¹⁵ Garris appealed his Privacy Act claims, and the Ninth Circuit held that a record must be pertinent to be maintained as an ongoing law enforcement activity.¹⁶ Accordingly, the Ninth Circuit concluded that the 2004 Memo must be expunged, but ruled that the Halliburton Memo was pertinent to an ongoing law enforcement activity and therefore could be maintained.¹⁷

In 1974, Congress enacted the Privacy Act, with the primary goal to protect privacy rights in response to both computer technology advancements and concerns of governmental abuse in the “computerization, collection, management, use, and disclosure of personal information about

¹⁰ *See id.* (detailing information included in 2004 Memo). The 2004 Memo had the subject “threat assessment . . . Eric Anthony Garris [and] www.antiwar.com” and discussed both the watch lists and Antiwar.com’s mission. *Id.* Some of the information included in the 2004 Memo was the result of law enforcement database searches, such as Lexis Nexis, for Garris and Antiwar.com. *Id.*

¹¹ *See id.* at 1290 (outlining procedural background of case).

¹² *See Garris*, 937 F.3d at 1290 (listing legal claims Garris brought against FBI).

¹³ *See id.* at 1290-91 (indicating how Garris learned of Halliburton Memo from documents disclosed by FBI).

¹⁴ *See id.* at 1289-90 (detailing Halliburton Memo’s contents and relation to Antiwar.com). The Halliburton Memo described the Halliburton company, its contracts and affiliations, and information about the shareholder’s meeting. *Id.* at 1289.

¹⁵ *See id.* at 1291 (explaining procedural history of Garris’s district court claims).

¹⁶ *See id.* at 1288 (stating Ninth Circuit’s holding regarding law enforcement activity exception to Privacy Act).

¹⁷ *See Garris*, 937 F.3d at 1291 (describing procedural history and Ninth Circuit’s holding).

individuals.”¹⁸ The Privacy Act sets out to accomplish this goal in several major ways; first, the Act requires agencies to give detailed information about their personal data banks, information systems, and computer resources.¹⁹ Second, agencies must abide by standards formed to: protect individuals’ privacy and due process rights; uphold the handling and processing of information in data banks; and preserve information security and information systems.²⁰ Third, to truthfully restrain agencies’ handling of

¹⁸ See S. REP. NO. 93-1183, at 6916 (1974) (summarizing Privacy Act’s purpose). The Privacy Act aims to increase accountability of government agencies by ensuring that they abide by principles of fairness and privacy, and only use Americans’ personal information in accordance with the legitimate needs of the government. *Id.* at 6916-17; see also Eric C. Surette, Annotation, *Prohibition of Federal Agency’s Keeping of Records on Methods of Individual Exercise of First Amendment Rights, Under Privacy Act of 1974* (5 U.S.C.A. § 552a(e)(7)), 20 A.L.R. FED. 2d 437, §2 (2007) (discussing primary purpose of Privacy Act as providing individuals more control over information about themselves); Miriam Schneider, Note, *Military Spying in the United States: When It Is Not Your Neighbor Knocking At Your Door, Where Do You Turn?*, 7 CARDOZO J. CONFLICT RESOL. 199, 217 (2005) (listing factors leading to Privacy Act, notably development of technology and computers); James P. Nehf, *Recognizing the Societal Value in Information Privacy*, 78 WASH. L. REV. 1, 40 (2003) (“A stated objective of the Privacy Act was to restrict the government’s use of technology to invade privacy interests . . .”); Steven W. Becker, Comment, *Maintaining Secret Government Dossiers on the First Amendment Activities of American Citizens: The Law Enforcement Activity Exception to the Privacy Act*, 50 DEPAUL L. REV. 675, 678-83 (2000) [hereinafter Becker, *Dossiers*] (highlighting several factors contributing to passage of Privacy Act). When introducing the bill, Senator Samuel J. Ervin, Jr. noted that, “Congress must act before sophisticated new systems of information gathering and retention are developed . . . [because] once they go into operation, it is too late to correct our mistakes or supply our oversight.” See Becker, *Dossiers*, *supra* note 18, at 679. Governmental abuses driving the concern for protecting personal data and information arose from allegations of improper handling of information in the Watergate investigations, the FBI’s surveillance of political and religious groups under its COINTELPRO operation, the DOJ’s warrantless wiretapping of citizens, investigations in the McCarthy era after the Cold War, the IRS’s improper monitoring of tax records for political purposes, and the Army’s surveillance of civilians. Becker, *Dossiers*, *supra* note 18, at 680-83. See generally *Surveillance Under the USA/PATRIOT Act*, ACLU, <https://www.aclu.org/other/surveillance-under-usapatriot-act> (last visited Dec. 1, 2020) [hereinafter PATRIOT Act, ACLU] (providing information on PATRIOT Act and government surveillance of American citizens). The PATRIOT Act was passed in response to the September 11, 2001 attacks, and was described by the ACLU as “an overnight revision of the nation’s surveillance laws that vastly expanded the government’s authority to spy on its own citizens.” See PATRIOT Act, ACLU, *supra* note 18. According to the ACLU, the PATRIOT Act appears consistent with the government abuses that triggered the 1974 Privacy Act, as it provided “unchecked government power to rifle through individuals’ financial records, medical histories, Internet usage, bookstore purchases, library usage, travel patterns, or any other activity that leaves a record.” See PATRIOT Act, ACLU, *supra* note 18.

¹⁹ See S. REP. NO. 93-1183, at 6917-19 (1974) (outlining ways Privacy Act meets its purposes). The Act created a new Privacy Commission, which maintains and publishes information for the public and carries out duties aimed at protecting privacy and individual rights. *Id.* Agencies that do not disclose the requisite information are penalized. *Id.*

²⁰ See *id.* at 6917-18 (explaining standards and outlining requirements for agencies to abide by). The information-gathering standards include: requiring the personal information that agencies collect and maintain be “relevant and necessary[;]” obliging this personal information be collected directly from the source when possible, in order to prevent inaccuracies; informing whether

personal data, the Act provides for a citizen's right "to be told upon request whether or not there is a government record on him or her, to have access to it, and to challenge it with a hearing upon request."²¹ Lastly, Congress required the Privacy Protection Commission, established under the Privacy Act, to complete a study of the major information systems of governmental agencies and recommend changes to protect individuals' privacy.²² While the Privacy Act aims to protect the privacy of individuals if a record is "pertinent to and within the scope of an authorized law enforcement activity," the protections preventing agencies from maintaining records "describing how any individual exercises rights guaranteed by the First Amendment" are inapplicable.²³

While the Privacy Act clearly states an exception to maintaining records related to First Amendment activities, the appellate courts have varied in their interpretation of the law enforcement activity exception.²⁴ In

"disclosure is mandatory or voluntary[;]" and mandating a "strict reviewing process" before establishing any program for information on how people exercise First Amendment rights. *Id.* at 6917. Agencies must ensure, among other things, that: (1) the information they have is "accurate, complete, timely and relevant[;]" (2) they "refrain from disclosing [information] unless necessary for employee duties" or proper consent or laws allow; (3) they keep proper records of people and organizations with access to different systems and files; (4) rules of conduct are established regarding the legal and ethical obligations surrounding the computerization and handling of personal data; (5) they do "not sell or rent" information; and (6) proper safeguards are in place ensuring the security and confidentiality of data and systems. *Id.* at 6917-18.

²¹ *See id.* at 6918 (explaining methods for administrative and judicial oversight and civil remedies for violations). Congress established the Privacy Protection Commission, an independent agency, to: investigate and report violations of the Privacy Act; assist agencies implementing the Privacy Act; and alert the President and Congress to proposed programs and data banks with the potential to violate the Privacy Act. *Id.* at 6918.

²² *See id.* at 6918 (1974) (detailing Privacy Protection Commission's mandate to recommend changes to protect individuals' privacy).

²³ *See* 5 U.S.C. § 552(e)(7) (explaining law enforcement activity exception to Privacy Act); *see also* S. REP. NO. 93-1183, at 6938 (demonstrating how law enforcement typically creates files while investigating or anticipating criminal activity).

[I]nformation generally maintained by law enforcement agencies are intelligence, or investigative files. These files contain highly sensitive and usually confidential information collected by law enforcement officers in anticipation of criminal activity, such as by organized crime figures, or in the course of investigating criminal activity which has already occurred. It was the Committee's judgment, shared by most criminal justice privacy experts and reflected in the pending criminal justice privacy legislation, that all of the provisions of title II of S. 3418 could not be applied to such sensitive information.

S. REP. NO. 93-1183, at 6938; Jill I. Goldenziel et al., *The New Fighting Words?: How U.S. Law Hampers the Fight Against Information Warfare*, 22 U. OF PA. J. CONST. L. 81, 118 (2019) ("Requiring a blanket prohibition on surveillance and recording until 'the agency was investigating a specific offense or a specific person' would severely undermine agency activities.")

²⁴ *See* Becker, *Dossiers*, *supra* note 18, at 699 ("Various appellate courts have adopted different standards in construing subsection (e)(7)'s law enforcement activity exception.")

Clarkson v. IRS, the Eleventh Circuit held that the IRS violated the Privacy Act “to the extent that the IRS has engaged in the practice of collecting protected information, unconnected to any investigation of past, present or anticipated violations of the statutes which it is authorized to enforce.”²⁵ Conversely, the Sixth Circuit in *Jabara v. Webster* allowed the FBI’s maintenance of records on Jabara—despite finding that the records were not related to any specific criminal act—and held that the law enforcement activity exception will be too narrowly interpreted if it only requires records to relate to an investigation of criminal activity.²⁶ Similar to the Sixth Circuit, the Third Circuit, in *Patterson v. FBI*, also interpreted the law enforcement activity exception as “requir[ing] agencies ‘to demonstrate that any and all records maintained on an individual’s exercise of First Amendment rights are *relevant* to an authorized law enforcement activity of the agency, and that there exists a sufficient basis for the maintenance of such records.’”²⁷ The D.C. Circuit held in *J. Roderick MacArthur Foundation v. FBI* that “if the information was pertinent to an authorized law enforcement activity when the agency collected the information,” the agency was not prohibited from maintaining records about an individual’s First Amendment activities, and did not need to expunge the records when they were no longer pertinent to law enforcement activity.²⁸ While both the

²⁵ See *Clarkson v. IRS*, 678 F.2d 1368, 1375 (11th Cir. 1982) (remanding issue under (e)(7) of Privacy Act to determine purpose of surveillance activities). Clarkson was involved in many organizations to protest the federal tax system; in 1979, he was the keynote speaker at a meeting in Georgia to plan the 1979 Tax Protest Day demonstration. *Id.* at 1369-70. Undercover IRS agents attended the meeting, and upon learning of their attendance, Clarkson initiated a series of complaints against the IRS, including a complaint that the IRS violated his rights under the Privacy Act. *Id.* at 1370.

²⁶ See *Jabara v. Webster*, 691 F.2d 272, 280 (6th Cir. 1982) (finding district court too narrowly construed law enforcement activity exemption). The FBI was investigating Jabara for his involvement in Arab causes. *Id.* at 273. The FBI maintained and disseminated information obtained from physical surveillance by agents and informants, inspection of his bank records, warrantless electronic surveillance, and interviews of others with knowledge about Jabara. *Id.*

²⁷ See *Patterson v. FBI*, 893 F.2d 595, 602-03 (3d Cir. 1990) (quoting *Patterson v. FBI*, 705 F. Supp. 1033, 1043 (D.N.J. 1989)) (agreeing with district court’s interpretation of law enforcement activity exception). As part of a sixth-grade school project to write a world encyclopedia, Patterson wrote to 169 countries requesting information. *Id.* at 597. The FBI opened a file on Patterson due to the volume of international mail he received. *Id.* The FBI monitored Patterson’s activities from 1983 until 1985, and his family reported receiving mail in damaged condition and hearing strange background noises on their telephone. *Id.* at 598. In response to Patterson’s (e)(7) claim under the Privacy Act, the Third Circuit found that the FBI’s records were relevant as an authorized law enforcement activity. *Id.* at 603.

²⁸ See *J. Roderick MacArthur Foundation v. FBI*, 102 F.3d 600, 605 (D.C. Cir. 1996) (holding law enforcement may maintain records if pertinent to law enforcement activity when collected). Lindblom, in his capacity as president of the J. Roderick MacArthur Foundation, would meet with foreign leaders and political figures because the Foundation worked with organizations on political, social, and economic issues. *Id.* at 601. When Lindblom discovered the FBI had a

Seventh and Eighth Circuits have had this issue before them, neither have adopted a specific standard for interpreting the law enforcement activity exception.²⁹

In 1986, the Ninth Circuit interpreted the law enforcement activity exception of the Privacy Act in *MacPherson v. IRS*—the only decision in the Ninth Circuit prior to *Garris*.³⁰ As part of its surveillance of the tax protester movement, the IRS attended several events at which MacPherson spoke.³¹ In an effort to identify leaders of the tax protest movement and determine protester strategies, the IRS maintained notes and recordings of MacPherson’s speeches in a file titled “Tax Protest Project File” in two IRS offices, and later distributed the files to three more IRS offices, the Department of Justice, and additional third parties.³² Notably, IRS surveillance of MacPherson did not uncover any illegal activity on his part, nor was he suspected or accused of any past, present, or anticipated illegal conduct.³³ Despite this, the Ninth Circuit affirmed the district court’s finding in favor of the IRS, and noted that there was no indication that the IRS planned to use the records for any purpose other than to give a complete picture of the conference where MacPherson spoke.³⁴ Distinct from the circuits that have adopted a rule interpreting the law enforcement activity exception, the Ninth Circuit “decline[d] to fashion a hard and fast standard[,]” and instead “elect[ed] to consider the factors for and against the maintenance of such records of First Amendment activities on an individual, case-by-case basis.”³⁵

file on him because of his involvement with the Foundation, he filed a complaint under the Privacy Act—but the district court decided in the FBI’s favor. *Id.* at 601-02.

²⁹ See *Bassiouni v. FBI*, 436 F.3d 712, 724 (7th Cir. 2006) (“Like our sister circuits, we do not believe that the circumstances presented to us here required us to determine the precise limits of the term ‘law enforcement activity.’”); Becker, *Dossiers*, *supra* note 18, at 705-06 (noting decision in *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1245-46 (8th Cir. 1990), “[t]he court did not adopt a specific standard of interpretation and stated that it preferred ‘to delay a closer scrutiny of the law enforcement exemption until the issue is more carefully framed and necessary to the decision.’”)

³⁰ See *MacPherson v. IRS*, 803 F.2d 479, 480-85 (9th Cir. 1986) (analyzing section (e)(7) of Privacy Act in relation to MacPherson’s claims); *Garris v. FBI*, 937 F.3d 1284, 1296 (9th Cir. 2019) (stating *MacPherson* is only opinion interpreting section (e)(7) of Privacy Act).

³¹ See *MacPherson*, 803 F.2d at 480 (outlining undisputed facts relevant to issue on appeal).

³² See *id.* (describing IRS tracking of MacPherson’s First Amendment activity).

³³ See *id.* (noting illegal activity was not relevant to MacPherson’s surveillance).

³⁴ See *MacPherson*, 803 F.2d at 484-85 (affirming district court’s finding in favor of IRS). The Ninth Circuit noted that MacPherson gave his speeches in public, and anyone willing to pay for the price of the tape could access them. *Id.* at 484. Additionally, MacPherson even acknowledged in a speech that there may be IRS agents in the audience. *Id.*

³⁵ See *id.* at 484 (electing to adopt case-by-case standard due to strong policy arguments on both sides). The court discussed the policy considerations, noting that on one hand “even ‘incidental’ surveillance and recording of innocent people . . . may have the ‘chilling effect’ on those

In 2019, the Ninth Circuit in *Garris v. FBI* considered whether the Privacy Act required the FBI's 2004 Memo and Halliburton Memo to be "pertinent to an ongoing law enforcement activity to be maintained."³⁶ The court looked to the text of the Privacy Act, and the definitions of its specific words used, and determined that because the statute defined "maintain" as "maintain, collect, use, or disseminate," the word "maintain" in the Privacy Act can be read "as it is, or replaced with 'collect' (or 'use,' or 'disseminate')." ³⁷ This analysis of statute's language led to the court's conclusion that "the most reasonable reading of the statute as a whole is that the record must be pertinent to an authorized law enforcement activity both 'at the time of gathering, i.e., collecting, [and] at the time of keeping, i.e., maintaining.'" ³⁸ To support its conclusion, the court referred to the purpose of the Privacy Act, noting that Congress was particularly concerned with preventing "both collection *and* retention of records."³⁹ Furthermore, the court compared its conclusion to *MacPherson*—its only other opinion discussing the law enforcement exception—and found it consistent with the *MacPherson* court's narrow reading of the law enforcement activity exception because it "better serves the goal of privacy."⁴⁰

The court disagreed with the FBI's stance that records only need to be pertinent to an authorized law enforcement activity at the time of collection; rather, the court noted that (1) accepting this position would "read the word 'maintain' out of the statute," (2) a reading of the statute "that divorces the authorized law enforcement activity clause from the verb" does not work when reading the statute with the verbs "disseminate" or "use" instead of "maintain," and (3) "use" being included in the statute's definition of "maintain" indicates the regulation of records that have already been

rights," and on the other hand, legitimate investigation and surveillance can be necessary in order to be "certain that political and religious activities are not used as a cover for subversive activities." *Id.* at 484.

³⁶ See *Garris v. FBI*, 937 F.3d 1284, 1294 (9th Cir. 2019) (identifying issue of first impression). In addressing this issue of whether under the Privacy Act a record needs to be pertinent to an ongoing law enforcement activity to be maintained, the Ninth Circuit assumed that the record's creation did not violate the Privacy Act. *Id.*

³⁷ See 5 U.S.C. § 552(e)(7) (stating law enforcement activity exception to Privacy Act); *Garris*, 937 F.3d at 1294-95 (examining definitions of "maintain" and "collect" and their reading in statute). The court also looked to the Oxford English Dictionary's definition of "maintain" and "collect" to ascertain the plain meaning of the words. *Garris*, 937 F.3d at 1294.

³⁸ See *Garris*, 937 F.3d at 1295 (stating requirement of current "law enforcement activity" for record to be pertinent).

³⁹ See *id.* at 1295-96 (noting purpose of Privacy Act and congressional intent).

⁴⁰ See *id.* at 1296 (quoting *MacPherson v. IRS*, 803 F.2d 479, 482 (9th Cir. 1986)) (comparing holding to *MacPherson*). The Ninth Circuit also noted its conclusion aligned with two Seventh Circuit decisions, *Becker v. IRS*, 34 F.3d 398 (7th Cir. 1994) and *Bassiouni v. FBI*, 436 F.3d 712 (7th Cir. 2006). *Id.*

created.⁴¹ The court recognized that, while the FBI's same argument was ultimately upheld in the D.C. Circuit's decision in *J. Roderick MacArthur Foundation*, the court ultimately disagreed with the D.C. Circuit's reasoning and interpretation of the statute's language; the court further remarked that, when Congress means "collection[.]" and not "maintenance" or "retention," it knows how to explicitly state so.⁴² Relying on its conclusion that the law enforcement activity exception to the Privacy Act applies to both collection and maintenance of records, the court found that the 2004 Memo was not pertinent to an authorized law enforcement activity because the FBI's threat assessment "turned up nothing more than protected First Amendment activity[.]" and had "at best only speculative relevance to an unstated law enforcement purpose."⁴³ Conversely, the court found that the Halliburton Memo was pertinent to an authorized law enforcement activity because the memo: was not under Garris's or Antiwar.com's name; was created to provide information on the annual shareholders meeting that local law enforcement was required to prepare for; and "only incidentally include[d] protected First Amendment activity."⁴⁴

The Ninth Circuit's decision in *Garris v. FBI* was a step forward towards safeguarding citizens' privacy and protecting ed First Amendment activity—an issue that has grown more pressing with recent technological advances.⁴⁵ The requirement, affirmed in this decision, of an authorized law enforcement activity in order to both collect and maintain records aligns with the purpose of the Privacy Act, which is to "promote governmental respect for the privacy of citizens."⁴⁶ Without this check that agen-

⁴¹ See *id.* at 1295-97 (delineating flaws in FBI's argument).

⁴² See *id.* at 1297 (emphasis added) (explaining reasons for disagreement with D.C. Circuit's decision that "the record itself, must be pertinent to an authorized law enforcement activity" (quoting *J. Roderick MacArthur Found. v. FBI*, 102 F.3d 600, 603 (D.C. Cir. (1996)))).

⁴³ See *Garris*, 937 F.3d at 1298-99 (applying conclusion on law enforcement activity exception to 2004 Memo). The court compared the contents of the 2004 Memo to the records in *MacPherson*, and noted that the record in *MacPherson* was related to a larger ongoing undertaking and was in a "general tax protestor file, not under MacPherson's name[.]" whereas, the 2004 Memo was specifically filed under Garris' name and not part of a "larger, valid investigation." *Id.* at 1298-99.

⁴⁴ See *id.* at 1300 (concluding Halliburton Memo was within law enforcement activity exception).

⁴⁵ See Nehf, *supra* note 18, at 10 ("[L]ack of control over information has long been a concern of privacy advocates.") "[M]ost recognize and appreciate the many benefits of data storage and information technologies . . . but [] are concerned about how personal information might be used." *Id.* at 9; see also Schneider, *supra* note 18, at 217 (explaining computers' "unforeseen potential to collect, and . . . an almost unlimited capacity to retain information"); Becker, *Dossiers*, *supra* note 18, at 741 (emphasizing potential consequences of failing to protect First Amendment freedoms).

⁴⁶ See S. REP. NO. 93-1193, *supra* note 18, at 6916 (noting purpose of Privacy Act); see also sources cited *supra* note 18 (discussing intent of Privacy Act).

cies require records to be pertinent to law enforcement activity, both at collection and while retained, fundamental rights granted by the Constitution could be threatened, resulting in a society not unlike a police state—a concept “truly frightening to a society nurtured on freedom.”⁴⁷ A potential threat to free speech and privacy rights occurred with the enactment of the PATRIOT Act in 2001, which increased the government’s surveillance powers in record searches, secret searches, intelligence searches, and “trap and trace” searches.⁴⁸ With the existence of legislation like the PATRIOT Act, the decision in *Garris* is all the more substantial as it upholds citizens’ rights as well as maintains checks and balances on the government.⁴⁹

A common concern regarding the Ninth Circuit’s conclusion is that requiring all records to be related to a pertinent law enforcement activity could hinder the work of the U.S. government in its national security efforts.⁵⁰ The law enforcement activity exception, however, does not necessarily forbid incidental surveillance of innocent people because it “would be administratively cumbersome and damaging to the completeness and accuracy of the agency records[;]” consequently, it seems with a legitimate national security threat, the government has more flexibility with national security efforts.⁵¹ Furthermore, if the U.S. government was concerned with managing national security threats without infringing upon citizens’ rights,

⁴⁷ See Becker, *Dossiers*, *supra* note 18, at 738-41 (describing impact if citizens do not have the freedom to meaningfully scrutinize retained, governmental records); see also Nehf, *supra* note 18, at 23-29 (explaining potential harm to individuals resulting from data collection and sharing).

⁴⁸ See PATRIOT Act, ACLU, *supra* note 18 (detailing government’s increased surveillance powers). Under the PATRIOT Act, the government can look at records held by a third party on an individual’s activity and can search private property without notice to the owner. *Id.* The PATRIOT Act expanded “a narrow exception to the Fourth Amendment that had been created for the collection of foreign intelligence information” and “another Fourth Amendment exception for spying that collects ‘addressing’ information about the origin and destination of communications, as opposed to the content.” *Id.*

⁴⁹ See *id.* (“PATRIOT Act vastly expanded the government’s authority to spy on its own citizens, while simultaneously reducing checks and balances on those powers like judicial oversight, public accountability, and the ability to challenge government searches in court.”); *Garris v. FBI*, 937 F.3d 1284, 1296 (9th Cir. 2019) (“In fact, the Act was ‘designed to set in motion a long-overdue evaluation of the needs of the Federal government to acquire *and retain* personal information on Americans, by requiring stricter review within agencies of criteria for *collection and retention*’ of such information.”)

⁵⁰ See Goldenziel & Cheema, *supra* note 23, at 85-86, 118-20 (arguing U.S. laws must reform to protect national security).

⁵¹ See *MacPherson v. IRS*, 803 F.2d 479, 484 (9th Cir. 1986) (explaining incidental surveillance cannot be forbidden); Goldenziel & Cheema, *supra* note 23, at 118 (noting “[c]ourts in Privacy Act cases have found that national security concerns generally prevail over concerns about the potential of the government’s action to chill speech[.]”). Therefore, it seems the government’s hands would not necessarily be tied with a legitimate national security threat. See Goldenziel & Cheema, *supra* note 23, at 118; Nehf, *supra* note 18, at 4 n.12 (noting recent trend favoring strength of law enforcement at expense of individual privacy).

lawmakers could carefully improve existing legislation to achieve such a goal.⁵² Some scholars suggest broadening the scope of the Privacy Act's law enforcement activity exception to prevent agencies from maintaining records, which describe how individuals exercise First Amendment rights unless pertinent to and within the scope of a specific national security purpose or an authorized law enforcement activity.⁵³ Changes to the exception in favor of national security should, however, go through extensive legislative review, be worded carefully and specifically to prevent broad interpretation of key terms, and require stringent judicial review whenever government agencies access information about citizens' First Amendment speech.⁵⁴

⁵² See Goldenziel & Cheema, *supra* note 23, at 135-38 (detailing how surveillance laws could be improved while still considering citizens' rights). In contrast to the PATRIOT Act—which allowed for unrelated provisions to be included—improvements to the Privacy Act and other surveillance laws should be tailored to specific national security concerns. *Id.* at 135.

⁵³ See *id.* at 136 (recommending legislators grant agencies power to access information necessary to secure national security).

⁵⁴ See PATRIOT Act, ACLU, *supra* note 18 (criticizing PATRIOT Act). Any changes in favor of national security to the Privacy Act law enforcement activity exception should learn from the mistakes of the PATRIOT Act. See *id.* The PATRIOT Act drew much criticism due to its hasty enactment and “[m]any Senators complained that they had little chance to read it, much less analyze it, before having to vote.” *Id.* Furthermore, any potential changes to the Privacy Act to increase national security should be as transparent as possible with the rest of the government and the public, as opposed to the PATRIOT Act, which did not have much accountability per the ACLU:

Attempts to find out how the new surveillance powers created by the Patriot Act were implemented during their first year were in vain. In June 2002 the House Judiciary Committee demanded that the Department of Justice answer questions about how it was using its new authority. The Bush/Ashcroft Justice Department essentially refused to describe how it was implementing the law; it left numerous substantial questions unanswered and classified others without justification. In short, not only has the Bush Administration undermined judicial oversight of government spying on citizens by pushing the Patriot Act into law, but it is also undermining another crucial check and balance on surveillance powers: accountability to Congress and the public.

Id.; Goldenziel & Cheema, *supra* note 23, at 135-37 (explaining mistakes of PATRIOT Act and suggesting model used by Foreign Intelligence Surveillance Act (FISA)). The PATRIOT Act has been observed as being “like a Christmas tree, where provisions with other purposes are attached without much connection, for other powers that law enforcement agencies and national security agencies would like to wield,” so any changes to the Privacy Act should aim to not make the same mistakes by articulating “a specific national security purpose that any related surveillance would support.” Goldenziel & Cheema, *supra* note 23, at 135. The FISA allows for the “surveillance of foreign agents without unduly infringing on the civil liberties of U.S. persons.” Goldenziel & Cheema, *supra* note 23, at 136. The FISA model permits government surveillance if a judge finds probable cause that the target is a foreign power, and the facility is used by the target. Goldenziel & Cheema, *supra* note 23, at 136. The judge can consider the target's activities and related facts and circumstances, but “cannot accept the government's assertion that someone is an agent of a foreign power solely based on activities protected by the First Amendment.” Goldenziel & Cheema, *supra* note 23, at 136.

Overall, the Ninth Circuit's decision is promising for all citizens who value First Amendment freedoms, particularly those who are vocal about frequently censored issues.⁵⁵ Journalists, for example, have often been monitored or surveilled after reporting on information that is classified or leaked, or expressing an opinion unfavorable to the government; therefore, the Ninth Circuit's decision in *Garris v. FBI* provides some comfort as the law enforcement activity exception to the Privacy Act also protects the freedom of the press.⁵⁶ While the Ninth Circuit's holding in *Garris* leans more conservatively in favor of protecting privacy rights, the Ninth Circuit's ultimate ruling created to review the factors on a case-by-case basis, leaves room for potential future unfavorable outcomes for citizens.⁵⁷ As this decision only affects the Ninth Circuit, perhaps the Supreme Court will address this "important but rarely considered provision of the Privacy Act," consider differing interpretations among the circuits, and the impact on citizens' highly valued First Amendment rights.⁵⁸

Garris v. FBI considered whether the law enforcement activity exception to the Privacy Act allowed for records that were permissibly created to continue to be maintained by a government agency. In alignment

⁵⁵ See Wajert, *supra* note 6 (emphasizing importance of decision for journalists). Journalists are often the victims of monitoring and surveillance. See *id.* In 2019, a letter signed by 103 organizations was submitted to the U.S. Department of Homeland Security "rais[ed] concerns over reports of surveillance activities" involving journalists and reporters. *Id.* "The letter . . . warn[ed] that surveillance of journalists may violate the Privacy Act and infringe on the rights of the press." *Id.*

⁵⁶ See *id.* (recognizing "recent high-profile examples of government efforts to monitor journalists.")

⁵⁷ See *Garris v. FBI*, 937 F.3d 1284, 1296 (9th Cir. 2019) (explaining court will "consider the factors for and against the maintenance of such records of First Amendment activities on an individual, case-by-case basis."); see also *MacPherson v. IRS*, 803 F.2d 479, 484 (9th Cir. 1986) (declining to create bright line rule).

[W]e decline to fashion a hard and fast standard for determining whether a record of First Amendment activity is exempt from section (e)(7) of the Privacy Act because it is "pertinent to and within the scope of an authorized law enforcement activity." The strong policy concerns on both sides of the issue present close and difficult questions and may balance differently in different cases. We therefore elect to consider the factors for and against the maintenance of such records of First Amendment activities on an individual, case-by-case basis.

MacPherson, 803 F.2d at 484.

⁵⁸ See Wajert, *supra* note 6 (noting importance of law enforcement activity exception despite being rarely considered); Becker, *Dossiers*, *supra* note 18, at 717 (explaining conflict among circuits). But see *Lindblom v. FBI*, 522 U.S. 913 (1997) (declining to hear case of *J. Roderick MacArthur Foundation v. FBI*). The Circuit for the District of Columbia held that law enforcement agencies are not required to expunge records of First Amendment activity when no longer pertinent to a current investigation. *J. Roderick MacArthur Foundation v. FBI*, 102 F.3d 600, 605 (D.C. Cir. 1996).

with the purpose of the Privacy Act, and in favor of protecting privacy rights, the Ninth Circuit held that a record had to be related to an ongoing, authorized law enforcement activity to be maintained. While some may argue against this decision, citing national security concerns, this holding does not eliminate the ability for the government to effectively do their job and instead merely emphasizes the importance of respecting constitutional rights. Overall, this decision is promising for citizens' privacy rights in a world shifting towards increased electronic communication in conjunction with constant technological advances that make surveillance too easy.

Megan Ryan

**CONSTITUTIONAL LAW—THIRD PARTY CROSS-
EXAMINATION DURING CAMPUS MISCONDUCT
HEARINGS SATISFIES DUE PROCESS
REQUIREMENT UNDER FOURTEENTH
AMENDMENT—*HAIKAK V. UNIV. OF MASS.-
AMHERST*, 933 F.3D 56 (1ST CIR. 2019)**

A student enrolled in a public educational institution has a legally recognized property interest in her education, and thus is entitled to due process when that interest is threatened.¹ Due process requirements for administrative proceedings, such as school misconduct hearings, differ substantially from their criminal counterparts.² Despite this distinction, both utilize cross-examination to discern questions of fact and vet witness reliability.³ In *Haidak v. Univ. of Mass.-Amherst*,⁴ the First Circuit Court of Appeals considered whether cross-examination by a neutral third party during school misconduct hearings satisfies the Fourteenth Amendment’s due process requirements.⁵ The court ultimately held that cross-examination conducted by a third party satisfies due process as long as the testifying witness’ testimony is properly probed.⁶ The First Circuit also explicitly refused to follow the Sixth Circuit’s holding in *Doe v. Baum* by ruling that public institutions were not required to allow student-lead cross-examination.⁷

¹ See U.S. CONST. amend. XIV, § 1 (requiring due process before deprivation of life, liberty, or property); *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (noting students’ property interest in public education); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) (citing *Goss*, 419 U.S. at 574-75) (reiterating students’ interest in public education falls under purview of Fourteenth Amendment).

² See J. Brad Reich, *When is Due Process Due?: Title IX, “The State,” and Public College and University Sexual Violence Procedures*, 11 CHARLESTON L. REV. 1, 5 (2017) (discussing differences in due process for criminal prosecutions and school disciplinary hearings).

³ See *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (noting importance of cross-examination when there are undetermined questions of fact). “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” *Id.*

⁴ 933 F.3d 56 (1st Cir. 2019).

⁵ See *id.* at 68 (outlining issue before court).

⁶ See *id.* at 69 (summarizing court’s holding). “[W]e agree . . . that due process in the university disciplinary setting requires ‘some opportunity for real-time cross-examination, even if only through a hearing panel.’” *Id.*

⁷ See *Haidak*, 933 F.3d at 69 (refusing to rule as extensively as *Baum* court); see also *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (summarizing Sixth Circuit’s holding).

James Haidak and Lauren Gibney were engaged in a romantic relationship while they were students attending the University of Massachusetts, Amherst (“University”).⁸ While studying abroad in Barcelona, the couple got into an argument that turned physical and Gibney’s mother reported Haidak’s alleged assault against Gibney to the University.⁹ The University issued a charge against Haidak for violating two provisions of the University’s Code of Student Conduct (“Code”) as well as a no-contact order prohibiting him from having further contact with Gibney.¹⁰

Despite the no-contact order, Haidak and Gibney continued consensual communication.¹¹ As a result, Haidak was issued second and third notices charging him with violations of the Code.¹² At the same time the third notice was issued, the University suspended Haidak pending a disciplinary hearing.¹³ Nearly five months later, the University held a hearing on the charges issued against Haidak.¹⁴ Prior to this hearing, Haidak submitted a list of thirty-six proposed questions for the Hearing Board (“Board”) to consider when questioning Gibney.¹⁵ The Board ultimately reduced this list to sixteen, with no question worded identically to any on Haidak’s initial list.¹⁶

⁸ See *Haidak*, 933 F.3d at 61 (describing Haidak and Gibney’s relationship).

⁹ See *id.* (outlining facts regarding Barcelona incident). After a spending a night at a club, Haidak and Gibney returned home and got into an argument. *Id.* According to Gibney, Haidak put his hands around her neck, pushed her onto a bed, grabbed her wrists, and punched himself in the face with her fists. *Id.* According to Haidak, Gibney hit him first and he only restrained her to prevent her from continuing to assault him. *Id.*

¹⁰ See *id.* at 62 (noting charges issued on first notice). The Dean of Students issued Haidak a Notice of Charge for violating two provisions of the Code: (1) Physical Assault and (2) Endangering Behavior to Persons or Property. *Id.*

¹¹ See *id.* (stating Haidak and Gibney resumed contact over phone and in person almost immediately).

¹² See *id.* (noting charges issued on second and third notices). The second and third Notice of Charge were for violating two additional provisions of the Code: (1) Harassment and (2) Failure to Comply with the Direction of University Officials. *Id.* The charge of “Failure to Comply with the Direction of University Officials” referred to Haidak’s violation of the no-contact order. *Id.*

¹³ See *Haidak*, 933 F.3d at 62-63 (describing Haidak’s suspension).

¹⁴ See *id.* at 64 (recounting events leading up to disciplinary hearing).

¹⁵ See *id.* (detailing University policy regarding hearing procedures). University policy did not allow a student respondent to question other students directly but permitted the respondent’s submission of proposed questions for the Board to consider posing to witnesses. See *id.*

¹⁶ See *id.* (describing Haidak’s questions and photographs of abuse); see also *Haidak v. Univ. of Mass. at Amherst*, 299 F. Supp. 3d 242, 257 (D. Mass. 2018) *aff’d in part, vacated in part, remanded sub nom.* *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56 (1st Cir. 2019) (noting questions omitted by Board). Of the sixteen questions the Board accepted, none addressed whether Gibney had ever hit or bitten Haidak, or whether Gibney had tried to conceal her consensual relationship with Haidak from her parents. See *Haidak*, 299 F. Supp. 3d at 257.

The Board ultimately found Haidak responsible for physical assault and failure to comply with the direction of University officials, resulting in his expulsion.¹⁷ He subsequently filed suit against the University alleging that the manner in which his hearing was conducted violated his right to due process under the Fourteenth Amendment.¹⁸ The district court granted summary judgement in the University's favor.¹⁹ On appeal, Haidak argued that due process requires that a student respondent be allowed to question an adverse witness directly when a disciplinary proceeding turns on that witness's credibility.²⁰ The First Circuit rejected this argument, ruling that the procedures of a common law trial need not govern a university disciplinary hearing and that due process was satisfied when the Board conducted its own cross-examination.²¹

The Fourteenth Amendment prohibits states from depriving citizens of life, liberty, or property without due process of law.²² There are two types of due process under the Fourteenth Amendment: substantive

¹⁷ See *Haidak*, 933 F.3d at 64-65 (stating Board's ruling); see also *Haidak*, 299 F. Supp. 3d, at 258-59 (outlining Board's rationale for its decision). The Student Conduct Hearing Board report provided the following:

The board finds [Plaintiff] not responsible for [endangering behavior to persons or property], because his actions did not rise to a level violating this policy. However, his behavior was disproportionate to the actions he attributed to Gibney, and the board believes [Plaintiff] did cause physical harm to [Gibney's] wrists and arms based on the narratives and pictures presented in the hearing. As such, we find [Plaintiff] responsible for [physical assault]. Regarding the second and third incidents, the board finds [Plaintiff] not responsible for [harassment] in both cases, as the contact after the April incident was mutual and non-threatening according to both parties. However, we find [Plaintiff] responsible for [failure to comply] in both cases because he still knowingly violated the directives of the university, and failed to address any reservations he might have had with the appropriate official.

Haidak, 299 F. Supp. 3d, at 258 (alterations in original).

¹⁸ See *Haidak*, 933 F.3d at 65 (outlining Haidak's complaint). Haidak claimed that his hearing was constitutionally flawed because: "(1) some of his proffered evidence was excluded; and (2) he was not allowed to cross-examine Gibney." *Id.* at 66.

¹⁹ See *Haidak*, 299 F. Supp. 3d at 271 (granting summary judgment for University).

²⁰ See *Haidak*, 933 F.3d at 68 (describing Haidak's argument that his constitutional rights were violated). While Haidak acknowledged that the right to unlimited cross-examination is not an essential requirement in school disciplinary hearings, he maintained he should have the right to cross-examine Gibney since the outcome his hearing depended on her credibility. *Id.*

²¹ See *id.* at 69 (outlining court's ruling). "[Haidak's] position would seem to be that the accused student must be allowed to question opposing witnesses himself. As a general rule, we disagree . . ." *Id.*

²² See U.S. CONST. amend. XIV, § 1 (stating due process is required before deprivation of life, liberty, or property).

and procedural.²³ Substantive due process protects citizens from the arbitrary and wrongful deprivation of a fundamental constitutional right, while procedural due process affords citizens the right to appropriate procedures before they are stripped of a property or liberty interest.²⁴ Whether procedural protections are due to a citizen under certain circumstances depends primarily on “the extent to which the individual will be ‘condemned to suffer a grievous loss.’”²⁵ This question of extent creates a sort of spectrum for procedural due process requirements, with civil due process located on one end and criminal due process located on the other.²⁶ Since defendants in criminal proceedings are more likely to suffer the loss of life or liberty, due process requirements in criminal cases are far more expansive than those in civil or administrative matters, where life and liberty are usually not at stake.²⁷

When determining whether a specific procedure violates a citizen’s due process rights, a court must first address the nature of the property or liberty interest at stake and then evaluate the adequacy of the proceedings afforded to the citizen.²⁸ The Supreme Court in *Mathews v. Eldridge* listed three factors for a court to consider when determining the sufficiency of procedural due process in administrative proceedings: (1) the private interest implicated by government action; (2) the risk of erroneous deprivation

²³ See Aaron Nisenson, *Constitutional Due Process and Title IX Investigation and Appeal Procedures at Colleges and Universities*, 120 PENN. ST. L. REV. 963, 963-64 (2016) (distinguishing between substantive and procedural due process).

²⁴ See, e.g., *id.* (defining substantive and procedural due process); *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (describing “student’s legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.”); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (describing substantive due process right of privacy); Reich, *supra* note 2, at 17-18 (discussing non-criminal situations analogous to campus sexual assault investigations where due process protections exist).

²⁵ See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)) (describing how Court determines whether procedural due process protections are due). The Court will first determine the weight of the individual’s interest and then consider whether the nature of the interest “is one within the contemplation of the ‘liberty or property’ language of the Fourteenth Amendment.” *Id.* Once the Court determines that due process applies, it must then decide what process is due. *Id.*

²⁶ See *id.* (stating due process is flexible and “calls for such procedural protections as the particular situation demands”). The *Morrissey* Court recognized that a parolee has a legitimate liberty interest in his parole and ruled that due process requires fair and informal hearing procedures when the state seeks to revoke parole. *Id.* at 484.

²⁷ See Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL’Y REV. 1, 56 (2006) (noting difference between criminal proceedings and civil proceedings).

²⁸ See Nisenson, *supra* note 23, at 964 (describing procedural due process analysis). To establish a procedural due process violation, a citizen must show that the state deprived him or her of a constitutionally protected property or liberty interest without appropriate procedures. *Id.*

of said interest through the procedures used and the value of additional or substitute procedural safeguards; and (3) the government's interest and the financial and administrative burdens that additional procedural requirements would entail.²⁹ Courts approach criminal procedural due process differently, however.³⁰ In the absence of a *Mathews*-like test, courts must rely on a wide variety of precedent to ensure that the due process rights of defendants in criminal trials are adequately protected.³¹ Among the various criminal due process rights protected under the Constitution is the right to confront witnesses through cross-examination.³² The Supreme Court declared that it is "one of the safeguards essential to a fair trial" and the most effective means of ascertaining the truth.³³

Legal scholars have defined cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth."³⁴ While cross-examination may be invaluable to a defendant who seeks to refute evidence presented against him, it also has its shortcomings.³⁵ In

²⁹ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (outlining three-factor test).

³⁰ See Kuckes, *supra* note 27, at 14 (distinguishing criminal due process analysis from civil due process analysis). Courts tend to approach civil and administrative procedural due process challenges in a straightforward fashion by using the *Mathews* test. *Id.* In criminal cases, however, there is no uniform doctrinal approach. See *id.* at 14-15. Courts must use a historical approach in determining what procedural due process rights should be afforded to criminal defendants. See *id.*

³¹ See *id.* at 18 (acknowledging criminal due process precedent is highly protective of criminal defendants). While many of the rights afforded to a criminal defendant are specifically enumerated in the Bill of Rights, the Supreme Court has found that criminal defendants are entitled to several additional freestanding rights, implied by the constitutional guarantee of due process of law. See, e.g., *Medina v. California*, 505 U.S. 437, 453 (1992) (acknowledging "longstanding recognition that the criminal trial of an incompetent defendant violates due process"); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (emphasizing presumption of innocence for criminal defendants); *In re Winship*, 397 U.S. 358, 364 (1970) (stating Due Process Clause protects accused against conviction except upon proof beyond a reasonable doubt); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (forbidding suppression of material evidence favorable to defendant).

³² See U.S. CONST. amend. VI ("[T]he accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."); Reich, *supra* note 2 at 15-16 (outlining due process protections afforded to criminal defendants); see also *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (affirming "fundamental right" to cross-examine witnesses); *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963) (affirming right to counsel).

³³ See *Pointer*, 380 U.S. at 404-05 (acknowledging importance of cross-examination in criminal proceedings). The Court emphasized the critical role cross-examination plays in exposing falsehood and protecting criminal defendants. *Id.* The Court also noted that this right appears in the Sixth Amendment, reflecting the Framers' belief that confrontation is a fundamental aspect of a fair criminal trial. *Id.*

³⁴ See JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, 32 (Chadbourn, rev. 1974).

³⁵ See Hannah Walsh, Note, *Further Harm and Harassment: The Cost of Excess Process to Victims of Sexual Violence on College Campuses*, 95 NOTRE DAME L. REV. 1785, 1800 (2020) (noting detrimental effects of cross-examination on victims' testimony). Walsh acknowledges that cross-examination is an imperfect method of discerning truth in that it "incentivizes respond-

cases that involve sexual assault and domestic violence, for example, the adversarial nature of such questioning often retraumatizes victims who testify against their abusers.³⁶ Despite this, it is universally acknowledged that cross-examination remains a fundamental procedural due process right afforded to criminal defendants.³⁷ Though the utility of cross-examination is almost unanimously accepted, some courts hesitate to extend this right to students accused of misconduct, primarily due to the difference in interests at stake and the resulting burden that schools would bear.³⁸ As a result, school misconduct hearings tend to resemble criminal trials through their fact-finding procedures, but markedly differ in other procedural aspects.³⁹

In school misconduct hearings, courts agree that schools must provide, at minimum, notice to students of specific charges laid against them and an opportunity to be heard.⁴⁰ While it is widely accepted that these hearings should not adopt all procedural formalities of a criminal trial, courts vary in their interpretations of which additional procedural safeguards schools must afford respondents.⁴¹ Specifically, federal circuit

ents to undermine a witness' credibility in the eyes of the trier of fact, regardless of the truth of the testimony." *Id.* As a result, cross-examination may weaken witness testimony and interfere with the accuracy of the testimony provided. *Id.*

³⁶ See *id.* at 1801 (explaining that sexual abuse victims are retraumatized when confronted with triggers). "Retraumatization is the 'reliving [of] stress reactions experienced as a result of a traumatic event when faced with a new similar incident . . . [in which] a current experience is subconsciously associated with the original trauma.'" *Id.* (quoting Substance Abuse & Mental Health Servs. V. Admin., *Tips for Survivors of a Disaster or Other Traumatic Event: Coping with Retraumatization* 1 (2017), <https://store.samhsa.gov/sites/default/files/d7/priv/sma17-5047.pdf>). Testifying victims are retraumatized when confronting their attacker in court, as they often must relive the assault through invasive questioning. *Id.* at 1802. Cross-examination further harms victims by attacking their character and undermining their credibility on the stand. *Id.*

³⁷ See Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protection*, 55 B.C. L. REV. 775, 776-78 (2014) (arguing courts and legislatures refuse to protect victims at expense of defendants' due process rights).

³⁸ See Lavinia M. Weizel, Note, *The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1627-28 (2012) (noting circuit splits regarding accused's right to cross-examine witnesses); see also *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961) (concluding school hearings need not exactly mirror judicial hearings). The Fifth Circuit reasoned that it would be impractical and "detrimental to the college's education atmosphere" if it were to force schools to adhere to trial-type procedures. *Dixon*, 294 F.2d at 159.

³⁹ See Nisenon, *supra* note 23, at 965-66 (outlining factors that may limit due process protections required). Due process requires that a person receive "an adequate opportunity to be heard in light of the circumstances at issue." *Id.* (emphasis added).

⁴⁰ See Weizel, *supra* note 38, at 1627 (explaining fundamental procedural safeguards required in school misconduct hearings). The consensus among federal courts is that notice of charges and opportunity to be heard are required when a student's interest in education is threatened. *Id.*

⁴¹ See *id.* (presenting differing opinions on due process requirements in school misconduct hearings). While courts vary in their interpretation of additional safeguards required under the

courts are split on whether students should have the opportunity to cross-examine adverse witnesses during these hearings.⁴²

The Sixth Circuit recently addressed this issue in *Doe v. Baum* and held schools must afford a student respondent the right to cross-examine witnesses when the outcome of a hearing depends on certain findings of fact.⁴³ While the Sixth Circuit was not the first to deem cross-examination a due process requirement for accused students, other courts have refused to adopt such a ruling, referencing the administrative and financial burdens of facilitating trial-type procedures.⁴⁴

School misconduct cases highlight the pervasiveness of intimate partner violence on college campuses.⁴⁵ While statistics quantifying sexual assaults and intimate partner violence on college campuses vary, they highlight how women enrolled at postsecondary educational institutions experience rape, sexual assault, and intimate partner violence at incredibly high rates.⁴⁶ One report from the U.S. Department of Justice found that from 1995-2013, women ages 18 to 24 had the highest rate of rape and sexual

Fourteenth Amendment, they usually seek to prevent the “judicializing” of school disciplinary hearings. *Id.*

⁴² See *id.* (outlining different opinions regarding cross-examination).

⁴³ See *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (outlining holding). “[W]hen the university’s determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination.” *Id.* (citing *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399-402 (6th Cir. 2017) and *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005)); see also Sage Carson & Sarah Nesbitt, *Balancing the Scales: Student Survivor’s Interests and the Mathews Analysis*, 43 HARV. J.L. & GENDER 319, 355-56 (2020) (summarizing court’s justification in *Baum*). The *Baum* court focused heavily on the second prong of the *Mathews* test: the nature of the accused students’ interest and the risk of its erroneous deprivation. Carson & Nesbitt, *supra* note 43, at 355-56.

⁴⁴ See *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) (holding students do not have right to cross-examine witnesses); *Dillon v. Pulaski Cty. Special Sch. Dist.*, 468 F. Supp. 54, 58 (E.D. Ark. 1978) (holding students have right to cross-examine witnesses when testimony essential to committee findings); see also Hunter Davis, Comment, *Symbolism over Substance: The Role of Adversarial Cross-Examination in Campus Sexual Assault Adjudications and the Legality of the Proposed Rulemaking on Title IX*, 27 MICHIGAN J. GENDER & L. 213, 226 (2020) (noting courts have not reached consensus on *Baum* approach).

⁴⁵ See Ilana Frier, Supreme Court Commentary, *Campus Sexual Assault and Due Process*, 15 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 117, 117 (2020) (noting high rates of sexual assault and rape on college campuses). Frier notes a popular statistic stating one-in-five women experience sexual assault while attending college and argues that these statistics are relevant in analyzing what process is due to students accused of sexual misconduct and intimate partner violence. *Id.*

⁴⁶ See David DeMatteo et. al., *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, 21 PSYCHOL. PUB. POL’Y. AND L. 227, 228 (2015) (noting variances in survey outcomes studying prevalence of campus sexual assaults).

assault victimizations compared to women in all other age groups.⁴⁷ Among those women who identified as college students, only 20% reported their rapes or sexual assaults to police.⁴⁸ The statistics on domestic and intimate partner violence are similarly concerning, with women ages 18 to 24 experiencing higher rates of intimate partner violence than women in all other age groups.⁴⁹ Schools have a legitimate interest in maintaining safe educational environments for students, and the prevalence of campus sexual assaults and domestic violence undoubtedly implicate this interest.⁵⁰

In *Haidak v. Univ. of Mass.-Amherst*, the First Circuit acknowledged the conflicting interests between educational institutions and the students attending those institutions.⁵¹ Students have a recognized property interest in their postsecondary education; at the same time, educational institutions have an interest in creating and enforcing codes of conduct to maintain order and ensure student safety.⁵² Here, both interests were implicated: the University had reason to believe that Haidak had used physical force against another student and subsequently harassed her, and Haidak faced potential expulsion as a result.⁵³ Because Haidak faced the possible divestiture of his interest in his education, the court ruled that the University was obligated to abide by certain procedural due process requirements, including notice and opportunity to be heard.⁵⁴

⁴⁷ See Sofi Sinozich & Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, U.S. DEP'T OF JUSTICE (Dec. 2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> (describing occurrence of rape and sexual assault victimizations among college-aged women).

⁴⁸ See *id.* (identifying reporting rate of students enrolled in postsecondary education institutions). This percentage can be compared with the reporting rate of nonstudent victims ages 18 to 24, of which 32% report their rapes and sexual assaults to police. *Id.*

⁴⁹ See Shannan Catalano, *Intimate Partner Violence, 1993-2010*, U.S. DEP'T OF JUSTICE (Nov. 2012), <https://www.bjs.gov/content/pub/pdf/ipv9310.pdf> (describing occurrence of intimate partner violence among college-aged women).

⁵⁰ See Frier, *supra* note 45, at 125 (acknowledging schools' interest in creating safe learning environment). Frier also acknowledges that, just as accused students have a legitimate interest in continuing their education, victims have a similarly legitimate interest in avoiding revictimization while pursuing their own education. *Id.*

⁵¹ See *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 66 (1st Cir. 2019) (acknowledging competing interests between students and state universities).

⁵² See *id.* (describing student interest in education and state interest in enforcing codes of conduct). "Students have paramount interests in completing their education, as well as avoiding unfair or mistaken exclusion from the educational environment . . . The state university, in turn, has an important interest in protecting itself and other students from those whose behavior violates the values of the school." *Id.* (citation omitted).

⁵³ See *id.* (acknowledging specific interests of University and Haidak).

⁵⁴ See *id.* (stating Haidak entitled to procedural due process). In determining whether Haidak's due process rights were violated, the court noted that it would only consider whether Haidak "had an opportunity to answer, explain, and defend." *Id.* at 66-67 (quoting *Gorman v.*

Haidak took issue with how his misconduct hearing was conducted and alleged several due process violations in his complaint.⁵⁵ Among these, he argued that the University violated his procedural due process rights by refusing to allow him to cross-examine Gibney during his hearing.⁵⁶ He cited the First Circuit's prior ruling in *Gorman v. Univ. of R.I.*—which held that the right to unlimited cross-examination was not a due process requirement in school misconduct cases—but urged the court to allow such cross-examination when the outcome of a disciplinary proceeding depends on a witness' credibility.⁵⁷ Haidak referenced the Sixth Circuit's decision in *Baum* to support his argument and urged the First Circuit to adopt a similar ruling.⁵⁸ The court dismissed this argument, stating that it had “no reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation.”⁵⁹ It noted that the University's inquisitorial model of adjudication has long been considered fair for administrative decisions and that, as long as complaining witnesses are adequately questioned by a neutral factfinder, due process is satisfied.⁶⁰

The First Circuit raised two justifications that contributed to its ruling.⁶¹ First, student respondents generally do not have the right to legal

Univ. of R.I., 837 F.2d 7, 14 (1st Cir. 1988)). The court explicitly stated that it would not ask whether Haidak's hearing procedurally mirrored a common law trial. *Id.*

⁵⁵ See *id.* at 67-68, 73 (outlining due process violations alleged by Haidak). Haidak argued that the University violated his due process rights in the following ways: (1) the University excluded certain evidence from the proceedings; (2) the University did not allow him to cross-examine Gibney; and (3) the University unduly delayed his expulsion hearing. *Id.*

⁵⁶ See *Haidak*, 933 F.3d at 68 (outlining Haidak's argument regarding cross-examination).

⁵⁷ See *Gorman v. Univ. of R.I.*, 837 F.2d 7, 14 (1st Cir. 1988) (noting full cross-examination of witness is not required); *Haidak*, 933 F.3d at 68 (describing Haidak's argument for distinguishing case from *Gorman*).

⁵⁸ See *Haidak*, 933 F.3d at 69 (outlining Haidak's argument to adopt *Baum*); *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018) (discussing court rationale). The Sixth Circuit in *Baum* ruled that a university violated an accused student's due process rights by not allowing him to question the female student who had accused him of rape. *Baum*, 903 F.3d at 586. The *Baum* court then announced a categorical rule that a state school must allow cross-examination by an accused student or his representative in all cases turning on credibility determinations. *Baum*, 903 F.3d at 586.

⁵⁹ See *Haidak*, 933 F.3d at 68 (stating reasons for refusing to adopt *Baum*).

⁶⁰ See *id.* (noting appropriateness of inquisitorial model for administrative hearings). The First Circuit defined an inquisitorial system as a system whereby a neutral factfinder conducts the hearing, determines what questions to ask and defines the extent of the inquiry. *Id.* (quoting *Inquisitorial System*, BLACK'S LAW DICTIONARY (11th ed. 2019)). The court acknowledged that there is no data proving which model (inquisitorial or adversarial) is more accurate in a school disciplinary setting but noted the inquisitorial model is appropriate for administrative hearings such as Social Security proceedings. *Id.*

⁶¹ See *Haidak*, 933 F.3d at 69 (outlining court's hesitancy to adopt *Baum* ruling).

counsel in school disciplinary hearings.⁶² Accordingly, if courts were to compel schools to allow cross-examination by the respondent, the student himself would conduct the questioning rather than through a representative.⁶³ The court expressed doubt as to the effectiveness of such an outcome, stating that student-conducted cross-examination would not substantially decrease the risk of erroneous deprivation.⁶⁴ Rather, such cross-examination could be founded on personal animus and negatively impact the probative value of disciplinary hearings, particularly when the questioner and witness are the respondent and complainant, respectively.⁶⁵

The First Circuit further justified its ruling by noting that disciplinary hearings should not mirror common law trials.⁶⁶ The Supreme Court previously held that imposing trial-type procedures onto administrative hearings would overwhelm administrative facilities and divert educational resources.⁶⁷ The First Circuit stated that, if it were to insist on a right to party-conducted cross-examination, school disciplinary hearings would begin to replicate jury-waived trials and invite further concessions, such as the right to legal counsel.⁶⁸ These concessions would ultimately make school misconduct hearings virtually indistinguishable from common law trials—a result the Supreme Court warned against in *Goss*.⁶⁹

The Sixth Circuit's decision in *Doe v. Baum* stands in stark contrast to the First Circuit's ruling in *Haidak*.⁷⁰ While both courts explicitly

⁶² See *id.* (noting courts generally do not require schools to allow students legal counsel).

⁶³ See *id.* (explaining consequence of allowing cross-examination in school misconduct hearings).

⁶⁴ See *id.* (expressing doubt over effectiveness of student-led cross-examination). “As a general rule, we disagree, primarily because we doubt student-conducted cross-examination would so increase the probative value of hearings and decrease the ‘risk of erroneous deprivation,’ that it is constitutionally required in this setting.” *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

⁶⁵ See *id.* (noting downsides of student-conducted cross-examination). The court suggests that “in the hands of a relative tyro, cross-examination can devolve into more of a debate.” *Id.*

⁶⁶ See *Haidak*, 933 F.3d at 69 (noting hesitancy to make misconduct hearings like common law trials). “We also take seriously the admonition that student disciplinary proceedings need not mirror common law trials.” *Id.* (citing *Goss v. Lopez*, 419 U.S. 565, 583 (1975)).

⁶⁷ See *id.* (explaining rationale behind different procedures for administrative hearings). “A major purpose of the administrative process, and the administrative hearing, is to avoid the formalistic adversary mode of procedure.” *Id.* (quoting *Gorman*, 837 F.2d at 16).

⁶⁸ See *id.* at 69-70 (acknowledging consequences of requiring schools to permit student-led cross-examination). “If we were to insist on a right to party-conducted cross-examination, it would be a short slide to insist on the participation of counsel able to conduct such examination, and at that point the mandated mimicry of a jury-waived trial would be near complete.” *Id.*

⁶⁹ See *id.* at 69-70 (citing *Goss*, 419 U.S. at 583) (reiterating effects of allowing party-conducted cross-examination).

⁷⁰ See *id.* at 69 (stating cross-examination from neutral factfinder satisfies due process). However, in *Haidak*, the First Circuit outlined the reasons why they would not follow *Baum*. *Id.* When discussing the Sixth Circuit's decision, the First Circuit said:

acknowledged the importance and effectiveness of adversarial cross-examination as a factfinding tool, the First Circuit deemed it an inappropriate practice within the context of administrative misconduct hearings.⁷¹ The Sixth Circuit in *Baum*, on the other hand, held that students facing suspension or expulsion as a result of alleged misconduct must be afforded the right to cross-examine adverse witnesses when the school's decision turns on a credibility determination.⁷² Thus, the Sixth Circuit allowed elements of an adversarial system to creep into the disciplinary hearings of public education institutions.⁷³

The basis of the Sixth Circuit's ruling lies primarily in its interpretation of the interests at stake for a student accused of sexual misconduct.⁷⁴ In its opinion, the court stated that a student facing sexual assault allegations could suffer numerous losses, such as personal relationships, future employment opportunities, and the property interest in their education.⁷⁵ According to the Sixth Circuit, these interests are substantial enough to require additional due process protections such as cross-examination.⁷⁶ While the First Circuit did not comment on these findings directly, it acknowledged the *Baum* ruling in its opinion and explicitly stated that it did not agree with its holding.⁷⁷ As such, it would appear that the First Cir-

In a holding that we could easily join, the court found the complete absence of any examination before the factfinder to be procedurally deficient. But the court took the conclusion one step further than we care to go, announcing a categorical rule that the state school had to provide for cross-examination by the accused or his representative in all cases turning on credibility determinations.

Id.; *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (ruling accused has right to cross-examine witnesses).

⁷¹ See *Haidak*, 933 F.3d at 68-69 (citing *California v. Green*, 399 U.S. 149, 258 (1970)) (noting cross-examination's effectiveness, but ruling cross-examination was unnecessary in school misconduct hearings); *Baum*, 903 F.3d at 581 (stating importance of cross-examination in credibility determinations).

⁷² See *Baum*, 903 F.3d at 581 (summarizing court's holding).

⁷³ See *id.* (defending use of cross-examination in school disciplinary hearings); see also *Davis*, *supra* note 44, at 224-25 (noting *Baum* holding improperly relied on criminal cases). *Davis* noted that the school disciplinary process should be distinct from the criminal justice system because students accused of sexual assault receive relatively minor punishments, such as temporary dismissal or, in rare cases, expulsion. *Davis*, *supra* note 44, at 226. These students do not face prison, fines, sex offender registration, or other forms of criminal sanctions. *Davis*, *supra* note 44, at 226.

⁷⁴ See *Baum*, 903 F.3d at 582 (describing student interest at stake).

⁷⁵ See *id.* (noting lasting impact of "sex offender" label from university).

⁷⁶ See *id.* at 583-84 (weighing student's interest against university's interest).

⁷⁷ See *Haidak*, 933 F.3d at 69 (refusing to adopt *Baum*'s ruling).

cuit considers these interests insufficient to permit the introduction of adversarial process into school misconduct hearings.⁷⁸

The First Circuit's decision affords procedural due process to students involved in school misconduct hearings that conform to the precedent set out in *Mathews v. Eldridge*.⁷⁹ The court properly reviewed University policy to determine the risk of erroneous deprivation of Haidak's education interest and carefully considered the financial and administrative burdens that student-led cross-examination would impose upon the University.⁸⁰ Furthermore, the court afforded Haidak's property interest the proper weight and allocated the appropriate due process protections, namely an opportunity to be heard in a proceeding that vetted the facts of his case.⁸¹ In contrast, the Sixth Circuit's ruling in *Baum* inflates the interests of the accused without properly considering the legitimate interests of the school in adjudicating cases of particularly traumatizing misconduct.⁸² When confronted with the possibility of re-traumatization on cross-examination, the *Baum* court sidestepped the issue, suggesting that, in cases where victims may be subjected to further harm, the respondent's representative may conduct the cross-examination instead of the respondent himself.⁸³ This solution disregards the fact that victims are re-traumatized through the adversarial nature of questioning, not merely because the respondent is the one conducting the questioning.⁸⁴ The Sixth Circuit conducted an unbalanced *Mathews* test in favor of the student respondent, effectively devaluing the

⁷⁸ See *id.* (summarizing court's holding).

⁷⁹ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (outlining three factor test). The factors the court must consider when conducting a due process analysis are: (1) the private interest implicated by the government action; (2) the risk of erroneous deprivation of the interest through the procedures used; and (3) the government's interest, including the burdens that may be imposed if additional procedural requirements were adhered to. *Id.*; *Haidak*, 933 F.3d at 69-70 (discussing factors from *Mathews* test).

⁸⁰ See *Haidak*, 933 F.3d at 68-70 (outlining court's weighing of competing interests).

⁸¹ See *id.* at 65 (stating students have property interest in education); see also Weizel, *supra* note 38, at 1624-25 (noting lesser interest at stake in school administrative hearings). Weizel notes that, while due process is flexible, a property and even liberty interest in education is not weighty enough to justify "highly technical or wieldy procedures." Weizel, *supra* note 38, at 1625.

⁸² See *Baum*, 903 F.3d at 581-82 (discussing whether cross-examination would unduly burden the school). Aside from considering the administrative and financial burden of cross-examination, the Sixth Circuit did not discuss any other interest that may be implicated by such a practice. *Id.*

⁸³ See *Baum*, 903 F.3d at 583 (stating accused does not always have right to personally confront accuser).

⁸⁴ See Walsh, *supra* note 35, at 1801 (describing re-traumatizing effects of cross-examination).

school's legitimate interest in adjudicating cases of sexual and intimate partner violence.⁸⁵

While the First Circuit's ruling was ultimately sound, the court should have discussed the prevalence of intimate partner violence and sexual assault on college campuses when it considered the nature of the University's interest.⁸⁶ The Supreme Court in *Mathews* explicitly stated that due process requirements are flexible and depend on context, and, as such, the pervasiveness of sexual assault and domestic abuse among female students warrants special consideration.⁸⁷ Courts should take these facts and statistics into account when considering the school's interest in conducting its misconduct hearings.⁸⁸ With the prevalence of such assaults, and because of the long-lasting stigma and fears associated with coming forward, public educational institutions have a legitimate interest in crafting adjudication hearings with the student victim in mind.⁸⁹ The practice of cross-examination, while arguably an effective tool for discerning the truth, works against schools seeking to curb violence on their campuses by discouraging female victims from reporting assault.⁹⁰

The rulings in *Haidak* and *Baum* represent a significant circuit split regarding the use of cross-examination in student misconduct hearings. While both courts utilized the balancing test set forth in *Mathews v. Eldridge*, the Sixth Circuit emphasized the interests of the student respondent at the expense of the legitimate interests of the school. The First Circuit, on the other hand, properly weighed these interests and upheld the widely

⁸⁵ See Carson & Nesbitt, *supra* note 43, at 359 (stating *Baum* court focused too heavily on private interest of accused).

⁸⁶ See *Haidak*, 933 F.3d at 69 (balancing competing interests between *Haidak* and University); see also Carson & Nesbitt, *supra* note 43 at 367 (asserting court in *Haidak* should have conducted "a more reliable, accurate balancing analysis."). Carson and Nesbitt argue that, when considering the nature of the University's interest—the third prong of the *Mathews* test—the court should determine the complainant's risk of erroneous deprivation of her access to education, her reputation, and professional and financial opportunities. Carson & Nesbitt, *supra* note 43 at 367.

⁸⁷ See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)) (stating due process varies depending on context); see also Frier, *supra* note 45, at 117 (noting high rates of sexual assault and rape on college campuses necessitate adjudication).

⁸⁸ See Carson & Nesbitt, *supra* note 43, at 319 (noting that third prong of *Mathews* test can accommodate interests of complaining students).

⁸⁹ See *id.* at 322 (listing consequences of speaking out against sexual assault). Student survivors have been forced out of school, punished for speaking out, lost money defending themselves, committed suicide, and been killed by intimate partners after their schools refused to act. *Id.* These factors create a hostile environment for student victims of intimate partner violence and discourage reporting. *Id.*

⁹⁰ See Davis, *supra* note 43, at 234 (listing negative impacts of cross-examination in sexual assault adjudications on campus). Davis notes that compulsory live cross-examination will lead to a decrease in already low reporting rates for sexual assault on campus. *Id.*

accepted tenet that school misconduct hearings should not mirror common law criminal trials. While the First Circuit's ruling was ultimately sound, it should have emphasized the school's interest in providing a safe educational environment for female students, who are overwhelmingly victims of sexual assault and intimate partner violence and would be further harmed by the use of adversarial cross-examination.

Kori Dean

**CRIMINAL LAW—EXTORTION OR PUBLIC
POLICY, WHERE DO WE DRAW THE LINE?:
FIRST CIRCUIT FINDS HOBBS ACT EXTORTION
MAY APPLY TO THE ACTIONS OF TWO BOSTON
CITY HALL OFFICIALS—*UNITED STATES V.
BRISSETTE*, 919 F.3D 670 (1ST CIR. 2019)**

The federal crime of extortion can have a substantial negative effect on interstate and foreign commerce due to its aggregate impact on the economy.¹ The Hobbs Act, enacted to regulate extortion and robbery, defines extortion as “the obtaining of property from another, with. . . consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”² In *United States v. Brissette*,³ the First Cir-

¹ See Hobbs Act, 18 U.S.C.S. § 1951 (1948) (making it federal crime to obstruct, delay, or affect commerce via robbery or extortion).

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term “commerce” means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Id.; see also U.S. Dep’t of Just., Criminal Resource Manual § 2403 (2011), <https://www.justice.gov/archives/jm/criminal-resource-manual-2403-hobbs-act-extortion-force-violence-or-fear> (providing list of questions to determine violation of Hobbs Act Extortion).

² See Hobbs Act, 18 U.S.C.S. § 1951 (b)(2) (defining extortion); see also U.S. Dep’t of Just., *supra* note 1 (explaining application of Hobbs Act). The Hobbs Act extortion offense “reaches both the obtaining of property ‘under color of official right’ by public officials and the obtaining of property by private actors.” U.S. Dep’t of Just., *supra* note 1.

cuit Court of Appeals grappled with defining and applying the elements of extortion under the Hobbs Act.⁴ The First Circuit ultimately determined that the “obtaining of property” element of the extortion provision may be satisfied even when no personal benefit is incurred.⁵

In 2016, two City of Boston (“the City”) public officials, Kenneth Brissette (“Brissette”) and Timothy Sullivan (“Sullivan”), were indicted for extortion and conspiracy to commit extortion in violation of the Hobbs Act.⁶ Brissette served as the Director of the Office of Tourism, Sports and Entertainment for the City and Sullivan served as the Mayor’s Chief of Staff for Intergovernmental Relations and the Senior Advisor for External Relations.⁷ In their respective roles, Brissette and Sullivan worked closely with Crash Line Productions (“Crash Line”), a live music production company that had a licensing agreement with the City to host “Boston Calling,” a biannual music festival hosted on City Hall Plaza.⁸

³ 919 F.3d 670 (1st Cir. 2019).

⁴ *See id.* at 673-74 (stating government must prove two primary elements of Hobbs Act: “wrongfulness” and “obtaining of property”).

⁵ *See id.* at 685-86 (concluding no personal benefit required for “obtaining of property” element of extortion).

⁶ *See id.* at 672-73 (explaining Brissette and Sullivan were indicted under “wrongfulness” prong of Hobbs Act extortion). A grand jury handed up the indictment which charged Brissette with Hobbs Act extortion on May 27, 2016. *Id.* On June 28, 2016, the grand jury handed up a superseding indictment which added a charge of extortion against Sullivan and charged both men with conspiracy to commit extortion. *Id.* Brissette and Sullivan were charged “under the ‘induced by wrongful use of . . . fear’ prong of Hobbs Act extortion—specifically, within the ‘wrongful use of fear of economic harm.’” *Id.* (quoting Hobbs Act, 18 U.S.C. § 1951(b)(2)).

⁷ *See id.* at 672-73 (describing Brissette’s title and responsibilities). Brissette’s office was responsible for issuing and securing permits for any entities using public space to host events in Boston. *See id.*; *see also* Andrew Ryan, *Kenneth Brissette Once Described His Job as ‘Minister of Fun’*, THE BOSTON GLOBE (May 19, 2016, 11:58 a.m.), <https://www.bostonglobe.com/metro/2016/05/19/kenneth-brissette-once-described-his-job-minister-fun/PJ4Pq8ZjHYShZwDi48HrXM/story.html> (reporting on indictment).

“The mission of the Office of Tourism, Sports, and Entertainment is to promote all public events in the city of Boston,” the indictment said of Brissette’s job. “As part of that mission, the Office of Tourism, Sports, and Entertainment should assist companies and individuals seeking to stage events in Boston, including music and sports performances, filmmaking, etc., including assistance in securing permits to use at public areas in Boston.”

Ryan, *supra* note 7.

⁸ *See Brissette*, 919 F.3d at 672 (describing Crash Line’s agreement with City of Boston). “The licensing agreement required Crash Line to obtain permits from the City to stage each festival.” *Id.*; *see also* Crash Line Productions, LINKEDIN, <https://www.linkedin.com/company/crash-line-productions/about/> (last visited Oct. 13, 2019). “Crash Line Productions is a leading live music event company, founded in 2012 in Boston, MA. [It] produces Boston Calling Music Festival, Eaux Claires Music & Arts Festival in Eau Claire, WI and Copenhagen Beer Festival in

In July 2014, Crash Line requested a permit to host the September “Boston Calling” festival.⁹ Over the next two months, Brissette and Sullivan repeatedly told the company that it needed to hire local union workers to staff the music festival in order to receive a permit.¹⁰ Crash Line explained that it had already secured labor for the festival through pre-existing contracts with a non-union company.¹¹ On September 2, 2014, Crash Line, still without a permit and with only three days before the festival was scheduled to begin, met with Brissette and Sullivan who, once again, insisted the company hire union workers to staff the festival.¹² Due to persistent demands from the City and the fast approaching event date, Crash Line entered into a contract to hire nine union workers; shortly after, the City issued the necessary permit to host the festival.¹³

In April of 2016, the Boston Globe reported that the Federal Bureau of Investigation was investigating whether members of Mayor Martin J. Walsh’s administration merely advised Crash Line of the potential problem that may arise if they did not staff local union workers, or whether the City pressured Crash Line to hire local union stagehands.¹⁴ The following

Boston, MA.” Crash Line Productions, *supra* note 8; Ryan, *supra* note 7 (discussing Boston Calling Music Festival and its setting at Boston’s City Hall Plaza).

⁹ See *Brissette*, 919 F.3d at 672 (noting responsibilities of Brissette and Sullivan’s office included issuing permits for public area venues). “Between July and September 2014, Crash Line sought certain permits and approvals from the City to put on one such festival in September 2014 as well as an extension of its licensing agreement.” *Id.*

¹⁰ See *id.* at 673 (stating Sullivan and Brissette told Crash Line to hire Local 11 Union workers); see also *About Us*, I.A.T.S.E LOCAL #11, <http://www.iate11.org/> (last visited Jan. 19, 2020) (explaining Local 11 Union workers and their responsibilities). “We are the skilled men and women who work behind the scenes in entertainment industry every day. We specialize in stage rigging, theatrical set construction, and the installation and operation of video, lighting, and sound systems in virtually any type of venue.” I.A.T.S.E LOCAL, *supra* note 10.

¹¹ See *Brissette*, 919 F.3d at 673 (explaining “[t]he licensing agreement between Crash Line and the City did not obligate Crash Line to hire the workers that it needed to put on a festival from any union or otherwise place restraints on Crash Line’s hiring practices.”)

¹² See *id.* (emphasizing Brissette and Sullivan’s insistence that Crash Line hire union members); see also *Past Lineups*, BOSTON CALLING, <https://bostoncalling.com> (last visited Oct. 19, 2019) (advertising dates for 2014 festival as September 5th, 6th, and 7th).

¹³ See *Brissette*, 919 F.3d at 673 (noting coincidental timeline of Crash Line hiring union workers and receipt of permit).

¹⁴ See Mark Arsenault, et al., *Feds Probe City Hall’s Dealings with Boston Calling*, BOSTON GLOBE (Apr. 29, 2016, 7:20pm), https://www.bostonglobe.com/metro/2016/04/29/feds-investigating-city-hall-interaction-with-boston-calling/9ZpyZh2jc7casqedHbVDbP/story.html?_sp=7a5bdd97-c3fb-4a64-8dbb-23d4887152d7.1571005562068 (discussing investigation as well as similar investigation that occurred in prior year). The “Boston Calling” incident was not Brissette’s first extortion investigation. *Id.* In 2015, Brissette was investigated after he warned two local restaurants of possible union pickets in connection with the filming of reality TV show “Top Chef.” *Id.* The investigation concluded that Brissette had not done anything unlawful. *Id.*

month, Brissette was arrested in response to an eight-page indictment.¹⁵ The initial indictment, handed up by a grand jury, charged only Brissette with Hobbs Act extortion; however, a month later, a superseding indictment added a Hobbs Act extortion charge against Sullivan and charged both men with conspiracy to commit Hobbs Act extortion.¹⁶

On March 22, 2018, the district court dismissed the indictment based on its interpretation of the phrase “obtaining of property” in the Hobbs Act extortion provision.¹⁷ District court Judge Leo Sorokin explained that the government failed to prove that Brissette and Sullivan physically obtained property and that the men gained a personal benefit from their actions, noting both elements are necessary under the extortion

¹⁵ See *Brissette*, 919 F.3d at 672 (stating initial indictment was handed up on May 27, 2016); see also Andrew Ryan, et al., *City Official Pleads Innocent to Extortion Charge, Released on Bond*, BOSTON GLOBE (May 19, 2016, 9:06 PM), <https://www.bostonglobe.com/metro/2016/05/19/walsh-administration-official-arrested-union-related-extortion-federal-officials-say/XJehp4hEQXVZ5ancU67KmJ/story.html> (stating Brissette plead innocent and was released on \$25,000 unsecured bond).

¹⁶ See *Brissette*, 919 F.3d at 672 (stating superseding indictment was handed up on June 28, 2016). The first superseding indictment alleged:

Brissette and Sullivan had “attempted to and did obtain” from Crash Line “money to be paid as wages for imposed, unwanted, and unnecessary and superfluous services and wages and benefits to be paid pursuant to a labor contract with Local 11.” That indictment further alleged that Brissette and Sullivan had done so “with the consent of [Crash Line] . . . which consent was induced by the wrongful use of fear of economic harm to [Crash Line] and others.” The indictment also alleged that Brissette and Sullivan had conspired, “together with others, known and unknown to the Grand Jury,” to commit the alleged extortion.

Id. at 673. In January 2017, the defendants moved to dismiss that indictment pursuant to Federal Rule of Criminal Procedure 12(b)(3). *Id.* After the First Circuit Court of Appeals issued a decision regarding the scope of the Hobbs Act in *United States v. Burhoe*, 871 F.3d 1 (1st Cir. 2017), the defendants filed renewed motions to dismiss the first superseding indictment. *Id.* The government opposed the motion and obtained a second superseding indictment, which modified the description of “property” under the act. *Id.* at 674. On January 31, 2018, the government obtained a third superseding indictment, known as the “operative [indictment].” *Id.* “The indictment charged Brissette and Sullivan, however, only under the ‘induced by wrongful use of . . . fear’ prong of Hobbs Act extortion – specifically, within the ‘wrongful use of fear of economic harm.’” *Id.* at 672; see also *Evans v. United States*, 504 U.S. 255, 263-64 (1992) (detailing two forms of extortion statute sets out). The “induced by wrongful use of actual or threatened force, violence, or fear” prong of the offense delineates a distinct form of extortion from the “under color of official right” prong. *Evans*, 504 U.S. at 264 n.13.

¹⁷ See *Brissette*, 919 F.3d at 675 (resolving Rule 12(b)(1) and 12(b)(3) motions and dismissing indictment). “[T]he government’s proffered evidence and the facts alleged in the indictment were insufficient to show . . . that the defendants received a personal benefit from the transfer of wages and benefits to the Local 11 workers that the defendants allegedly directed Crash Line to make.” *Id.*; see also Hobbs Act, 18 U.S.C.S. § 1951 (1948) (defining extortion in § 1951 (b)(2)). “The term ‘extortion’ means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” Hobbs Act, 18 U.S.C.S. § 1951 (b)(2).

provision.¹⁸ The government appealed, and the First Circuit Court of Appeals was tasked with deciding whether, under the Hobbs Act, “merely directing property to a third party” constitutes “obtaining of [that] property,” or whether one must also “enjoy[] a personal benefit from” that directed transfer.¹⁹ Aligning itself with other circuits that have resolved the same question, the First Circuit Court of Appeals held that conferring a personal benefit is not necessary to prove Hobbs Act extortion.²⁰ Therefore, the district court’s order of dismissal was vacated and the case was remanded for further proceedings.²¹

In 1946, Congress passed the Hobbs Act to prohibit actual or attempted robbery or extortion that would negatively affect interstate or foreign commerce.²² Since its adoption, the Hobbs Act has expanded federal

¹⁸ See *United States v. Brissette*, No. 16-cr-10137-LTS, 2018 U.S. Dist. LEXIS 44426, at *34 (D. Mass. Mar. 19, 2018) (rejecting government’s position and ruling personal benefit required to prove extortion). Judge Leo Sorokin stated:

To accept the government’s invitation and essentially read the word “obtain” out of the Hobbs Act, such that any action taken to direct a private entity to spend money in a certain way—regardless whether the defendant himself receives the money or enjoys a personal benefit from it—would invite the precise risks against which the Supreme Court has cautioned, particularly when dealing with conduct by public officials.

Id. at *34; see also Jerome Campbell, *Boston Mayoral Aides Found Guilty in Boston Calling Extortion Case*, WBUR News (Aug. 7, 2019), <https://www.wbur.org/news/2019/08/07/brissette-sullivan-guilty-conspiracy> (stating Judge Sorokin “told jurors that political favors do not rise to . . . federal extortion charge under the Hobbs Act.”)

¹⁹ See *Brissette*, 919 F.3d at 675 (analyzing “obtaining property” prong of Hobbs Act extortion).

²⁰ See *id.* at 679-80; see also, e.g., *United States v. Carlson*, 787 F.3d 939, 944 (8th Cir. 2015) (finding defendant does obtain property at issue irrespective of gaining personal benefit); *United States v. Vigil*, 523 F.3d 1258, 1264 (10th Cir. 2008) (holding “obtaining of property” element met when directing benefit to third party); *United States v. Provenzano*, 334 F.2d 678, 686 (3d Cir. 1964) (“It is enough [under the Hobbs Act] that payments were made at the extortioner’s direction to a person named by him.”)

²¹ See *Brissette*, 919 F.3d at 685-86 (stating holding is confined to “obtaining property” element of offense). But see *United States v. Brissette*, No. 16-CR-10137-LTS, 2020 WL 718294, at *46 (D. Mass. Feb. 12, 2020) (vacating Brissette and Sullivan’s guilty verdicts). Sullivan and Brissette’s guilty verdicts were later vacated by Judge Sorokin, who noted that, “[e]ven if the Hobbs Act authorized its alternatives, the government failed to prove them.” *Brissette*, 2020 WL 718294, at *1; see also The Associated Press, *Judge Tosses Convictions Of 2 Aides To Marty Walsh In Boston Calling Case*, WBUR (Feb. 12, 2020), <https://www.wbur.org/news/2020/02/12/judge-tosses-convictions-of-2-aides-to-marty-walsh-in-boston-calling-case> (“U.S. District Judge Leo Sorokin said in his ruling that he must overturn the jury’s guilty verdict because the government failed to prove the existence of a quid pro quo.”)

²² See Hobbs Act, 18 U.S.C.S. § 1951 (1948) (prohibiting obstruction, delay, or affecting of commerce by robbery or extortion); see also Matt Evola, Comment, *You Shall Go No Further: The Hobbs Act and the Expansion of Federal Criminal Jurisdiction*, 53 AM. CRIM. L. REV. ONLINE 6 (2016) (stating act was crafted to target problem of forced fee payment for farmers de-

criminal jurisdiction and is frequently used in cases involving public corruption, commercial disputes, violent crimes, and corruption directed at labor unions.²³ By definition, the elements of extortion are: (1) interference with interstate commerce; (2) obtaining, attempting to obtain or conspiring to obtain property from another; (3) with consent; and (4) “induce[ment] by wrongful use of actual or threatened force, violence, or fear or under color of official right.”²⁴ The use of force, violence, or fear to obtain property must be “wrongful” in order for the action to fall within the Hobbs Act and violate criminal law.²⁵ Courts have grappled with defining two elements

livering goods). “At the time, farmers would be stopped upon entering major cities and be forced to either pay a fee or hire a union driver to deliver their goods” Evola, *supra* note 22, at 6.

²³ See, e.g., *Evans v. United States*, 504 U.S. 255, 290-91 (1992) (Thomas, J., dissenting) (describing Hobbs Act as “stunning expansion” of federal criminal jurisdiction); *United States v. Culbert*, 435 U.S. 371, 380 (1978) (explaining scope of statute). “Our examination of the statutory language and the legislative history of the Hobbs Act impels us to the conclusion that Congress intended to make criminal all conduct within the reach of the statutory language.” *Culbert*, 435 U.S. at 380; *United States v. Rivera-Rivera* 555 F.3d 277, 286 (1st Cir. 2009) (holding de minimis interference with interstate commerce is sufficient for Hobbs Act conviction); *United States v. Valenzano*, 123 F.3d 365, 367 (6th Cir. 1997) (stating Hobbs Act is valid exercise of Congress’ power to regulate); see also U.S. Dep’t of Just., Justice Manual, Title 9, Chapter 9-131.010 (2011), <https://www.justice.gov/jm/jm-9-131000-hobbs-act-18-usc-1951> (detailing history and purpose of Hobbs Act).

²⁴ See Hobbs Act, 18 U.S.C.S. § 1951 (detailing elements of extortion); see also *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 403 (2003) (stating “Congress used two sources of law as models in formulating the Hobbs Act”). The Penal Code of New York and the Field Code, a 19th-century model penal code, were both used in creating the language for the Hobbs Act. *Scheidler*, 537 U.S. at 403; see also, e.g., *People v. Ryan*, 133 N.E. 572, 573 (1921) (explaining New York law demonstrated elements of “obtaining of property” requirement before Hobbs Act); *United States v. Jackson*, 180 F.3d 55, 69 (2nd Cir. 1999) (acknowledging definition of extortion in Hobbs Act is copied from New York State law); Brian J. Murray, Note, *Protestors, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 710 (1999) (tracing “extortion” definition in Hobbs Act to Anti-Racketeering Act (1934) and New York State law). See generally BLACK’S LAW DICTIONARY 696 (4th ed. 1957) (defining “extort” as “to gain by wrongful methods, to obtain in an unlawful manner, to compel payments by means of threats of injury to person, property, or reputation . . . to exact something unlawfully by threats or putting in fear.”)

²⁵ See Howard J. Alperin, Annotation, *Elements of Offense Proscribed by the Hobbs Act, Against Racketeering in Interstate or Foreign Commerce*, 4 A.L.R. FED. 881, § 6[c] (2007) (defining “wrongful use” under statutory definition of extortion). The term “wrongful,” within the meaning of the Hobbs Act, modifies the use of each enumerated means of obtaining property through actual or threatened force, violence, or fear. *Id.* This definition limits the statute’s coverage to those instances where obtaining property would itself be “wrongful” because the alleged extortionist has no lawful claim to that property. *Id.*; see also *Ocasio v. United States*, 136 S. Ct. 1423, 1435 (2016) (providing example of “wrongful” use of fear). The Supreme Court explains that a store owner making periodic protection payments to gang members out of fear that the gang will otherwise trash the store is an example of “inducement by wrongful use of actual or threatened force, violence, or fear” as stated in the statute. *Ocasio*, 136 S. Ct. at 1435.

of the Hobbs Act in particular: the phrase “obtaining of property,” and “wrongful” conduct.²⁶

The Hobbs Act does not define the word “obtaining,” nor the phrase “obtaining of property.”²⁷ When the terms of a statute are ambiguous, courts will interpret them within the context of their statutory scheme, or, alternatively, presume that the statutory terms hold their common-law meaning.²⁸ The Model Penal Code’s (“MPC”) definition of “extortion,” which is rooted in common-law, defines the term “obtaining” as “bringing about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another.”²⁹ Relying on the MPC definition, the Supreme Court has held that the term “obtaining,” as used under the Hobbs

²⁶ See Alperin, *supra* note 25 (explaining each element of Hobbs Act and its interpretations).

²⁷ See Hobbs Act, 18 U.S.C.S. § 1951 (declining to define key words of Act). *But see* Sekhar v. United States, 570 U.S. 729, 735 (2013) (differentiating between coercion and extortion). By including the “obtaining of property” element, Congress kept compulsion outside of the scope of Hobbs act extortion. *Sekhar*, 570 U.S. at 735; *People v. Scotti* 195 N.E. 162, 163 (N.Y. 1934) (per curiam) (distinguishing extortion from common law crime of coercion); *People v. Ginsberg*, 188 N.E. 62, 62 (N.Y. App. Ct. 1933) (affirming convictions where threats and property damage to compel store owner to join trade organization); *People v. Kaplan*, 269 N.Y.S. 161, 162-64 (N.Y. App. Ct. 1934) (holding that compelling union members to drop lawsuits against union leadership is coercion).

²⁸ See *David v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (“It is a fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”); *see also* *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (“[A]mbiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”); *Taylor v. United States*, 495 U.S. 575, 594 (1990) (“In the absence of any specific indication that Congress meant to incorporate the common-law meaning of burglary, we shall not read into the statute a definition of ‘burglary’ so obviously ill-suited to its purposes.”); *Morrisette v. United States*, 342 U.S.246, 262 (1952) (explaining common law meaning should not be adopted when directly contrary to congressional direction). *But see* *Sekhar v. United States*, 570 U.S. 729, 735 (2013) (applying New York Penal Code definition of “obtaining” as used in *Scheidler*). By including the “obtaining of property” element, Congress kept compulsion outside of the scope of Hobbs act extortion. *Sekhar* 570 U.S. at 734; *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 402-03 (2003) (using “the Penal Code of New York and the Field Code” definitions of “extortion” and “obtaining of property” element). In *Scheidler*, the Supreme Court was confronted with contention that the “obtaining of property” element in the Hobbs Act extortion provision did not define the conduct for which the defendant was charged. *Schiedler*, 537 U.S. at 402. The Supreme Court also examined the common-law crime of extortion, leading the Court to consider the Model Penal Code’s definition, and finding that “[o]btaining property” requires “a deprivation and acquisition of property.” *Schiedler*, 537 U.S. at 404; *Kaplan*, 269 N.Y.S. at 163 (holding compelling union members to drop lawsuits against union leadership is considered coercion).

²⁹ See *Schiedler*, 537 U.S. at 408, n.13 (“Under the Model Penal Code § 223.4, cmt. 1, at 201-02. “Extortion requires that one ‘obtains [the] property of another’ using threat as ‘the method employed to deprive the victim of his property.’”) This “obtaining” is further explained as “bringing about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another.” *Id.*; *see also* *Murray*, *supra* note 24, at 703 (noting MPC contains useful definition of extortion).

Act extortion provision, does not impliedly require that a personal benefit be conferred.³⁰ On the contrary, the Supreme Court has consistently found that the phrase “obtaining property” is not exclusive to the extortioner, but includes situations where the defendant directs a transfer from the victim to a third party.³¹ The Supreme Court has also established that Congress intended for the “obtaining of property” element to be satisfied through “ex-

³⁰ See *United States v. Green*, 350 U.S. 415, 420 (1956) (holding extortion, as defined in Hobbs Act, does not depend on direct benefit conferred). A union and its representative were charged with extortion in attempting to obtain wages from employers to pay for unwanted and fictitious services. *Id.* at 417. For purposes of the act’s proscription of extortion, the Court noted it is not necessary to show that a direct benefit is conferred upon the person who obtains the property allegedly extorted. *Id.* at 420.

³¹ See *United States v. Carlson*, 787 F.3d 939, 944 (8th Cir. 2015) (noting “obtaining” does not mean defendant must enjoy personal benefit). The defendant sent threatening letters to the plaintiff, demanding that money and veterinary supplies be brought to a certain address or else the defendant would follow through on the threats made. *Id.* at 942. The court held that “obtaining of property” element was met where the defendant “did demand items of value, she just did not seek to obtain them for herself.” *Id.* at 944; see also *United States v. Burhoe*, 871 F.3d 1, 27-28 (1st Cir. 2017) (stating that taking work away from one union member and giving to another satisfies “obtaining of property” element); *United States v. Vigil*, 523 F.3d 1258, 1264 (10th Cir. 2008) (holding “obtaining of property” element met where state treasurer “attempted to obtain money from [a company’s head] and direct that money to [a political supporter’s wife]”). The defendant in *Vigil* argued that his conduct was merely hard bargaining, however the court held that a rational jury could have concluded that it was exploitation due to fear of economic loss and his actions were done in order to obtain property to which he was not entitled. *Vigil*, 523 F.3d at 1261-62; *United States v. Gotti*, 459 F.3d 296, 324 n.9 (2d Cir. 2006) (noting defendant may “obtain property” by “order[ing] the victim to transfer the [victim’s property] rights to a third party of the extortionist’s choosing”). In this case, the Gambino family had a corrupt influence over several “labor unions, businesses, and individuals operating at the piers in Brooklyn and Staten Island.” *Gotti*, 459 F.3d at 301. The indictment alleged that the defendants sought to extort wages, positions, and employee benefits from local union workers to another set of individuals. *Gotti*, 459 F.3d at 305-06; *United States v. Panaro*, 266 F.3d 939, 943 (9th Cir. 2001) (explaining how obtaining element is satisfied under Hobbs Act). The defendants agreed to force the victim out of his share of an auto shop and to intimidate the remaining business owner to share the proceeds of the business. *Panaro*, 266 F.3d at 945-46. The court held that Hobbs Act extortion does not apply simply when someone parts with property, rather “someone – either the extortioner or a third person – must receive the property of which the victim is deprived.” *Panaro*, 266 F.3d at 948; *United States v. Hyde*, 448 F.2d 815, 843 (5th Cir. 1971) (stating “one need receives no personal benefit to be guilty of extortion . . .”). In *Hyde*, the defendants, an attorney general and two associates, were convicted of extortion because of threats made to loan and insurance companies; they stated that, unless payments were made to them, the companies would be driven out of business. *Hyde*, 448 F.2d at 843. Following the precedent set in *Provenzano*, the court held that one does not need to receive a personal benefit to be convicted of extortion. *Hyde*, 448 F.2d at 843; *United States v. Provenzano*, 334 F.2d 678, 686 (3d Cir. 1964) (holding “it is enough [under the Hobbs Act] that payments were made to a person named by the extortioner”). In *Provenzano*, the defendant was convicted of obstructing, delaying, and affecting interstate commerce by extorting from a transportation company through economic fear in violation of the Hobbs Act. *Provenzano*, 334 F.2d at 680-81. The court affirmed the judgment and held that the payments by the company were a continuous series of payments made because of fears instilled by defendant. *Provenzano*, 266 F.3d at 945-46.

tortion under the guise of obtaining wages . . .” regardless of whether it was for actual or fictitious labor.³²

When determining whether the means used to obtain property is “wrongful,” courts have ruled that the use of actual or threatened violence or fear, as well as fear of physical harm, is inherently wrongful under the statute.³³ The Supreme Court has held that the obtaining of property itself is “wrongful” when the extortioner uses wrongful means to accomplish a wrongful end.³⁴ The term “wrongful,” qualifies each of the enumerated means of obtaining property found in the Hobbs Act: “actual or threatened force, violence or fear.”³⁵ Though “fear of economic loss” is a type of fear, courts have held that it is not considered “wrongful” under the Hobbs Act because the fear of economic harm is a part of many legitimate business transactions.³⁶ It should be noted, however, that the fear of economic loss

³² See *United States v. Kemble*, 198 F.2d 889, 891 (3rd Cir. 1952) (stating historical scope of Anti-Racketeering Act, now called Hobbs Act). “[T]he conclusion seems inescapable that Congress intended that the language used in the [Hobbs Act] be broad enough to include, in proper cases, the forced payment of wages.” *Id.* at 891; see also *United States v. Enmons*, 410 U.S. 396, 403 (1973) (stating purpose of Hobbs Act). Congressman Hancock stated: “This bill is designed simply to prevent both union members and nonunion people from making use of robbery and extortion under the guise of obtaining wages in the obstruction of interstate commerce. That is all it does.” *Enmons*, 410 U.S. at 403; *United States v. Local 807, Int’l Bhd. of Teamsters*, 315 U.S. 521, 538 (1942) (holding Supreme Court’s decision put into perspective scope of Hobbs Act). The Supreme Court held that members of the Teamsters’ Union were exempt from the provisions of the Anti-Racketeering Act when attempting to obtain wages for a job through the threat of violence, whether they rendered any service or not. *Local 807, Int’l Bhd. of Teamsters*, 315 U.S. at 521.

³³ See *United States v. Strum*, 870 F.2d 769, 773 (1st Cir. 1989) (discussing whether “wrongful” applied to means used or to ends sought by alleged extortioner). “[T]he use of actual or threatened force or violence to obtain property is inherently wrongful.” *Id.*; *United States v. Kattar*, 840 F.2d 118, 123 (1st Cir. 1988) (ruling that means used to obtain end must be “wrongful”); *United States v. Coppola*, 671 F.3d 220, 241 (2nd Cir. 2012) (stating requirements necessary to meet wrongfulness element). “What is required is evidence that the defendant knowingly and willfully created or instilled fear or used or exploited existing fear with specific purpose of inducing another to part with property.” *Coppola*, 671 F.3d at 241.

³⁴ See *United States v. Enmons*, 335 F. Supp. 641, 643 (E.D. La. 1971) (explaining extortion under the Hobbs Act requires “wrongful” taking of property). In this case, violence erupted during a lawful strike. *Id.* at 641. The strike was meant to compel an employer to accept certain provision for higher wages. *Id.* The question before the court was whether the violence qualified as Hobbs Act extortion due to the violence making the strike unlawful. *Id.*; see also *Kattar*, 840 F.2d at 123 (holding that means used to obtain end must also be wrongful). “Actual or threatened force, violence or fear” is the Hobbs Act’s reference to the means of obtaining property that are wrongful. *Kattar*, 840 F.2d at 123.

³⁵ See *supra* text accompanying note 25; see also *Burhoe*, 871 F.3d at 9 (citing Hobbs Act, 18 U.S.C.S. § 1951(b)(2) (1948) (“The Hobbs Act references means used to obtain property through the phrase ‘actual or threatened force, violence, or fear.’”))

³⁶ See *Burhoe*, 871 F.3d at 9 (stating fear of economic harm not wrongful); *United States v. Rivera-Rangel*, 396 F.3d 476, 483 (1st Cir. 2005) (explaining how to establish extortion through fear of economic loss). “To establish extortion through fear of economic loss, the government

has been deemed wrongful “when [it’s] employed to achieve a wrongful purpose.”³⁷

In *United States v. Brissette*, the First Circuit held that a defendant need not receive a personal benefit when “obtaining” property under the Hobbs Act.³⁸ The court reached this conclusion by applying the MPC definition of “obtaining,” as the court in *Scheidler* did.³⁹ Though the defendants argued that the use of the word “obtaining” impliedly imposes a “personal benefit requirement,” the court viewed the term in context to rule

must ‘show that the victim believed that economic loss would result from his . . . failure to comply with the alleged extortionist’s terms, and that the circumstances . . . rendered that fear reasonable.’” *Rivera-Rangel*, 396 F.3d at 483 (quoting *United States v. Bucci*, 839 F.2d 825, 828 (1st Cir. 1988)). The court found that the plaintiff was making payments out of fear that they could lose the opportunity to compete with government contracts and future business opportunities with the state, not that they would simply lose the business altogether. *Rivera-Rangel*, 396 F.3d at 483-84; *see also* *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 523 (3d Cir. 1998) (stating fear of economic loss is normal business consequence and not inherently wrongful).

Indeed, the fear of economic loss is a driving force of our economy that plays an important role in many legitimate business transactions. This economic reality leads us to conclude that the reach of the Hobbs Act is limited in cases, such as this one, which involve the use of economic fear in a transaction between two private parties.

Brokerage Concepts, Inc., 140 F.3d at 523; *United States v. Capo*, 791 F.2d 1054, 1063 (2d Cir. 1986) (stating economic loss is not necessarily wrongful, but part of many business transactions).

We recognize, of course, that fear of economic loss plays a role in many business transactions that are entirely legitimate; awareness of that fear and use of it as leverage in bargaining, in which each side offers the other property, services, or rights it legitimately owns or controls, is not made unlawful by the Hobbs Act.

Capo, 791 F.2d at 1062.

³⁷ *See Kattar*, 840 F.2d at 123 (quoting *United States v. Clemente*, 640 F.2d 1069, 1077 (2d Cir. 1981). “Use of fear of economic loss is wrongful when employed to achieve the wrongful purpose of obtaining property to which one is not entitled.” *Id.*

³⁸ *See United States v. Brissette*, 919 F.3d at 685-686 (stating holding).

[The “obtaining of property”] element may be satisfied by evidence showing that the defendants induced the victim’s consent to transfer property to third parties the defendants identified, even where the defendants do not incur any personal benefit from the transfer and even where the transfer takes the form of wages paid for real rather than fictitious work.

Id.

³⁹ *See id.* at 677 (applying interpretive approach that Supreme Court used in *Scheidler*). There is nothing in *Scheidler* or similar case law that would suggest that the Hobbs Act codify a form of extortion different from common-law extortion. *Id.*; *see also Scheidler*, 537 U.S. 393, 410 (2003) (stating where MPC recognizes and defines extortion, Hobbs Act must have similar requirements).

against the defendants' position.⁴⁰ Once the court defined the term, it then used precedent to determine the application of "obtaining of property."⁴¹

The court rejected the appellees' argument that the element of "obtaining" cannot include a transfer of property to a third party, stating that the defendants misinterpreted the holding in *Sekhar v. United States*.⁴² Aligning itself with the Second, Third, Eighth, Ninth and Tenth Circuits, the First Circuit found that the "obtaining" element of the extortion provision of the Hobbs Act is satisfied when property is transferred to a third party, notwithstanding any personal benefit.⁴³ Lastly, by clarifying the

⁴⁰ See *id.* at 676-77 (stating defendants' interpretation of "obtaining").

The defendants nevertheless contend that the text – apparently through the use of the word "obtaining" itself – impliedly imposes that "personal benefit" requirement in a circumstance in which the defendant is charged only with having "induce[d]" the victim's "consent" to transfer "property" to an identified third party. But when we focus on the possible meaning of the word "obtaining," we see no reason to import such a "personal benefit" requirement into that text.

Id. at 676. The court states the surrounding context of the word "obtaining" reinforces their conclusion. *Id.*

⁴¹ See *Brissette*, 919 F.3d at 677 (following Supreme Court's interpretive approach in *Scheidler* to define "obtaining of property").

[In *Scheidler*], the Court was similarly confronted with a contention that the "obtaining of property" element in the Hobbs Act extortion provision did not encompass the conduct for which the defendants had been charged. The Court proceeded by looking to the common-law crime of extortion, which in turn led the Court to consider how the Model Penal Code ("MPC") defined extortion and its "obtaining of property" element.

Id. (citations omitted). The court then turned to Hobbs Act extortion precedent to directly address the application of the statute's "obtaining of property" element definition to the circumstances of the case at hand. *Id.*

⁴² See *id.* at 678 (citing *Sekhar v. United States*, 570 U.S. 729, 735 (2013)). The *Sekhar* holding stated that the Hobbs Act extortion provision's "obtaining of property" element requires proof of the acquisition of property – meaning "proof that 'the victim part[ed] with his property, and that the extortionist gain[ed] possession of it.'" *Id.* In correcting the defendant's misinterpretation of *Sekhar*, the First Circuit stated:

But, we do not see how [the holding] of *Sekhar* precludes the conclusion that a defendant may "acqui[re]" property within the meaning of *Sekhar* by directing its transfer from the victim to a party of his choosing, notwithstanding that he does not otherwise personally benefit from the transfer. *Sekhar* contains no suggestion that it reads the Hobbs Act to codify a form of extortion that, with respect to the "obtaining of property" element is distinct from the one set forth in the version of the MPC quoted by *Scheidler*.

Id. at 678-79.

⁴³ See *Brissette*, 919 F.3d at 679 (citing *United States v. Carlson*, 787 F.3d 939, 944 (8th Cir. 2015). The cases the *Brissette* court cited each held that a defendant is deemed to have acquired the property at issue by directing its transfer to another of his choosing, irrespective of whether he receives a personal benefit as a result. See also *United States v. Burhoe*, 871 F.3d 1, 27-29 (1st

purpose of the Hobbs Act, the court rejected the defendants' alternative arguments that their conduct did not warrant a Hobbs Act federal violation, but instead a possible common-law coercion violation.⁴⁴ Judge Baron, writing for the First Circuit, distinguished coercion from extortion by examining *United States v. Enmons* and *United States v. Kemble*, ultimately finding that the act of directing wages to a third person, regardless of whether it's for actual or fictitious labor, constitutes "obtaining property" under the Hobbs Act.⁴⁵

The defendants pointed to a line of cases concerning the "under color of official right" element of Hobbs Act extortion; however, the Court determined that these cases did not address the "obtaining" element and were therefore irrelevant to the case at hand.⁴⁶ The court solely dealt with the "under color of official right" element, which was not addressed in *Brissette* and *Sullivan's* indictment.⁴⁷ The court did not address the

Cir. 2017); *United States v. Vigil*, 523 F.3d 1258, 1264 (10th Cir. 2008); *United States v. Gotti*, 459 F.3d 296, 324 n.9 (2d Cir. 2006); *United States v. Panaro*, 266 F.3d 939, 943 (9th Cir. 2001); *United States v. Provenzano*, 334 F.2d 678, 686 (3d Cir. 1964).

⁴⁴ *See id.* at 681-82 (rejecting contention that defendants must obtain benefit themselves). The defendants argued that the Hobbs Act extortion provision does not apply because they were not trying to acquire Crash Line's right to hire their own workers, but rather attempting to procure an opportunity for union workers. *Id.* The defendants equated their behavior to that of *Sekhar's* cited example of common-law coercion, which contained no "obtaining of property" element. *Id.* They argued that the indictment failed to establish that they "directed" wages or benefits to anyone, and therefore their conduct was not extortion under the Hobbs Act. *Id.* at 680-81. The court explained that there is a difference between an interference with rights and a Hobbs Act extortion, which is why Congress choose to include the "obtaining of property" element in the language of the statute. *Id.* at 681 (citing *Sekhar*, 570 U.S. at 735). The First Circuit decided to address this argument despite the district court's silence on the issue, noting that it was closely related to the government's ability to prove the "obtaining of property" element and that the defendants had fully briefed it on appeal. *Id.* (citing *Oxford Aviation, Inc. v. Glob. Aerospace, Inc.*, 680 F.3d 85, 87-88 (1st Cir. 2012)).

⁴⁵ *See Brissette*, 919 F.3d at 682 (detailing what constitutes "obtaining property" under Hobbs Act). Referencing both *Enmons* and *Kemble*, Judge Baron stated that the court clearly concluded the employer's property was "misappropriated" and, therefore, the Hobbs Act applied. *Id.*

[T]he Supreme Court has made it quite clear in *Enmons* that "the Hobbs Act has properly been held to reach instances where union officials threatened force of violence against an employer in order to . . . exact 'wage' payments from the employer in return for imposed, unwanted, superfluous and fictitious services of workers."

Id. (citing *United States v. Enmons*, 410 U.S. 396, 400 & n.4 (1973)).

⁴⁶ *See id.* at 680 (noting that cases were largely irrelevant regarding "obtaining of property" element).

⁴⁷ *See id.* (stating that cases concerning "under color of official right" have no bearing on this case). "[T]he passages from these cases on which the defendants rely do not even concern the 'obtaining of property' element of the Hobbs Act extortion provision that is our concern here. They concern the statute's 'under color of official right element' which the indictment in this case does not implicate." *Id.*; *see also* Hobbs Act, 18 U.S.C. § 1951(b)(2) (1948) (separating elements

“wrongfulness” element of the provision, confining its holding to the “obtaining of property” element that the parties raised on appeal.⁴⁸

Ultimately, the First Circuit improperly expanded the extortion provision of the Hobbs Act in *Brissette v. United States*.⁴⁹ The Supreme Court has repeatedly held that the rule of lenity prevents courts from adopting a broad interpretation of an act where the language and history of the Hobbs Act is ambiguous.⁵⁰ In *United States v. Bass*, the Supreme Court listed two vitally important reasons for applying the rule of lenity: first, “a fair warning” and fair understanding of the law “should be given to the

of “obtaining property” and “under color of official right”); *Wilkie v. Robbins*, 551 U.S. 537, 564-65 (2007) (highlighting that “under color of official right” element is separate from “obtaining of property element”). “Under color of official right” cases require proof of “the sale of public favors for private gain.” *Wilkie*, 551 U.S. at 564; *Evans v. United States*, 504 U.S. 255, 267-68 (1992) (stating “under color of official right” requires proof of quid pro quo); *McCormick v. United States*, 500 U.S. 257, 273-74 (1991) (explaining public official’s convictions for extortion under “color of official” right prong of Hobbs Act). Specifically, a quid pro quo is a payment to a person in a position of public power in return for official acts. *See McCormick*, 500 U.S. at 273.

⁴⁸ *See Brissette*, 919 F.3d at 685 (explaining why court need not address wrongfulness element). Neither the district court nor the parties on appeal addressed the wrongfulness element; therefore, the First Circuit confined its holding to the elements of the parties’ arguments. *Id.*

[W]e express no view as to whether the indictment sufficiently alleges the other elements of Hobbs Act extortion or whether the government would ultimately be able to prove its case beyond a reasonable doubt were it to proceed to trial. Thus, we express no view as to whether, for example, the defendants’ conduct was “wrongful,” as it must be under the statute

Id.

⁴⁹ *See United States v. Enmons*, 410 U.S. 396, 411 (1973) (stating Hobbs Act cannot be expanded). “[T]his being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity.” *Id.*

⁵⁰ *See United States v. Bass*, 404 U.S. 336, 347 (1971) (explaining preference for narrower reading of ambiguous criminal statutes).

In various ways over the years, we have stated that “when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.”

Id. (quoting *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-222 (1952)); *see also United States v. Enmons*, 410 U.S. 396, 411 (1973) (stating it is improper to expand application of Hobbs Act). “Even if the language and history of the Act were less clear than we have found them to be, the Act could not properly be expanded as the Government suggests . . .” *Enmons*, 410 U.S. at 411; *Rewis v. United States*, 401 U.S. 808, 812 (1971) (stating “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”); *Bell v. United States*, 349 U.S. 81, 83 (1955) (explaining Congress’s role of enacting statute and judiciary’s of applying statute). When Congress enacts statutes that leave elements of criminal offenses undefined, it “leaves to the Judiciary the task of imputing to Congress an undeclared will, [and] the ambiguity should be resolved in favor of lenity.” *Bell*, 349 U.S. at 83; *Arroyo v. United States*, 359 U.S. 419, 424 (1959) (reasoning penal laws cannot be construed so strictly as to defeat obvious intention of legislature).

world in language that the common world will understand,” and second, due to the severity of criminal penalties, legislators should be responsible for defining statutory criminal activity rather than judges.⁵¹ While the Act was historically designed to address highway robberies, the Supreme Court has given it a broader application that includes acts of robbery and extortion that were traditionally addressed through state law.⁵² This expansion stems from the “*de minimis* standard” that has applied to cases with a tenuous effect on interstate commerce, resulting in the expansion of federal jurisdiction into areas traditionally governed by state law.⁵³ In his dissenting opinion in *Evans v. United States*, Justice Thomas critiqued this expansion of the Hobbs Act to include acts of public corruption by state and local officials, stating that “[o]ver the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws.”⁵⁴

An expansive view of the Hobbs Act raises a federalism concern because it impedes States’ substantial sovereign powers.⁵⁵ Under the U.S.

⁵¹ See *United States v. Bass*, 404 U.S. at 348 (stating two important reasons for applying rule of lenity); Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 101-02 (2016) (explaining origin and purposes of applying rule of lenity). The courts have applied four differing standards to determine whether a statute is sufficiently ambiguous that the rule of lenity requires an interpretation in favor of the defendant: whether the state’s interpretation is unambiguously correct, whether there is reasonable doubt as to the meaning of the statute, whether the court can make “no more than a guess” at the statute’s meaning, and whether there is grievous ambiguity in the statute’s text. Ortner, *supra* note 51, at 106-20.

⁵² See Evola, *supra* note 22, at 7 (describing Supreme Court’s expanded interpretation of Hobbs Act to include robbery and extortion); Alperin, *supra* note 25, at § 3 (explaining reasons for enacting Anti-Racketeering Act and later Hobbs Act).

⁵³ See *United States v. Rivera-Rivera*, 555 F.3d 277, 286 (1st Cir. 2009) (noting well-established rule that Hobbs Act conviction requires only *de minimis* interference with commerce); see also Evola, *supra* note 22, at 7-8 (providing further explanation and context on *de minimis* standard).

⁵⁴ See *Evans v. United States*, 504 U.S. 255, 290 (1992) (Thomas, J., dissenting) (criticizing majority’s interpretation of Hobbs Act as “repugnant” to federalism). Justice Thomas opined that, when courts adopt broader readings of statutes like the Hobbs Act, it can “become[] impossible to tell where prosecutorial discretion ends and prosecutorial abuse, or even discrimination, begins.” *Id.* at 296. “The potential for abuse, of course, is particularly grave in the inherently political context of public corruption prosecutions.” *Id.* at 296-97; see also Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1213-14 (1977) (arguing federal prosecutors tend to abuse discretion criminal statutes grant them); Charles N. Whitaker, Note, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for A Structured Approach*, 78 VA. L. REV. 1617, 1653 (1992) (stating expansion of Hobbs Act should be curtailed by limiting jurisdiction under federal statutes).

⁵⁵ See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”) The Supreme Court has reinforced this principle for more than a century. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (explaining dual sovereignty between states and federal

Constitution, states have the power to determine and regulate the scope of interaction between appointed officials and their constituents.⁵⁶ This issue of federalism overshadows public officials' responsibility to their respective communities and constituents, and makes it difficult to differentiate extortion and representative government conduct.⁵⁷ The Hobbs Act's expansion of jurisdiction over criminal acts that are traditionally policed by state and local laws has given federal prosecutors "a license for ferreting out all wrongdoing[s] at a state and local level," by allowing them to "prosecute state officials for political courtesies and other innocent acts that are part of the fabric of American political life."⁵⁸

government); *Lane Cty. v. State of Oregon*, 74 U.S. 71, 76 (1868) ("The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence."); *Texas v. White*, 74 U.S. 700, 725 (1868) ("[T]he perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States.")

⁵⁶ See *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (describing regulatory power of states). "A state defines itself as a sovereign through 'the structure of its government, and the character of those who exercise government authority.'" *Id.* (quoting *Ashcroft*, 501 U.S. at 460); see also *United States v. Enmons*, 410 U.S. 369, 410-11 (1973) (rejecting "broad concept of extortion" that would lead to "an unprecedented incursion into the criminal jurisdiction of the States.")

⁵⁷ See *Amici Curiae Brief of 77 Former State Attorneys General*, *supra* note 22, at 18 (arguing broad interpretation of Hobbs Act blurs public officials' delivery of basic services to constituents); see also Judge Nancy Gertner, *There Should Be a Chorus Crying Foul Over Boston Calling Verdict*, *The BOSTON GLOBE* (August 28, 2019, 11:26 AM), <https://www.bostonglobe.com/opinion/2019/08/28/there-should-chorus-crying-foul-over-boston-calling-verdict/UKU4JzlhSC6CiN4CYz9DFJ/story.html> (providing thought provoking question about role of public officials).

If the purpose here was to "secure real work for members of a specific union" (the First Circuit's words in an earlier *Brissette-Sullivan* appeal), how can that be unlawful? Assume no union involvement: Let's say a company using city property for a concert doesn't hire women or minorities. A city official says to the company representative, "[i]f you don't hire women or minorities, you will be picketed by women's groups or by the NAACP." And let's say the support of those groups happened to have been crucial to his boss's election. Is that extortion or just representative government?

The law doesn't distinguish between constituents—the ones you are allowed to help, and the one you can't. In fact, unions are an important constituency. That's why so many observers are decrying the jury's verdict.

Gertner, *supra* note 57.

⁵⁸ See *Amici Curiae Brief of 77 Former State Attorneys General*, *supra* note 22 (explaining how prosecutors may prosecute crimes covered by both state and local laws); see also *Evans*, 504 U.S. at 290-91 (Thomas, J., dissenting) (alteration in original) (citing *United States v. Kenny*, 462 F.2d 1205, 1229, cert. denied, 409 U.S. 914 (1972) (explaining how *Kenny* altered distinction between extortion and bribery).

Kenny obliterated the distinction between extortion and bribery, essentially creating a new crime encompassing both. "As effectively as if there were federal common law crimes, the court in *Kenny* . . . amended the Hobbs Act and [brought] into existence a

Lastly, the First Circuit Court of Appeals failed to address whether the defendants' conduct under the extortion provision of the Hobbs Act would ultimately satisfy the statute's "wrongfulness" requirement.⁵⁹ The court should have determined whether the public officials in this case impeded on "the right [of Crash Line] to make business decisions free from outside pressures wrongfully imposed."⁶⁰ To answer this question, the court would need define and apply "wrongful" to the circumstances of the case.⁶¹ Due to many circuits' view that fear of economic harm is not inherently "wrongful," it is likely that a court could find this element of the provision unsatisfied.⁶²

In *United States v. Brisette*, the First Circuit Court of Appeals considered how to properly define and apply the elements of the extortion provision of the Hobbs Act. The court overturned the district court's decision and held that, under the Hobbs Act, a defendant need not receive a personal benefit when "obtaining" property through extortion. In doing so, the court improperly applied the rules of statutory construction and impeded on the state of Massachusetts' sovereign power to regulate the behavior of its own public officials. There is a longstanding debate regarding where the line can be drawn between public officials engaging in forceful advocacy for their constituents and engaging in unlawful extortion. In this case, the First Circuit took an incorrect and overly expansionist approach by criminalizing behavior that should be considered legitimate public advocacy.

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new crime—local bribery affecting interstate commerce. Hereafter, for purposes of Hobbs Act prosecutions, such bribery was to be called extortion. The federal policing of state corruption had begun."

Id. at 291 (quoting J. NOONAN, BRIBES 586 (1984)).

⁵⁹ See *United States v. Coppola*, 671 F.3d 220, 241 (2nd Cir. 2012) (stating requirements necessary to meet wrongfulness element).

⁶⁰ See *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978) (holding defendant guilty of Hobbs Act extortion). "We agree with the government that here . . . the property extorted was the right of [third party] to make a business decision free from outside pressure wrongfully imposed, and this is sufficient to sustain the [Hobbs Act] convictions . . ." *Id.*

⁶¹ See *United States v. Kattar*, 840 F.2d 118, 123 (1st Cir. 1988) (stating means used to obtain end must be "wrongful"). The court made clear that the use of actual or threatened violence or force is inherently wrongful. *Id.*

⁶² See *supra* text accompanying note 38 (stating fear of economic loss is normal business consequence and not inherently wrongful).

**TRADEMARK LAW—LOOKING OUT FOR THE
BIG GUYS: OUTDATED PRECEDENT REVEALS
THE NEED FOR NEW LEGAL TEST IN *FORTNITE*
LIKENESS CASE—*PELLEGRINO V. EPIC GAMES,
INC.*, 451 F. SUPP. 3D 373 (E.D. PA. 2020).**

States have an interest in both protecting an individual’s right of publicity and safeguarding the proprietary interest in their acts and likeness.¹ In a world of viral videos and overnight fame, issues have arisen regarding the extent to which public figures have ownership over their image and signature moves, and whether third parties, like video game developers, can profit off them.² In *Pellegrino v. Epic Games, Inc.*,³ the United States District Court for the Eastern District of Pennsylvania considered whether Epic Games, Inc. (“Epic”) misappropriated Leo Pellegrino’s (“Pellegrino”) likeness and signature move when creating the “Phone It In” emote for its game *Fortnite Battle Royale* (“Fortnite”).⁴ The court ultimately dismissed Pellegrino’s right of publicity claims and found that Epic’s use of Pellegrino’s likeness in creating the “Phone It In” emote satisfied the Transformative Use Test (“Test”), granting the emote First Amendment protection.⁵

Pellegrino is a professional baritone saxophone player and member of the “brass house” group Too Many Zooz.⁶ At concerts and festivals, Pellegrino performs his signature move: a series of movements that “express his own unique dancing style.”⁷ Pellegrino performs his signature move so frequently and in front of so many people that “it has become inextricably linked to his identity.”⁸ Epic is a video game developer that cre-

¹ See *Zacchini v. Scripps-Howards Broad. Co.*, 433 U.S. 562, 573 (1977) (highlighting right of publicity is “right of the individual to reap reward of his endeavors”).

² See Katie Thomas, *Image Rights vs. Free Speech in Video Game Suit*, N.Y. TIMES (Nov. 15, 2010), <https://www.nytimes.com/2010/11/16/sports/16videogame.html> (discussing importance of balancing First Amendment free speech rights against right of publicity).

³ 451 F. Supp. 3d 373 (E.D. Pa. 2020).

⁴ See *id.* at 378 (describing legal issue).

⁵ See *id.* at 381 (concluding Epic’s use of Pellegrino’s likeness is sufficiently transformative); see also *infra* notes 25-26 (describing Transformative Use Test).

⁶ See *Pellegrino*, 451 F. Supp. 3d at 378 (describing Pellegrino’s profession).

⁷ See *id.* (explaining Pellegrino’s unique ability and anatomy to perform signature move). “Using his unique anatomy—specifically his externally rotatable feet—Pellegrino was able to create the Signature Move. . . .” *Id.*

⁸ See *id.* at 378 (explaining how Pellegrino’s signature move has become synonymous with him).

ated Fortnite, one of the most popular video games ever.⁹ It is described as “a battle royale video game that blends survival, exploration, and scavenging elements with last-man-standing gameplay.”¹⁰ Within its free-to-play game, Epic generates revenue through in-game purchases, such as customizable outfits and content for player avatars; this content includes their popular “emotes,” which allow players to cause their Fortnite avatar to perform certain dances, movements, or acts.¹¹ By copying moves from popular ce-

⁹ See Nick Statt, *Fortnite is Now One of the Biggest Games Ever with 350 Million Players*, THE VERGE (May 6, 2020, 1:54 PM), <https://www.theverge.com/2020/5/6/21249497/fortnite-350-million-registered-players-hours-played-april> (stating Fortnite has over 350 million registered players with billions of logged playtime hours); Kevin Webb, *'Fortnite' Was the Most Important Video Game of This Decade, and It Will Be For the Next One Too*, BUSINESS INSIDER (Dec. 29, 2019, 10:05 AM), <https://www.businessinsider.com/fortnite-most-influential-video-game-decade-2019-12> (stating Fortnite generated \$2.4 billion in 2018).

¹⁰ See Pellegrino, 451 F. Supp. 3d at 378 (noting Epic’s significant growth in valuation because of Fortnite); see also Yousef Saifi, *Fortnite NFL Skins: New Fortnite Football Skins Leaked Gridiron Gang Outfits*, FORTNITE INSIDER (Nov. 23, 2020), <https://fortniteinsider.com/fortnite-nfl-skins-new-fortnite-football-skins-leaked/> (explaining Fortnite’s two-time collaboration with NFL, once in 2018 and again in 2020). The game is so popular that even the National Football League (“NFL”) collaborated for a cut of the profit. Saifi, *supra* note 10. Fortnite allowed players to buy skins for their avatars representing any of the thirty-two NFL teams with a customizable player number to place on the back of the skin’s jersey. Saifi, *supra* note 10; Isaiah Alonzo, *'Fortnite' x Houseparty: How to Use Live Video Chat While Playing and Get Rainbow Fog Wrap!*, TECH TIMES (Nov. 20, 2020, 1:44 AM), <https://www.techtimes.com/articles/254334/20201120/fortnite-x-houseparty-use-live-video-chat-playing-rainbow-fog.htm> (outlining Epic’s goal to bring live video chat into game without employing third-party device). Epic has also partnered with Houseparty, a video chatting app, in hopes of integrating live video chat on the screen while playing the game. Alonzo, *supra* note 10; Tom Gerken, *Fortnite: 'Millions Attend' Virtual Marshmello Concert*, BBC (Feb. 4, 2019), <https://www.bbc.com/news/blogs-trending-47116429> (describing phenomenon of Fortnite’s first live concert); Marc Hogan, *Where Can Virtual Concerts Go After Travis Scott's Fortnite Extravaganza?*, PITCHFORK (May 5, 2020), <https://pitchfork.com/thepitch/virtual-concerts-travis-scotts-fortnite-100-gecs-minecraft/> (showing how Fortnite’s success in virtual concerts has inspired others); Andrew Webster, *Fortnite is Launching a Concert Series it Hopes Will Become a 'Tour Stop' for Artists*, THE VERGE (Sept. 8, 2020, 10:00 AM), <https://www.theverge.com/2020/9/8/21423004/fortnite-party-royale-concert-series-dominic-fike> (describing musical performances held in Fortnite’s virtual platform by artists like Diplo and Steve Aoki). With the Fortnite and Houseparty collaboration, Epic has taken yet another step to transform Fortnite from a basic video game to a virtual reality where people can listen to concerts, video chat with friends, and play a battle royale shooter simultaneously. Gerken, *supra* note 10; Digital Staff, *Fortnite Isn't Just a Game, It's a Social Platform – and It's Eclipsing Facebook*, 7NEWS (June 11, 2019, 12:22 PM), <https://7news.com.au/the-morning-show/fortnite-isnt-just-a-game-its-a-social-platform-and-its-eclipsing-facebook-c-162425> (referencing studies that show Fortnite players spend more time playing than using social media). With Fortnite’s success, some people say that Fortnite is no longer just a video game, but rather a social platform that has grown bigger than anyone could have imagined. Digital Staff, *supra* note 10; Bijan Stephen, *Fortnite was 2018's Most Important Social Network*, THE VERGE (Dec. 21, 2018, 2:37 PM), <https://www.theverge.com/2018/12/21/18152012/fortnite-was-2018s-most-important-social-network> (describing Fortnite as cultural phenomenon accessible by almost every device).

¹¹ See Pellegrino, 451 F. Supp. 3d at 378 (explaining Epic creates emotes by copying dances and movements from pop culture, sometimes without consent); see also *Best Fortnite Dances in*

lebrities and viral videos, Epic promotes the purchase of these emotes because it allows players to mimic their favorite idols in-game.¹²

Real Life!, BEANO, <https://www.beano.com/posts/7-best-fortnite-dances-in-real-life> (last visited Oct. 19, 2020) (showing use of *Scrubs* dance move as default battle royale dance). The free default dance available to every player is based on the dance moves of a character named Turk from the comedy television show *Scrubs*. *Best Fortnite Dances in Real Life!*, *supra* note 11. Other examples of emotes taken from pop culture are the “Best Mates” emote based on Marlon Webb’s dancing and the “Fresh Dance” emote based on the dancing of Alfonso Ribeiro’s character, Carlton Banks, from *The Fresh Prince of Bel-Air*. *Best Fortnite Dances in Real Life!*, *supra* note 11; Kiril Stoilov, *Top 7 Celebrity Fortnite Skins That Look Most Like the Original*, EARLY GAME (Sep. 4, 2020), <https://www.earlygame.com/top-7-celebrity-fortnite-skins-that-look-most-like-the-original/> (providing pictures of notable collaboration skins). While Epic has created many emotes based on pop culture and individuals’ identities without permission, Epic has contracted to collaborate with famous figures such as streamer and professional gamer, Tyler “Ninja” Blevins, iconic streamer, Kathleen “Loserfruit” Belsten, DJ Marshmello, and rapper, Travis Scott. Stoilov, *supra* note 11; Dipanjan Dey, *More Accurate than Ninja Skin- New Fortnite Skin for Iconic Streamer*, ESSENTIALLY SPORTS (June 22, 2020, 12:07 PM), <https://www.essentiallysports.com/more-accurate-than-ninja-skin-new-fortnite-skin-for-iconic-streamer-esports-epic-games-loserfruit-news/> (showcasing Loserfruit’s collaboration skin).

¹² See *Pellegrino*, 451 F. Supp. 3d at 378 (noting emotes’ popularity such that professional athletes perform Fortnite emotes in on-field celebrations). “Emotes have become popular even outside of Fortnite. For example, professional athletes perform celebrations based on Fortnite emotes and other people post social media videos of themselves executing the emotes.” *Id.*; see also Adi Robertson, *Most of the Fortnite dance lawsuits are on pause*, THE VERGE (Mar. 9, 2019, 12:23 PM), <https://www.theverge.com/2019/3/9/18257385/epic-fortnite-lawsuit-ribeiro-2milly-dance-emote-lawsuits-withdrawn-pause-registration> (providing examples of other people and videos Epic has used for emotes); Nick Statt, *Fortnite Keeps Stealing Dances – And No One Knows If It’s Illegal*, THE VERGE (Dec. 20, 2018, 8:55 AM), <https://www.theverge.com/2018/12/20/18149869/fortnite-dance-emote-lawsuit-milly-rock-floss-carlton> (noting claims of well-known celebrities like 2 Milly and lesser known figures like “Backpack Kid”); *Collaborations*, FANDOM, <https://fortnite.fandom.com/wiki/Collaborations> (last updated Mar. 7, 2021) (listing Fortnite’s collaborations). Fortnite has become so successful that many companies and celebrities want to collaborate with Epic to promote themselves to an audience of millions. Paul Tassi, *‘Fortnite’ Could Follow Its Marvel Season with a DC Season*, FORBES (Aug. 30, 2020, 10:34 AM), <https://www.forbes.com/sites/paultassi/2020/08/30/fortnite-could-follow-its-marvel-season-with-a-dc-season/?sh=21ec04152290> (reporting how Marvel and DC Comics have been competing for collaborations with Fortnite); Webb, *supra* note 9 (describing success of Fortnite and player base); Oscar Gonzalez, *Fortnite X Stranger Things Adds Chief Hopper, Demogorgon Skins for Crossover*, CNET (July 5, 2019, 6:01 AM), <https://www.cnet.com/news/fortnite-x-stranger-things-adds-chief-hopper-demogorgon-skins-for-crossover/> (describing Fortnite’s collaboration with hit TV show “Stranger Things”). Even television shows have joined the long list of collaborators as Fortnite has become a formative tool for promoting new content and attracting new viewers. See Gonzalez, *supra* note 12; Andrew Webster, *The Mandalorian is the Perfect Fortnite Character*, THE VERGE (Dec. 2, 2020, 11:05 AM), <https://www.theverge.com/2020/12/2/22028767/the-mandalorian-fortnite-perfect-character-season-5> (describing Fortnite’s collaboration with hit TV show *The Mandalorian*); Andrew Webster, *The New Trailer for Christopher Nolan’s Tenet Will Air in Fortnite*, THE VERGE (May 21, 2020, 4:24 PM), <https://www.theverge.com/2020/5/21/21266768/fortnite-party-royale-christopher-nolan-tenet-trailer> (explaining how world premiere trailer for *Tenet* aired on Fortnite on hourly basis). Some collaborators who have less faith in Fortnite’s influence, such as Christopher Nolan, will not allow their characters in the game, but still admit that working with Epic would benefit them in the long run due to sheer publicity. *The New Trailer for Christopher No-*

One of the emotes Epic created and currently profits from is the “Phone It In” emote, which is identical to Pellegrino’s signature move.¹³ While many Fortnite players recognized the emote as Pellegrino’s signature move, some players were under the false impression that it was Epic’s original creation.¹⁴ As a result, Pellegrino brought suit against Epic and asserted that it used his name or likeness without consent in violation of Pennsylvania statute § 8316.¹⁵ The district court ultimately dismissed Pellegrino’s § 8316 claim because he was unable to prove that the “Phone It In” emote resembled his appearance or biographical information.¹⁶ Moreover, in applying the Transformative Use Test, the court emphasized that Fortnite players can customize their characters with various emotes that mimic celebrities other than Pellegrino.¹⁷ The court further reasoned that emotes are utilized in a battle royale setting—whereas Pellegrino ex-

lan’s Tenet Will Air in Fortnite, *supra* note 12; Patricia Hernandez, *Fortnite Fans are Making Kratos Dance, and it’s Amazing*, POLYGON (Dec. 4, 2020, 2:18 PM), <https://www.polygon.com/fortnite/2020/12/4/22153779/fortnite-god-of-war-kratos-emote-dance-epic-games-sony-sequel-ps5> (explaining Kratos’ character in Fortnite contrasts with Kratos’ more serious character in *God of War*). With all of Epic’s success, other gaming companies, such as Sony Interactive Entertainment, capitalized on Fortnite’s publicity by collaborating with Epic to add characters from their own popular games such as Psycho from *Borderlands 3* and Kratos from *God of War*. Hernandez, *supra* note 12; Andrew Webster, *Fortnite’s New Borderlands 3 Crossover Features Psycho, Claptrap, and a Pandora Zone*, THE VERGE (Aug. 27, 2019, 8:44 AM), <https://www.theverge.com/2019/8/27/20834819/fortnite-borderlands-3-crossover-psycho-claptrap-pandora> (explaining Fortnite’s *Borderlands 3* collaboration).

¹³ See *Pellegrino*, 451 F. Supp. 3d at 378 (noting name of emote refers to Pellegrino’s appearance in 2017 Google Pixel 2 Phone commercial). Epic generates revenue when players purchase emotes, like “Phone It In”, from the “in-game electronic storefront.” *Id.*

¹⁴ See *id.* at 379 (noting players’ high awareness about relationship between “Phone It In” and Pellegrino’s signature move). Pellegrino argued that players who are unaware that the “Phone It In” emote imitates Pellegrino’s signature move “have the false impression that the ‘Phone It In’ emote was Epic’s original creation because Epic does not credit Pellegrino as the Signature Move’s creator and owner.” *Id.*

¹⁵ See 42 PA. CONS. STAT. ANN. § 8316 (allowing individuals to bring actions against unauthorized use of their name or likeness); *Pellegrino*, 451 F. Supp. 3d at 379 (summarizing Pellegrino’s claims against Epic). Pellegrino made a claim for unauthorized use of his name and likeness in violation of § 8316. *Pellegrino*, 451 F. Supp. 3d at 379. He also brought claims under misappropriation of publicity, invasion of privacy by misappropriation of identity, unjust enrichment for using his trademark, unfair competition for using his likeness, and trademark infringement all under Pennsylvania common law. *Pellegrino*, 451 F. Supp. 3d at 379. Pellegrino’s last two claims were for trademark infringement and trademark dilution under the Lanham Act. *Pellegrino*, 451 F. Supp. 3d at 379; see also 15 U.S.C. §§ 1125 (a), (c) (prohibiting trademark infringement and trademark dilution).

¹⁶ See *Pellegrino*, 451 F. Supp. 3d at 381 (noting avatar equipped with “Phone It In” emote did not resemble Pellegrino whatsoever).

¹⁷ See *id.* (explaining Fortnite players can cause their avatars to perform emotes). The court discussed the allegations in the complaint and acknowledged that Fortnite players can customize their avatars with new characters. See *id.* However, the court noted that the photos provided in the complaint did not share any resemblance to Pellegrino. See *id.*

cutes his signature move at musical performances and festivals—thereby making Epic’s “Phone It In” emote sufficiently transformative to be granted First Amendment protections.¹⁸

The right of publicity grants famous figures the ability to control and profit from certain uses of their identities.¹⁹ In an effort to protect this right, courts have utilized different balancing tests to limit others from copying a famous figure’s signature moves.²⁰ One such test came from the United States Court of Appeals for the Second Circuit decision *Rogers v. Grimaldi*; here, the court created a two-prong test to determine whether a work is protected under the First Amendment.²¹ The first prong examines the title of the work and the second prong states that no protection will be granted if the work clearly misleads consumers as to the source or content of the work.²² This test has been met with criticism, however, as it is ill-suited for application to video games.²³ Another test is the Predominant Use Test, as applied by the Missouri Supreme Court in *Doe v. TCI Cablevi-*

¹⁸ See *id.* at 381-82 (concluding Epic’s use of emote constitutional under Transformative Use Test).

¹⁹ See Matthew D. Bunker & Emily Erickson, *Transformative Variations: The Uses and Abuses of the Transformative Use Doctrine in Right of Publicity Law*, 14 WASH. J.L. TECH. & ARTS 138, 139 (2019) (explaining history of right of publicity); see also William K. Ford & Raizel Liebler, *Games Are Not Coffee Mugs: Games and the Right of Publicity*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 6-7 (2012) (discussing how right of privacy led to right of publicity).

²⁰ See Joseph Gutmann, Note, *It’s in the Game: Redefining the Transformative Use Test for the Video Game Arena*, 31 CARDOZO ARTS & ENT. L.J. 215, 219 (2012) (describing three primary balancing tests courts have used).

²¹ See *Rogers v. Grimaldi*, 875 F.2d 994, 997-99 (2d Cir. 1989) (evaluating claim by dancer against movie producer for incorporating characters that mimicked dancer’s identity).

²² See *id.* at 999 (stating goal of test is to avoid consumer confusion). Under the first prong, courts examine the title of the work and will deem a work unprotected if that title has no artistic relevance to the original work. See *id.* The second prong of the test focuses on misleading titles, and the court in *Rogers* explained that a misleading title with no artistic relevance would violate the Lanham Act. See *id.*; see also *Parks v. LaFace Records*, 329 F.3d 437, 459 (6th Cir. 2003) (applying test and finding artistic relevance of title to song lyrics highly questionable). For example, a song titled *Rosa Parks* was deemed unprotected because it “ma[de] no explicit statement that the work is about that person in any direct sense” and its title had no artistic relevance to the original work. See *Parks*, 329 F.3d at 459. The court reasoned that, though the song referenced Rosa Parks for marketing reasons, “[t]he composers did not intend [the song] to be about Rosa Parks, and the lyrics are not about Rosa Parks.” See *Parks*, 329 F.3d 437 at 452.

²³ See Gutmann, *supra* note 20, at 220 (arguing deception is not indicative of work being complete imitation). Gutmann further explains that a work can be a complete imitation even if it is not deceptive. See *id.* While imitations have almost no creative value on their own, they would still undeniably pass the *Rogers* test. See *id.* As a result, the *Rogers* test is not appropriate when applied to most forms of media, such as video games, where issues are much more complex. See *id.*

sion²⁴; there, the court examined the creative intent behind the work and held that protection will only be granted where there is intent to make a distinct creative work.²⁵ The Predominant Use Test is not immune from criticism either, as it fails to properly examine works that seek to make an expressive comment while directly imitating a famous figure's likeness.²⁶

Finally, courts utilize the Transformative Use Test, which the United States Court of Appeals for the Third Circuit expanded upon in *Hart v. Electronic Arts, Inc.*²⁷ The Transformative Use Test asks if the imitation is so transformed that it mainly becomes a defendant's own expression rather than the celebrity's likeness.²⁸ Like the *Rogers* and Predominant Use Tests, the Transformative Use Test has not escaped criticism because it lacks clear, objective guidelines and essentially allows judges to base decisions on external factors.²⁹ The Transformative Use Test has been used in a myriad of cases and continues to be used even as it is met with changing circumstances, such as the video game industry's continued incorporation of pop culture figures.³⁰

A notable invocation of the Transformative Use Test came with *Winter v. DC Comics*, where the Supreme Court of California found that

²⁴ See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374-76 (Mo. 2003) (applying Predominant Use Test).

²⁵ See *id.* at 374 (stating expressive values are given greater weight when predominant purpose of product comments on celebrity). The court explained that a product sold for the main purpose of exploiting the commercial value of an individual's identity is a clear violation of the right of publicity and not protected by the First Amendment. See *id.* While, under certain circumstances, there may be some "expressive" content in the product that could qualify as "speech," this would not be sufficient to grant the product protections. See *id.* On the other hand, a product whose predominant purpose is to make an expressive comment on or about a celebrity is given greater leeway as the expressive values are greater. See *id.*

²⁶ See Gutmann, *supra* note 20, at 221 (admitting that creative intent is important, but test is still not enough).

²⁷ See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 145 (3d Cir. 2013) (utilizing Transformative Use Test).

²⁸ See *id.* at 160 (explaining that "expression" means something other than likeness of celebrity). In a case of first impression, the Third Circuit determined that the Transformative Use Test was the proper analytical framework to examine the right of publicity and how it interacts with the First Amendment. See *id.* at 165; see also *Comedy III Prods. Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001) (establishing Transformative Use Test). The origin of the Transformative Use Test came from the Supreme Court of California, which stated the inquiry as follows: "whether the product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness." *Comedy III Prods. Inc.*, 21 P.3d at 809.

²⁹ See David Tan, *Political Recoding of the Contemporary Celebrity and the First Amendment*, 2 HARV. J. SPORTS & ENT. L. 1, 25-26 (2011) (arguing Test allows judges to base decisions on external factors like fame of artist).

³⁰ See Gutmann, *supra* note 20, at 222 (demonstrating how courts deciding on same video game came to different conclusions).

using the likeness of two musicians to create two half-worm, half-human comic book characters was sufficiently transformative and therefore protected by the First Amendment.³¹ A few years later, the California Court of Appeal addressed a singer's claim against a video game producer in *Kirby v. Sega of America, Inc.*, where the singer claimed a video game character used her persona.³² The court in *Kirby* held that Sega of America was protected because the character in the game, Ulala, was not a literal depiction of the plaintiff, American musician Kirby, but was instead based on a Japanese "anime" style character with a different storyline and background from Kirby.³³ In contrast, the California court found in favor of the plaintiff in *No Doubt v. Activision Publishing, Inc.*, ruling that there was insufficient transformation where avatars, based on the musicians of a popular rock band, performed in outer space venues in a video game, because the game still involved the plaintiff band members doing what they typically do—singing and performing music.³⁴ In two important Electronic Arts

³¹ See *Winter v. D.C. Comics*, 69 P.3d 473, 479 (Cal. 2003) (explaining differences in appearance between plaintiffs and comic book characters). In this case, famous musicians Johnny and Edgar Winter, who had distinctive long white hair due to albinism, claimed that their depictions in a comic book miniseries misappropriated their likeness. See *id.* at 476. The comic book characters in question were Johnny and Edgar Autumn, also known as the Autumn brothers, and they are depicted as "villainous half-worm, half-human offspring." See *id.* The plaintiffs argued that the defendant misappropriated both their names, Johnny and Edgar, and their likeness as to the plaintiffs' long white hair. See *id.* However, the court found that the comics depicted the plaintiffs in a way that was so unique and creative that it gave birth to something new and expressive, such that it deserved First Amendment protection. See *id.* at 480. The court reasoned that the plaintiffs were "merely part of the raw materials from which the comic books were synthesized," and their likeness was so distorted in the comic that Winter brothers' fans who wanted to purchase pictures of them would find the drawings of the Autumn brothers unsatisfactory as a substitute for the real Winter brothers. See *id.* at 479.

³² See *Kirby v. Sega of America, Inc.*, 50 Cal. Rptr. 3d 607, 608-09 (Cal. Ct. App. 2006) (describing Kirby's claims).

³³ See *id.* at 615-17 (explaining differences between Ulala and Kirby that warranted protection). The court noted that Kirby and the character Ulala's backgrounds differed significantly, notably because Ulala was a news reporter living in a fantasy world and not a musician. *Id.*; see also Kevin L. Chin, Note, *The Transformative Use Test Fails to Protect Actor-Celebrities' Rights of Publicity*, 13 NW. J. TECH. & INTELL. PROP. 197, 204 (2015) (explaining significant role of activity and work setting in applying Test).

³⁴ See *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 401 (Cal. Ct. App. 2011) (holding song played in different venue not transformative enough). This case involved ska-pop rock band No Doubt, who sued Activision Publishing, Inc. ("Activision") for using their likeness in ways outside the scope of the license granted to Activision for the use of their likeness and music in the popular video game *Band Hero*. See *id.* at 400. No Doubt was unaware that there was a feature in the game that allowed players to use No Doubt's likeness to perform songs other than their own. See *id.* at 402. The court found the First Amendment did not protect Activision in this instance, because, while the setting in which the band performed could be changed in-game, the fact that the band still performed rock songs—the very same activity that the band used to achieve its fame—was not enough to transform the game into a new, expressive creation. See *id.* at 411-12.

(“EA”) cases, *Hart v. Electronic Arts, Inc.*, and *Keller v. Electronic Arts, Inc.*, two different federal courts examined video games focused on collegiate sports and held that there was insufficient transformative use of student-athletes to provide First Amendment protection.³⁵ Most recently, in *Mitchell v. Cartoon Network, Inc.*, a court examined the likeness of a television character to the plaintiff, Billy Mitchell, a figure in the video gaming community well-known for his world record high scores in famous arcade games, and found the defendant’s use of the plaintiff’s likeness was sufficiently transformative under the Test.³⁶

³⁵ See *Keller v. Elec. Arts, Inc.* (In re NCAA Student-Athlete Name & Likeness Licensing Litig.), 724 F.3d 1268, 1284 (9th Cir. 2013) (holding that video game’s use of player likeness not protected by First Amendment). In *Keller*, the Ninth Circuit found that EA’s use of National Collegiate Athletic Association (“NCAA”) student-athlete likenesses was not sufficiently transformative to warrant First Amendment protection because the video games literally recreated playing college football, the same setting in which the student-athletes had achieved their celebrity status in the first place. See *id.* at 1276. The Ninth Circuit drew many parallels to *No Doubt* in reaching its decision, as both cases involved celebrities represented as avatars in video games doing what made them famous: playing music in *No Doubt* and playing college football in *Keller*, respectively. See *id.* at 1275-76; *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 170 (3d Cir. 2013) (finding in favor of college football player against video game company). Although the Third Circuit in *Hart* and the Ninth Circuit in *Keller* ultimately concluded that video game manufacturers must compensate student-athletes for use of their likenesses, the district court in *Hart* found that the *NCAA Football* games were sufficiently transformative. See *Hart*, 717 F.3d at 170. Unlike the Ninth Circuit, the district court in *Hart* found that features within the games that allowed players to alter student-athlete avatars were transformative enough to be granted First Amendment protection. *Hart*, 717 F.3d at 168. The Third Circuit did not share the district court’s view and its decision was reversed. See *Hart*, 717 F.3d at 170.

It is worth noting that, because of the *Keller* ruling, EA canceled the *NCAA Football* game franchise because each member of the class of student-athletes was to be paid \$4,000 for every year their likeness was used in the games. See also Thomas A. Baker III et al., *Simplifying the Transformative Use Doctrine: Analyzing Transformative Expression in EA’s NCAA Football Sport Video Games*, 7 ELON L. REV. 467, 486 (2015) (noting debate on proper application of Transformative Use Test in *Hart* and *Keller*); Tom Risen, *Electronic Arts Cancels NCAA 2014 Video Game After Lawsuit*, U.S. NEWS (Sept. 27, 2013, 5:36 PM), <https://www.usnews.com/news/articles/2013/09/27/electronic-arts-cancels-ncaa-2014-video-game-after-lawsuit> (detailing EA’s cancellation of 2014 edition of *NCAA Football*); Tom Farrey, *Players, Game Makers Settle for \$40M*, ESPN (May 30, 2014), https://www.espn.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm (detailing settlement agreement that delivered thousands of dollars to student-athletes).

³⁶ See *Mitchell v. Cartoon Network, Inc.*, No. 15-5668, 2015 WL 12839135, at *16 (D.N.J. Nov. 20, 2015) (stating plaintiff’s likeness sufficiently transformed where defendant added new features). Billy Mitchell, recognizable by his long black hair and black beard, alleged Cartoon Network misappropriated his likeness in creating a character named Garrett Bobby Ferguson (“GBF”) who appeared as “a giant floating head from outer space, with long black hair and a black beard, but no body.” See *id.* at *1-3. The court held that “while GBF may [have been] a less-than-subtle evocation of plaintiff, GBF [was] not a literal representation of him” because: (1) GBF appeared as a non-human creature; (2) GBF held the universe record to a different game than the game to which Mitchell held a world record; and (3) GBF attempted to keep his universe record deceit while Mitchell questioned his opponent’s equipment and the authenticity of a filmed

In *Pellegrino*, the District Court for the Eastern District of Pennsylvania dismissed Pellegrino’s right of publicity and privacy claims, finding that Epic’s use of Pellegrino’s likeness was sufficiently transformative under the Transformative Use Test.³⁷ First, the court established that the First Amendment protects Fortnite as an expressive work because it is a video game.³⁸ Then, following the precedent set by the Third Circuit in *Hart*, the court applied the Transformative Use Test when balancing Epic’s First Amendment protections against Pellegrino’s publicity and privacy rights.³⁹ The Transformative Use Test provides that an expressive work that overcomes a celebrity plaintiff’s interest in their likeness is granted First Amendment protections as long as “the product containing [the] celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness.”⁴⁰

When applying the Transformative Use Test, the court found that Fortnite avatars using the “Phone It In” emote did not resemble Pellegrino in appearance or biographical information.⁴¹ Additionally, Fortnite avatars fight in a battle royale environment and can perform emotes like “Phone It In” while wielding weapons and using violence to eliminate other avatars.⁴² On the other hand, Pellegrino is a musical performer who performs his sig-

high score. *See id.* at *5. The court likened GBF to the Autumn brothers’ characters from *Winter*, as both had recognizable traits of the source material but were ultimately turned into supernatural creatures. *See id.* at *6; *see also* *Winter v. D.C. Comics*, 69 P.3d 473, 479 (Cal. 2003) (analyzing Autumn brothers’ likeness as reflected in comic book characters).

³⁷ *See Pellegrino v. Epic Games, Inc.*, 451 F. Supp. 3d 373, 381-82 (E.D. Pa. 2020) (stating holding).

³⁸ *See id.* at 380 (discussing Epic’s motion to dismiss claim on First Amendment grounds); *see also Hart*, 717 F.3d at 148 (citing *Brown v. Entm’t Merch. Ass’n*, 564 U.S. 786, 790-91 (2011)) (“[V]ideo games are protected as expressive speech under the First Amendment.”). In determining whether an expressive work violates a plaintiff’s right of publicity and privacy, a court must determine whether the First Amendment protections afforded to the expressive work outweigh the plaintiff’s publicity and privacy rights. *See Hart*, 717 F.3d at 148-49.

³⁹ *See Pellegrino*, 451 F. Supp. 3d at 380-81 (noting Third Circuit’s use of Transformative Use Test in *Hart*); *see also Hart*, 717 F.3d at 165 (ruling “the Transformative Use Test is the proper analytical framework to apply” when balancing First Amendment protections and publicity rights).

⁴⁰ *See Hart*, 717 F.3d at 160 (emphasis omitted) (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001)) (describing origin of Transformative Use Test); *see also Pellegrino*, 451 F. Supp. 3d at 380-81 (explaining Transformative Use Test).

⁴¹ *See Pellegrino*, 451 F. Supp. 3d at 381 (ruling that “the avatars in Fortnite do not share Pellegrino’s identity nor do what Pellegrino does in real life.”) The court referenced a picture of a Fortnite avatar equipped with the “Phone It In” emote and observed that the avatar did not bear any resemblance to Pellegrino. *See id.* *But see* Complaint at 9-12, *Pellegrino v. Epic Games, Inc.*, 451 F. Supp. 3d 373 (E.D. Pa. 2020) (No. 2:19-cv-01806-JP) (detailing how Fortnite’s emote copied Pellegrino’s signature move).

⁴² *See Pellegrino*, 451 F. Supp. 3d at 381 (describing Fortnite universe and environment).

nature move at concerts and festivals.⁴³ The court found that, because Fortnite avatars did not share Pellegrino's identity or his profession, Epic's use of Pellegrino's likeness was sufficiently transformative under the Transformative Use Test.⁴⁴ Accordingly, the court dismissed Pellegrino's claim of right to publicity and privacy because Epic's use of Pellegrino's likeness was provided First Amendment protections under the Transformative Use Test that are not outweighed by Pellegrino's interests in his likeness.⁴⁵

While the *Pellegrino* court correctly followed precedent in utilizing the Transformative Use Test, the Test itself is not immune to criticism.⁴⁶ A frequently raised issue is that the Test is difficult to apply and predict, forcing judges to make subjective and inconsistent analyses of artworks.⁴⁷ Critics also suggest that the Transformative Use Test should be changed in order to properly address the ever-changing world of video games.⁴⁸ Even if the Transformative Use Test is crafted well enough to apply to video games, the court's adherence to precedent using this test will leave small, lesser-known figures with no avenue for relief; as a result, Epic may continue to add their signature moves and likeness into Fortnite without permission.⁴⁹

⁴³ See *id.* (describing Pellegrino's profession and context of signature move).

⁴⁴ See *id.* (outlining reasoning). But see Gerken, *supra* note 10 (recounting Fortnite's first virtual concert); Statt, *supra* note 12 (describing various claims against Epic for Fortnite emotes); Webster, *supra* note 10 (explaining Epic wants Fortnite to become tour stop for artists). Fortnite's head of global partnerships, Nate Nanzer, stated that virtual concerts have been extremely successful, and that Epic is focused on finding ways to host more virtual concerts and performances. See Webster, *supra* note 10.

⁴⁵ See *Pellegrino*, 451 F. Supp. 3d at 381 (outlining court's holding).

⁴⁶ See Chin, *supra* note 33, at 212 (noting distinctive features of Test are dubious and difficult to apply) The Missouri Supreme Court criticized and rejected the Transformative Use Test, reasoning that, under the Test, a commercial work whose sole purpose was commercial could still receive First Amendment protections as long as there is a slight hint of personal expression. See Chin, *supra* note 33, at 201-02; see also Ford & Liebler, *supra* note 19, at 77 (arguing courts have failed to apply Transformative Use Test properly in video game cases); Gutmann, *supra* note 20, at 222 (discussing inconsistent application of Test to video games).

⁴⁷ See Chin, *supra* note 33, at 212 (asserting Transformative Use Test forces judges to decide on artistic value and expressions of artwork).

⁴⁸ See Baker *et al.*, *supra* note 35, at 474 (explaining problems applying Test to commercial products with creative components); see also Gutmann, *supra* note 20, at 222 (suggesting line be drawn between "altered reality" games and "imitation of life" games). Gutmann's suggestion would create an important distinction between video games that merely seek to relate to a person, and video games that actually imitate life and intend to replicate a person's life. See Gutmann, *supra* note 20, at 222.

⁴⁹ See Robertson, *supra* note 1 (noting smaller figures like "Backpack Kid" are unable to obtain relief); see also *infra* note 52 and accompanying text (explaining criticisms of Transformative Use Test as being ill-suited in application to video games).

The court analyzed Fortnite's universe as one in which players focus only on eliminating the competition.⁵⁰ Although this may have been true at the time, the Fortnite universe has since evolved into a venue where performers can hold virtual musical concerts and festivals—events that more closely align with Pellegrino's profession.⁵¹ Because Epic regularly incorporates into Fortnite's universe what musical performers do in real life, Epic's plans for virtual concerts could open the door for celebrities to attack the Transformative Use Test's misguided focus on whether the celebrities' primary claims to fame have been incorporated into the game.⁵² As Epic tries to capitalize on Fortnite's success, the result of *Pellegrino* could make Epic overly confident, potentially leading Epic to use the likeness of someone who would not give in but who would make use of the brand new avenue of attack to surprise Epic and succeed on a claim against it.⁵³ Even if Epic adds people into Fortnite without their permission, Epic would likely rely on this case's precedent and argue that the body and identity of the figures have been sufficiently transformed through the in-game design.⁵⁴

Notwithstanding the addition of regular virtual concerts in Fortnite, the court has opened a door through which Epic can take advantage of lesser known figures by allowing Epic to copy people without their consent and without subsequent repercussions.⁵⁵ Lesser-known pop culture figures will find themselves hard-pressed to win a claim against Epic and Epic will have free rein to incorporate pop culture references into their game to attract different audiences with little threat of litigation.⁵⁶ In a world where viral videos skyrocket to millions of views within hours, cultural figures

⁵⁰ See *Pellegrino*, 451 F. Supp. 3d at 381 (describing setting where Fortnite avatars interact).

⁵¹ See Webster, *supra* note 10 (detailing Epic's plan for more virtual concerts to extend musical artists' audience); see also *Pellegrino*, 451 F. Supp. 3d at 377 (explaining Pellegrino's profession).

⁵² See Webster, *supra* note 10 (outlining Epic's goal to hold additional and longer concerts); see also *supra* text accompanying note 34 (providing example where performing profession in different venue not transformative).

⁵³ See Webb, *supra* note 10 (noting Epic's ability to adapt to huge audience, providing model for other companies). If a plaintiff can recover on a claim against Epic, it could hurt Epic financially, as demonstrated in *Keller*. See *supra* note 35 and accompanying text. However, even if a plaintiff were to prevail, Epic would likely continue to profit after paying off a settlement. See Webb, *supra* note 10 (reporting Epic's revenue of at least \$2.4 billion in 2018).

⁵⁴ See *Kirby v. Sega of America, Inc.*, 50 Cal. Rptr. 3d 607, 615-17 (2006) (explaining how game characters could resemble celebrities and be sufficiently transformed); see also Dey, *supra* note 11 (illustrating how in-game design of characters can differ from celebrities).

⁵⁵ See Stoilov, *supra* note 11 (showcasing Epic's collaborations with celebrities too famous to exploit); see also *supra* note 12 and accompanying text (listing Epic's numerous past collaborations).

⁵⁶ See Robertson, *supra* note 12 (noting numerous claims against Epic have failed and been dismissed).

want to profit from their internet fame, free from the fear that big corporations and video game developers, like Epic, will profit off their signature moves and images without any repercussions.⁵⁷

In *Pellegrino v. Epic Games, Inc.*, the United States District Court for the Eastern District of Pennsylvania addressed whether Epic's use of Pellegrino's likeness was sufficiently transformative to be granted First Amendment protection under the Transformative Use Test, and whether Pellegrino's interests in his likeness outweighed the protections provided under the Test. Although the court followed Third Circuit precedent in utilizing the Transformative Use Test, the court's application of the Test lays the groundwork for Epic, and similar businesses, to be able to exploit smaller, lesser-known figures. Meanwhile, figures who have more influence and can use their social media following against Epic will always have the benefit of creating legal and legitimate collaborations with Epic, ensuring their share of the profits while building their brand through Fortnite's popular platform.

Epic has molded Fortnite into a platform that creates an amalgamation of characters from all different universes, with collaborations one would never think were possible. Epic's massive influence is extremely enticing to figures who want to gain a larger following by reaching an audience that is normally unavailable to them. As such, more characters and celebrities from different media universes and platforms will do just about anything to reap the benefits of being added into Fortnite. Considering the unprecedented success that one video game can have and the mingling of influencers and characters from a never-ending amount of different universes and platforms, perhaps the court should have stepped away from the Transformative Use Test—or even created a new one altogether—to give smaller, lesser-known figures a chance at presenting a successful claim against the goliath that is Epic Games.

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⁵⁷ See *id.* (acknowledging lawsuits filed against Epic for utilizing likenesses without permission); see also Statt, *supra* note 11 (explaining “Backpack Kid” and his overnight fame).