Brigham Young University Prelaw Review

Volume 38 Article 16

4-2024

Full Issue

Brigham Young University Prelaw Review

April 2024 Vol 38

The Brigham Young University Prelaw Review is published once a year. Select previous editions of the Prelaw Review can be found at *scholarsarchive.byu.edu*. The contents of this volume represent the opinions of the authors and not necessarily those of the editing staff, advisors, Brigham Young University, or its sponsoring institution The Church of Jesus Christ of Latter-day Saints.

BYU Prelaw Review
3328 WSC
Brigham Young University
Provo, Utah 84602
USA
prelaw@byu.edu

The editing staff would like to graciously acknowledge those organizations and individuals who have supported the Brigham Young University Prelaw Review in this, its thirty-eighth volume.

We are very appreciative of the support from:

BYU's Pre-Professional Advisement Office
Kris Tina Carlston

We would also like to thank those who have made the printing and distribution of the journal possible:

Rawlinson Family Foundation

Brigham Young University Prelaw Review

Volume 38
April 2024

Brigham Young University Prelaw Review

Volume 38
2024

Table of Contents

Publisher's Note

The 2024 Brigham Young University Prelaw Review (Journal) continues to demonstrate Brigham Young University's commitment to excellence in scholarship and student development. Throughout this past year, it has been a privilege to work with ambitious students who want to produce the best possible undergraduate legal journal.

Continuing the vision of the Journal, this year's staff has worked arduously to present professional and current legal scholarship. As undergraduates, the depth and breadth of the addressed topics required that these students do much more than just edit. The authors and editors researched to find court cases and law review articles to support their arguments. During the year, as new information became available, authors and editors continually updated and refocused their arguments to provide timely discussions of the current issues. Consequently, each of these articles reflects the latest decisions from the courts and scholarship from the legal community.

The goal is always to produce a reputable legal journal. However, this experience also provides the opportunity for the staff to prepare themselves as members for future professional scholarship and work in the legal field. Each student has become proficient in the Bluebook system of legal citations and all have spent countless hours editing and source checking each other's legal articles. The students have also learned to analyze pressing issues, incorporate legal citations, and present cogent legal arguments, all while receiving training in journal publishing. These students leave the 2024 edition of this Journal possessing the ability to excel in law and other professional pursuits.

We continue to be grateful for the endowment from the Rawlinson Family Foundation that funds the Journal and the support of Brigham Young University's resources to create and print this publication. As you read the topics addressed in this Journal, I'm sure that you will agree that this is an impressive work produced by these

BYU undergraduate authors and editors. It continues to be a pleasure to work with such fine individuals and students on a daily basis.

Kris Tina Carlston, JD, MBA
Director—Pre-Professional Advisement Center
Prelaw Advisor

Editor in Chief & Managing Editor's Note

We are honored to present the 2024 edition of the Brigham Young University Prelaw Review. This publication continues a tradition of academic excellence and intellectual growth at Brigham Young University. This issue includes contemporary legal issues such as copyright law for works produced by artificial intelligence, legal protections for the elderly, water rights for Native American tribes, and so much more. Our authors and editors confronted various challenges throughout the creation of this publication. Despite these challenges, they did excellent legal research, engaged in critical thinking, and crafted the careful legal arguments present in this edition. Their work is worthy of publication and a serious contribution to legal research.

We would like to extend our sincerest gratitude to those who make the BYU Prelaw Review possible. We are first and foremost indebted to the legal professionals, professors, and other mentors who help the Prelaw Review maintain its academic excellency. Their sacrifice of time and resources are greatly appreciated. We would also like to thank the other two members of the editorial board, Greta Asay and Breannan Lopez. Their help and expertise was integral to the success of this year's edition. Additionally, we are infinitely grateful for Kris Tina Carlson. She is the primary contributor to the success of the Prelaw Review. Lastly, we would like to thank the students of the Prelaw Review. They worked tirelessly, exercised patience, and wrote wonderful articles.

As you read this edition, we hope you will recognize the excellent work of these students. The BYU Prelaw Review evidences the excellency of our institution and our students. More importantly, however, the Prelaw Review serves as a genuine contribution to the legal scholarship. We hope you will engage critically and enjoy each article.

Inaê Cavalcante
Editor in Chief

Zac Bright
Managing Editor

Safeguarding Wetlands Post-Sackett v. EPA: Protecting Indigenous Territories and Environmental Health

Anna J. Mahler[1]

I. Introduction

The Ojibwe Tribe embarked on a historic migration 1,500 years ago.[2] They left their homes along the Atlantic coast to go on a journey

---

1 Anna J. Mahler is a senior at Brigham Young University, pursuing a Bachelor of Science in Wildlife and Wildlands Conservation. She plans to attend law school in Fall 2024. Anna would like to thank her editor, Emily Richardson, who is studying business management at Brigham Young University and plans to attend law school in Fall 2026.

2 *The Ojibwe People*, Minn. Historical Society, https://www.mnhs.org/fortsnelling/learn/native-americans/ojibwe-people (last visited Jan. 11, 2024)

driven by the Seven Fires Prophecy.[3,4] This prophecy urged the Tribe to find the place where "food grows on water."[5] They found a fulfillment of their prophecy in the Manoomin, or wild rice, of the Great Lakes Region, where Manoomin grows in the region's wetlands, streams, and lakeshores.

The Ojibwe have relied on the waters of the Great Lakes region since they first settled in the area to fish, hunt, trap, farm,[6] and travel throughout the vast territory.[7] Before the 20th century, the Tribe was semi-nomadic.[8,9] During the 20th century, treaties between the Tribe

3 *The Prophecy of the Seven Fires of the Anishinaabe*, Seven Fires Foundation, *https://caid.ca/SevFir013108.pdf* (last visited Mar. 3, 2024) Note: *The Seven Fires Prophecy was given by seven prophets who appeared to the Ojibwe. They each spoke about a fire, or period that the Ojibwe would experience, specifically regarding their spiritual path. The first fire warns of the arrival of light-skinned races and instructs the tribe to move west, towards the chosen place where food will grow on water. The second fire describes the hardships of adapting to new challenges and developing new skills in the area. The third fire speaks of the light-skinned race influencing the Ojibwe. Part of this influence enters into the fourth fire, where the people will be introduced to weapons, alcohol, and disease, which will lead to the people suffering. The fifth fire refers to two paths that the Ojibwe can take; one in line with spiritual growth, harmony and earthly connection, the second of materialism, self-destruction, and earthly disconnect. The sixth fire directs the people to reconnect with their spiritual knowledge and traditions. Lastly, the seventh fire speaks of another crossroad, this time between peace and harmony, and one of self-destruction.*

4 *The Teachings of the Seven Fires Prophecy*, Ya-Native, *https://www.ya-native.com/nativeamerica/theteachingsofthesevenfiresprophecy.html* (last visited Mar. 2, 2024)

5 Native Hope, *The History and Culture of the Ojibwe (Chippewa) Tribe,* Native Hope Blog (Jan. 11, 2024, 2:52 PM) https://blog.nativehope.org/history-and-culture-of-the-ojibwe-chippewa-tribe

6 The Ojibwe People, *supra* note 2

7 Native Hope, *supra* note 5

8 The Ojibwe People, *supra* note 2

9 *Migration Tradition*, Fond du Lac Band of Lake Superior Chippewa, http://www.duluthstories.net/index.html (last visited Jan. 22, 2023).

and the United States of America designated specific, permanent residences for the Ojibwe people to settle in.[10]

Along with forming specific residence areas for the Ojibwe, the treaties gave the Tribe a protected right to "fish, hunt, and gather" on lands throughout Minnesota and Wisconsin,[11] including countless headwater streams, tributaries, and wetlands. The rights ensured that the Tribe would always maintain their ability to practice the traditional aspects of their culture that are central to its "sustenance, identities, and economies."[12] Harvesting Manoomin and fishing around the Great Lakes region are two traditional customs of the Ojibwe people. Such practices tie the Ojibwe to the regional water system. These customs cannot continue without lakes, rivers, streams, headwaters, and wetlands maintaining their current state of health. The Ojibwe consider themselves protectors of the Great Lakes hydraulic system and use various methods to perform that duty.

In 2022, the NorthMet Open Pit Sulfide Mine[13] was proposed to reside within headwaters and wetlands that feed into the St. Louis River.[14] A band of the Ojibwe live on the river and would face the consequences of 1,578.6 acres of degraded or destroyed wetlands.[15] One of the most significant problems posed by the NorthMet project

10 *Treaties*, Fond du Lac Band of Lake Superior Chippewa, http://www.duluthstories.net/treaties.html (last visited Jan. 22, 2023).

11 1854 Treaty Authority, Chippewa-U.S., art. 1 Sept. 8, 1854

12 Menominee Tribe v. United States, 391, U.S. 404, 407-408 (1968).

13 *PolyMet NorthMet Mine*, EPA, https://www.epa.gov/mn/polymet-northmet-mine (last modified Oct. 11, 2023).

14 *Babbitt PolyMet NorthMet Project*, Minnesota Pollution Control Agency, https://www.pca.state.mn.us/local-sites-and-projects/babbitt-polymet-northmet-project (last visited Jan. 21, 2024).

15 *NorthMet Mining Project and Land Exchange Final Environmental Impact Statement*, State Of Minnesota Dep't Of Nat. Res., https://files.dnr.state.mn.us/input/environmentalreview/polymet/feis/fact_sheets/wetlands.pdf (last visited Jan. 22, 2023).

was the increased levels of mercury[16] and sulfates within the water system.[17] Increased levels are concerning due to the severe environmental and public health implications of mercury[18] and sulfates.[19]

The Ojibwe successfully used the Clean Water Act (CWA) to prevent the NorthMet Mine from being built, as the CWA had jurisdiction over the proposed construction site in 2022. The CWA is administered by the Environmental Protection Agency (EPA) specifically in fulfillment of the EPA's mission to "...protect human health and the environment."[20] The EPA, in collaboration with the Army Corps of Engineers (COE), has regulated wetlands, streams, rivers, lakes, and headwaters since the passing of the CWA 50 years

16 *NorthMet Mining Project and Land Exchange EIS – Record of Decision*, State Of Minnesota Dep't Of Nat. Res., 21 (2016) https://files.dnr.state.mn.us/input/environmentalreview/polymet/polymet-eis-rod-030316-final.pdf

17 *Id.*

18 Mercury - ToxFAQs™, Agency For Toxic Substances And Disease Registry, (April, 2016), https://www.atsdr.cdc.gov/toxfaqs/tfacts46.pdf. Note: *Mercury is a known neurotoxin that can also affect the kidneys. Its effects depend on the form of mercury, the exposure amount, the age of the person exposed, the length of exposure, and the current health of those exposed. It accumulates through the food chain, increasing as each organism ingests its food, and it is not readily eliminated from most species. The Ojibwe who would consume fish exposed to mercury could be at a higher risk of developing tremors, incoordination, impaired vision, impaired learning and memory, increased mood swings, movement problems, birth defects, high blood pressure, alterations to their immune system, nervous system effects and kidney damage*

19 WebMD Editorial Contributors, *What to Know About Sulfate*, WebMD, https://www.webmd.com/beauty/what-to-know-sulfate (May 12, 2023). Note: *Sulfates are a group of naturally or man-made produced salts. Increased exposure to sulfates can increase risk of developing diarrhea, intestinal pain, lung irritation, dry skin, dermatitis and edema.* They are additionally a concern for sensitive plants, like manoomin, that will die, even with a slight increase of sulfate presence.

20 *Our Mission and What We Do*, EPA, https://19january2017snapshot.epa.gov/aboutepa/our-mission-and-what-we-do_.html (last visited Feb. 27, 2024)

ago. This regulation ended with the 2023 Supreme Court decision in *Sackett v. EPA*.

During the time of the conflict between the Ojibwe and NorthMet, the EPA, acting within their jurisdiction, suspended the NorthMet mine's construction permit.[21] The EPA's suspension of NorthMet's permit stemmed from concerns that the mine had no viable method to ensure discharges from the proposed construction "would comply with the Ojibwe water quality requirements"[22] deemed vital for the "health and welfare" of individuals in the Ojibwe borders.[23]

Ultimately, the conflict between the Ojibwe and the NorthMet mine was resolved when the NorthMet mine's permit was permanently revoked. The revocation of this permit stopped the construction of the mine and allowed the Ojibwe to maintain its water quality requirements. The ending of the NorthMet conflict would have been very different if these events had unfolded just a few months later, during 2023 instead of 2022. The May 2023 Supreme Court Decision in *Sackett ET UX. v. Environmental Protection Agency ET AL*. (Sackett v. EPA) restricted the EPA's jurisdiction over various bodies of water. Ultimately, the decision allows the EPA to preside only over waters that maintain a "continuous surface connection" to other waters that are considered "navigable." This definition of navigable includes waters that have been traveled by ships, boats, or other watercraft.[24] Under this new decision, the EPA could not revoke the NorthMet 404 permit because NorthMet would have been building on land over which the EPA has no jurisdiction. Therefore, if NorthMet was proposed after May of 2023, it is likely that the mine would have been built, exposing the Tribe to unknown levels of mercury and sulfates with "no way to protect itself and its food sources."[25]

21 *PolyMet NorthMet Mine*, EPA, https://www.epa.gov/mn/polymet-northmet-mine (last modified Oct. 11, 2023)

22 *Id.*

23 Lake Superior, Mich., Water Quality Standards of The Fond Du Lac Reservation Ordinance (Dec. 1998).

24 Sackett v. Environmental Protection Agency, 598 U. S. 21, 24 (2023).

25 Menominee Tribe v. United States, 391, U.S. 404, 411 (1968).

The Ojibwe are just one example of the many tribes across the United States that rely on wetlands and depend on the waters' health for their physical and cultural survival. Wetlands must be protected not only to preserve tribal cultures but also to maintain the components that most contribute to the health of the wetlands and the nation's water. These components include the aquatic system's chemical, physical, and biological properties.

The 2023 *Sackett v. EPA* decision restricted the EPA's authority to safeguard wetlands under the Clean Water Act, posing a significant threat to the environment and indigenous waters. The decision prompts the need for new wetland-specific regulations to preserve the wetlands and waters of the United States. Implementing nationwide wetland-specific regulations is vital for successfully protecting these critical aquatic systems, contributing to biodiversity, carbon sequestration, and flood control. Tribes and states have attempted to solve the problem through localized regulation but have been unsuccessful in managing the waterways that transcend their borders. Therefore, this paper proposes implementing nationwide wetland regulation for the comprehensive protection of the nation's wetlands.

II. Background

Two major types of law regulate the federally recognized tribes in the U.S. The first is Federal Indian Law, which defines the interactions between the federal government, states, and tribes or nations.[26] Federal Indian Law includes laws, judicial decisions, treaties, and presidential orders. They give tribes the right to tribal sovereignty,[27] tribal resource rights,[28] and agricultural water rights.[29] However, Federal Indian Laws do not manage internal tribal affairs.

Tribal law is made by tribes exercising sovereignty. These laws differ for every tribe and are only enforceable within tribal borders.

26 Elizabeth A. Reese, *The Other American Law*, 73 Stan. L. Rev. 555 (2021)

27 Worcester v. the State of Georgia, 31 U.S. (6 Pet.) 515 (1832)

28 Winters v. United States, 207 U. S. 564 (1908)

29 Arizona v. California, 547 U. S. 150 (2006)

The enactment of these laws can include codes of justice, health standards, and environmental regulations. This paper focuses on Federal Indian Laws rather than tribal laws since the latter are tribe specific and affect a smaller population.[30]

A. Federal Indian Law

Federal Indian Legislation History Chart

There are many Supreme Court Decisions that have affected the laws governing tribes. The decisions listed below are a few that significantly impact how tribes in the U.S. interact with the environment within and surrounding their borders.

Case	**Background**	**Holding**	**Implications**
Johnson v. M'Intosh (1823) (Marshall Trilogy)	Thomas Johnson purchased land from the Painkenshaw Indian Tribe and passed it onto his children. Later, William M'Intosh bought the same land from the U.S. Johnson's children then filed suit to determine which man had the right to the land.	The Supreme Court decided in favor of M'Intosh and determined that tribes had the right to occupy land. The right to sell land was reserved for the federal government.	Established Federal supremacy in Indian affairs. The case imposed limits on Tribal Sovereignty.

30 Felicity Barringer, *How the U.S. Legal System Ignores Tribal Law,* High Country News (Oct. 7, 2021), https://www.hcn.org/articles/law-how-the-us-legal-system-ignores-tribal-law

Cherokee Nation v. Georgia (1831) (Marshal Trilogy)	In response to Georgia Laws, Cherokee Chief John Ross sought an injunction at the U.S. Supreme Court. The Cherokee argued that they were a foreign nation.	The Supreme Court determined that tribal nations were "domestic dependent nations," not foreign nations.	The decision reaffirmed Federal Supremacy over Indian affairs.
Worcester v. Georgia (1832) (Marshall Trilogy)	Samuel Worcester was preaching on Cherokee lands. After being arrested, he filed suit, claiming that Georgia did not have the authority to control activity within Cherokee borders.	The Court sided with Worcester, finding the Cherokee Nation as sovereign and giving authority to the U.S.	The decision reaffirmed Federal Supremacy over Indian affairs.

United States v. Winans (1905)[31]	Lineas and Audubon Winans operated a fishing operation along the Columbia River Gorge, an area culturally significant to the Yakima Tribe. The Winans actively prohibited the tribal members from accessing the fishery land. The Yakima members believed the Winans' actions violated their treaty-reserved right to fish at traditional fisheries.	The Supreme Court sided with the Yakima Tribe, deciding that the Yakima Treaty protected tribal rights to hunt and fish. The Supreme Court reasoned that if tribal access to a fishery were limited, the tribal right to fish would be worthless.	The case established tribal rights outside of the borders of the tribal reservation.
Winters v. United States (1906)[32]	When Montana became a state, the U.S. government filed suit on behalf of the Assiniboine and Gros Ventre Tribes to restrain Montana settlers from preventing the Milk River's water from flowing to the Fort Belknap Indian Reservation.	The Supreme Court held that the Tribes reserved a "sufficient amount of water from the Milk River for irrigation purposes." The Court determined that reservations created by the U.S. implied a water right.	Created implied priority water rights for tribes. These implied rights allow tribes to access the water they need regardless of other water rights.

31 United States v. Winans, 198 U.S. 371 (1905)

32 Winters v. United States, 207 U. S. 564 (1908)

Arizona v. California (1963)[33]	The case began when Arizona filed a dispute with California regarding the extent of each state's right to use water from the Colorado River. The United States intervened to set Water Rights for tribes. The case had ten iterations, most ending in degree since the Supreme Court had original jurisdiction.	The Supreme Court issued a decree determining water rights between Arizona, California, tribes, and other states. The decree provided a method for quantifying tribal rights, titled the Practicably Irrigable Acreage (PIA).	Tribes were given an exact amount of water, and the decision also allowed water to be used for nonagricultural purposes.

B. Water Legislation

Water Legislation Chart

The Rivers and Harbors Act, Federal Water Pollution Control Act, and Water Quality Act preceded the Clean Water Act (CWA). Ultimately, these acts failed to create an effective method of regulating the nation's waters. The Rivers and Harbors Act and the Federal Water Pollution Control Act failed because their scopes were too narrow. The Water Quality Act failed because states were unwilling to set designations and water quality standards.

33 Arizona v. California, 373 U. S. 546 (1963)

Case	Details
Rivers and Harbors[34] (1899)	Enacted to protect the navigation of large bodies of water throughout the United States. It prevented discharge, dredges, filling, and altering these "navigable" waters without first obtaining a permit.[35] Focused only on maintaining the ability to navigate the nation's waters. It succeeded in this focus but was not sufficient in protecting the overall health of the nation's waterways.
Federal Water Pollution Control Act[36] (1948)	Created to "provide a comprehensive program for preventing, abating, and controlling water pollution,"[37] it applied only to interstate waters.
Water Quality Act[38] (1965)	It was created as an amended version of the 1948 bill. It relied on state regulation of state-set water quality standards and state designations of waterways.[39]

The CWA was created to remedy the failures of its predecessors and "provide for the protection and propagation of fish, shellfish and wildlife" and for "recreation in and on the water."[40] These specific provisions and regulatory requirements worked at creating municipal

34 Rivers and Harbors Act, 33 U.S.C § 419 (1899)

35 James E. Salzman, Barton H. Thompson Jr., Environmental P*olicy and Law* 178 (5th ed. 2019).

36 Federal Water Pollution Control Act, 33 U.S.C § 1251-1387 (1948)

37 Ann Powers, *Federal Water Pollution Control Ac*t (1948), Encyclopedia.org, https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/federal-water-pollution-control-act-1948 (last visited Jan. 24th, 2024)

38 Water Quality Act, 33 U.S.C § 1251 (1948)

39 Claudia Copeland, *Clean Water Act: A Summary of the Law*, (Oct. 8, 2016) https://sgp.fas.org/crs/misc/RL30030.pdf

40 Clean Water Act 33 U.S.C. § 1330

sewage treatment plans, constructing treatment plants, and regulating discharges into navigable bodies of water. The expectation was that the impacted aquatic systems' chemical, physical, and biological integrity would improve by decreasing sewage discharges and other pollutants into the waters.

C. Supreme Court Cases

Case	Background	Holding	Implications
Riverside v. Bayview[41] (1985)	Bayview Homes Inc. began placing fill materials on its property in Michigan. The Army Corps of Engineers (Corps) filed suit to enjoin Bayview from filling its property without a permit.	The Corps did not overstep in regulating the wetlands, and the CWA's "language, policies, and history" compelled a holding that the Corps acted reasonably in its interpretation of authorities over discharge material in wetlands.	Created a defined scope of federal regulatory powers regarding WOTUS. That scope included intrastate wetlands

41 United States v. Riverside Bayview, 474 U.S. 121, (1985)

Solid Waste Agency of Northern Cook County (SWANCC) v. U.S Army Corps of Engineers[42] (2001)	SWANCC selected an abandoned sand and gravel pit as a solid waste disposal site. Trenches within the property had been used as ponds for migrating birds. If SWANCC used this area, some trenches would need to be filled. The Corps was contacted to determine if the trenches were considered WOTUS and were under the CWA regulation. The Corps decided the trenches were WOTUS and then denied SWANCC a permit.	The Corps overstepped its jurisdiction as the trenches were not WOTUS. Furthermore, isolated waters, abandoned seasonal ponds providing habitat for migratory birds, and navigable bodies of water were explicitly those that "have been navigable or could reasonably be so made."	Isolated wetlands are not considered under the CWA.

42 Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, (2001)

U.S. Army Corps of Engineers v. Hawkes Co. Inc.[43]	The Corps attempted to prevent Hawkes Co., Inc. from purchasing land and mining peat by arguing that the land was a wetland connected to WOTUS through a "significant nexus." Hawkes challenged this jurisdiction, and the Corps asserted that they made no final determination regarding the property and could not be challenged.	The Corps determination of WOTUS was a final agency action subject to judicial action. It made no decision on the reach of WOTUS or "significant nexus."	Left confusion over what constituted a "significant nexus" and clarified that jurisdictional designations can be constructed as the final agency decision.

43 U.S. Army Corps of Engineers v. Hawkes Co. Inc., 578 U.S. 15, (2016)

County of Maui, Hawaii v. Wildlife Fund[44]	The Lahaina Wastewater Reclamation Facility in Maui County, Hawaii, injected its reclaimed water into various wells on the island. Due to Hawaii's geologic nature, it was assumed that the reclaimed water seeped into the ocean. The University of Hawaii at Manoa conducted experiments that found evidence of seepage within the oceans.	The CWA forbids "any addition" of pollution from point sources to navigable waters without a permit. It also requires that a permit be granted when there is a "functional equivalent of a direct discharge. SCOTUS determined that the Wildlife Fund had proved there was a functional equivalent of discharge and rejected Maui's assertion that they didn't need a permit. Furthermore, the Court specified that determining a functional discharge should consider the time and distance a pollutant travels.	The decision broadened regulatory authority, emphasized environmental protection and water quality preservation, and expressed the importance of considering hydrologic connections while deciding on tests to determine Corps or EPA jurisdiction.

44 County of Maui, Hawaii v. Hawaii Wildlife Fund, 590 U.S. 18, (2020)

1. Rapanos ET UX., ET AL. v. United States:

Rapanos v. United States[45], decided in 2006, centered on defining and determining the scope of waters protected under the Clean Water Act. It examined whether wetlands, even those not directly adjacent to navigable waters, could be considered "Waters of the United States"[46] due to a "hydrologic connection."[47] John A. Rapanos was charged with violating the CWA for discharging fill material into a wetland adjacent to navigable waters. The Court's decision regarding whether the adjacent wetlands were part of the navigable body of water was split. Justice Scalia proposed a narrow interpretation of the CWA jurisdiction in the plurality, only encompassing relatively permanent, standing, or continuously flowing bodies of water. Justice Kennedy wrote the opposing opinion, which proposed a broader test: CWA jurisdiction should encompass any waters with a "significant nexus" to the traditional navigable waters.

The split nature of the decision led to confusion over which test should be applied to determine the CWA's jurisdiction. The presidential office has attempted to mitigate this confusion by defining what test they believe should be used. Presidents Obama, Trump, and Biden have each proposed their own tests. President Obama chose to apply a test similar to Justice Kennedy's, giving the CWA jurisdiction of waters with a significant nexus to navigable bodies of water. President Trump favored a test similar to Justice Scalia's, limiting CWA jurisdiction to "traditional navigable waters." President Biden revealed his test before the Supreme Court's ruling in *Sackett v. EPA*. His test restored the CWA jurisdiction to what it had been when President Obama was in office, to the significant nexus interpretation. President Biden's interpretation also added protection to relatively permanent water surfaces.

45 Rapanos v. United States, 547 U.S. 715, (2006)

46 33 U.S.C § 1362 (7)

47 Rapanos v. United States, 547 U.S. 715, 718 (2006)

2. Sackett ET UX. v. Environmental Protection Agency ET AL.

The unclear decision from *Rapanos v. United States* eventually led to the *Sackett v. EPA* case filings. The *Sackett cases* arose when the Sacketts, property owners in Idaho, purchased a property near Priest Lake and filled in part of their land.[48] They later received a letter from the EPA notifying them that the land was regulated under the CWA[49] and that the Sacketts would face fines if actions were not taken to reverse the filling of the land. The Sacketts began their lengthy court battle with the EPA and first appeared before the Supreme Court in 2012. This trial addressed the Sacketts' right to challenge the EPA's compliance order before any enforcement actions occurred. The Court granted the Sacketts the right to challenge the order.

With the 2012 right to challenge, the Sacketts began another legal battle—this time, they aimed to contest the EPA's jurisdiction over their land. This case, which appeared before the Supreme Court in October 2022, saw its decision released in May of 2023. The 2023 decision unanimously ruled that the Sacketts' land was not a wetland, and the EPA had no jurisdiction over it. The Majority opinion, delivered by Justice Alito, further determined that subsurface flow and a significant nexus were insufficient for the CWA to have jurisdiction.[50]

The Court, unanimous in its decision regarding the Sackett land, was split on its proposed definition of Wetlands. The majority test adopted a narrower interpretation of the CWA's jurisdiction to include only wetlands with a "continuous surface connection to bodies that are waters of the United States in their own right, with no clear demarcation between the waters and wetlands."[51] This decision has led to more than half of U.S. wetlands no longer being protected through federal law.

48 Sackett v. Environmental Protection Agency, 598 U. S. 21, 41-42 (2023)

49 *Id.* at 65-71

50 *For clarity, the 2023 decision of Sackett v. EPA is the case referred to within the remainder of this paper.*

51 Sackett v. Environmental Protection Agency, 598 U. S. 21, 25 (2023)

III. Proof of Claim

Before the *Sackett v. EPA* decision, wetlands were governed by the EPA under the CWA. This was enabled by past Supreme Court Decisions such as *Rapanos v. U.S., County of Maui v. Wildlife Fund, U.S. Army Corps v. Hawkes*, and *Riverside v. Bayview. Sackett v. EPA* reverses these previous decisions, aligning with the *SWANCC v. U.S.* decision by limiting the scope of the CWA and the EPA's jurisdiction over wetlands. In Sackett, the Court held that "the CWA's use of 'waters' refers only to geographic[all] features that are described in ordinary parlance as streams, oceans, rivers, and lakes."[52] The 2023 *Sackett* decision further states that "adjacent wetlands that are 'indistinguishable' from those bodies of water due to a continuous surface connection" are the only wetlands governed under the CWA.[53] This position reverses the previously held decision of *SWANCC v. U.S. Army Corps of Engineers* and *Riverside* v. *Bayview*, which characterize wetlands as part of the 'waters' the CWA can govern. This restriction of CWA jurisdiction surpasses the precedent set by the *Rapanos v. U.S.* decision, resulting in the most extensive loss in wetland protection in the past 50 years. Without any additional regulation, the loss of protection will be detrimental to wetlands and the environment.[54]

A. Importance of Wetlands

The EPA defines wetlands as "areas where water covers the soil, or is present at or near the surface of the soil all year or for varying periods of times during the year, including the growing season."[55]

52 Sackett v. Environmental Protection Agency, 598 U.S. 21, 1 (2023)

53 *Id.*

54 The Federalist Society, *Courthouse Steps Decision: Sackett v. Environmental Protection Agency*, YouTube (June 8, 2023), https://www.youtube.com/live/D-vsXmeZ9Ew?si=S4FCpDJMAf_p6Va (Minute 1:06:42-1:08:49)

55 *What is a Wetland?*, EPA, https://www.epa.gov/wetlands/what-wetland (last updated May 4, 2023)

The EPA splits wetlands into Coastal/Tidal and Inland/Non-tidal segments,[56] which encompass a variety of other types.[57] Wetlands contribute to their ecosystems' biodiversity, water quality, climate regulation, aesthetics, and flood and erosion control.

1. Biodiversity

Biodiversity, the variety of all life forms, is essential to the existence and proper functioning of all ecosystems.[58] The species counted in a biodiverse ecosystem include plants, vertebrates, and invertebrates. Each species exists in a specialized niche that serves a purpose for the maintenance of the system. Conserving biodiversity is not only a matter of ecological significance but also a source of multifaceted benefits. These benefits include contributions to modern medicine,[59] supporting endangered species and migrating birds, and are essential areas for maintaining aesthetics, recreation, steady food supply, and spiritual purposes of the Native American Tribal Nations.[60]

Tribal nations have relied on biodiversity for as long as they have existed. There are species that exist only in the specialized wetland environment that are important for religious ceremonies, cultural continuance, and tribal economies. For example, the Skokomish of Washington gather and protect Olympia Oysters in saltwater ponds and estuaries.[61] These oysters are essential for the Tribe's economic

56 *Id.*

57 *Classification and Types of Wetlands*, EPA, https://www.epa.gov/wetlands/classification-and-types-wetlands#marshes (Last updated April 13, 2023)

58 *EnviroAtlas Benefit Category: Biodiversity Conservation*, EPA, https://www.epa.gov/enviroatlas/enviroatlas-benefit-category-biodiversity-conservation (Last updated Aug. 9, 2023)

59 Robert T. Watson & A.H Zakri, *Ecosystems And Human Well-Being*, 34 (2005), https://www.millenniumassessment.org/documents/document.354.aspx.pdf

60 *Id.* at 36

61 Bryan Bougher, *Tribes Work To Restore Native Olympia Oysters*, Northwest Indian Fisheries Commission Blog (June 19, 2003), https://nwifc.org/tribes-work-to-restore-native-olympia-oysters/

diversity and maintenance of cultural roots.[62] The Tribe also relies on salmon runs, shellfish populations and beds, macroalgae, economic growth, and cultural education. All of these depend on maintaining a healthy water system. Any degradation could cause catastrophic effects throughout the ecosystem chain, decreasing a tribe's ability to gain access to these invaluable species.

For the Ojibwe mentioned at the start of this paper, Manoomin is central to cultural activities and religious ceremonies. The health of wetlands is crucial for sustaining the growth of plants like Manoomin, which cannot thrive in non-hydric soils.[63] Manoomin relies on wetlands' continuous water supply, specific chemical composition, and water flow to flourish. Healthy wetlands upstream of the plant are able to filter the water to the chemical composition needed and soak up water from floods. If the upstream wetlands are degraded or destroyed, Manoomin will not be able to survive. Therefore, it would not be enough to protect Manoomin alone; the surrounding wetlands also need protection.

2. Carbon

Wetlands contribute to climate regulation through carbon sequestration. During photosynthesis, plants absorb carbon and store it in living biomass and the soil. This process is increased in wetlands with greater plant biomass production. The amount of carbon a system can take depends on the vegetation, soil composition, water flow, restoration activity, and human activity.

When carbon stores are disrupted, carbon is released into the atmosphere, trapping heat from the sun and preventing its escape. This release causes the planet to warm and influences climate change. The consequences of such warming include biodiversity

62 *Aquaculture Holds Connection and Resilience Opportunities for Skokomish Tribal Communities,* NOAA Fisheries (Dec. 3, 2021), https://www.fisheries.noaa.gov/feature-story/aquaculture-holds-connection-and-resilience-opportunities-skokomish-tribal-communities

63 *Hydric soils are soils that are saturated, flooded, or ponded for enough time that they develop low oxygen levels. They are a defining characteristic of wetlands.*

loss, human health risks, loss of glaciers and ice sheets, and rising sea levels. Deliberately protecting wetland ecosystems can prevent the disruption of carbon stores and stop carbon release in the first place.[64] Preventing carbon release creates a better chance that climate change can be slowed and its consequences mitigated.

The Clean Water Act (CWA) has protected wetlands for the majority of its existence. This protection ensures that carbon sinks aren't disrupted and prevents the release of previously trapped gasses. The new *Sackett v EPA* decision has narrowed the CWA's ability to regulate such areas, leaving these sensitive sinks to be degraded and potentially increasing the amount of greenhouse gasses in the atmosphere. The United States has five acts protecting air quality and gas emissions, none addressing gas reduction methods. Currently, the nation has no regulations protecting land that takes CO2 from the air. This paper proposes regulations to be set to preserve CO2-reducing land.

3. Flood and Erosion Mitigation

In addition to controlling what is released into the air, wetlands control what is released in waterways by managing water quality, floods, and erosion, trapping sediment, and retaining excess nutrients or pollutants. This occurs because the high plant density creates a low water flow within wetlands, allowing sediments to settle. Such creates a natural filtration system that is effective enough to provide potable water with no other filtration systems in place.[65]

The density of plants that create a low flow within wetlands also allows them to stop floods and erosion. The plants and soils within wetlands are capable of handling large amounts of water and acting as a sponge during floods, trapping water and then slowly releasing

64 Project Drawdown Team, *The Drawdown Review*, 6 (Christian Leahy et. al eds., 2020)

65 Arturo S. Leon et al., *S.C. Dynamic Management of Water Storage for Flood Control in a Wetland System: A Case Study in Texas*, MDPI Water Journal, Mar. 15, 2018, at 1. https://www.mdpi.com/2073-4441/10/3/325

it.[66] In areas where wetlands have decreased, over three feet of land are lost each year,[67] placing schools, homes, industries, and ecosystems in jeopardy. In 2016, the coastal village of Shishmaref, Alaska, relocated due to the loss of shoreline. Six hundred community members, mostly Inupiat Inuit, voted to move from their land, the ocean, and their traditions.[68] The actions of the community in Shishmaref call for regulations aimed at preventing erosion. Wetland regulation is one possible avenue for mitigating these effects and preventing further displacement of communities from their homes.

Preserving wetlands presents a potential solution to curbing the effects of erosion. Wetlands are able to bind land together through their extensive root network by decreasing soil disruption from rainfall. Currently, no federal regulation directly protects wetlands used for flood and erosion prevention. The lack of protection for flood mitigation could exacerbate erosion and flooding concerns within an area. As wetlands deteriorate, they progressively lose their ability to fulfill ecological requirements, resulting in diminished capacity to filter pollutants, provide habitat, and reduce erosion. This leaves U.S. citizens in danger of losing their homes and creating additional costs to local, state, and federal governments. Wetland-specific regulations would prevent this degradation and protect American life and property.

B. Federal Law

1. Endangered Species Act (ESA)

The Endangered Species Act (ESA) protects species threatened with extinction and their respective habitats. The Act "provides a

66 *Why are Wetlands Important*, EPA, https://www.epa.gov/wetlands/why-are-wetlands-important (Last updated Mar. 22, 2023)

67 Sama Sidik, *How Alaska's Coastal Communities are Racing Against Erosion*, Salon (Mar. 4, 2023) https://www.salon.com/2023/03/04/how-alaskas-coastal-communities-are-racing-against-erosion_partner/

68 Aura Bogado, *Alaska Native Village Votes to Relocate in the Face of Rising Sea Levels*, Grist (Aug. 17, 2016), https://grist.org/equity/alaska-native-village-votes-to-relocate-in-the-face-of-rising-sea-levels/

program for the conservation of threatened and endangered plants and animals."[69] The ESA explicitly bans hunting, killing, and transporting endangered species. It protects against 'significant' habitat loss through the section 9 "takings" provision. Under the ESA, "takings" are actions that "harass[70], harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such contact"[71] with species listed as endangered or threatened.

In the case of *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,*[72] the plaintiffs consisted of landowners, logging companies, and timber workers. This Chapter of Communities brought action against the Secretary of the Interior and the Director of Fish and Wildlife Service to challenge the departments' definition of the ESA "takings" and "harm." Specifically, this case was about whether habitat modification, when it may injure or kill wildlife, is considered "harm" to the species and, therefore, a "taking." The Supreme Court held that the definition of a "taking" should include anything that "naturally encompasses habitat modification that results in actual injury or death."[73]

The "taking" provision of the ESA is vital for protecting sensitive wetlands and the biodiversity within. Approximately half of all federally listed threatened and endangered species are wetland

69 Summary of the Endangered Species Act, EPA, https://www.epa.gov/laws-regulations/summary-endangered-species-act (Last Updated Sept. 26, 2023)

70 Robin K. Craig, Robert W. Adler, Noah D. Hall, *Water Law (Concepts and Insights)*, 271- 272, 1st ed. 2017 Note: An intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition was upheld by the Supreme court in the Babbitt v. Sweet home case.

71 *Id.* at 271

72 Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995)

73 *Id.* at 687

dependent,[74] meaning that these species could not survive without the wetlands in which they live. If their habitat (the wetland) is degraded or destroyed, these species will cease to exist. The loss of these species would be detrimental to the ecosystem due to the loss of specific niche fulfillments. Many of the species are subjects of medical and natural resource research, as well as recreational benefits. The loss of these species would result in a loss of the associated research, including medicinal discoveries and the recreation associated with these species. The loss of these species will affect the tribal nations that have coexisted with them for hundreds of years. For many tribes, these species are part of their mythology, playing parts of gods and spirits.[75] For the species in these legends and the tribes that share their mythology, a loss of these species is a loss of much more than just the loss of an animal. For that reason, many of the tribes across the U.S. fight for wetland protection.

The Endangered Species Act can stop habitat degradation if an endangered or threatened species resides within the area under the "takings" provision but does nothing if there is no such species. The ESA cannot protect any wetland that does not contain a listed species. The lack of protection is problematic, as it leaves many species in need of habitat protection. Such species could be extinct before they are listed and given protection under the ESA, creating a decrease in biodiversity that is important for ecosystem management. If a species happens to be listed before it becomes extinct, it often faces a near-impossible recovery because its habitat has already deteriorated. Once a species is listed, land managers must invest in

74 *Why Healthy Wetlands are Vital to Protecting Endangered Species*, U.S. Fish And Wildlife Service, https://www.fws.gov/story/2023-04/why-healthy-wetlands-are-vital-protecting-endangered-species (last visited Mar. 12, 2024)

75 *Native American Indian Animals of Myth and Legend*, https://www.native-languages.org/legends-animals.htm (last visited Feb. 20, 2024)

restoring the habitat, an intensive project[76] that can cost over $51 million and take more than five years to complete.[77]

The disruption to the species and the cost of wetland restoration could be avoided if these habitats were already protected under a separate law focused on wetland preservation. However, protecting wetlands only because they house an endangered species is not a sustainable practice. Wetlands must also be protected for more than just the endangered species within their borders.[78]

2. Migratory Bird Treaty Act (MBTA)

The Migratory Bird Treaty Act (MBTA) was passed in 1918 to protect the North American waterfowl. The MBTA implements four international conservation treaties, including the United States, Canada, Mexico, Japan, and Russia as contributing parties. Its purpose is to "ensure the sustainability of populations of all protected migratory bird species."[79] It also prohibits the "killing, capturing, selling, trading and transport of protected migratory bird species."[80] The earlier edition of the act, The North American Waterfowl Management Plan, spurred the creation of the North American Wetlands Conservation Act. The Wetlands Conservation Act authorized grants to public-private partners who would "protect, enhance, restore and manage waterfowl or other migratory birds and other fish and wildlife in wetlands."[81]

76 *Wetland Restoration*, EPA, https://www.epa.gov/sites/default/files/2021-01/documents/wetland_restoration.pdf (2002)

77 *Frequently Asked Questions*, Provo River Delta, https://www.provoriverdelta.us/faqs (last visited Feb. 20, 2023)

78 *Why Are Wetlands Important*, National Park Service, https://www.nps.gov/subjects/wetlands/why.htm (last visited Feb. 20, 2023)

79 *Migratory Bird Treaty Act of 1918*, U.S Fish And Wildlife Service, https://www.fws.gov/law/migratory-bird-treaty-act-1918 (last visited Feb. 27, 2024)

80 Migratory Bird Treaty Act, 16 U.S.C. §§703-711 (1918)

81 *North American Wetlands Conservation Act*, U.S. Fish And Wildlife Service, https://www.fws.gov/law/north-american-wetlands-conservation-act (last visited Feb. 27, 2024)

The combination of the MBTA and the North American Wetlands Conservation Act provides a framework for protecting wetlands that waterfowl rely on. However, its limitations require additional regulation to protect the watershed further. The North American Wetlands Conservation Act relies on public-private partnerships to manage the protection of wetlands. The Standard and Small Grants programs are competitive and require partner contributions at a minimum 1-1 ratio,[82] making it challenging to find motivated partners for wetland protection efforts. Due to this, many wetlands remain unprotected under the Conservation Act.

The Migratory Bird Treaty Act is limited by the Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers Supreme Court decision, which held that the Corps could not regulate isolated, non-navigable intrastate waters solely based on their use as a habitat for migratory birds. This ruling prevented the Corps from regulating wetlands that migratory birds use. The Corps's responsibility is to ensure activities that might impact migratory birds or their habitats are conducted in a manner consistent with the provisions of the MBTA.[83]

Wetlands are vital to their dependent species and migratory birds. They are also heavily relied upon by fish, amphibians, mammals, and insects who do not fit those categories for breeding, birthing, and nursing grounds. Foraging animals, such as deer, elk, cattle, and sheep, who use the wetlands as shelter rely on the proteins and minerals available in wetland plants during the winter. For many of these foraging animals, the food they rely on over the summer becomes dormant in the winter, which means less protein and minerals are available for these species to consume. Wetlands provide green forage throughout the year because the plants within their boundaries have consistent access to surface and subsurface water flows. In subsurface flows, the water in the system isn't seen but can be measured just below the surface. This insulation prevents the waters from freezing because the ground insulates the water, which

82 North American Wetlands Conservation Act, 16 U.S.C. 4401 (1989)

83 Migratory Bird Treaty Act, 16 U.S.C. §§703-711 (1918)

reduces energy loss through evaporation and convection.[84] In above-ground flows, the water is present above the surface. The top layer of this water may freeze, but the remainder will remain a liquid for the plants.

If these water flows are altered, degraded, or polluted, it will lead to the plant biomass[85] decreasing. This change, in turn, would decrease the amount of winter forage available for dependent species. If the gap between what biomass was and is now available cannot be sourced in other areas of a species' range, various species could permanently decrease. Specific wetland areas are protected from this fate because of the presence of endangered species. As clarified by Babbitt v. Sweet Home, these areas are subject to section 4 of the ESA and the "takings" it describes. A majority of wetlands are not protected because they lack the presence of listed endangered species. Before Sackett v. EPA, the Clean Water Act (CWA) played a pivotal role in wetland protection, with the Endangered Species Act (ESA) and Migratory Bird Treaty Act (MBTA) serving as supplementary safeguards. However, in the absence of the CWA, the ESA and MBTA prove inadequate, leaving a significant gap in ensuring the continued well-being of wetlands. A law specifically constructed to protect additional wetlands would create a safeguard for all species, listed or not, maintain their habitat, and ensure the continued health of wetlands.

3. Federal Indian Law

Tribal law governs the legal framework that applies to its members and territories. Within the United States, tribes can practice tribal law because they are classified as "domestic dependent nations."[86] The principle of tribal sovereignty, or the ability of tribes to govern themselves, enables self-determination and self-governance, giving them

84 Scott Wallace, Gene F. Parkin, *Cold Climate Wetlands: Design and Performance,* PubMed (Feb. 2001) https://www.researchgate.net/publication/11555217_Cold_climate_wetlands_Design_and_performance

85 *Biomass refers to the total weight of living plants.*

86 *Native American Policies*, U.S. Dep't Of Justice, https://www.justice.gov/otj/native-american-policies (last visited Feb. 27, 2024)

the authority to administer programs and services independent of the federal government.[87] Tribes have had their right to sovereignty expanded and restricted through Federal Indian Law, specifically through federal courts. Three Supreme Court cases have been especially influential in determining tribal rights. These decisions constitute the "Marshall Trilogy": a series of monumental definitions in the judicial foundation they create. The foundation provides means for tribes to operate within the U.S. without oversight from states and reduced federal regulation—Cherokee *Nation v. Georgia, Johnson v. M'lntosh,* and *Worcester v. Georgia* compose the Trilogy. Chief Justice John Marshall, the primary author of the "Marshall Trilogy," established federal primacy in Indian affairs, barred state law from Indian Country, recognized tribal governance, and established tribes as "domestic dependent" nations. The Trilogy has been reaffirmed countless times, solidifying the principles within as fixtures in Federal Indian Law.[88]

One contribution of Federal Indian Law is its judicial confirmation of tribal water rights, affirmed by Supreme Cases such as *Winters v. U.S.* and *Arizona v. California.* In *Winters v. U.S.,* the Court held that five tribes, the Colorado River Indian Tribes, the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, the Cocopah Indian Tribe, and the Fort Yuma (Quenchan) Indian Tribe, retained an implied water right within the treaty, placing the tribal water right at a higher level than settlers in the area.[89] Fearful that lower water rights wouldn't have predictable standards, *Arizona v. California* set forth a test to determine the water rights owned by a tribe. The test examined the acreage that could potentially be used in an economically feasible manner for agricultural purposes. The test was

87 *Indian Affairs*, U.S. Dep't Of The Interior, https://www.bia.gov/frequently-asked-questions (last visited Feb. 27, 2024)

88 Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court,* Human Rights Magazine, May 1, 2015 at 1, 9-11, Note: Williams v. Lee, Montana v. US, Santa Clara Pueblo v. Martinez and Warren Trading Post Co. v. Arizona State Tax Commission are three examples that affirm and retain the principles within the Marshall Trilogy.

89 Winters v. United States, 207 U. S. 564 (1908)

titled the Practicably Irrigation Acreage (PIA) test. It gave a specific amount of water to tribes and allowed that water to be used for any purpose, no longer limited to agriculture.[90] The test was used in the 9th District's decision in *Colville Confederated Tribes*[91] *v. Walton*. The District held that the Confederated Tribes could use their allocated water rights to maintain stream flow and general fish habitat or for agricultural purposes.[92]

Prior to *Colville v. Walton*, the Supreme Court, in its decision on *United States v. Winans,* acknowledged that the Yakama Nation Members deserved the right to access culturally important fish species.[93] The *United States v. Winans* decision created a precedent for tribes maintaining access to culturally significant species. The case debated the rights of the Yamika Nation, specifically regarding whether they could enter private or obstructed land to practice their fishing rights and privileges. The Tribe's 1859 Treaty with the U.S. specifically granted the tribe the right to "taking of fish in all streams running through or bordering said reservation… also the right of taking fish at all usual and accustomed places…"[94] The court held that the members of the Yamika Nation had the same fishing privileges inside and outside of their borders, even if, in accessing fisheries they crossed private lands. The Court majority believed that the right to fishing, offered by the treaty, would be meaningless without fishing sites. Similarly, one must wonder if a tribe's treaty would

90 Arizona v. California, 373 U.S. 546 (1963)

91 Colville Confederated Tribes v. Walton, 460 F. Supp. 1320 (E.D. Wash. 1978) Note: The Colville Confederated Tribes comprise the Methow, Okanogan, Aampoil Nespelem, Lake, and Colville Tribes. No Name Creek, located entirely within the Colville Indian Reservation, serves as the home of the Confederated Tribes. The Waltons held allotments within the Reservation. The Tribes sought to prevent the Waltons from using No Name Creek waters to ensure that the waters could reach Omak Lake and remain available for the Lahontan cutthroat trout.

92 Colville Confederated Tribes v. Walton, 647 F.2d 42, 44 (9th Cir. 1981)

93 United States v. Winans, 198 U.S. 371 (1905)

94 *Yakama Nation Treaty of 1855*, Confederated Tribes And Bands Of The Yakama Nation, https://www.yakama.com/about/treaty/ (last visited Mar. 6, 2024)

be meaningless if the fishing sites were degraded due to a lack of protection.

Aidar v. United States[95] answers whether tribal treaties protect water quality. In this case, the Klamath Tribe claimed the stream flow and lake levels needed to be maintained to protect treaty rights pertaining to fishing, wildlife, and plants. Applying the Winans rationale, the Supreme Court affirmed this stance that treaty rights are void without access to the means to exercise those rights. *Aidar v. United States* was later affirmed when the Washington Supreme Court decided on the *State Department of Ecology v. Yakima Reservation Irrigation District.* The Washington Court recognized that the Yakima Tribe maintained rights to instream flows within and outside of the borders of the district as protection of fishery habitat and treaty rights.[96]

The judicial decisions regarding tribal water rights have set a precedent; tribes are entitled to maintain waterways and wetlands to practice all reserved rights. The United States fails in its responsibility as the protector of the "domestic dependent nations" if waters within the country are refused regulation and are permitted to degrade. When wetlands disappear, the United States cannot fulfill the reserved tribal rights promised within its treaties. To ensure that reserved tribal rights may always be practiced, the United States must pass wetland-specific regulation that protects any significant nexus to wetlands and tribal lands.

C. Tribal Law

As domestic-dependent nations, tribes have the ability to set reservation-specific regulations that apply within their borders. The regulations set under the authority of tribal sovereignty often include

95 *US v. Aidar originated when the US filed suit to determine water rights within the Klamath area. The government named individual land owners as defendants. The US argued that the Klamath Indians retained reserved water rights for fishing and hunting. The land owners disagreed, believing that tribal water rights were only for agricultural purposes.*

96 State Department of Ecology v. Yakima Reservation Irrigation District, 121 Wash. .2d 257, 288 (1993)

environmental regulations, such as water quality standards. Federal entities monitor the regulations and tribal laws set by the nations. Many agencies, such as the EPA, have determined to "look directly to Tribal Governments to play this lead role for matters affecting reservation[s]."[97] The EPA has determined that tribes will have a lead role in environmental matters within their borders. This occurs as tribes are expected to make policies and manage their environmental programs, which the EPA then reviews to ensure they comply with federal requirements. The practice of setting environmental regulations is beneficial, but the benefits are relatively limited as they stop at the borders of the tribal land.

The Fond du Lac Band of Minnesota has created the Fond du Lac Wetlands Protection and Management Ordinance (WPMO) to "ensure maximum protection for wetlands by discouraging development activities in wetlands and those activities in adjacent upland sites that may adversely affect wetlands."[98] The Band has also created a Wetland Protection and Management Plan with Carlton County, St. Louis County, and the City of Cloquet.[99] These, in combination with water quality standards set by the Band, help to ensure that the wetlands and waters within their borders are protected and conserved. Other tribes, such as the Makah of Washington, the Navajo Nation, and the Fort Hall Reservation of the Shoshone Bannock Tribes, maintain similar laws, ordinances, and organizations dedicated to preserving their wetlands and waterways.

After 2023, the CWA's use to protect a wetland similar to that of the Fond du Loc case would be ineffective. The decision in Sackett v. EPA restricted the CWA and EPA's wetland jurisdiction to wetlands

97 Policy for the Administration of Environmental Programs on Indian Reservations, EPA, 2 (Nov. 8, 1984) https://www.epa.gov/sites/default/files/2015-04/documents/indian-policy-84.pdf

98 *Wetland Protection and Management Ordinance*, Fond Du Loc Band Of Lake Superior Chippewa, https://www.fdlrez.com/rm/wetlandordinance.htm (last visited Feb. 27, 2024)

99 *Joint Comprehensive Wetland Protection and Management Plan*, Fond Du Loc Band Of Lake Superior Chippewa, https://www.fdlrez.com/rm/downloads/WetlandPlan16JAN06.pdf (Jan. 16, 2006)

that maintain a "continuous surface connection," severely limiting the act's ability to protect tribal wetlands.

D. State regulations

Many states within the U.S. have wetland-specific laws[100]. Virginia, for instance, has the Tidal Wetlands Act of 1972, Chapters 12 and 13 of Title 28.2, for the code of Virginia, Virginia Code Sections 62.1-44.2 et seq. and 62.1-44.15:5, and the Chesapeake Bay Preservation Act. and more.[101] These acts authorize regulations, recognize the environmental value of wetlands, establish permit systems, and ultimately preserve wetlands.[102] The protections states offer are beneficial; however, wetland protection between states can differ greatly. For instance, Alaska wetlands are regulated mainly by the U.S. Army Corps of Engineers - Alaska District (COE) and the EPA, with limited wetlands protected under the Alaska Coastal Management Program.[103] In contrast, California wetlands are regulated by five agencies and one act: the California Environmental Protection Agency, the State Water Resource Control Board, the Department of Parks and Recreation, The Department of Fish and Game, the California Coastal Conservancy, and the Porter-Cologne Water Quality Control Act.[104] Other states, like Michigan, have received authorization to administer Section 404 of the Clean Water Act within the

100 *Laws and Regulations*, Wetlands Watch, https://wetlandswatch.org/laws-and-regulations (last visited Feb. 27, 2024) Note: *Virginia has the Tidal Wetlands Act of 1972, Chapters 12 and 13 of Title 28.2, for the code of Virginia, Virginia Code Sections 62.1-44.2 et seq. and 62.1-44.15:5, and the Chesapeake Bay Preservation Act and more.*

101 *Laws and Regulations*, Wetlands Watch, https://wetlandswatch.org/laws-and-regulations (last visited Feb. 27, 2024)

102 *Id.*

103 *Wetlands State Resource Locator: Alaska*, https://www.envcap.org/srl/srl.php?srl=21&state=AK (last visited Feb. 27, 2024)

104 *Wetlands State Resource Locator: California*, https://www.envcap.org/srl/srl.php?srl=21&state=CA (last visited Feb. 27, 2024)

state[105] and use that ability in combination with state laws like the Geomare-Anderson Wetland Protection Act.[106]

These regulations are a starting point for wetland protection, but they are not fit to remain as they are. The Water Quality Act,[107] which relied on state action, was revised just seven years after its passing due to the unwillingness of states to pass regulations and the desire to have a unified regulation. The CWA provided this unified front to address the country's water quality issues. Wetlands are in a biological crisis that calls for a similar, unified front that was pushed for in the past because state-by-state regulations will not provide the necessary framework to protect wetlands. It is essential to have national wetland regulations so that the issue can be addressed uniformly and as a united country. Fostering a cohesive national strategy is critical to ensure the comprehensive preservation and sustainable management of wetlands across the entire United States.

E. Proposed Regulation

Wetlands require federal regulations tailored to them, with the purpose of preserving the ecological functions of wetlands by protecting their "chemical, physical and biological"[108] properties that connect to navigable bodies of water. The wetlands included in the law must be clearly defined–leaving no room for the ambiguity that has left so many wetlands and, therefore, people unprotected from harm. This paper proposes new regulations, separate from the CWA, be created. This regulation will include all waters defined by the

105 *Wetlands State Resource Locator: Michigan*, https://www.envcap.org/srl/srl.php?srl=21&state=MI (last visited Feb. 27, 2024)

106 *State and Federal Wetland Regulations*, Dep't Of Environment, Great Lakes, And Energy, https://www.michigan.gov/egle/about/organization/water-resources/wetlands/state-and-federal-wetland-regulations (last visited Feb. 27, 2024)

107 Copeland, *supra* note 39

108 Clean Water Act 33 U.S.C. § 1330

EPA,[109] as well as other bodies of water that contain a significant nexus to navigable bodies of water to ensure the preservation of the ecological functions of these lands. The historical jurisdiction of wetlands is under the EPA and the COE, and this paper proposes the agency retain jurisdiction. The regulation will be modeled after the CWA, creating a robust monitoring and permitting program designed to assess and maintain the health of wetlands. It will purposefully remove wetlands from the jurisdiction of the CWA. Separating the acts creates individualized protection for wetlands, decreases confusion over wetland jurisdiction, and increases wetland protection overall.

The EPA defines wetlands as "areas where water covers the soil, or is present at or near the surface of the soil all year or for varying periods of times during the year, including the growing season."[110] Wetlands of varying sizes will be held under the new regulation. Some wetlands, dependent on spring runoff for sustenance, are barely existent, while others, such as the expansive 41,000-acre Cheyenne Bottoms in Kansas,[111] persist year-round. The diverse characteristics of wetlands prompt a debate over which should be included under the ambit of new regulatory measures. In order to safeguard traditional navigable bodies of water and uphold tribes' capacity to maintain water quality standards, it is crucial to incorporate wetlands that exhibit a "significant nexus"[112] to the traditional bodies of water. Additionally, wetlands with a significant nexus to tribal lands fall within the purview of this proposed regulation.

Under this interpretation, wetlands could be interpreted as bogs directly off a water body's shore or marshes connected only through

109 What is a Wetland?, *supra* note 55 Note: *Areas where water covers the soil, or is present at or near the surface of the soil all year or for varying periods of times during the year, including the growing season.*

110 EPA, *supra* note 55

111 *Places We Protect Cheyenne Bottoms Kansas,* The Nature Conservancy, https://www.nature.org/en-us/get-involved/how-to-help/places-we-protect/cheyenne-bottoms-preserve/ (last visited Feb. 28, 2024)

112 A significant nexus is a body of water that could affect the biological, chemical and physical properties of traditional navigable bodies of water.

subsurface flows and headwaters of a stream that passes through tribal lands. If it can be proven that a change in the wetland can be seen in the navigable body of water, all should be regulated under the new wetland-specific regulation. If there is no detectable connection to a navigable body of water, the regulation will not protect that wetland.

The EPA and Army Corps of Engineers, as they have authority over the CWA, will oversee the program and grant permits for actions affecting wetlands within the regulation. Additionally, in the first stages of the law, it is important that both agencies set quality standards in collaboration with states, tribal authorities, and scientific experts. Each should consider the specific needs and vulnerabilities of wetland ecosystems and provide a guide to management, pollution control, and restoration.

The precedent has determined that wetland regulation is a federal matter. Since 1985, wetlands have been subject to federal government regulation due to their connection with navigable bodies of water. This follows the decision of *Riverside v. Bayview*, which clarified that the Army Corps acted reasonably in interpreting the Act to require permits for the discharge of material into wetlands adjacent to other 'waters of the United States.'

IV. Conclusion

Protecting wetlands is paramount to the protection of American land, whether in the use of Indians, natural life, or the average American citizen. The Clean Water Act (CWA) has served as a crucial regulatory tool for wetland protection aimed at protecting the chemical, physical, and biological properties of water. However, the Supreme Court decision in *Sackett v. EPA* 2023 has imposed limitations on the CWA, rendering it ineffective in achieving its goals. This narrowing of regulatory scope poses a significant challenge to the comprehensive protection of wetlands and their ecological services. Wetlands create unique habitats, carbon reduction, and flood and erosion mitigation. In communities like Shishmaref in Alaska, these services would have prevented the loss of shoreline, protecting the town and its citizens. Federally recognized tribes, such as the

Ojibwe of Minnesota, rely on wetlands outside of their borders to continue cultural practices. In light of the diminishing CWA jurisdiction, there is a pressing need for renewed efforts to reinforce and enhance wetland conservation measures to ensure the sustained well-being of communities and ecosystems across the United States.

State and tribal regulatory initiatives have sought to address the gaps left by inadequate federal regulations. The effectiveness of these measures is limited due to their localized nature. The absence of clear, national guidance regarding wetland protection continues to be a hindrance in state and tribal regulation. Unless this ambiguity is clarified, state and tribal regulations will remain unsuccessful in their attempts to regulate the protection of wetlands. To truly address the complexities of wetland protection, the United States must enact comprehensive federal legislation establishing criteria for safeguarding these critical ecosystems. Such federal legislation would not only bridge the gaps in existing regulation but also provide a constant and standardized approach to wetland preservation, ensuring equitable protection across the nation.

Free Speech or Fair Elections? A Call for Campaign Finance Reform and a New Definition of Corruption

Annabelle Crawford[1]

I. Introduction

The United States of America is a democratic republic—a system of government "of the people, by the people, for the people."[2] The grand American experiment designed almost 250 years ago imagined a government that was beholden to its people, in which the interests of all citizens would be protected and prioritized. Of course, the United States has seldom met this ideal. However, historically, citizens of the United States have a tradition of faith in the government to protect the interests of the people to whom it answers.[3] Unfortunately, this confidence in the federal government is steadily declining and is today at an all-time low.[4] Among other reasons for this declining faith, Americans cite concerns including the government's lack of intervention to address issues faced by specific groups, diminishing confidence in government employees,

1 Annabelle Crawford is a junior at Brigham Young University, studying International Relations and Economics. She will attend law school in the fall of 2025. She would like to thank her editor, Lindsay Haddock, who is a senior at Brigham Young University, studying English. She will attend law school in the fall of 2024.

2 Abraham Lincoln, *The Gettysburg Address* (1863).

3 *Public Trust in Government: 1958-2023*, Pew Research Center (Sept. 19, 2023), https://www.pewresearch.org/politics/2023/09/19/public-trust-in-government-1958-2023/.

4 *Id*.

and concern that politicians are generally self-interested.[5] Such concerns are hallmarks of sinister corruption.

Corruption and money go hand-in-hand. Corrupt governments might intervene to protect groups with the money to make themselves heard at the expense of groups who do not have the funds to organize. Self-interested government employees and politicians might make deals wherein they provide some service in exchange for monetary incentives. And those with extreme wealth might be able to "buy" an election by spending exorbitant amounts in support of their preferred candidates.

The cost of running for office itself is preposterously high. Total federal spending during the 2020 election cycle was $14.4 billion.[6] That is more than double the cost of the 2016 election, which was already record-breaking. The presidential election race alone cost $5.7 billion. Some presidential hopefuls and other candidates for office have enough money to fund their own campaigns, and there are no limits on a candidate's contributions to their own campaign.[7] Certainly, for the handful of people who can afford to bankroll their own campaigns, their presence in the political sphere may not meaningfully represent their constituents, as their campaign success reflects their independent wealth rather than constituent support. However, the vast majority of candidates who cannot finance their own campaigns must accept donations in order to have a chance of winning an election race, making it difficult to avoid the influence of these donors once they are elected.

5 *Americans' Views of Government: Decades of Distrust, Enduring Support for Its Role,* Pew Research Center (June 6, 2022), https://www.pewresearch.org/politics/2022/06/06/americans-views-of-government-decades-of-distrust-enduring-support-for-its-role/.

6 Karl Evers-Hillstrom, *Most expensive ever: 2020 election cost $14.4 billion*, OpenSecrets (Feb. 11, 2021, 1:14 PM), https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16/.

7 *Using the personal funds of the candidate,* Federal Election Commission, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/using-personal-funds-candate/#:~:text=When%20candidates%20use%20their%20personal,must%2C%20however%2C%20be%20reported (last visited Feb. 27, 2024).

Justifiably, many Americans are concerned that "major political donors and special [interest groups] have too much influence on politics and that ordinary people have too little influence."[8] However, the more sinister campaign finance issue is not contributions given directly to a candidate but rather is the lack of limits on independent expenditures—which are expenditures "for a communication" that "expressly [advocate for] the election or defeat of a clearly identified candidate" without "consultation or cooperation with…any candidate"[9]—and on total aggregate contributions—which are the total amount of direct contributions that an individual can donate during an election cycle.[10]

The First Amendment says that "Congress shall make no law… abridging freedom of speech."[11] The Supreme Court has held that giving money directly to a candidate in the form of campaign contributions constitutes speech, as do independent expenditures. The Court has allowed limits to be placed on contributions directly to a single candidate or political action committee. However, they have not permitted limits on independent expenditures or aggregate contributions. This means that individuals or interest groups can spend as much as they want to create publicity in support of or against a candidate. Alternatively, they can spend as much money as they want donating small amounts to many interest groups, which in turn can spend on behalf of a candidate or donate directly to one candidate (in small amounts below the contribution limit threshold). The Court has held that the influence of independent expenditures and aggregate

8 *Money, power, and the influence of ordinary people in American politics,* Pew Research Center (Sept. 19, 2023), https://www.pewresearch.org/politics/2023/09/19/money-power-and-the-influence-of-ordinary-people-in-american-politics/.

9 *Making independent expenditures*, Federal Election Commission, https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures/#:~:text=Individuals%2C%20groups%2C%20corporations%2C%20labor,are%20not%20subject%20to%20limits (last visited Feb. 12, 2024).

10 *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014).

11 U.S. Const. amend. I.

contributions does not constitute corruption and that limiting campaign spending is an unwarrante restriction on free speech.[12]

The Supreme Court's definition of corruption has changed over time. As it is currently defined, only bribery is considered corruption. By ignoring the influential role of money in elections beyond the influence of bribery, the Supreme Court has prioritized a right to free speech for corporations at the expense of the right of ordinary citizens to have their voices heard in political discourse. To protect the right to free speech guaranteed by the Constitution, the Supreme Court must authorize stricter limits on both independent expenditures and aggregate contributions and expand the legal definition of corruption. Corruption must prevent political favors and undue influence by powerful actors, thereby limiting the leverage held by billionaires and massive corporations and promoting equality in political participation.

II. Background

In the current system, running for office in the United States is nearly impossible without considerable monetary power. Money impacts the kinds of candidates who can run for office and influences the policies of candidates both before and after they take office. Thus, ordinary Americans have almost no influence on policy when their opinions are contrary to those of the rich.[13] Additionally, research finds that independent expenditures on campaign messaging and advertising do impact voter support of candidates.[14] Independent expenditures are an effective means of changing "the composition

12 *Buckley v. Valeo*, 424 U.S. 1 (1976); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *Wisconsin Right To Life, Inc. v. Federal Election Commission,* 551 U.S. 449 (2007); *McCutcheon*, 572 U.S.

13 Martin Gilens, *Affluence and Influence* (2012).

14 Richard N. Engstrom & Christopher Kenny, *The Effects of Independent Expenditures in Senate Elections,* Political Research Quarterly, Dec. 2002.

of voters,"[15] or in other words, the types of individuals who vote in an election. Independent expenditures are especially effective in changing the voting behavior of individuals who lack information or who identify strongly with a particular political party.[16] The correlation between money and votes is very strong, although admittedly, it is not clear whether it is an increase in spending that drives votes or an increase in votes that drives donations.[17] Election spending from non-party groups, like interest groups and Super PACs, has surpassed party spending, with non-party groups spending $4.5 billion dollars from 2010-2020 (compared to $750 million in the twenty previous years).[18] Concerningly, independent expenditures by powerful actors have begun to surpass spending by campaigns themselves.[19]

A. Origins of Campaign Finance in the United States

The idea of campaigning, like so many hallmarks of American politics, began with President Andrew Jackson. As the first grassroots campaigner, Jackson sought election by garnering widespread support from the American people. He was an early adopter of political patronage, in which he awarded his supporters with political positions. Jackson's 1824 electoral race set in motion the pattern of political campaigning that continues today, including the collection of financial donations to support a campaign. Campaigning requires money. Thus, in American election-

15 Steven Sprick Schuster, *Does Campaign Spending Affect Election Outcomes? New Evidence from Transaction-Level Disbursement Data*, The Journal of Politics, Oct. 2020.

16 *Id.*

17 Thomas Ferguson, Paul Jorgensen, & Jie Chen, *How money drives US congressional elections: Linear models of money and outcomes*, Structural Change and Economic Dynamics, June 2022.

18 Karl Evers-Hillstrom, *More money, less transparency: A decade under Citizens United*, OpenSecrets, Jan. 14, 2020.

19 *Id.*

eering, campaigning is supported—and funded—by the wealthy.[20] The first federal legislation regulating campaign finance, the 1867 Naval Appropriations Bill, stipulated that the federal government could not solicit funds from naval yard workers.[21] Over the next 100 years, Congress enacted a series of laws that attempted to regulate campaign spending with varying levels of success.[22] A lack of government infrastructure to carry out the requirements of the laws rendered the campaign finance elements of these laws largely unenforceable.

In 1971, Congress "consolidated its earlier reform efforts"[23] by passing the comprehensive Federal Election Campaign Act (FECA),[24] which remains an important piece of legislation. The FECA and its 1974 amendments permitted the creation of Political Action Committees, which allow corporations and unions to amass donations for particular candidates. The FECA also established the Federal

20 *Money-in-Politics Timeline,* OpenSecrets, https://www.opensecrets.org/resources/learn/timeline (last visited Feb. 23, 2024); David P. Callahan, *The Politics of Corruption: The Election of 1824 and the Making of Presidents in Jacksonian America* (2022).

21 *The Presidential Public Funding Program,* The Federal Election Commission (April 1993), https://www.fec.gov/resources/cms-content/documents/The_Presidential_Public_Funding_Program.pdf.

22 The Pendleton Civil Service Reform Act (1883) required that federal positions be awarded on the basis of merit and not via political patronage (Pendleton Civil Service Reform Act, 22 Stat. 403, 1883). The Tillman Act of 1907 banned corporations and national banks from contributing to candidates (Tillman Act, Pub. L. No. 59-36, 34 Stat. 864, 1907). The Federal Corrupt Practices Act of 1910, amended in 1910 and 1925, increased disclosure requirements (Federal Corrupt Practices Act, Pub. L. 61-274, 36 Stat. 822, 1910). The Hatch Act of 1939 placed some limits on contributions and expenditures in federal elections (Hatch Act, Pub. L. 76-252, 53 Stat. 1147, 1939). The Taft-Hartley Act of 1947 prevented labor unions and corporations from making contributions to Federal elections (Taft-Hartley Act, Pub. L. 80-101, 61 Stat. 136, 1947).

23 *Mission and history,* Federal Election Commission, https://www.fec.gov/about/mission-and-history/ (last visited Feb. 23, 2024).

24 Federal Election Campaign Act, Pub. L. 92-225, 86 Stat. 3, 1972, 52 U.S.C. § 30101.

Election Commission, the first regulatory body created to enforce campaign finance laws.

B. Supreme Court Definitions of Corruption

In the landmark Supreme Court case *Buckley v. Valeo (1976)*,[25] the Court affirmed the already-established standard that there must be sufficient governmental interest to limit free speech. It held that placing restrictions on campaign contributions does limit free speech. However, these limits are justified to prevent "quid pro quo" corruption. "Quid pro quo" is Latin for "this for that." It implies a direct exchange, and in the language of campaign finance, it refers to a donation of money in exchange for political favors, such as political appointments and explicit support or votes for certain policies. In addition to upholding limits on direct contributions to a specific candidate, the Court upheld provisions that limited the aggregate contributions an individual or corporation could make in a one-year period. Despite confirming restrictions on campaign contributions, the Court knocked down the provisions of the FECA that would have limited independent expenditures. The Court held that independent expenditures do not directly lead to quid pro quo corruption, and thus, placing limits on these expenditures would limit protected speech without due cause.

Subsequent cases expanded the definition of corruption to include undue influence by large corporations and the appearance of such influence. *Austin v. Michigan Chamber of Commerce (1990)*[26] upheld a Michigan law that prohibited corporations from using their general fund to make independent expenditures to support or oppose candidates. Additionally, the Court held that legislatures are justified in passing laws that protect against "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no relation to

25 *Buckley*, 424 U.S. In *Buckley*, the Court sought to address whether the Federal Election Campaign Act violated the First Amendment's free speech and association clauses.

26 *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

the public's support for the corporation's political ideas."[27] Therefore, under *Austin*, Congress was permitted to enact legislation to limit independent expenditures to mitigate distortion of the political process by powerful actors.

McConnell v. Federal Election Commission (2003)[28] upheld the Bipartisan Campaign Reform Act of 2002 (BRCA),[29] which banned unrestricted donations to political parties, limited the types of advertising that corporations could carry out up to sixty days before an election, and placed restrictions on parties' funds for advertising for particular candidates. It should be noted that all corporations were subject to the BRCA, including non-profit groups, unions, and large businesses. *McConnell* upheld the regulations of the BRCA on the basis that doing so prevented "both the actual corruption threatened by large financial contributions and…the appearance of corruption."[30] This case made it clear that the government is justified in limiting free speech to prevent the perception of possible corruption to protect the integrity of the political process. It also upheld Congress's right to regulate "express advocacy," or an entity's right to make independent expenditures to advocate on behalf of a political candidate.

However, the Court quickly began to reverse course, holding in *Wisconsin Right to Life, Inc. v. Federal Election Commission (2007)* that "issue ads" are not subject to the same scrutiny that "express advocacy" ads are, and that "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[31] By narrowing the definition of express advocacy ads, the Court decreased Congress's right to regulate independent

27 *Id.* at 660.

28 *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

29 Bipartisan Campaign Reform Act, Pub. L. 107-155, 116 Stat. 81, 2002.

30 *Id.* at 136 (citing *National Right to Work*, 459 U.S., at 208).

31 *WRTL*, 551 U.S. The Court ruled that *McConnell v. FEC* allows for Wisconsin Right to Life to proceed with its "as-applied" challenge to the BCRA, instructing the U.S. District Court for D.C. to consider whether the BCRA is constitutional as applied to WRTL's ad campaign.

expenditures and increased the amount of money allowed in campaigning, thereby increasing risks of corruption.

In the landmark case *Citizens United v. FEC (2010)*,[32] the Court overruled *Austin* and parts of *McConnell*. It struck down provisions of the Bipartisan Campaign Reform Act that had prevented corporations of all kinds from engaging in independent spending. The Court held that political speech cannot be limited just because the "speaker" is a corporation, and thus, independent expenditures by a corporation in support of or in opposition to a candidate cannot be limited. Under this decision, only quid pro quo corruption is sufficient to overcome the rights to free speech guaranteed by the First Amendment. The Court upheld existing disclosure requirements and limits on contributions directly to a political candidate. This decision has led to the rise of Super PACs, which are independent political action committees that can amass unlimited sums of money to support or oppose a candidate independently of their campaign. In a post-*Citizens United* political environment, corporations, unions, nonprofits, and Super PACs can spend as much money as they want to influence elections.

C. Specific Limits on Campaign Spending and Contributions

As noted, there are limits on the contributions an individual can make to one candidate or political entity. Contribution limits are indexed for inflation every two years. Currently, an individual may give $3,300 per election directly to a candidate and $5,000 to a PAC. A corporation or PAC can give $5,000 to a candidate committee or $5,000 to another PAC.[33] It is important to note that these limits are on individual contributions, not on the aggregate contributions an individual or group may make during an election cycle.

32 *Citizens United*, 558 U.S. Citizens United sought an injunction against the FEC to prevent application of the BCRA to a film it produced expressing political opinions. Citizens United argued that the BCRA violates the First Amendment and is unconstitutional.

33 *Contribution Limits for 2023-2024*, Federal Election Commission (February 2023), https://www.fec.gov/resources/cms-content/documents/contribution_limits_chart_2023-2024.pdf.

Importantly, the 1974 amendments to the Federal Election Campaign Act limited the amount of money that could be spent independently to influence federal elections and required the disclosure of independent expenditures over a specific amount. Specifically, individuals were limited to a total of $1,000 per year on independent expenditures, and political action committees were limited to $5,000 per year on independent expenditures.[34] These provisions were overturned by *Buckley v. Valeo*.[35] The Federal Election Campaign Act, and the later Bipartisan Campaign Reform Act of 2002,[36] also limited aggregate contributions that could be made by an individual during an election cycle (although there were never any limits imposed on aggregate spending by a corporation or other group). Until 2014, the aggregate limit that any individual could spend during a two-year election cycle was $123,200.[37]

However, in the Court's 2014 ruling in *McCutcheon v. Federal Election Commission,*[38] the Court held that although Congress is justified in placing limits on individual contributions, Congress cannot place limits on aggregate contributions. This means that although there are limits on how much money one donor can give to one candidate, there are no limits to how much money a donor can give collectively to all candidates. There are also no limits on the number of Political Action Committees that can operate. This means one donor can give money to many PACs who all support one candidate. Thus,

34 *Buckley v. Valeo,* Federal Election Commission, https://www.fec.gov/legal-resources/court-cases/buckley-v-valeo/#:~:text=The%20appellants%20had%20charged%20that,such%20candidate%22%20 (last visited March 12, 2024).

35 *Buckley*, 424 U.S.

36 Bipartisan Campaign Reform Act, Pub. L. 107-155, 116 Stat. 81, 2002.

37 *McCutcheon*, 572 U.S. at 194, 249. In the 2011-2012 election cycle, Alabama resident Shaun McCutcheon wanted to donate an amount of money that was allowed under the BCRA base limit but not permitted by the aggregate limit. McCutcheon sued the FEC, arguing that the aggregate limit violated the First Amendment, and the Court agreed, holding that the aggregate limit, while attempting to combat corruption, unnecessarily constrained free speech.

38 *McCutcheon*, 572 U.S.

although theoretical barriers prohibit spending unlimited funds to support one candidate, in practice there are no limits to the contributions that an individual or corporation can give to one candidate.

Under current Supreme Court holdings, there are no limits on the independent expenditures that can be made in support of or against a candidate.[39] Additionally, there are no limits on aggregate contributions. Therefore, there are virtually no limits to how much a corporation or individual can spend in support of or in opposition to a particular candidate. Those with money to spend on elections can have a hugely disproportionate effect on electioneering. Only a tiny fraction of wealthy Americans donate to campaigns,[40] but these donations have a significant influence both on elections and on the policies of elected officials once in office.

III. Proof of Claim

A. Corruption: A "Clear and Present Danger"

As mentioned, the First Amendment prohibits Congress from enacting legislation that limits freedom of speech,[41] and the Supreme Court has repeatedly held that the right to free speech includes the right to spend money to speak.[42] The Court has also held that the right to free speech is extended to corporations unless there is some compelling government interest in regulating said speech (the threshold for which is very high). Thus, opponents of campaign finance reform

39 This is true at both the federal and state levels, although every state except Indiana requires reporting and disclosure of independent expenditures to some degree. *See Independent Expenditure Disclosure Requirements,* National Conference of State Legislatures, https://www.ncsl.org/elections-and-campaigns/independent-expenditures (last updated July 21, 2017).

40 In 2022, only 0.395% of U.S. females and 0.646% of males donated more than $200 to political candidates, parties, or PACS. The proportion of people who gave larger contributions was even smaller. *See Donor Demographics,* OpenSecrets, https://www.opensecrets.org/elections-overview/donor-demographics (last visited March 11, 2024).

41 U.S. Const. amend. I.

42 *Buckley v. Valeo*, 424 U.S; *Citizens United*, 558 U.S; *WRTL,* 551 U.S.

point to the First Amendment as the principal reason why Congress should favor free speech over spending regulations.

In the 1919 case *Schenck v. United States,* the Supreme Court held that the government is justified in limiting an entity's First Amendment right to free speech to prevent a "clear and present danger" that could bring about "substantive evils."[43] From this case comes the oft-invoked and somewhat cliché precedent that one cannot "shout fire in a crowded theater." Later cases affirmed the right of the government to limit free speech in scenarios which present clear and present danger.[44] One such danger recognized by the Court is corruption: a concept both difficult to define and difficult to regulate that broadly implies an individual or organization uses their authority for personal gain.

Corruption has long been a concern in campaign finance. Court decisions indicate that free speech concerns are overshadowed by corruption concerns when it comes to contributions directly to a campaign, and there is thus sufficient "governmental interest" in regulating contributions. As previously outlined, in the first modern-era campaign finance case, *Buckley v. Valeo*, the Court held that the government is justified in placing limits on campaign donations when such donations lead to corrupt behavior[45] even though the donations qualify as speech under the First Amendment. This sort of quid pro quo corruption presents a "clear and present danger" to representative democracy, a fact which the Supreme Court has affirmed.

However, in *Buckley*, the Court failed to recognize the "clear and present danger" inherent in unregulated independent expenditures. The Court held that "contribution limits are subject to lower scrutiny because they primarily implicate the First Amendment rights of association, not expression, and contributors remain able to vindicate their associational interest in other ways."[46] In other words, campaign donations directly to a candidate are subject to more stringent

43 *Schenck v. United States*, 249 U.S. 47 (1919).

44 *See also Gitlow v. New York*, 268 U.S. 652 (1925); *Dennis v. United States*, 341 U.S. 494 (1951); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

45 *Buckley*, 424 U.S.

46 *Id.*

regulations, both because they are less expressive of pure speech and because they can have, in the opinion of the Court, a more corruptive influence on the electoral process than independent expenditures. In the Court's view, the free speech concerns associated with limiting expenditures outweigh corruption concerns because it does not view corruption as a significant issue in these cases. However, the current Court has not conceptualized corruption correctly.

Scholars have characterized campaign finance corruption in several ways. Before the heated and salient debates surrounding campaign finance of the last twenty years, scholar Thomas Burke preemptively explained three types of corruption that are inherent in campaign finance. In addition to (1) quid pro quo corruption, he noted other avenues of corruption: (2) monetary influence and (3) distortion. Burke's conception of these corruptive processes, along with a fourth avenue of corruption, the appearance of corruption, mirror the kinds of corruption the Court has acknowledged—although ultimately failed to regulate—in the years since.

1. "Quid Pro Quo" Corruption

Imagine that a corporation or interest group does not donate directly to a candidate, but uses their platform and their wealth to run a series of television advertisements in favor of a particular candidate. Largely as a result of their advertising campaign, their preferred candidate is elected.[47] Certainly, this presents a potential issue of quid pro quo corruption. Despite provisions in the FECA and the BRCA[48] that prohibit corporations and candidates from colluding and ostensibly prevent any exchange of political support for political

47 *See* Michael M. Franz & Travis N. Ridout, *Does Political Advertising Persuade?*, Political Behavior (April 21, 2007), https://link.springer.com/article/10.1007/s11109-007-9032-y; Daniel Houser, Rebecca Morton, & Thomas Stratmann, *Turned on or turned out? Campaign advertising, information and voting,* European Journal of Political Economy (December 2011), https://www.sciencedirect.com/science/article/abs/pii/S0176268011000498?via%3Dihub.

48 Federal Election Campaign Act, Pub. L. 92-225, 86 Stat. 3, 1972, 52 U.S.C. § 30101; Bipartisan Campaign Reform Act, Pub. L. 107-155, 116 Stat. 81, 2002.

favors, it is conceivable that such favors would be given, because, as Justice John Paul Stevens wrote in an opinion joined by Justice Sandra Day O'Connor for *McConnell v. FEC* (2004), "money, like water, will always find an outlet."[49] In this scenario, perhaps both parties know what they will get out of the exchange: the corporation or interest group pays for advertisements that help a candidate win an election, and in exchange, the corporation receives favors, perhaps in the form of their preferred policies, after the candidate takes office. Certainly, in such a scenario, the Supreme Court would be justified in allowing limits on independent expenditures to prevent such an outcome.

2. Monetary Influence

Even if independent expenditures are not made in exchange for direct political favors, they still have a corruptive influence on the political process. Imagine instead that the corporation or interest group pays for the advertisement campaign with no promises of future political favors from the candidate. However, the candidate recognizes the aid that the corporation has provided to the success of the candidate's campaign and acts accordingly once in office. The newly-elected official may choose to prioritize the issues that they suspect the corporation would favor. Perhaps the candidate believes that acting on behalf of this corporation could incentivize said corporation to again run ads in their favor when the official runs for reelection. This avenue of corruption reflects what Burke explains is "monetary influence," or the idea that officeholders "perform their public duties with monetary considerations in mind."[50] It also reflects what the Supreme Court defined as "undue influence" in *Austin v. Michigan State Chamber of Commerce.*

49 *McConnell*, 540 U.S.

50 Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law,* Constitutional Commentary (1997), https://scholarship.law.umn.edu/concomm/1089/.

3. Distortion

Now imagine a third scenario, in which the corporation does create advertisements on behalf of the candidate, but the candidate is not influenced by any advertising campaigns run in favor of their election. The candidate neither makes deals with donors, nor considers the donor's interest when making policy decisions. In such a case, the public would not need to be concerned about either quid pro quo corruption or monetary influence. However, even in the absence of such forms of corruption, corporations can still have a significant distorting influence on the political process. Perhaps the corporation is in a position to spend so much money on advertising in favor of one candidate or in opposition to another that they effectively drown out the voices of smaller groups, individuals, and candidates who lack the resources to advertise their merits and platforms on as large a scale. In this case, although the candidate does nothing to directly support the corporation or interest group that effectively won them the election, the kinds of policies that they choose to implement will reflect the ideologies of the corporation and may not accurately mirror the ideologies of the candidate's overall constituency.

Distortion, according to Burke, is the idea that the decisions made by democratically elected leaders do not reflect the opinions of the majority of their constituents. This definition mirrors the earlier Supreme Court holding also outlined in *Austin*, in which the Court held that anti-distortion is a rationale for limiting the influence of corporations.[51] Although previous Courts clearly recognized the dangers associated with these "lesser" forms of corruption, the current Court has chosen to limit corruption to quid pro quo. With little deference to precedents set by earlier Courts, the majority of the current Court has chosen to ignore the distorting influence and appearance of influence that independent expenditures and aggregate contributions have on the political process.

Distortion is perhaps the most egregious form of corruption because it is the most subtle and hardest to detect, and thus, the most difficult to regulate. Empirical evidence demonstrates that "express

51 *Austin*, 494 U.S.

advocacy"[52] in the form of advertisements has a significant effect on the kind of people that are elected to political office. In addition, evidence suggests that "the influx of money" in the political discourse surrounding elections "is correlated with the kinds of policy outputs that emerge from the legislative process."[53] The consequence of this type of "express advocacy" is that the corporation or interest group that spends the most money on advertising will be in the best position to have their preferred candidate elected. Such a candidate would be someone they can be sure will support their preferred ideology and policy goals without any direct "quid pro quo" political favors. What this means is that individuals and groups with deep pockets distort the electoral playing field by determining the kind of candidates who will be elected to office. As long as corporations can spend unlimited sums of money on independent expenditures in favor of or against a particular candidate or donate without regulation to a myriad of super PACs who funnel resources into campaigns of the same candidate, the equality of the political process and elections will always be distorted. Thus, corruption of the political voice of the average citizen will always be present.

4. The Appearance of Corruption

Of course, these situations are all hypotheticals, and while it is certainly plausible that all three avenues of corruption (quid pro quo, monetary influence, and distortion) are consistently affecting the political process, the nature of corruption makes it hard to detect, meaning that we cannot really know the true consequence of these corruptive forces. However, consider how you felt as you read the previous three scenarios. Did you believe them plausible? Did they raise concern about the fairness of the political process? Did they make you question your trust in your government to represent you? Groups and individuals who are in a position to make independent expenditures or to spend a large amount of money in aggregate over

52 *WRTL*, 551 U.S.

53 Yasmin Dawood, *Campaign Finance and American Democracy,* Annu. Rev. Polit. Sci. at 342 (2015), https://www.annualreviews.org/doi/pdf/10.1146/annurev-polisci-010814-104523.

a political election cycle have the appearance of political power. The money they spend leads to the appearance of corruption, which is almost as dangerous to the political process as the existence of true corruption itself. The appearance of corruption erodes public trust in the government. It leads to reduced civic engagement and increased cynicism and polarization. The appearance of corruption, whether or not it is present, creates distance between the public and the officials who are supposed to represent them.

Previous Supreme Courts recognized the dangers of the appearance of corruption. Under the now-overturned *McConnell v. Federal Election Commission*, the Court held that the government is justified in limiting free speech in the form of money (whether direct contributions or independent expenditures) when not doing so would result in "undue influence on an officeholder's judgment, and the appearance of such influence."[54] This caveat shows that the Court that decided *McConnell* knew minimizing the appearance of corruption is important, because even the perception of corruption is damaging to political participation and limits the types of candidates that can make it into office.

Quid pro quo corruption is regulated. However, undue influence, distortion of the political process, and the appearance of corruption are not. The difficulty associated with regulating these corruptive processes does not justify allowing them to be unregulated. Though perhaps less harmful than quid pro quo corruption, these lesser forms of corruption are also much more common, and present a "clear and present danger" to representative democracy. Because of the influence that corporations and wealthy individuals can have on the electoral process, the Court should return to the precedent that regulated these influences. If it does not, the officeholders and the policies they make will not reflect the wants and needs of the general public, and democracy will be jeopardized.

The Court's current definition of corruption as a donation of money in exchange for political favors is limited and short-sighted at best. Activities that were considered corruptive under earlier Supreme

54 *McConnell*, 540 U.S. at 95 (citing *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 441).

Court holdings are now (since *Citizens United* and *McCutcheon*) considered "responsiveness" by politicians and "participation" by donors.[55] To promote broad political participation and to limit the distorting influence that wealth has on the kinds of candidates that are elected to political office, the Supreme Court must expand the definition of corruption in campaign finance in order to support broad political participation. Any incorporated group—including business corporations, interest groups, and unions—and any individual, that, by force of their significant wealth, has resources at their disposal to drown out other voices in the political process must be subject to more stringent regulations of the expenditures that they can make in support of or in opposition to a political candidate and the aggregate contributions they can spend during an election cycle.

B. Regulations as a Means of Protecting First Amendment Rights

That is not to say that we must entirely remove all such groups from the political playing field. If we were to entirely prevent these groups from making expenditures as a form of express advocacy, we could conceivably lose a lot of valuable information, especially when we consider that a large number of these groups are interest groups devoted to protecting the rights of overlooked individuals. However, these groups have an overwhelming influence on election cycles and subsequent policies.

Scholar John Rawls wrote, "The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate."[56] The influence of corporations and individuals who can spend money on campaigns without limits hurts the chances of people without such monetary power to have their voices heard. Doing so goes against the very principles of a

55 *McCutcheon*, 572 U.S. at 30, 39.

56 John Rawls, *A Theory of Justice* (1971). John Rawls was an American professor and political philosopher, who believed in the doctrine of "justice as fairness." *A Theory of Justice* set out this idea, which was later developed in subsequent books. Many consider Rawls to be one of the most important political philosophers of the 20th century.

democratic society, wherein elected officials are dependent on all of their constituents, not just those with disproportionate monetary power. Thus, contrary to the Court's recent holdings, prioritizing anticorruption over "free speech" will actually promote freedom of expression and political participation.

Imposing limits on independent expenditures and aggregate contributions will promote political participation in a myriad of ways. Limits will decrease the war chests of electoral candidates, allowing more people with less money to run. Thus, candidates who run for office will be more representative of the constituents whom they are vying to represent. Additionally, limits on independent expenditures and aggregate contributions may actually induce more people to donate because they will be more confident that their funds will have an impact on the types of candidates who are elected.

Limits on independent expenditures and aggregate contributions will also equalize advocacy via advertisements in elections. Some estimates conclude that running TV ads constitutes the largest percentage of money spent during an election campaign.[57] Ads are an extremely effective way of reaching a large audience and proposing an idea, platform, or candidate. Therefore, by holding that corporations have a right to speak via ads, and allowing corporations to spend unlimited funds to create ads, the Court has contributed to the decrease in political voice afforded to those without such funds. Imposing independent expenditure and aggregate contribution limits would not completely dispense with the practice of making political advertisements for or in opposition to a particular candidate, nor would it prevent groups from furnishing information that is necessary to the political process. In fact, it could make information more available, as more groups will be able to provide information at a lower cost.

Regulations on independent expenditures and especially on aggregate contributions may also encourage the development of a multiparty system. Currently, it is risky to spend funds on behalf of

57 Chavi Mehta, *US political ad spending to soar in 2024 with TV media the biggest winner – report,* Reuters (Jan. 11, 2024), https://www.reuters.com/world/us/us-political-ad-spending-soar-2024-with-tv-media-biggest-winner-report-2024-01-11/.

a third party because they are unlikely to receive as much support as the majority parties. Additionally, since there is a lack of aggregate contribution limits and an unlimited number of political action committees, individuals and interest groups with monetary power to influence elections can spend limitlessly to support the specific candidates or parties that they align themselves with, which prevents the growth of smaller parties. Placing limits on aggregate contributions and independent expenditures would encourage donations by those who support third-party candidates, thereby encouraging more people to exercise their First Amendment rights and allowing smaller parties to break into a political arena that currently keeps them out. Doing so would decrease polarization and encourage cooperation as elected officials focus on coalition building. It would allow people with views that do not align with either major party to have more representation in politics, thereby encouraging political participation and protecting political representation.

Thus, to equalize the political process, the Court should allow Congress to regulate independent expenditures and aggregate contributions just as it does for individual contributions. Doing so would promote and protect First Amendment rights to free speech, not limit them. By regulating independent expenditures and aggregate contributions, the government would level the playing field. Certainly, individuals with money would still have an influence on the kinds of people elected to office and the kinds of policies enacted. However, their influence would be less distorting to the political process and would not drown out the voices of those without substantial financial resources to donate to a political campaign.

C. Potential Solutions and Related Problems

The most obvious solution to mitigate the issues associated with campaign finance is a congressional statute. In fact, a bill to amend the Federal Election Campaign Act of 1971 was introduced during the current Congress, on October 31st, 2023, which would place more stringent regulations on independent expenditures and

contributions.[58] Clearly, at least some members of Congress (the very people who benefit most from maintaining the status quo) recognize that unchecked expenditures and contributions in campaigns are dangerous to a democratic society. However, this solution is dependent upon the Supreme Court's willingness to let such a statute stand. Over the last fifty years, the numerous laws that Congress has enacted to regulate expenditures and aggregate contributions over time have mostly been overturned by the Supreme Court.

Therefore, a solution to the corruption in campaign finance requires the cooperation of both Congress and the Supreme Court. The first step for lasting and meaningful change in campaign finance law to be enacted is for Congress to pass a bill that would limit independent expenditures and aggregate contributions. Congress should follow the model of earlier campaign statutes as it enacts such laws.

One way that Congress could limit independent expenditures is by setting a cap on such spending equal to the cap on contributions directly to political parties. As noted earlier, an individual may currently give $3,300 directly to a candidate per election and $5,000 to a PAC, and a corporation or PAC can give $5,000 to a candidate committee or $5,000 to another PAC.[59] Congress could simply set caps on independent expenditures at the same level. Alternatively, in recognition of the Court's holding that contributions should be subject to more stringent regulations than independent expenditures, Congress could allow slightly higher caps on independent expenditures. Congress could limit aggregate contributions for individuals by returning to the pre-2014 limit on contributions—which, as noted earlier, was $123,200 per individual per election-cycle[60]—and setting

58 In fact, the bill, known as the Ending Corporate Influence on Elections Act, would limit all expenditures and contributions by publicly traded corporations. *See* Ending Corporate Influence on Elections Act, 118th Cong. (2023).

59 *Contribution Limits for 2023-2024*, Federal Election Commission (February 2023), https://www.fec.gov/resources/cms-content/documents/contribution_limits_chart_2023-2024.pdf.

60 *McCutcheon*, 572 U.S. at 149, 249.

a high but reasonable limit on aggregate contributions for corporations as well.

In addition to placing caps on independent expenditures and aggregate contributions, there are potentially other solutions to limit the amount of money (and thus the amount of corruption and lack of political representation) in elections. Advertising on television is a huge expense for American candidates and the corporations and individuals who spend money to support them. In some other countries,[61] candidates are either forbidden from advertising on television, or they are given free airtime on T.V. Such a solution would level the playing field because it would give all candidates the right to have their voices heard, although it could be seen as limiting to individuals and corporations who wish to show their support for or opposition to a political candidate. Another solution utilized in other countries is shortening the campaigning period. Though this would certainly reduce the amount of money in elections and thus is a compelling idea, it is not a true solution, as it would not necessarily limit the relative influence of wealthy individuals and powerful corporations on the electoral process. Therefore, the most effective solution to limit the amount of money in elections, to mitigate the distorting effects of corruption in campaign finance, and to encourage political participation and representative democracy is a congressional limit on independent expenditures and aggregate contributions.

Ultimately, however, the decision to limit independent expenditures and aggregate contributions in campaign finance, or to allow any other laws that may impact campaign finance reform, rests with the Court. The Court has the power of judicial review, and thus can overturn any legislation passed by Congress. Given the Court's current makeup, it seems unlikely that the Court would be willing to entertain any challenges to campaign finance at the present time. Three of the nine justices currently on the Court joined the

61 *Media and Elections,* Administration and Cost of Elections Project, https://aceproject.org/main/english/me/mec04b01.htm (last visited March 11, 2024); Nisar Nikzad, *How Radio & Television Advertising Differs from Country to Country,* Translation Excellence Language Services (August 7, 2023), https://translationexcellence.com/how-radio-television-advertising-differs-from-country-to-country/.

majority in both *Citizen United* and *McCutcheon*. All six conservative justices on the Court, John Roberts, Samuel Alito, Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, joined the majority opinion in *Federal Election Commission v. Ted Cruz,* a recent Supreme Court case in which the Court further decreased campaign finance regulation in order to ostensibly protect free speech.[62] Although unfettered independent expenditures and aggregate contributions are a significant problem, it is unlikely that a feasible solution could be achieved given the reticence of the current Supreme Court to limit what they consider to be "freedom of speech." The Court would have to be convinced that independent expenditures and aggregate contributions have a more corruptive influence on American democracy than the proposed imposition on campaign spending.

IV. Conclusion

By and large, Americans support limits on campaign spending.[63] In our current climate, it has become nearly impossible for ordinary citizens who don't have corporate backing or independent wealth to run for office. That makes it less likely that elected officials will have similar characteristics to the people they represent, which is

62 *Federal Election Commission v. Ted Cruz for Senate,* 596 U.S. 289 (2022). In 2018, Ted Cruz loaned his senate campaign $260,000. Under the Bipartisan Campaign Reform Act of 2002, there is a $250,000 cap on post-election contributions that can be used to pay back a candidate's pre-election loans, meaning that $10,000 of Cruz's loan would instead be converted to a campaign contribution. In this case, the majority decided that placing a limit on the amount of contributions that can be used to pay back a candidate who had loaned money to his or her own campaign violates the candidate's right to free speech under the First Amendment. The minority, however, argued that these transactions make those who already hold positions of power richer, which can result in corruption.

63 Bradley Jones, *Most Americans want to limit campaign spending, say big donors have greater political influence,* Pew Research Center (May 8, 2018), https://www.pewresearch.org/short-reads/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/.

detrimental to a democratic society. The policies that elected officials advocate for and the legislation that they propose will not reflect the types of positions that are important to the majority of their constituents. This distortion of the political playing field has a corruptive influence on the very ideals of a representative democracy.

Campaign finance reform will change the types of candidates that run for office. In doing so, it will promote political equality and participation for the average American. Therefore, the Supreme Court and Congress must work in tandem to promote change in campaign finance law. Congress must pass statutes, as they have done in the past, to limit independent expenditures in favor of or in opposition to a particular candidate. They must also place a limit on aggregate contributions during an election cycle by a corporation or individual. However, this solution will be useless without the support of the Supreme Court, which must recognize that corruption extends beyond "quid pro quo" and expand the definition accordingly. Only if this happens will we begin to see a change in campaign finance. Campaign finance reform will promote democratic governance in an era when our country desperately needs such change.

Ensuring Equity in Medical Malpractice Cases for Low-Income Plaintiffs

Hassan El-Cheikh[1]

I. Introduction

Across the United States, about 85,000 lawsuits are filed against medical providers every year.[2] This represents an unfortunate trend for both medical providers seeking to care for patients as well as for patients seeking care for the myriad of ailments they may be facing. For the plaintiff, suing a doctor is a grueling and complicated process. For a plaintiff to prove medical malpractice and receive compensation, they must demonstrate that the medical provider fell below the standard of care. The process of bringing a lawsuit against a doctor is laborious, highly emotional, and time-consuming.

A. Ryan and Malyia Jeffers

In 2010, a Sacramento man named Ryan Jeffers took his two-year-old daughter, Malyia, to the doctor. Malyia was a perfectly healthy baby who loved to dance, sing, and entertain. One Sunday in November, Jeffers noticed Malyia had an unusually high fever, and

---

1 Hassan El-Cheikh is a fifth-year student studying Communications at Brigham Young University. He plans to attend law school after graduating. Hassan has also worked as a writer for BYU's Daily Universe and as executive producer of BYU's Universe Live. Hassan would like to thank his editor, Stetler Tanner. Stetler is a fourth-year student studying Family Life: Human Development at BYU. He plans to attend medical school in Fall 2024.

2 *US Medical Malpractice Case Statistics*, Justpoint (Jan. 2024), https://justpoint.com/knowledge-base/us-medical-malpractice-case-statistics.

unusual bruises appeared on her cheek. Alarmed by this, he rushed Malyia to the emergency room at Sacramento's Methodist Hospital, where the situation took a turn for the worse.

The family claims they could not get a physician to examine their daughter and that the five-hour wait in the emergency room nearly killed her. As Malyia waited to be seen, her septic infection deteriorated. Ultimately, this perfectly healthy baby girl had to have several amputations, which the family feels could have been avoided. "If any of my other kids get sick, I'm terrified of taking them to the ER," said Jeffers.[3] This quote illustrates the fear that individuals throughout the nation can develop because of medical negligence.

Three months later, (once Malyia's condition had stabilized) the Jefferses filed a lawsuit against Sacramento Methodist Hospital. The claims filed included medical malpractice, negligent infliction of shock, and emotional distress. "The day this happened, I knew I wanted to sue," said Jeffers. "No one's child should have to suffer the way Malyia did in that ER."[4] In the end, Sacramento Methodist Hospital and the Jefferses reached a settlement of $9 million according to California court records.[5]

It is difficult to imagine what type of pain Malyia and her father endured. For plaintiffs, the main issue is holding doctors accountable, let alone the financial setbacks, and hoping the compensation received is enough for future medical treatment. While it is evident the impact lawsuits can have on patients, one argument of this paper is that the ramifications equally impact treating physicians.

B. Effects on Physicians

A researcher at the University of Illinois Department of Psychiatry found that upon learning of a lawsuit against them, doctors are often encompassed by initial feelings of surprise, shock, outrage,

3 Sabriya Rice, *Harmed in the Hospital? Should You Sue?* CNN (Mar. 24, 2011), http://www.cnn.com/2011/HEALTH/03/24/ep.malpractice.sue.or.not/index.html.

4 Id.

5 *Jeffers v. Methodist Hospital of Sacramento* CCP §877.6(a)(2)

anxiety, or dread. The researchers also found that when doctors begin consulting with their attorneys, the reactions include anger, denial, concern, reassurance, and panic. Naturally, these emotions depend on the initial assessment of the case.[6]

This is followed by lengthy periods of denial and intrusions, with active attempts to erase thoughts about the case. However, doctors become preoccupied by ruminating excessively; this is exacerbated whenever case-related activity increases, such as before the deposition, when experts testify, and before and during the trial. Overall, the researchers' findings show that sued physicians often experience a "see-saw effect": up one week and down another, with alternating feelings of confidence and low self-esteem, assurance, and doubt.[7]

The overall goal of this paper is to offer a proposal that will benefit both plaintiffs and doctors. In a medical malpractice lawsuit, a plaintiff is typically accompanied by a medical expert witness. Low-income individuals should be guaranteed a right to a medical expert witness that is willing to testify on the plaintiff's behalf due to the high expenses associated with obtaining the medical expert witness. By doing so, doctors will be more focused on building a physician-patient relationship, while victims of medical negligence will have a fair and equal chance at receiving just compensation. This will be done via taxpayer dollars to a "Medical Expert Witness Fund" that will pay out appropriate funds to lawyers who have low-income clients seeking a medical expert witness.

II. Background

A. Civil Lawsuits and Medical Malpractice

This section offers a discussion of what a medical malpractice lawsuit looks like and considers the difficulties involved. The first medical malpractice lawsuit in the United States dates to 1794, just four years after George Washington's inauguration, when a

6 Sara Charles, *Coping with a Medical Malpractice Suit*, 174(1) West. J. Med. 55-58 (2001).

7 Id.

Connecticut man claimed a doctor promised to skillfully perform an operation on his wife, but she later died from surgical complications. The court ruled in favor of the plaintiff and awarded him 40 English pounds (roughly $20,900 in 2023). While a medical malpractice lawsuit shares much of the same characteristics of any other civil lawsuit, it is important to note that medical malpractice also differs in many ways, most notably in the characters involved in the lawsuit. As with any civil lawsuit, the case begins with a plaintiff. In this specific discussion, the plaintiff is the victim of medical negligence who shares their story with an attorney specializing in medical malpractice. From there, the attorney determines whether they will take the case.

One extremely important method through which an attorney determines the validity of the victim's claim is consulting a medical expert witness. According to another peer-reviewed study, the expert witness may be asked to evaluate the merits of a claim before legal action is filed. To do this, they may be tasked to review the medical records and then provide a written opinion regarding the standard of care and any deviation from it.[8]

While at first glance, medical malpractice may seem to not deviate far from any other kind of civil lawsuit, there are important specifics that make medical malpractice unique:

1. In the United States, medical malpractice law has traditionally been under the authority of individual states rather than the federal government. This contrasts with many other countries.

2. State laws governing medical malpractice can vary across different jurisdictions, although the principles are similar.

3. These laws have been heavily influenced by state legislatures in the past 30 years.

4. Allegations of medical negligence must be filed in a timely manner (see Statute of Limitations section). These vary from state to state.

8 Yasmyne Ronquillo et al., *Expert Witness* (2023).

5. Damages account for both actual economic losses, such as lost income and cost of future medical care, as well as noneconomic losses, such as pain and suffering.

6. Physicians practicing in the United States generally carry medical malpractice insurance to protect themselves in case of medical negligence or unintentional injury. In some instances, such insurance is required as a condition of hospital privileges, or employment with a medical group.

7. If an act of malpractice occurred in a federally funded clinic, then the action is filed in a federal district court rather than a state court.

8. To successfully prove malpractice, four elements or legal requirements must be met: 1) the existence of a legal duty on the part of the doctor to provide care or treatment to the patient; 2) a breach of this duty by a failure of the treating doctor to adhere to the standards of the profession; 3) a causal relationship between such breach of duty and injury to the patient; 4) the existence of damages that flow from the injury such that the legal system can provide redress.[9]

The standard of care, or the standards of the profession, refer to the benchmark that determines whether professional obligations to patients have been met. Failure to meet the standard of care is considered negligence, which can carry significant consequences for clinicians.[10]

The deposition is also an important element of the system. Those who will be deposed in a medical malpractice case include the plaintiff or injured person, the treating physician(s), family members, individual defendants, nurses and other healthcare providers who may have been present during the particular medical event, expert witnesses retained on behalf of the plaintiff, and the defendant. As

9 B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, 467(2) Clin. Orthop. Relat. Res. 339-347 (2008).

10 Donna Vanderpool, *The Standard of Care*, 18(7-9) Innov. Clin. Neurosci. 50-51 (2021).

with any civil lawsuit, prosecuting attorneys will record statements or events that transpired in the deposition to prove negligence.[11]

In court, medical malpractice attorneys will conduct opening statements, and the plaintiff's attorney will present the victim of negligence's case in chief. This involves calling upon the medical expert witness who offers testimony designed to establish (a) the appropriate medical standard of care that applied under the circumstances (what the doctor should have done); (b) that the defendant doctor breached the medical standard of care (what the doctor did wrong); and (c) how the plaintiff suffered harm (damages) as a result (this will be detailed proof of everything from additional medical treatment and lost income to pain and suffering, loss of employment, etc.).

A trial in court can take hours, days, or even weeks depending on the complexity of the case and the witnesses involved. Both plaintiff and defense attorneys are given the opportunity to question all the witnesses, including the victim of negligence. After both parties plead their case, closing arguments are given. Upon closing arguments, the judge instructs the jury to deliberate, and a verdict is given. If damages are awarded, it is based upon what the law allocates.

B. Payment

This section provides an overview of the potential issues of medical malpractice law. Specifically, the different methods of payment lawyers require and the laws that advantage medical providers in malpractice lawsuits are noted.

As in many lawsuits, the cost of filing a medical malpractice claim is quite costly. Yet, the challenge arises in how payment is allocated. Upon a simple Google search of "How much does it cost to file a medical malpractice lawsuit?" A plethora of advertisements for medical malpractice attorneys appears touting, "You pay us

11 *See* Julie Clements, *The Medical Malpractice Deposition Process—an Overview*, MOS Medical Record Reviews (Sept. 8, 2023), https://www.mosmedicalrecordreview.com/blog/the-medical-malpractice-deposition-process-an-overview.

nothing… until we win," as seen in Utah-based law firm Creekside Injury Law.[12]

Medical malpractice attorneys generally follow the "you pay us nothing… until we win" business model because attorneys working in the field of medical malpractice do not usually work on billable hours as is customary in other areas of law. Instead, medical malpractice attorneys work on contingency fees. This means that instead of charging a plaintiff by the hour, they will instead be given a percentage of either the settlement or award damages by the jury. According to Gilman and Bedigian Trial Attorneys, "Contingency fee arrangements allow lawsuit accessibility to even those who cannot afford it—they will not be charged a fee if they do not win the case, in which case the fee comes out of the damage award."[13] While contingency fees are generally standard when it comes to attorney fees, paying the medical expert witness complicates the protocol.

The complexity arises from the fact that various law firms throughout the country handle the payment of a medical expert witness differently. Many law firms, such as Gerry Oginski, Esq. in New York, will pay for the expert's time, and if they are successful, are reimbursed for those expenses at the end.[14] Other law firms, such as Ganson Co. in Ohio, require payment from the client up-front due to the tremendous expense to prosecute medical malpractice cases ever since Republicans in that state's legislature enacted laws that protect medical professionals and their insurance companies.[15] Listed below are examples of laws that protect medical providers.

12 Matt Schmoldt, *Utah Medical Malpractice Lawyer*, Creekside Injury Law (Apr. 19, 2021), https://www.creeksidelegal.com/utah-medical-malpractice-lawyer.

13 *Costs in Medical Malpractice Cases*, Gilman & Bedigian, LLC, https://www.gilmanbedigian.com/costs-in-medical-malpractice-cases/ (last visited Feb. 6, 2024).

14 E-mail from Gerry Oginski, Founding Partner, Oginski Law, to Hassan El-Cheikh, Undergraduate Student, BYU (Nov. 25, 2023, 06:34 PM EST) (on file with author).

15 E-mail from Michael B. Ganson, Founding Partner, Ganson Law Office, to Hassan El-Cheikh, Undergraduate Student, BYU (Nov. 16, 2023, 07:25 AM CST) (on file with author).

C. Apology Statutes

One of these laws protecting medical providers are apology statutes. The Ohio apology statute can be found in Section 2317.43 under the medical liability action-admissibility of certain communications. This is commonly referred to by Ohioan medical malpractice attorneys as the Ohio Apology Statute.[16] It reads:

> In a civil action brought by an alleged victim of an unanticipated outcome of medical care or in any arbitration proceeding related to such a civil action, any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, error, fault, or general sense of benevolence that are made by a health care provider, an employee of a health care provider, or a representative of the alleged victim, and that relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care are inadmissible as evidence of an admission of liability or as evidence of an admission against interest.[17]

In short, this means that a doctor's apology cannot be used as de facto evidence of medical malpractice. "If an apology can't be used against a doctor in court, then how sorry are they really?" points out the founding partner at Ganson, Michael B. Ganson.[18] However, the law was upheld by the Ohio Supreme Court in a 5-2 decision in *Stewart vs. Vivian*. In the majority response, Justice Kennedy stated Ohio's apology statute indeed provides exemption of liability for

16 *Ohio apology statute covers admissions of fault*, Bricker Graydon (Sept. 15, 2017), https://www.brickergraydon.com/insights/publications/Ohio-apology-statute-covers-admissions-of-fault.

17 Medical Liability Action—Admissibility of Certain Communications, Ohio Rev. Code Ann. § 2317.43 (West 2019).

18 Telephone Interview with Michael B. Ganson, Founding Partner, Ganson Law Office (July 15, 2022).

statements made by a health care provider who acknowledges the patient's medical care fell below the standard of care.[19]

Section 2317.43 was passed after extensive lobbying efforts while the law was a bill, titled H.B. 7, in 2018 during the 132nd Ohio General Assembly. This influence is evident by examining the record of the bill's main sponsor, Representative Bob Cupp (R-OH). After seeing the record of some of the individuals and organizations that contributed to him while he was in office in 2018, it is not too difficult to see why Rep. Cupp introduced this bill. Donors include Dr. Michael Heaphy, M.D. ($1,000); the Ohio Optometry Association ($700); the Physical Medicine Association of NW ($600); the Ohio Dental Association ($500); the Ohio Association of Nurse Anesthetists ($350); the Ohio State Medical Association ($350); Ultrasound Special Events ($250); the Gastro-Intestinal Association ($200); Dr. Gary R. Beasler, M.D. ($125); Dr. Carl S. Wher, M.D. ($100); Bradd Pots (psychologist; $50); and St. Rita's Hospital ($50), which brings the combined donations to $4,275.[20]

Ohio is not the only state to have such legislation. Republican states like Utah also have a similar law protecting physicians. In Utah, this law is commonly referred to as the Utah Apology Rule.[21] It is titled in Utah law as Utah Code 78B-3-422 "Evidence of disclosures—civil proceedings—Unanticipated outcomes—Medical Care." This code reads:

> In any civil action or arbitration proceeding relating to an unanticipated outcome of medical care, any unsworn statement, affirmation, gesture, or conduct made to the patient by the defendant shall be inadmissible as evidence of an admission against interest or of liability.[22]

19 *Stewart v. Vivian*, 151 Ohio St. 3d 574, 2017-Ohio-7526.

20 *Donor Lookup*, Open Secrets, https://www.opensecrets.org/donor-lookup/results?cand=Robert+Cupp&cycle=2018/ (last visited Feb. 6, 2024).

21 Alex Stein, *The Apology Rule*, Harvard Law: Bill of Health (Mar. 5, 2014), https://blog.petrieflom.law.harvard.edu/2014/03/05/the-apology-rule-2.

22 Utah Code Ann. § 78B-3-422 (West 2008).

Like Rep. Bob Cupp, Utah legislators can also fall prey to medical lobbying. Legislation for this law was introduced in 2009 as S.B. 79 by Senator Peter C. Knudson (R-UT), and looking at Sen. Knudson's donor list from 2008, a pattern is noted between this list and Rep. Cupp's. Donors include Medco Health Solutions ($1,000); Regence Group of Salt Lake City ($800); Pharmaceutical Research and Manufacturers Association of America ($500); Wyeth Pharmaceutical ($300); Johnson & Johnson ($250); and the Walgreens Utah Retail Merchants Association ($250), which brings the combined donations to $3,100.[23]

By not allowing a doctor's apology, even if the health care provider acknowledges that the patient's medical care fell below the standard of care, the doctors are heavily advantaged, and the client is left without what could be a form of evidence to prove ipso facto that the treating physician was indeed negligent. In another study, researchers identified 39 states that currently have apology laws.[24]

D. Statute of Limitation

Another law that advantages doctors in certain states is the statute of limitation on medical malpractice claims. These laws disadvantage those trying to sue their doctors by reducing the amount of time victims of negligence must sue their providers. Most states have their statute of limitation set at 3 years or more.[25] However, 18 states, including Utah, have a two-year statute of limitation. Kentucky, Tennessee, and Louisiana have a one-year limit. In Utah, the statute can be found under Utah Code 78B-3-404, which reads:

23 *Donor Lookup*, Open Secrets, https://www.opensecrets.org/donor-lookup/results?name=&cycle=2008&cand=Peter+Knudson/ (last visited Feb. 6, 2024).

24 Nina E. Ross & William J. Newman, *The Role of Apology Laws in Medical Malpractice*, 49(3) J. Am. Acad. Psychiatry Law. (2021).

25 *See Medical Malpractice Statute of Limitations by State*, Rocket Lawyer, https://www.rocketlawyer.com/family-and-personal/health-and-medical/personal-injury/legal-guide/medical-malpractice-statute-of-limitations-by-state/ (last visited Feb. 6, 2024).

> A malpractice action against a health care provider shall be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence.[26]

This bill to codify Utah Code 78B-3-404 was introduced by State Senator John L. Valentine (R-UT). As with other legislators previously mentioned who introduced the apology statutes, the State Senator's donor list provides some elucidation for the motives behind his interest in this bill. Donors include Select Health ($5,000), the Utah Medical Association ($2,200), Bluecross and Blueshield Utah ($750), the Utah Hospitals and Health Systems Association ($600), the Utah Dental Association ($300), USANA Health Sciences ($300), the Utah Association of Health Underwriters ($300), which brings the combined donations to $9,450.[27]

E. Payment (cont.)

These codes are causing medical malpractice attorneys to adapt how they take payment for their medical expert witnesses. The previously cited medical malpractice attorney Michael B. Ganson explains, "In other words, there is no steadfast rule on when a client pays for medical expert witness fees. It depends on the facts of the case, the likelihood of proving liability and the amount of compensation likely to be recovered."[28]

This echoes much of the sentiment of Randy Sorrels, a medical malpractice attorney based at Sorrels Law Firm in Texas, who says, "It depends on the case. Most of the time, the expenses are paid out of the client's share of the recovery. But a questionable case where the client really wants to pursue the case, but the outcome is not

26 Utah Code Ann. § 78B-3-404 (West 2012).

27 *Donor Lookup*, Open Secrets, https://www.opensecrets.org/donor-lookup/results?cand=John+Valentine&jurisdiction=UT/ (last visited Feb. 13, 2024).

28 Ganson, *supra* note 15.

likely favorable would require the plaintiff to pay the medical expert witness fee up-front."[29]

If lawyers are following the payment standard of Ganson Co. (where clients must pay the fees of the medical expert witness up-front regardless of favorability) or the payment standard of Sorrels (where payment of the medical expert witness is up-front only if case deemed unfavorable), the high expense of obtaining a medical expert witness can cause a tremendous, or even insurmountable, burden to a plaintiff who is low-income. According to the Gilman and Bedigian Trial Attorneys, the indispensable cost of having a medical expert witness does not come cheaply, with witnesses charging roughly $582 per hour for deposition testimony and $622 per hour for courtroom testimony.[30] (It should be noted that there can be an enormous deviation from these average figures, depending on the medical field.)

Many times, those who are low-income simply cannot afford the high fees for a medical expert witness. According to the U.S. Department of Health and Human Services' Poverty Guidelines, the federal poverty level of "low-income" for a single-person household is $14,580, or roughly $1,215 per month.[31] With the average rental price in the United States being $1,978 per month alone,[32] the price of having a medical expert witness is simply an unrealistic expense for a low-income individual.

As described earlier, different attorneys throughout the country have different methods of payment for attaining a medical expert witness. However, only two will be focused on for this proposal. The first is Ganson's up-front payment method, and the second is Sorrell's

29 E-mail from Randall Sorrels, Founding Partner, Sorrels Law, to Hassan El-Cheikh, Undergraduate Student, BYU (Nov. 25, 2023, 07:08 PM CST) (on file with author).

30 GILMAN & BEDIGIAN, *supra* note 13.

31 *Poverty Guidelines*, OFFICE OF ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, (Jan. 17, 2024), https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines.

32 Jon Leckie, *Rent Report*, RENT.RESEARCH, (Dec. 7, 2023), https://www.rent.com/research/average-rent-price-report.

unfavorable odds payment method. In states like Ohio where the up-front method is used, the burden to pay the medical expert witness is prohibitively costly. There is not much debate as to the financial burden that having to pay for a medical expert witness up-front will be for a low-income individual.

Sorrell's unfavorable odds payment method is even more controversial. Critics of providing funds for a low-income individual to attain a medical expert witness that has an unfavorable case may feel that such funds would be a waste. However, the criticism runs into a major problem. What makes a case "favorable" or "unfavorable"? Legal records show serious variability in this criterion. A viable medical malpractice claim requires presenting evidence and having considerably favorable odds.

Even with strong evidence, 50% of malpractice claims are in favor of the doctor.[33] By that definition, all cases are "unfavorable" as there is lower than a 50.1% chance of winning a trial verdict. That said, paradoxically 95% of medical malpractice claims end in settlement. Even if the case is "unfavorable" in court, it is likely to be favorable in settlement negotiations, as now the plaintiff has a medical expert witness testifying on their behalf. This strengthens their case and increases their likelihood of receiving compensation via settlement.

For these reasons, this paper argues that there should be an option at the state level to provide payment to a plaintiff's attorney for a medical expert witness. Through this model, the cost of the medical expert witness would not fall immediately upon the shoulders of the victim of negligence, regardless of if they are using the up-front model or unfavorable model. In addition, if the case is ruled in favor of the plaintiff, the government may reimburse itself for the expenses paid to attain the medical expert witness. In the following

33 *See* Gabriel Levin, *What Are the Odds of Winning a Medical Malpractice Suit?*, The Levin Firm, (July 18, 2023), https://www.levininjuryfirm.com/what-are-the-odds-of-winning-a-medical-malpractice-suit; *See* Jeffrey Goldberg, *What Are the Odds of Winning a Medical Malpractice Suit*, Jeffrey M. Goldberg Law Offices, (Mar. 21, 2022), https://goldberglaw.com/what-are-the-odds-of-winning-a-medical-malpractice-suit.

proof of claim, there is further discussion on the importance of having a medical expert witness.

III. PROOF OF CLAIM

In Charles Dickens' classic, *Great Expectations*, the prominent and enigmatic London lawyer named Mr. Jagger says, "Take nothing on its looks; take everything on evidence. There's no better rule."[34] To satisfy the rigorous demand of Mr. Jagger, this paper will discuss the proof of claim showing how it is possible for U.S. taxpayer dollars to provide monetary payment to low-income individuals seeking a medical expert witness. This will be done in three focuses: 1) the importance of having a medical expert witness, 2) evidence of precedents of taxpayer money being used for similar reasons, and 3) an explanation of how low-income plaintiffs may practically receive funding for a medical expert witness.

The idea of the government acting as parens patriae by funding opportunities and resources for the poor is nothing new. Advocates for such a system include John Rawls, an American political philosopher who advocated for a social minimum that would protect the interests of the poor;[35] John Keynes, a British economist who introduced Keynesian Economics during the Great Depression to argue government intervention in the economy to address poverty;[36] and Franklin D. Roosevelt, the 32nd president of the United States, who introduced the New Deal, which lifted thousands of Americans out of economic hardship through government-funded work opportunities.[37]

---

34 Charles Dickens, GREAT EXPECTATIONS 373 (1861).

35 John Rawls, JUSTICE AS FAIRNESS 47-48 (Erin Kelly ed., 2001); *See John Rawls*, STANF. ENCYC. PHIL. (Apr. 12, 2001), https://plato.stanford.edu/entries/rawls/#Bib.

36 *See* Sarwat Jahan et al., *What Is Keynesian Economics?*, 51(3) FIN. & DEV. (2014). Nina E. Ross & William J. Newman, *The Role of Apology Laws in Medical Malpractice*, 49(3) J. AM. ACAD. PSYCHIATRY L. (2021).

37 *See* David M. Kennedy, *What the New Deal Did*, 124(2) Political Science Quarterly, 251-268 (2009).

Yet, such a belief in this system is not without its critics. Fredrich Hayek, an Austrian-British economist, said, "new welfare activities of the government [cunningly disguised as 'mere service activities'] are a threat to freedom."[38] Robert Nozick, a 20th century American philosopher at Harvard, also argued against such systems of economic prowess and was reported in a *New York Times* article as claiming, "the trouble with government regulation of the market is that it prohibits 'capitalistic acts between consenting adults.'"[39]

While the role that the government has in providing welfare to its citizens in all aspects of life is beyond the scope of this paper, the examples above illustrate the divide in this nation's economic thought behind a potential increase in government-sponsored welfare programs. Understanding these economic principles are crucial to the subject of the medical malpractice tort system, which is commonly understood and governed by well-established principles of common law. Four principles of this must be addressed and are found in *A Measure of Malpractice*:

> 1. If a patient is injured as a result of the wrongful behavior of another (a physician or other medical care provider), then the victim is entitled to recover for all losses—both financial and non-pecuniary—caused by such fault.
>
> 2. In the absence of negligent behavior, a doctor is not legally responsible for injuries suffered by his or her patients; instead, such losses must be borne by the victims personally or by the broader community through its various programs of public and private loss insurance.
>
> 3. Disputes over whether an instance of medical treatment was careless and over what injuries the victim suffered as a result are ultimately resolvable in a civil trial before a jury;

38 Andrew Farrant & Edward McPhail, *Supporters Are Wrong: Hayek Did Not Favor a Welfare State*, 55(5) Challenge 6 (2012).

39 Jonathan Lieberson, *Harvard's Nozick: Philosopher of the New Right*, N.Y. Times (Dec. 17, 1978), https://www.nytimes.com/1978/12/17/archives/harvards-nozick-philosopher-of-the-new-right-nozick.html/; Robert Nozick, Anarchy, State, and Utopia 163 (1974).

(although in practice some 90% of such claims are settled by the parties and their lawyers through voluntary negotiation before a trial).

4. If some legal fault and liability are established through this process, compensation will almost invariably be paid to the victim. This may not be by the individual guilty of the careless act, but rather by another entity, such as the liability insurer in the case of an independently practicing doctor, or by the institution (or its insurer) that employed the doctor or other provider in question.[40]

Government involvement in economic practices is not a novel, unconstitutional practice that ought to be criticized, but rather it is a fundamental aspect of the well-being of Americans. Listed below are the benefits of such a proposal to both American victims of negligence and American doctors:

1. Benefits for Victims of Negligence

a. Such a proposal shall increase the victim's probability of an even and fair trial.
b. Such a proposal shall increase the probability of patients receiving higher rates of compensation for negligence.
c. Such a proposal shall bridge the inequality gap between America's most vulnerable, specifically low-income individuals, and the wealthy.

2. Benefits for Treating Physicians

a. Such a proposal shall mitigate the amount of medical malpractice cases physicians will face.
b. Such a proposal shall cause physicians to take more precaution in how patients are treated, if they know there will be someone readily enlisted to testify in court.
c. Such a proposal shall remove negligent doctors from practice, thus preserving the high standard quality of medical care.

40 Paul C. Weiler et al., A Measure of Malpractice 14 (1993).

A. Importance of Having a Medical Expert Witness

Here, a brief definition of what a medical expert witness is in the context of medical malpractice is helpful:

> A medical expert witness is a physician, nurse, surgeon, or other licensed practitioner whose skills and experience qualify them to testify on a particular medical area. In personal injury and medical malpractice lawsuits, attorneys often utilize medical expert witnesses during both the discovery and trial stages.[41]

Medical professionals—as members of the medical community, patient advocates, and private citizens—have a professional and ethical responsibility to assist with the civil and criminal judicial processes.[42] A medical expert opinion ensures that there is a non-bias actor who can testify and level the playing field against the team of doctors that the defense generally has.

In a medical malpractice lawsuit, the laws and regulations heavily favor doctors, nurses, specialists, and hospitals. This is evident through legislation like the aforementioned apology statutes and the statute of limitation in Ohio and Utah. "Professionals don't like to get sued. So, there's a lot of extra legislation and law around these kinds of cases," according to Laura M. Shamp, a medical malpractice attorney with Shamp Silk.[43] By ensuring those who are low-income can receive fair and equal access to a medical expert witness that would otherwise be a financial burden, low-income individuals can be assured that there will be no unfair advantage for the defense.

To further show the unfair advantage that doctors have, let us point out another study in which researchers showed that physicians

41 *What Is a Medical Expert Witness?*, American Medical Forensic Specialists, https://www.amfs.com/resources/what-is-a-medical-expert-witness/ (Last accessed Mar. 11, 2024).

42 Ibid.

43 Seth Bader, *Medical Malpractice Attorney Speaks Out - 8 Figure Attorney Podcast*, YouTube (Mar. 11, 2022), https://www.youtube.com/watch?v=WIxm4F_F-tU.

win 70% of cases with borderline evidence of medical negligence. Conversely, only 50% of cases that show strong evidence of medical negligence are ruled in favor of the plaintiff.[44] This latter figure is particularly alarming. Not only do these rulings decrease the chance of the victims receiving just and fair compensation for damage caused, but they also almost completely dismiss the concept of *res ipsa loquitir* in medical care and put other patients at risk by allowing a negligent doctor to continue working with minimal to no repercussions.

By absolving the need of low-income individuals to afford a medical expert witness, these plaintiffs can be assured fair and equal representation by a doctor, nurse, or specialist that can testify on their behalf and provide evidence of medical negligence on the part of the treating doctor, nurse, specialist, or hospital. According to Prince Benowitz Accident Injury Lawyers, LLP, "It is rare for a malpractice plaintiff to achieve a successful case result without input from at least one medical expert witness, especially in states that generally require [an] affidavit of merit to be filed alongside initial complaints."[45]

B. Evidence of Taxpayer Money Being Used for Similar Reasons

There is enough evidence from previous court rulings setting a precedent that would allow for government funding to pay for a low-income plaintiff to receive a medical expert witness. This discussion begins with the supreme law of the land, the U.S. Constitution, which would allow for such a ruling to be constitutional.

44 Philip G. Peters, *Twenty Years of Evidence on the Outcomes of Malpractice Claims*, 467(2) Clin. Orthop. Relat. Res. 352-357 (2009).

45 *Who Serves as an Expert Witness in Medical Malpractice Cases?*, Price Benowitz Accent Injury Lawyers, LLP, https://pricebenowitz.com/blog/who-serves-as-an-expert-witness-in-medical-malpractice-cases/ (Last accessed Feb. 6, 2024).

1. U.S. Constitution Article 1 Section 8

In Article 1 Section 8, the document reads, "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States:"[46]

The foundation of the presented argument that the government paying for a medical expert witness for a plaintiff rests on the idea that it would, in fact, provide for the general welfare of the United States. For one, the government subsidizing a medical expert witness for a low-income plaintiff would ensure that less negligent doctors would be practicing medicine. If, conversely, a government allows negligent doctors to continue practicing, more people may be harmed by that doctor, thus harming the general public. This, along with revoking the licenses of negligent doctors to practice, is in the general welfare of citizens of the United States to receive justice and compensation when any wrong is committed against them. If people are not afforded a fair chance at justice, then how can we truly be a nation touting "liberty and justice for all?"

2. Civil Gideon

A civil right to counsel, also referred to as "Civil Gideon" refers to the idea that people who are unable to afford lawyers in legal matters involving basic human needs should have access to a lawyer at no charge. The idea of Civil Gideon law came about after a 1994 study by the American Bar Association (ABA) revealed that about four of every five families with civil legal needs were not being met.[47] While this right exists in criminal matters due to the sixth amendment[48] and Supreme Court case *Gideon vs Wainwright*, it also exists at present in some civil matters.[49] The American Bar Resolution 112A and the

46 U.S. Const. art. 1, § 8.

47 Robert J. Derocher, *Access to Justice: Is Civil Gideon A Piece of the Puzzle?*, ABA, 32(6), (2008).

48 U.S. Const. amend. VI.

49 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Utah Civil Case Pro Bono Program (described below) are practical examples of Civil Gideon law in action.[50,51]

3. American Bar Resolution 112A

In August 2006, the House Delegates of the ABA took a historic step forward by adopting a resolution urging "federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, safety, health or child custody."[52] This resolution was sponsored by thirteen state and local bar associations, and the principles were adopted by an additional six state bar associations and five Access to Justice Commissions.

This resolution by the ABA details health as a matter of right. When medical malpractice occurs, the victim of negligence loses their right to health and should have the opportunity to receive compensation. Notably in 2018, the ABA also adopted Resolution 114, which calls for a right to counsel whenever physical liberty is at stake, regardless of whether the case is civil or criminal.[53]

4. The Utah Civil Case Pro Bono Program

In the state of Utah, the District Court offers a program called the Civil Case Pro Bono Program. The purpose of this program is "to provide access to justice for those who are unable to afford representation in civil cases."[54] This program appoints qualified attorneys

50 Res. 112A, ABA (Aug. 7, 2006), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.

51 D. Utah Civ. R. *Civil Case Pro Bono Program*, https://www.utd.uscourts.gov/civil-case-pro-bono-program/ (Last accessed Feb. 13, 2024).

52 ABA, *supra* note 50.

53 Albert S. Dandrige III, *ABA Resolution 114: An Important Right to Counsel Measure*, Law.com (June 28, 2018), https://www.law.com/thelegalintelligencer/2018/06/28/aba-resolution-114-an-important-right-to-counsel-measure.

54 D. Utah Civ. R., *supra* note 51.

for general and limited purposes; it also provides opportunities for attorneys to gain valuable litigation experience in a variety of cases from employment discrimination matters to violation of civil rights claims.

The court uses the attorney admission fund to reimburse pro bono counsel for out-of-pocket expenses, payment for pro bono counsel, witness fees, and other expenses for pro se civil litigants, thus providing counsel to those who cannot afford it in civil matters. A medical expert witness is included in that counsel.

Theoretically, a low-income individual could have the right to a medical expert witness if the plaintiff is suing in federal court. It is unjust that this program should be offered in federal courts but not at the state level. A Civil Case Pro Bono Program should be offered in the state to allow victims of medical negligence to receive the necessary funds of obtaining a medical expert witness.

When someone becomes a victim of medical negligence, there is no question that the individual has lost a right to physical liberty. From 2013 to 2017, 33% of all filed medical malpractice claims were related to missed or delayed diagnosis, which have life-altering consequences. Others include prescription drug errors and surgical errors that cause similar results. Gary N. Stern, owner of Stern Law office, explains,

> Loss of enjoyment of life can and should be honored, emphasized, and argued because it is right there in our nation's Declaration of Independence. There is a symbiotic relationship between 'loss of life' and 'pursuit of happiness.' The phrase loss of enjoyment of life should be considered as a loss of one's natural right to pursue happiness.[55]

By providing funding to low-income individuals to attain a medical expert witness, the government can fulfill its duty of promoting the general welfare of the United States as this will ensure low-income victims of negligence may receive a fair and just opportunity at

55 Gary N. Stern, *"Loss of Enjoyment of Life" and the Declaration of Independence*, Advocate (Jan. 2022), https://www.advocatemagazine.com/article/2022-january/loss-of-enjoyment-of-life-and-the-declaration-of-independence.

compensation as well as keep repeatedly negligent doctors away from patients, thus preserving the standard of excellence for America's medical institutions.

C. Explanation of How This Would Be Done

Of course, the idea of promoting social welfare is nothing new. However, one of the primary challenges stems from disagreements about the implementation of such welfare. While ideas of a utopia where everyone can partake of the bountiful plenty may seem appealing, the reality is that very few times in history have such systems worked.[56] Still, if a strong plan is present, there is no reason to dismiss it.

The first step of understanding this paper's proposal is a description of what this would look like at the fiscal level for taxpayers; the example of Utah can illustrate how the system would work. This paper proposes that a portion of the state's available Medicaid budget that is not fully used be directed into a separate budget henceforth referred to as "the expert witness fund." The expert witness fund will be created using a portion of the state's sales tax of hospitals. Utah has a sales tax of a little over 6%.[57] Because the budget is coming from already mandated sales taxes, there would be no need to increase taxes on Utahns.

As the cost of medical malpractice varies widely depending on factors such as attorney fees, rates per testimony, rates for discovery and research, rates for depositions, etc., the present example will use the Seak Expert Witness Directory average rate of $500 per hour for the malpractice witness, with an assumption of an average of 24 hours for the amount of work that the witness must put in for a single case. This equates to an average total cost of $12,000 for the medical expert witness. Utah had 175 cases of medical malpractice in 2022

56 Ewan Morrison, *Why Utopian Communities Fail*, Areo (Aug. 3, 2018), https://areomagazine.com/2018/03/08/why-utopian-communities-fail.

57 *Taxes in Utah*, Tax Foundation, https://taxfoundation.org/location/utah/ (Last accessed Feb. 13, 2024).

according to Becker's ASC Review.[58] Of Utahns with medical insurance, 11% have state government-funded Medicaid insurance.[59] The conclusion, then, is that of the medical malpractice claims filed, 17% were filed by Medicaid, making 30 of the 175 individuals who filed a medical malpractice lawsuit a Medicaid carrier.

If the $12,000 per case is multiplied by the 30 individuals filing a lawsuit, then the overall cost would be $360,000. To account for the fact that some years may contain more lawsuits than others, we will round this number up to $500,000. According to the 2022 Utah Tax Commission Report, Utah generated $9,434,850 in tax revenue from rural hospitals alone.[60] This means roughly only 5% of the revenue generated from rural hospitals will go into the expert witness fund. We once again propose that the government may reimburse itself, thus making the 5% needed for the expert witness fund much smaller, as not every single case will lose or fail to settle.

IV. Conclusion

The area of medicine is a complex and daunting one. However, individuals have a right to physical liberty. While it is understandable that representation should only be allowed for criminal prosecution as guaranteed under the Sixth Amendment, the premise of the Amendment is to allow someone who was wronged to be returned their freedom. While victims of medical negligence may not have their freedom taken in the sense that they are incarcerated, they have lost their freedom to the basic enjoyment of life and their bodily autonomy. Thomas Jefferson believed in life, liberty, and the pursuit of happiness; victims of medical negligence may lose all three. It is not too far to say that victims of malpractice not receiving representation is an un-American idea.

58 Claire Wallace, *Medical Malpractice Reports by State in 2022*, ASC Review (Nov. 21, 2022), https://www.beckersasc.com/asc-news/medical-malpractice-reports-by-state-in-2022.html.

59 Kaiser Family Foundation, 2022 Medicaid in Utah Report, (June 2023), https://files.kff.org/attachment/fact-sheet-medicaid-state-UT.

60 Utah State Tax Commission, Annual Report (2021-2022).

Some may think that this proposed system will cause prospective health providers to no longer want to be a part of the field of medicine. This is more alarming than ever as the U.S. will have an estimated shortage of 17,800-48,000 primary care physicians by 2034.[61]

While it is easy to understand protecting doctors and encouraging individuals to join the profession, what is unacceptable is a failure to hold negligent doctors accountable. It is unfair that someone seeking compensation has only 10% odds of winning in trial and that those odds rise to only 50% if strong evidence is presented. The current system is heavily skewed towards negligent doctors, but the creation of an expert witness fund would be a productive primary step to helping victims of negligence receive just compensation for the future treatments they will need and for receiving the much-deserved compensation for pain and affliction.

The goal is that the research conducted and the analysis provided here is at least a step in the right direction of both helping victims of negligence receive just and deserving compensation from a system that is unfavorable as well as clear the name of doctors throughout the U.S., building upon the patient-doctor relationship that many Americans cherish.

61 Annalia Merelli, *A New Paper Suggests a Simple Fix to the Primary Care Physician Shortage*, STAT+ (Sept. 1, 2023), https://www.statnews.com/2023/09/01/primary-care-physician-shortage.

Parched Rights, Thirsty Lands: Improving Paiute Water Rights with a Proactive State Solution

Hailey Russell[1]

I. Introduction

"For me, I know how to survive without electricity or running water, and I don't think the rest of America knows how. Welcome to our plight. Welcome to our situation. Welcome to that world and our reality." – Alastair Lee Bitsóí, Diné Navajo freelance writer.[2]

Bitsóí's experience is not an uncommon one across Native American tribes in the United States. From depending on often unreliable water trucks to bring water for drinking and sanitation, to no access to clean water, these tribes continue to face water rights struggles.[3] While it may be hard to imagine places within the United States that lack access to water, the relationship between the federal

---

1 Hailey Russell is a student at Brigham Young University majoring in English. She would like to thank her editor, McKenna Schmidt. McKenna is a senior at Brigham Young University majoring in Journalism.

2 Sydnee Gonzalez, *'Welcome to our plight': Exploring tribal communities and water rights,* Deseret News (Feb. 9, 2024), https://www.deseret.com/utah/2023/4/20/23691062/exploring-tribal-communities-water-rights/.

3 Michael Sakas, *Historically excluded from Colorado River policy, tribes want a say in how the dwindling resource is used. Access to clean water is a start,* Colorado Public Radio (Feb. 26, 2024), https://www.cpr.org/2021/12/07/tribes-historically-excluded-colorado-river-policy-use-want-say-clean-water-access/

government and Native American tribes has presented challenges in regards to water rights. There are 574 federally recognized tribes[4] in the United States today and more than 200 unrecognized.[5] Both federally recognized and unrecognized tribes face various struggles in their attempts to gain access to drinkable, usable water. The Paiute tribe in southern Utah (PITU) is small, contributing to a tense relationship with federal and state governments and a lack of representation in this struggle for secure water rights. While legislation exists to protect and uphold tribal water rights, the weaknesses in this legal framework can make attaining physical access to water difficult for the Paiute Tribe of Utah.

The Winters Doctrine—a landmark legislation—has played a pivotal role in securing water rights for Native American tribes, providing a framework for legal battles and negotiations. This paper explores the successes and shortcomings of the Winters Doctrine, focusing on its impact on the PITU. While the doctrine has enabled significant achievements, especially through acts like the Ute Water Compact and the Shivwits Water Rights Settlement Act of 2000, challenges persist, emphasizing the need for a comprehensive solution. This review delves into the shortcomings of the doctrine—particularly concerning the distinction between physical rights to use water and the theoretical right to a water source, and presents a case study involving the Navajo Nation. Additionally, it highlights the exclusivity of the Winters Doctrine to federally recognized tribes, leaving unacknowledged tribes vulnerable. The subsequent examination of the doctrine of prior appropriation reveals its complexities and challenges, especially in cases like the Paiute Indian Tribe of Utah, emphasizing the need for a nuanced approach. Finally, the paper scrutinizes the current state of wet water rights for the PITU, revealing disparities among bands and underscoring the urgent need for a comprehensive solution.

4 *Federally recognized Indian Tribes and resources for Native Americans,* USAGov (Feb. 9, 2024), *https://www.usa.gov/tribes.*

5 Eilis O'Neill, *Unrecognized Tribes Struggle Without Federal Aid During Pandemic* (Feb. 9 2024), https://www.npr.org/2021/04/17/988123599/unrecognized-tribes-struggle-without-federal-aide-during-pandemic.

II. Background

Over the course of the past 150 years, due to drought and other causes, the amount of water available to the Paiute tribe has changed. These variations have been a result of changing legal decisions and the federal recognition of individual tribes. When first settling in Southern Utah in 1000 A.D., the various Paiute bands had unrestricted access to the neighboring water sources. However, in the mid-1800s, more people moved to the Southern Utah area, congesting the area and making access to water difficult due to disputes between European homesteaders and the Paiutes. Starting in 1891, official reservations were established for the PITU bands, and, with the support of President Woodrow Wilson, the PITU reservation spanned 26,880 acres. Unfortunately, in 1954, under President Eisenhower, the PITU lost federal recognition and federally protected water access. With this termination policy, nearly half of the PITU members died due to a lack of basic health resources. It was not until 1980 that the PITU regained federal recognition, but the tribe received only 4,770 acres of land—a fraction of their original land allotment. This loss of land resulted in a loss of natural water resources that the Paiutes once had access to.[6]

In the state of Utah, water rights are defined as the "right to divert and beneficially use water."[7] These rights are characterized by specific elements, including: defined nature and extent of beneficial use (the basis, measure, and limit of a water right), a priority date, specified quantity of water allowed for diversion, designated point of diversion and water source, and a specified place of beneficial use.[8] When it comes to water allocation, Utah and other Western states adhere to the doctrine of prior appropriation. This means

6 *History: The Paiutes*, Utah American Indian Digital Archive (Feb. 26 2024), https://utahindians.org/archives/paiutes/history.html.

7 Utah Admin. Code § 655-3-2 (2024).

8 *The Winters Doctrine: The Foundation of Tribal Water Rights*, Inter Tribal Council of Arizona (Jan. 30 2024), https://itcaonline.com/programs/tribal-leaders-water-policy-council/the-winters-doctrine-the-foundation-of-tribal-water-rights/.

the first person to use or divert water for a beneficial purpose can acquire individual rights to the water source.[9] However, the situation becomes more complicated for the Paiute tribe of Utah. The PITU includes five bands, or groups, of Paiutes that span across the southern part of Utah.[10] Although this tribe has historical documentation dating back to 1100-1200 A.D. in Southern Utah, they were not federally recognized until 1980. Consequently, their access to water over the years has been uncertain. As water sources in Southern Utah have dried up, it has been increasingly difficult for Native American tribes to receive clear guidelines for the frequency and amount of water they are legally allowed to draw. This raises important questions about the Paiute tribe's right to claim prior appropriation. Did their claim to each band's respective water source begin when they first began drawing water, or did it start when the government assigned an arbitrary date to recognize their existence as a tribe? With water resources constantly fluctuating and the looming threat of drought, it becomes crucial to consider how these tribes will access the water they desperately need for their survival.

In addition to the complex legal landscape surrounding Native American tribes' water rights, it is essential to recognize the socioeconomic and cultural implications of these changing water levels. The availability of water directly affects the livelihood and well-being of the members of these tribes. Access to water is not just about survival but also about maintaining their cultural practices and traditions that have been intertwined with water for centuries. The ability to fish, hunt, gather medicinal plants, and perform sacred ceremonies all depend on a reliable and sustainable water supply. Without secure and guaranteed water rights, these tribes face immense challenges in preserving their way of life and passing down their

9 *Prior Appropriation Doctrine,* Legal Information Institute (Feb. 10, 2024), *https://www.law.cornell.edu/wex/prior_appropriation_doctrine.*

10 Paiute Indian Tribe of Utah, Paiute Indian Tribe of Utah (Feb. 26, 2024), https://pitu.gov/.

cultural heritage to future generations.[11] Additionally, threats to necessary natural resources could force tribal members to relocate to cities or other areas with access to water. In 2022, the Newtok, Napakiak, and Quinault tribes were given funding from the Biden administration to relocate.[12] While the consideration of the Biden administration is notable, could relocation due to climate change and natural disaster damage be prevented?

Furthermore, the impact of climate change on water resources adds another layer of complexity to the issue.[13] As water resources diminish, the threat of drought becomes more pronounced. This exacerbates the already precarious situation of tribes that have historically faced challenges in accessing water. The need for comprehensive and equitable solutions that address both the legal and environmental aspects of water allocation becomes even more urgent. Without these rights, tribes are forced to resort to buying water from other municipal counties nearby (which can be incredibly expensive) and gives no guarantee that they will always be able to have water, especially in times of drought.[14]

11 April Eagan, *Heritage and Health: A Political-Economic Analysis of the Foodways of the Paiute Indian Tribe of Utah and the Bishop Paiute Tribe,* Portland State University (2013).

12 *The Indigenous World 2023: United States of America,* International Work Group for Indigenous Affairs (Feb. 26, 2024), https://www.iwgia.org/en/usa/.

13 *Southwest*, U.S. Climate Resilience Toolkit (Feb. 8, 2024), https://toolkit.climate.gov/regions/southwest.

14 Email from Keiti Jake, PITU Environmental Manager (Jan. 16, 2024), kjake@ptu.gov.

A. Legal Definitions

"Water right"	A "water right" is "the right to use surface water, ground water, or other resources"[15]
"Prior appropriation"	"Prior appropriation" is the allocation system used by the Western United States, which gives water rights based on "timing of use, place of use, and purpose of use. It allows for diverting water from its source to fulfill water rights and determines who gets water during times of shortage."[16]
"Paper water"	When you have gone through the process to receive a water right, you receive "paper water," which is the "legal claim to a specific allocation of water for beneficial use."[17]
"Wet water"	"Wet water" is the "actual, physical amount of water that is allocated for use in a given year based on your water right. However, during times of shortage, some water rights may not be fulfilled."[18]

B. Legislation

Winters v. United States

One key legal decision that has shaped these rights is the 1908 agreement known as *Winters v. United States*. In 1888, the Fort Belknap reservation was created, but the agreement that reserved the land for the reservation neglected to mention anything about their

15 *Western Water Law: Understanding the Doctrin*e of Prior Appropriation, University of Nevada (Feb. 10, 2024), https://extension.unr.edu/publica*tion.as*px.

16 *See id*.

17 See id.

18 *See id.*

water rights.[19] Western settlers began building dams and reservoirs on the Milk River, preventing the Fort Belknap reservation from receiving the water they needed for agricultural and other endeavors.[20] The decision in *Winters v. United States* asserted that federally recognized Native American tribes have the right to draw enough water to sustain themselves in the same way they have access to other natural resources on their reserved land. However, since this federal decision, the availability of water resources for many tribes has decreased. Over the last five years, there has been a difference of as much as 20 inches of precipitation across the state of Utah.[21]As a result, these tribes have had to turn to their respective state governments for representation and clarification on their ability to access the necessary quantities of water needed for their survival and livelihoods. Unfortunately, the term "self-sufficiency" in the agreement is vague. This creates a loophole that allows federal and state governments to either withhold additional water allocation or deny assistance in clarifying these water rights, which unfortunately does not violate constitutional rights.

Arizona v. Navajo Nation

An ongoing example of this complex situation is the 2023 Supreme Court decision in the case of *Arizona v. Navajo Nation*.[22] The Navajo Nation sought a clearer understanding of their water rights due to the diminishing water supply in the Colorado River Basin in recent years. Initially, Navajo Nation filed a complaint to the U.S. District Court for the District of Arizona, to which their request was denied. The Supreme Court agreed to listen to the case; however, the Supreme Court upheld the previous decision to refrain from organizing new allocation plans for Navajo Nation, effectively leaving the tribe without secure future water rights. Justice Kavanaugh led

19 Winters v. United States, 207 U.S. 564 (1908)

20 Harold A. Ranquist, The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water, 1975 BYU L. Rev. 639 (2013).

21 *Precipitation Graphs*, Utah Department of Natural Resources, (Feb. 7, 2024), https://water.utah.gov/precipitationgraphs/.

22 Arizona v. Navajo Nation, 599 U.S. 5-7, 9-10 (2023).

the majority opinion, stating that although the 1868 treaty reserved "necessary" water for Navajo Nation, the United States felt no obligation to "take affirmative steps to secure water for the tribe."[23] This particular decision sheds light on the federal government's apparent and problematic lack of interest in establishing plans or taking action to ensure the survival of this tribe.

Navajo Utah Water Rights Settlement

A positive example of state government involvement is found within the 2020 *Navajo Utah Water Rights Settlement*.[24] This legislation provided much-needed water resources to the Utah portion of Navajo Nation (where almost half of the population previously lacked indoor plumbing).[25] Not only did this agreement allocate previously promised and desperately-needed water, but it also saved the tribe and Utah taxpayers from the costly legal proceeding fees. The *Navajo Utah Water Rights Settlement* granted specific water allocation quantities and also authorized funding for water infrastructure within the Utah portion of Navajo Nation. This bill is an ideal example of a state-driven commitment to resolve tribal water rights in a fair, preventative, and cost-effective manner.

Ute Water Compact

The *Ute Water Compact of 1990* is another example of positive involvement from the Utah state government to secure water rights for a Utah-based tribe. This agreement resolves any controversies regarding the allocation and use of water by the Ute Indian tribe.[26] The Ute Water Compact outlines the allocation of water rights to the

23 *Arizona v. Navajo Nation*, SCOTUSblog (Feb. 8, 2024), https://www.scotusblog.com/case-files/cases/arizona-v-navajo-nation/.

24 Navajo Utah Water Rights Settlement Act of 2019, H.R. 133, 116th Cong. § 1207 (2020).

25 Kris Neset et al., Effective Partnering to Increase Access to Water on the Navajo Nation, The Military Engineer 62-66 (2022).

26 Utah Code § 73-21-101 (2018).

Ute tribe as well as quantities and priority dates.[27] This thorough document brings clarity for the current and future water rights of this tribe. This document guarantees the allocated water is granted in perpetuity and held in trust, meaning these water rights are intended to last indefinitely, regardless of changing natural resources.[28] The Ute Water Compact is another positive example of the steps the Utah state government can make to secure the water rights for its tribes.

III. Proof of Claim

A. Successes of the Winters Doctrine

The successes of the Winters Doctrine for Native American tribes are important to note, because they demonstrate the federal government's attempt to support the livelihood of Native American tribes. This legislation provides the framework for Native American tribes to lobby for their water rights, and secures water rights for many of these Native American peoples. Under the Winters Doctrine, legal decisions such as the Ute Water Compact were enacted, giving actual water rights and government-funded water programs to the Ute Indian Tribe of Utah. Since this 2018 decision, the Ute tribe has been able to "resolve [its] claims over the quantification, distribution, and use of all waters claimed. The Compact apportions, confirms, and recognizes the rights of the Tribe to the waters apportioned to UT from the Colorado River System."[29] Even in a time of low water levels in the Colorado River Basin, the Utah state government deemed it important to allocate these necessary water rights to the Ute tribe.

Another success of the Winters Doctrine among the Native American tribes in Utah is found within the Shivwits Water Rights Settlement Act of 2000. This act gave 4,000 acre-feet per year to the

27 *See id.*

28 *See id.*

29 *Ute Indian Water Compact*, The Open University (Feb. 7, 2024), https://core.ac.uk/display/78931193.

band of 30 Shivwits Paiute tribe members.[30] Most of the water from this decision comes from the St. George Water Reuse Project and the Santa Clara Project – both of these projects utilize treated water from water treatment facilities, which conserve water and redirect it to meet the dire needs of the Shivwits band.[31] This agreement is a model example of using the available water resources in ways that benefit all users of water in Southern Utah areas. Without the Winters Doctrine in place, these vital water agreements would not have been possible. Even though these benefits exist, there are many loopholes in the Winters Doctrine that allow the government to unfairly restrict water rights.

B. Shortcomings of the Winters Doctrine

The Winters Doctrine has been the first step in securing water rights for tribal lands; however, there are areas in which it falls short. First of all, while it does dictate that every federally recognized tribe receive water rights, it does not necessarily translate into physical access to usable water. Herein lies the difference between "paper water rights" and "wet water rights," meaning there is a difference between having theoretical, government-approved rights to water and having *physical* access to water. Unfortunately, even if a tribe has paper water rights, there are loopholes in the Winters Doctrine that can prioritize city or municipal use of water over tribal water rights, even if that tribe has an early prior appropriation date. According to the doctrine of prior appropriation, drought can block the most recent water users from having their water rights fulfilled. Having water access blocked could result in anything from rationing water to eliminating water for agricultural purposes, to forcing

30 *Shivwits Band History*, Shivwits Band of Paiutes (Feb. 11, 2024), https://shivwits.org/shivwits-band-history/.

31 *Completion of Shivwits Band Water Rights Settlement Act*, U.S. Department of the Interior Indian Affairs (Feb. 8, 2024), https://www.bia.gov/as-ia/opa/online-press-release/secretary-norton-announces-completion-shivwits-band-water-rights.

these more recent water users to find water elsewhere.[32] The nuance of the water issue extends much farther than water rights and access alone considering much of the set apart water is either unclean or unfit for the needs of said tribes, and the designated water source experiences major fluctuations in water levels (thus impacting the amount of available water to draw).[33] All of those issues aside, the language in the Winters Doctrine is vague enough that a deciding government body can choose to remain uninvolved if it serves their agenda, further limiting or nullifying the water rights of deserving Native Americans.

For example, the recent June 2023 case *Arizona v. Navajo Nation* ended with a majority decision to ignore the pleas of Navajo Nation to reevaluate their need for water as the Colorado River Basin continues to dry up. This decision states that although Navajo Nation retains water rights through the Winters decision, the federal government has "no obligation to secure or even identify the water needed for the reservation."[34] It seems only natural to question how Navajo Nation would possibly be able to draw any water if the government felt it had no obligation to even identify the water source for this tribe to draw from. Thus, it is clear that while the Winters Doctrine opens some doors for water rights, it also allows the government and other agencies to maintain their control over the actual water drawn by these tribes.

The other major shortcoming of the Winters Doctrine is it only gives water rights to federally recognized tribes. If a tribe is federally recognized, they have a stronger foundation to protect their land and territory rights even if they do not have strong legal representation. Federal recognition allows a Native American tribe to exercise

32 Western Water Law *supra* note 15

33 *After no clean drinking water for 4 years, this Native American tribe wants more than sympathy*, NPR in Kansas City (Feb. 26, 2024), https://www.kcur.org/2023-10-19/native-american-communities-struggle-water-access.

34 *Supreme Court: U.S. Not Responsible For Water Rights; Navajo Nation Still Battling For Water*, Native American Rights Fund (Feb. 10, 2024), https://narf.org/scotus-az-v-navajo-amicus/.

freedom in religious, cultural, and agricultural practices.[35] In the case of the PITU, (despite inhabiting Southern Utah for over 800 years) this tribe has only been federally recognized as of 1980. Until 1980, the Paiute bands were able to draw water, but there was no legislation that formally recognized these water rights, meaning the government could have revoked their water rights or instituted unfair regulations at any time. While this did not happen, this hypothetical presents a clear weakness in the Winters doctrine as the sole way by which tribes can secure their water rights. The Winters doctrine certainly provides a framework for unrecognized tribes to become federally recognized, but this process could take years, leading to years of underrepresentation and lack of access to vital resources before coming to fruition.

1. Prior Appropriation

The doctrine of prior appropriation designates the earliest users of a water source as having the highest priority to continue their use of said water.[36] If someone happens to be one of the oldest water users, they may retain priority drawing during times of water shortages.[37] While this doctrine of water allocation is simple in theory, it has proven to be messy in practice. In the case of the PITU, this has certainly held true. The bands of the PITU have long inhabited Southern Utah, dating as far back as 1100 A.D.[38] However, with tensions between this tribe and the settlers who came later, it took until 1980 for this tribe to be federally recognized.[39] Even then, it took until 1984 for a statute to be enacted that guaranteed water rights

35 *How Can mctlaw's Indian Law Team Help Your Tribe Become Federally Recognized (Obtain Federal Acknowledgment)*, mctlaw (Feb. 26 2024), https://www.mctlaw.com/indian-law/federal-recognition/.

36 Prior Appropriation Doctrine *supra* note 9

37 Kat Ruane, *How Do Water Rights Work in the West*, Food and Water Watch (Feb. 8, 2024), https://www.foodandwaterwatch.org/2023/08/07/how-do-water-rights-work-in-the-west/.

38 Paiute Indian Tribe of Utah, 98 U.S.C. § 11 (1984).

39 *Paiute Indian Tribe of Utah: History*, Paiute Indian Tribe of Utah (Feb. 26, 2024), https://pitu.gov/our-history/.

for the land that was set apart for the Paiute tribe.[40] Clearly, it is possible to get a permit that outlines prior appropriation rights, but in the case of the PITU, it took almost 900 years to secure their priority drawing.[41] Whether this reflects a disinterested attitude from the federal and state governments or the PITU's lack of representation delayed this rightful recognition, 900 years is a problematic span of time. Even now, as aforementioned, the Winters Doctrine allows the federal government to rescind these priority rights at any point during times of drought or other water shortages.[42]

The political issues surrounding the doctrine of prior appropriation are many and convoluted. The first prior appropriation water users were the gold miners in the Sierra Nevada Mountains during the Gold Rush. These miners, followed by the homesteaders, pioneers, and farmers that first lived in and settled in the West, are the individuals who established the allocation system of prior appropriation.[43] As these geographical areas grew in population, more water rights were appropriated, and the long, chronological list of water users was created. Understandably, some of the most recent prior appropriation water users are cities and towns. This creates a conflict of interest for the state governments, because, with growing city populations, it is tempting to divert water from early prior appropriation users to supplement the growing needs of these cities. The Indian Peaks band of the PITU is currently experiencing a run on their water via the Pine Valley Water Supply Project proposal, which proposes a pipeline that would divert billions of gallons of water from this area to the growing urban areas in Cedar City.[44] This would dangerously decrease the Indian Peaks band's access to

40 *See id.*

41 *See id.*

42 Winters v. United States *super* note 19

43 *Prior Appropriation and Water in the West,* Waterkeeper Alliance (Feb. 26, 2024), https://waterkeeper.org/news/prior-appropriation-and-water-in-the-west/.

44 Leia Larsen, *In the Pine Valley pipeline debate, a small tribe's right to water remains largely ignored* (Mar. 5, 2024), https://www.sltrib.com/news/environment/2023/10/16/pine-valley-pipeline-debate-small/.

water. This proposal comes after years of municipalities in Cedar City overdrawing water from the Cedar Valley aquifers, despite the fact that the Pine Valley water system is already prone to drying up due to the continuing threat of drought.[45,46] This attitude of overriding the prior appropriation status of the Indian Peaks and Cedar bands of the PITU reveals the danger this tribe faces when it comes to maintaining their water rights and prior appropriation status.

Many Western state governments could be interested in reallocating water from these prior appropriation farms to satisfy the needs of growing urban developments. However, the doctrine of prior appropriation blocks them from doing so unless new settlements are reached and monetary reparations are made. This might lead state governments to seek other incentives or loopholes to divert water from prior appropriation farms. Thus, the issue of prior appropriation and potentially moving to a new system of water allocation is clearly a multifaceted, complicated issue that has blocked the progress of securing water rights for these tribes.

2. The Current State of "Wet Water Rights" in the PITU

Today, the respective bands of the PITU each have reserved water sources for their needs. The Shivwits band has the most prescriptive wet water rights of any of the PITU bands, likely due to the fact that it maintains a population of over 300 members—the highest population of any PITU band.[47] The Shivwits Water Rights Settlement Act of 2000 designates that the tribe's members "shall have the right in perpetuity to divert, pump, impound, use, and reuse a total of 4,000 acre-feet of water annually from the Virgin River and Santa

45 Claire Carlson, *Utah landowners and tribes fight a plan to pump rural city water to Cedar City*, Utah Public Radio (Feb. 10, 2024), https://www.upr.org/utah-news/2022-11-15/utah-landowners-and-tribes-fight-a-plan-to-pump-rural-water-to-cedar-city.

46 *Drought Conditions for Beaver County*, National Integrated Drought Information System (Feb. 8, 2024), https://www.drought.gov/states/utah/county/Beaver.

47 History: The Paiutes *supra* note 6

Clara River systems."[48] This includes 1,900 acre-feet from the Santa Clara River basin with an 1890 priority date, 2,000 acre-feet from the St. George Water Reuse Project with first priority claim, and 100 acre-feet from the groundwater system with a 1916 priority date.[49] Not only does this act clearly quantify the amount of water and the priority of drawing it, but it also designates government funding from the state to put into water treatment facilities and water safety education programs for the benefit of the Shivwits band. The most beneficial part of this agreement is that the Shivwits band maintains these water rights "in perpetuity," which means that they are guaranteed these water drawing rights no matter the state of the Virgin and Santa Clara Rivers.[50] This act fulfills the wet water rights the Paiute tribe is entitled to according to the tenets of prior appropriation, especially due to their long residency in Southern Utah.

Unfortunately, none of the other bands of the PITU have received similar settlements.[51] As the water sources of these Southern Utah bands are diminishing, how will these Paiute members maintain access to water for their livelihood and survival? These bands, due to their smaller size, are often underrepresented and do not have the strong voice necessary to effectively advocate for their water rights. The Paiute bands need to have a prior appropriation date that accurately reflects the longevity of their residency in Southern Utah. When President Eisenhower terminated federal supervision of the Paiute tribe in 1952, the PITU lost its federally appointed rights to resources, even when President Carter restored the PITU in 1980, many of those rights were lost in the process.[52] Despite the reversal of this decision, the Paiute tribe only retains a prior appropriation

48 Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act § 106-263 (2000).

49 *See id.*

50 *See id.*

51 Josh LaMore, *Survival of the Southern Paiute,* National Park Service (Feb. 26, 2024), https://www.nps.gov/articles/survival-of-the-southern-paiute.htm.

52 Paiute Indian Tribe of *Utah supra* note 39

date of 1980 which significantly impacts their access to water and ability to farm, and even exist, without government intervention.

C. Proposed Solution

The best, most effective solution to meet the water needs of the Paiute Tribe of Utah centers around the willingness of the Utah state government, and in particular, the Utah Division of Water Rights, to be proactive in creating settlements for every Paiute band in the state of Utah. The best solution to secure the wet water rights for this tribe is a state-appointed plan that details the quantity, frequency, and perpetuity of wet water rights for each PITU band.[53]

1. Quantity, Frequency, and Perpetuity

The quantity of water available to each band should center on the band's population and the viability of the water source the band is proximate to. The frequency of drawing should also correspond with these respective statistics. Similar to the Shivwits Water Rights Settlement Act of 2000, these water rights should exist in perpetuity and should maintain priority status according to the tenets of prior appropriation doctrine.[54] This plan should include conditions that state the reparations that would be made in case the doctrine of prior appropriation shifts or changes in the future. If prior appropriation privileges are revoked, reparations such as financial supplements or stimuli could be beneficial, but a plan for water allocation is vital regardless. Thus, a specific water allocation plan for the PITU transcends prior appropriation and its questionable future as the water regulation method for the Western states.

2. Institution of Infrastructure that Supports the Logistics of PITU Water Rights

Additionally, this state-appointed plan should include useful water infrastructure investments to support these wet water rights.

53 Utah Admin. Code 655-3-2 (2016).

54 Shivwits Band Water Rights *supra* note 31

This should depend on the needs and current status of each band but could cover funding for the institution of water treatment plants, water sanitation education programs, and the creation of jobs to support the economy of these PITU bands. The Bipartisan Infrastructure Law provides a model for supporting water infrastructure, delivering $50 billion to the Environmental Protection Agency to improve the quality of drinking water, wastewater management, and vital stormwater preparation plans.[55] While this law does not support the Paiute tribe or any other Native American tribes with its funding, it makes the vital statement that investment in water infrastructure is much more than spending money for people to have clean water. Investing in infrastructure specialized for the PITU would not only address the issue of unclean water and lack of water, it would also stimulate the economy in these small tribal bands, supporting their livelihood.

3. Emergency Plan in Case of Drought or Other Natural Disasters

In the case of drought, this state-appointed plan or settlement must address the logistics of each band's ability to draw water from their respective water source, and how (if at all) the quantity of water drawn would change due to natural disasters or drought. These quantities should be separated into the categories of: drinking water, agricultural water needs, and water for sanitation purposes.[56] For the clarity of the government and the PITU, (and to avoid any future legal battles) it is necessary for clear quantities or ratios to be described within this plan. In the unlikely case of a water source drying completely, it would be the responsibility of the Utah Division of Water Rights to guarantee access to groundwater via a pipeline or through government-created wells.

55 *Water Infrastructure Investments*, United States Environmental Protection Agency (Feb. 7, 2024), https://www.epa.gov/infrastructure/water-infrastructure-investments.

56 *Emergency Preparedness: Division of Drinking Water*, Utah Department of Environmental Quality (Feb. 10, 2024), https://deq.utah.gov/drinking-water/emergency-preparedness-drinking-water.

D. Objections and Potential Pushback

Those in favor of dissolving prior appropriation water rights might object to the claim that the Paiute bands are entitled to priority water allocation, especially when drought is presently not the most pressing legal issue. It might seem frivolous to take preemptive steps to secure water allocation rights now, but according to the Utah Division of Water Resources, Southern Utah water reservoirs in 2021 and 2022 were at or below 55% of capacity, where it stayed until 2023.[57] Further, 2020 was the driest calendar year Utah has experienced since 1895, with total rainfall in the state reaching a mere 7.24 inches.[58] From this, it is clear the water sources the Southern Utah bands have access to are volatile and fluctuating. Even though the threat of danger is currently low, it is inevitable that at some point in the future water levels will dip dangerously low once again. After only a few low water level years, the agricultural endeavors of the Paiute bands could be at risk, as the chemical composition of their soil could become uninhabitable.[59] This would likely force many of the Paiute people out of their homes into the city. For those who stay in the reservation, a drought would mean cutting down their water supply to only the essentials, meaning drinking water and running water for sanitation.

Many may question the necessity of the state government's involvement in creating a water allocation plan in case of drought. Tribal governments and state governments will often cooperate on things like education and law enforcement, but the rights that these reservations have are secured by treaties enacted in the past. These treaties dictate the rights these tribes have to natural resources,

57 *2022 Drought Declaration*, Utah Department of Natural Resources (Feb. 8, 2024), https://water.utah.gov/water-data/drought/drought-declaration/.

58 Carter Williams, *Utah on pace for a top-5 water year. How is the rest of the West faring?*, KSL.com (Feb 11, 2024), https://www.ksl.com/article/50618350/utah-on-pace-for-a-top-5-water-year-how-is-the-rest-of-the-west-faring.

59 *How Drought Affects Soil Health*, Iowa State University (Feb. 10, 2024), https://crops.extension.iastate.edu/cropnews/2017/08/how-drought-affects-soil-health.

which includes access to water. Thus, any question regarding natural resources is directed to the state government's Office of Indian Affairs as well as their division of water rights. Because the PITU is made up of small bands, it marks itself as one of the smallest tribes in Utah. With this small size comes a drastic lack of representation and resources, making their negotiation for future water rights lower on their list of priorities. Despite their size, the PITU and its respective bands have every right to secure their water rights just as the Ute Water Compact and the Investment and Infrastructure Job Act secured allocation rights to the Ute tribe and the Utah portion of Navajo Nation. The Paiutes currently lack the large numbers to receive the attention and consideration of the Utah State Division of Water Rights.

The Ute tribe and Utah portion of Navajo Nation have signaled they are deserving of water rights because Utah recognizes their ability to contribute to Utah's industry.[60] It is important to prioritize these tribes and communities based on their size, population, and their individual economies. These large tribes certainly deserve these water rights but so does the small Paiute tribe. However, it is worth questioning whether the Paiute tribe deserves any less water security than a similarly-sized, industry-less town in Utah. For example, the town of Dammeron Valley has a population of 912 as of 2022 and has no contributory industry.[61] However, this community has received adequate and comprehensive water rights allocation both currently, and in perpetuity. The General Plan for the Dammeron Valley community outlines the current water rights status of this small community, which is both secure and unthreatened, and yet it explicitly asserts that "the Washington County Water Conservancy District would be able to provide supplementary water to the valley at some future time, should it be necessary to obtain supplementary water for the existing community, or to supply water for additional

60 *Commercial & Industrial Development*, Navajo Nation Division of Economic Development (Feb. 8, 2024), https://navajoeconomy.org/commercial-industrial-development/

61 Utah Cities by Population, Utah Demographics by Cubic (Feb. 11 2024), https://www.utah-demographics.com/cities_by_population.

land in the Dammeron Valley area."[62] This very clear and prescriptive document is the exact solution that the PITU desperately needs. In addition, this plan raises questions regarding the fairness and the need to ensure equal access to water resources for all communities, regardless of their larger-scale economic contributions to the state of Utah.

IV. Conclusion

In conclusion, the successes of the Winters Doctrine in securing water rights for Native American tribes—as evidenced by the Ute Water Compact and Shivwits Water Rights Settlement Act—are commendable. However, its shortcomings, such as the ambiguity in language and the limitation to federally recognized tribes, are apparent. The case of the Paiute Tribe of Utah exemplifies the challenges faced, with prior appropriation adding further complexity to water allocation. To address these issues, a proposed solution emphasizes the importance of a state-appointed plan detailing the quantity, frequency, and perpetuity of wet water rights for each PITU band. This plan, inclusive of infrastructure support and emergency provisions, aims to navigate objections and potential pushback. Despite prevailing challenges, it is crucial for the Utah state government, particularly the Utah Division of Water Rights, to proactively engage in settlements for all Paiute bands, ensuring equitable water rights and securing the future of these tribal communities.

62 *The General Plan For The Community of Dammeron Valley 2010-2011*, The Washington County Planning Department (Feb. 10, 2024), https://www.washco.utah.gov/wp-content/uploads/cdev/pdf/cgp/community-dammeron-valley.pdf.

Prison Labor: The Ethical and Economic Implications of Rethinking the Thirteenth Amendment and Fair Labor Standards Act

Peter Holland[1]

I. Introduction

In 2018, several wildfires raged across Mendocino, California. Of the fourteen thousand firefighters involved in putting out the Mendocino fires, roughly two thousand were prison inmates. It was reported that when actively fighting the fires, inmates were only paid one dollar an hour. The California Department of Corrections and Rehabilitation estimates that inmate firefighters save the state of California around ninety million dollars each year. This exemplifies how prisoners can be exploited for economic benefits and also take jobs away from non-convicts. Clearly, non-convict firefighters would struggle to compete with wages of one dollar an hour. The lack of protections guarding prison workers creates an imbalance in the economy that could feasibly benefit employers while decreasing job opportunities for non-inmate employees.

Another issue regarding this particular work program is that it fails to teach prisoners marketable skills. One of the stated purposes of many inmate work programs is to enable prisoners to gain skills that they can use after completing their sentence. Yet, it is unlikely that any of the California inmate firefighters will be able to advertise

---

1 Peter Holland is a sophomore studying Mathematics at Brigham Young University. He plans to start law school in the fall of 2028. Peter would like to thank his editor, Jaymon Roan. Jaymon is a senior majoring in History and French Studies. He will begin at Brigham Young University Law School in the fall of 2024.

their work experience after being released since most firefighters are required to become a certified EMT. The inconsistency here is that boards that grant EMT certifications typically deny applicants with a criminal history. Thus, inmates do not have a high chance of being able to find a firefighting job after release. Many jobs fulfilled by prisoners create opportunity challenges for free workers at the benefit of large organizations while also failing to set prisoners up to obtain economic success upon their release.[2]

The wildfires in Mendocino exposed one vivid example of a widespread practice in the United States that uses different ethical systems to treat the convicted and unconvicted in regards to financial compensation and more. Among the most ethically problematic aspects of this example was the use of convicted minors in the Mendicino wildfires. Fifty-eight of the two thousand convict firefighters who worked in Mendocino were under the age of eighteen.[3] According to the State of California government website, seasonal firefighters are required to be eighteen years or older.[4] Additionally, fighting forest fires is specifically listed in the FLSA as a prohibited occupation for minors.[5] Evidently, the safety of some minors is taken more seriously than that of others. The story of the Mendicino wildfires reveals a rather unsavory ethical inconsistency in the United States that is even more unpleasant when it comes to the nation's children.

There are a variety of problems with the national and local policies on penal labor. Prisoners are not covered under the labor laws that protect unincarcerated employees. One of the biggest complications with prisoners not being protected under these laws is that the lack of coverage undermines the equity of state and national

2 Abigail Johnson Hess, *California Is Paying Inmates $1 an Hour to Fight Wildfires*, CNBC (2018), https://www.cnbc.com/2018/08/14/california-is-paying-inmates-1-an-hour-to-fight-wildfires.html (last visited Feb 9, 2024).

3 Hess, *Supra* note 2.

4 Seasonal Firefighter | CAL FIRE, https://www.fire.ca.gov/join-calfire/seasonal-firefighter#:~:text=Requirements%20and%20Training,and%20work%20on%20weekends%2Fholidays (last visited Feb 3, 2024).

5 Fair Labor Standards Act, 29 U.S.C. § 570.54 (1951)

economies. Paying prisoners less than minimum wage creates unfair competition for those outside of prison who are seeking jobs but cannot compete with prisoners who are forced to accept wages that are sometimes less than a dollar per hour.[6] Low wages also prevent prisoners from being able to save money to support their loved ones outside of prison or to support themselves once they are released.[7] In fact, many prisoners leave prison with debt. One study showed that, upon release, prisoners have an average debt of thirteen thousand dollars from legal fees alone.[8] A lack of financial stability is a major contributor to ex-inmate recidivism. With no savings to rely on and no marketable experience, many ex-convicts resort to the same illegal activities that got them into jail the first time.[9] A study by the Bureau of Justice Statistics found that 71% of prisoners released in 2012 were arrested and 46% were sent back to jail within five years.[10] Including prisoners under protections that the law affords free workers would resolve many of these issues, giving ex-convicts some savings to fall back on, thereby reducing recidivism and preventing corporations from benefitting at the cost of workers.

6 Alexander B. Wellen, *Prisoners and the FLSA: Can the American Taxpayer Afford Extending Prison Inmates the Federal Minimum Wage*, 67 TEMPLE L. REV. 295, 296 (1994). See also *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990).

7 Tanisha Mink Aggarwal, *Prison Labor and the Fair Labor Standards Act: Resolving the Circuit Split on Whether Incarcerated Workers Are Entitled to the Federal Minimum Wage*, 13 Columbia Journal of Race and Law 893, 917–8 (2023), https://journals.library.columbia.edu/index.php/cjrl/article/view/11912 (last visited Feb 13, 2024).

8 Andrea N. Montes et al., *An Assessment of Prisoner Reentry, Legal Financial Obligations and Family Financial Support: A Focus on Fathers*, 18 IJERPH 9625 (2021), https://www.mdpi.com/1660-4601/18/18/9625 (last visited Feb 3, 2024).

9 Aggarwal, *supra* note 7.

10 Recidivism of Prisoners Released in 34 States in 2012: A 5-Year Follow-Up Period (2012–2017) | Bureau of Justice Statistics, https://bjs.ojp.gov/library/publications/recidivism-prisoners-released-34-states-2012-5-year-follow-period-2012-2017 (last visited Jan 3, 2024).

II. Background

The absence of a minimum wage, legal protection, and mandatory benefits for working inmates prompts a broader discussion on the topics of slavery and involuntary servitude. As this paper will focus on these topics, it is important to make clear the current definition of these terms. Slavery is defined as the practice of forced labor and restricted liberty where physical compulsion is used.[11] Involuntary servitude is defined similarly. Section 1584 of Title 18 of the United States Code stipulates that for someone to qualify as having been subjugated to involuntary servitude, that person must be held against their will by force, threats of force, or threats of legal action and required to perform labor or compulsory service.[12] In the court ruling of *Watson v. Graves*, the Fifth Circuit of the U.S. Court of Appeals ruled that for slavery or involuntary servitude to exist, there must be no choice for the coerced individual. No matter how difficult a choice may be, if there is an option to not work, slavery and involuntary servitude do not exist.[13]

A. Thirteenth Amendment (1865)

Enacted during the Civil War, the Emancipation Proclamation declared that all slaves living in a state that was in open rebellion against the United States government were free. This proclamation only guaranteed freedom to slaves who were still living in Confederate states. After the war, the Thirteenth Amendment broadened the protections of the Emancipation Proclamation to free all slaves. Ratified by the necessary number of states on December 6th, 1865, the Thirteenth Amendment abolished slavery and involuntary servitude

11 Slavery, LII / Legal Information Institute, https://www.law.cornell.edu/wex/slavery (last visited Feb 12, 2024).

12 Civil Rights Division | Involuntary Servitude, Forced Labor, And Sex Trafficking Statutes Enforced, (2015), https://www.justice.gov/crt/involuntary-servitude-forced-labor-and-sex-trafficking-statutes-enforced (last visited Feb 13, 2024).

13 *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990).

"except as a punishment for crime whereof the party shall have been duly convicted."[14] The clause that allowed both slavery and involuntary servitude as a punishment for crime, commonly known as the punishment clause, created a legal basis that could be used to justify various forms of slavery within prisons. The punishment clause had complex implications for former slaves, future prison laws, and future prison-prisoner relationships.[15]

B. History of Prison Labor

Shortly after the ratification of the Thirteenth Amendment, ten former slave states passed what became known as the "Black Codes." These laws created new criminal charges such as "insolent gesture," which specifically targeted African Americans. Those accused of such minor misdemeanors would often be sentenced to jail. Once incarcerated, convicts could be bid out by the state to private companies and individuals in the "convict-lease" program. This created a new system of slavery that relied on prison populations and heavily discriminated against African Americans. As a result of the punishment exception in the Thirteenth Amendment, many states continued to profit off slave labor well after the ratification of the 13th Amendment.[16] This exposes how, historically, the application of the 13th Amendment has been used to perpetuate slavery and economic stratification. While "convict-lease" programs no longer exist in their original form, the root problems created by the punishment clause persist.[17] Extending coverage of worker protections to prisoners would bring the United States law up to par with modern ethical standards that look down upon slavery. Additionally, given the murky roots of prison labor that have strong ties to slavery and racism, granting convicts rights such as minimum wage clearly becomes the more ethical choice as opposed to denying them these

14 U.S. Const. amend. XVIII, § 1.

15 Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 875-7, (2012).

16 Armstrong, *supra* note 15.

17 Armstrong, *supra* note 15.

benefits.[18] It would represent a meaningful step toward addressing the lingering consequences of the nation's original sin.

C. Fair Labor Standards Act (1938)

The exploitative practices associated with the nineteenth-century punishment clause have an increasingly tense relationship to advances in American labor laws, especially the Fair Labor Standards Act. The Fair Labor Standards Act (FLSA) was signed by President Franklin Roosevelt in June 1938. The Act created regulations regarding minimum wage, the maximum number of hours that could be worked during a typical work week, and child labor.[19] Today, this Act continues to guide overtime, minimum pay, and restrictions for the employment of minors. It contains guidelines for determining what constitutes an employer-employee relationship. In 2024, the FLSA requires that a minimum wage of $7.50 be paid to all employees in the United States and that overtime be paid for every hour exceeding forty hours in a given work week.[20]

Exceptions to these mandates are based on the type of work being performed and the relationship between the two parties (employer-employee, contractors, etc.) and not on other identifiers regarding the parties individually.[21] Nowhere in the FLSA are prisoners explicitly mentioned as being excluded from the employee protections of the FLSA or as being covered under the FLSA.[22] By contrast, other groups, such as elementary school teachers, outdoor sales workers,

18 Armstrong, *supra* note 15.

19 Ellen Terrell, *Research Guides: This Month in Business History: Fair Labor Standards Act Signed*, https://guides.loc.gov/this-month-in-business-history/june/fair-labor-standards-act-signed (last visited Feb 13, 2024).

20 Handy Reference Guide to the Fair Labor Standards Act, DOL, http://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa (last visited Feb 10, 2024).

21 Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA), DOL, http://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship (last visited Feb 13, 2024).

22 *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8 (2d Cir. 1984).

and newspaper deliverers are specifically excluded from minimum wage and overtime pay protections.[23] This highlights how exceptions to FLSA coverage are defined by the job being performed and not qualities regarding individual workers, such as where they live.

Although prisoners are not explicitly exempt from coverage under the FLSA, most courts interpret them as not being protected because of the Thirteenth Amendment clause that permits slavery and involuntary servitude as punishment for a crime.[24] These rulings demonstrate a current misunderstanding of the Thirteenth Amendment, as they equate not paying prisoners' full wages to slavery. This interpretation then allows businesses to deny large groups of prisoner-workers the normal rights of an employee. As a result of the court system's current interpretation of the Thirteenth Amendment and the FLSA, prisoners are regularly denied minimum wage and other protections guaranteed under the FLSA for free workers. Therefore, the application of this Act should be broadened to include the incarcerated, reflecting the Thirteenth Amendment more accurately.

III. Proof of Claim

This paper will argue that prisoners performing work from which the greatest economic benefit is not gained by their prison should fall under the FLSA, thereby assuring that they receive minimum wage for their work. This payment should be made by the entity that does receive the greatest economic advantage from their labor. The qualifications outlined within the FLSA, the economic realities test, and both the *Watson v. Graves* and *Carter v. Dutchess* decisions will be analyzed in this paper to highlight how the proposed prescription is not only legally justified but economically advantageous and morally sound.

23 *Supra* note 20.

24 *Draper v. Rhay*, 315 F.2d 193 (9th Cir. 1963); see also *Lindsey v. Leavy*, 149 F.2d 899 (9th Cir. 1945); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320 (9th Cir. 1991); *Henthorn v. Dep't of Navy*, 29 F.3d 682 (D.C. Cir. 1994).

A. Economic Realities Test

The economic realities test is an unstandardized set of qualifications that can be used to determine if the relationship between two parties is an employee-employer relationship.[25] The protections of the FLSA apply specifically to employee-employer relationships and not to other professional and economic relationships, including those of an independent contractor.[26] Thus, the economic realities test is utilized by some courts to determine who is covered under the FLSA.[27] If the relationship is that of an employee and employer, then the employee has the right to receive minimum wage, overtime pay, and other benefits ensured by the FLSA.[28]

While the economic realities test has not been standardized, the Department of Labor (DOL) has identified factors it deems significant in determining the working relationship between entities. These factors include the necessity of the worker's contribution to the business, the permanency of the relationship, and the degree of control the alleged employer has over the alleged employee. Factors it describes as being insignificant are the location wherein the work takes place, whether there is a formal agreement between the two parties, and if the party performing the work is contracted by the government. Furthermore, the Supreme Court has ruled that the method by which payment is transferred between the two parties is an irrelevant factor.[29]

While there is no standardized method of determining if an employee-employer relationship exists, a test outlined in *Bonnette v. California* has been used in other cases to determine the nature of a work relationship. The four factors outlined by the district court involved in *Bonnette v. California* were then later used by the U.S. 9th

25 *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990).

26 *Supra* note 21.

27 *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990) and *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8 (2d Cir. 1984).

28 *Supra* note 21.

29 *Supra* note 21.

Circuit Court of Appeals to establish whether an employee-employer relationship existed. The four factors used by the district and 9th Circuit courts were:

> Whether the alleged employer
>
> (1) had the power to hire and fire the employees,
>
> (2) supervised and controlled employee work schedules or conditions of employment,
>
> (3) determined the rate and method of payment, and
>
> (4) maintained employment records.[30]

While the Department of Labor has stated that the method of payment is not relevant, this test looks at who *determines* the method of payment to better classify the relationship between two parties. Since this test does not consider where the work is performed or if other relationships exist between the two parties, there is no reason that prisoners working within a prison or jail should be automatically excluded from qualifying for the FLSA when this test is applied.[31]

One of the major problems inherent in the economic realities test is that its language can inconsistently exclude prisoners working within a prison from qualifying for coverage under the FLSA. The economic realities test proposed in *Bonnette v. California* places a strong emphasis on the control of the alleged employer over its employees. In situations where the work is performed within a prison, the prison maintains more control over the prisoners than any company, private or public. The test in *Bonnette v. California* can be used to block prisoners working within a prison from qualifying for FLSA coverage because of the control that a prison has over any prisoner-workers. For example, In *Hale v. State of Arizona*, the U.S. 9th District Court declined to use the test because it believed the test did not apply to jobs that prisoners perform while inside of a

30 *Bonnette v. California Health and Welfare Agency*, 414 F. Supp. 212 (N.D. Cal. 1976).

31 *Bonnette v. California Health and Welfare Agency*, 414 F. Supp. 212 (N.D. Cal. 1976).

"prison-structured" program, even if external entities were benefitting from the labor.[32] This case referenced *Vanskike v. Peters* in stating that since a prison has almost complete control over prisoners, the control over a prisoner's work is under the prison and not an outside company.[33] This reasoning creates a gap in which prisoners who perform work within a prison are left without an employer. This gap then allows corporations to receive unfair economic advantages and undermines the protections that the FLSA ensures merely because prisons act as mediators.

Another issue with the economic realities test outlined in *Bonnette v. California* is that it has not been standardized. As a result, many courts have strayed from applying the test proposed in *Bonnette* to the prison labor cases presented to them.[34] In *Henthorn v. Department of Navy,* the Court of Appeals for the District of Columbia stated that when prisoners are required to work as a part of their sentence or by their correctional facility, they are an "involuntary servant to whom no compensation is actually allowed."[35] This is an example of when courts and prisons may be inaccurately applying the Thirteenth Amendment. As previously established, the legal definition of involuntary servitude includes being forced to perform labor. This definition does not address payment. Receiving payment for work does not exclude the work from qualifying as involuntary servitude.[36] The Thirteenth Amendment makes no mention of lack

32 *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993).

33 *Id.*

34 *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992), *Henthorn v. Dep't of Navy*, 29 F.3d 682 (D.C. Cir. 1994), *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993).

35 *Henthorn v. Dep't of Navy*, 29 F.3d 682 (D.C. Cir. 1994).

36 Being subjected to involuntary servitude is not mutually exclusive with receiving payment for work. This is shown by the definition of involuntary servitude, which makes no mention of payments, as defined by the Trafficking Victims Protection Act which provided supplements to the 18 U.S.C. 1584. Civil Rights Division | Involuntary Servitude, Forced Labor, And Sex Trafficking Statutes Enforced, (2015), https://www.justice.gov/crt/involuntary-servitude-forced-labor-and-sex-trafficking-statutes-enforced (last visited Feb 7, 2024).

of pay for prisoners and only explicitly allows for forced labor as a punishment for crime.[37] Thus, there is no legal basis to deny prisoners coverage under the FLSA simply because they are being forced to work.

Despite its many flaws, the economic realities test proposed in *Bonnette v. California* was also a key stepping stone in establishing workers' rights for prisoners as demonstrated in *Carter v. Dutchess* and *Watson v. Graves*. In both cases, courts applied this test to argue in favor of paying prisoners minimum wage.[38] Up until these two cases, there was very little legal precedent for including prisoners under the FLSA in any context. Thus, *Bonnette's* proposed economic realities test paved the way for the creation of a legal basis on which prisoners could be covered by the FLSA.

B. Carter v. Dutchess 1984

Louis Carter was an inmate at the Fishkill Correctional Facility in New York in 1981. While an inmate at Fishkill, Carter participated in a work program with Dutchess Community College (DCC). As a part of this program, Carter worked as a teaching assistant. Despite the minimum wage being $3.10 at the time, Carter was only paid $1.20 per hour. When Carter discovered the discrepancy in pay between prisoners and other teaching assistants, he filed a lawsuit against DCC. His case was originally dismissed on the basis that prison officials had more control over Carter than the college, and thus the college was not his employer. However, the 2nd Circuit Court of Appeals stated they did not believe an employer had to have total control over a worker for the relationship to be that of an employee and an employer. Furthermore, they disagreed with the district court that stated the FLSA was not intended to be applied to prisoners. The 2nd Circuit Court stated that it "would be an encroachment upon the legislative prerogative for a court to hold that a class of

37 U.S. Const. amend. XVIII, § 1.

38 *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990) and *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8 (2d Cir. 1984).

unlisted workers is excluded from the Act."[39] Since Congress had not included prisoners in the list of people excluded from coverage under the FLSA, the 2nd Circuit Court believed that courts had no right to exclude prisoners.

On the basis that courts could not exclude prisoners from FLSA coverage, the 2nd Circuit Court proceeded to apply the economic realities test defined in *Bonnette v. California* to the case. It was revealed to the court that only prisoners who had graduated from a four-year university were eligible to participate in this program. Additionally, DCC conducted screening interviews to determine which inmates they wanted to select for the program. The prison did not have to supply DCC with the prisoners they requested. On the other hand, DCC did not have to accept every prisoner the prison offered to them. Thus, it was determined that DCC did have a fair amount of power in the hiring and firing process. Next, the court analyzed how the payment process was decided. The program was initiated through a letter by an employee of the DCC to a member of the New York State Department of Correctional Services. In this letter, said employee proposed the prisoners' wages to be between three and four dollars a day, which ended up being around the wages they made. Additionally, Dutchess Community College would send money directly to the prisoners' bank accounts showing they controlled the payment method. Furthermore, the 2nd Circuit Court decided that the DCC would determine how long and for how many classes a prisoner would work. While the 2nd Circuit court did not ultimately decide whether Carter was an employee, they sent the case back to the district court to be re-decided under the new evidence they had proposed in Carter's favor.[40]

While the case ended up being dropped before a decision was ever made by the district court, this case still has significant implications. First, this case establishes legal precedence for the inclusion of the incarcerated under the FLSA. Second, this case shows that even though a prison or jail will have more control over its inmates than any other entity, other parties can still be considered

39 *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8 (2d Cir. 1984).

40 *Id.*

employers of convicts. The control of a prison facility over prisoners and the control of an employer over a prisoner employee are not mutually exclusive. Thus, prisoners can still be covered under the FLSA even if they remain under the control of a correctional facility while working.[41]

C. Watson v. Graves (1990)

Kevin Watson and Raymond Thrash were both sentenced to serve time at Livingston Parish Jail, Louisiana, for non-violent crimes. Neither were required to perform hard labor as a part of their sentencing. While in jail, both Watson and Thrash chose to participate in a work program set up by Odom Graves, the Sheriff of Livingston Parish and keeper of the jail. The work program created by Graves required the prisoners to perform labor for his son-in-law for a flat fee of twenty dollars a day without fluctuations depending on hours worked. Darryl Jarreau, Graves' son-in-law, would sometimes have the prisoners work from six in the morning to as late as six in the evening.[42] The federal minimum wage at this time would have been three dollars and thirty-seven cents.[43] A twelve-hour workday would have entitled the men to receive double the amount that they were actually being paid. After being released from jail, both Watson and Thrush charged the defendants, including Jarreau and Graves, with infringing on their Thirteenth Amendment rights and their rights under the Fair Labor Standards Act.[44]

The United States Fifth Circuit District Court of Appeals ruled against Watson and Thrush's Thirteenth Amendment claims. This court cited the 2nd Circuit United States Court of Appeals decision in *United States v. Shackney*, which defined involuntary servitude as a condition in which someone believes they have "no way to avoid"

41 *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8 (2d Cir. 1984).

42 *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990).

43 History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938 - 2009, DOL, http://www.dol.gov/agencies/whd/minimum-wage/history/chart (last visited Jan 3, 2024).

44 *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990).

performing labor.[45] While Watson and Thrush were receiving illegal wages, they both testified that they requested to work outside of the jail. The men had a choice to work. Although the option of staying in jail all day without making any money is not a pleasant one, both men still made their own decision to work and were not forced to participate in the program. Thus, the convicts could not qualify as being subjected to involuntary servitude or slavery. Although this court decided that prisoners who are not subjected to hard labor do retain their Thirteenth Amendment rights, Watson's and Thrush's Thirteenth Amendment rights were never infringed because their labor was never compelled. However, the fact that Watson and Thrush did not qualify as involuntary servants or slaves might have actually enabled them to have claims for FLSA protections.[46] Courts have historically ruled that prisoners subjected to slavery or involuntary servitude are not covered under the FLSA because they are not employees.[47]

On the Fair Labor Standards Act claims, the Fifth District Court cited *Carter v Dutchess* in stating that prisoners are not exempted from coverage under the FLSA. To determine whether Watson and Thrush were employees of Jarreau, the court applied the economic realities test defined in *Bonnette v. California*. The court decided that since Jarreau had the ability to request certain prisoners from his father-in-law, he in effect had hiring and firing power. Additionally, the prisoners worked for him outside of the jail with no supervision from jail officials, making him the only supervisor of them during work. Eventually, the court ruled that Watson and Thrush were employees of Jarreau under the economic realities test. Thus, they were entitled to the full wages for the time they had worked for Jarreau including overtime.[48]

45 *Id.*

46 *Id.*

47 *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992), *Henthorn v. Dep't of Navy*, 29 F.3d 682 (D.C. Cir. 1994), *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993).

48 *Supra* note 42.

While *Carter v. Dutchess* established that prisoners could potentially be employees, the Fifth District Court in *Watson v. Graves* ruled in favor of prisoners being covered under FLSA and considered the prisoners involved as employees due to them passing the economic realities test. One of the key factors the court used in determining that the FLSA would apply in this situation was the intention behind the FLSA. They believed the FLSA was meant to end "grossly unfair competition among employers and employees."[49] Jarreau did not have to pay minimum wage, overtime, unemployment insurance, social security or any other employee benefit plans because he was hiring out prisoners. Instead, he only paid them meager wages, well below the minimum wage. The court hypothesized that other construction contractors in the area would have been unable to compete with the prices Jarreau offered to customers because he was using his easy access to prison labor to cut costs. This would have unfairly affected the jobs and businesses in the surrounding area.[50]

D. Prescriptions

A new amendment to the FLSA that added coverage to prisoners for all work done within or outside of the prison for private and public companies would fix many issues and logical fallacies resulting from the current application of the FLSA and the Thirteenth Amendment. The work covered under the FLSA would have to be work that produces a surplus or a profit for the companies. Thus, work done within a prison that helps maintain the prison would not be covered. However, work done for the prison or an external company that produces external revenue would earn the prisoner's payment. The proposed amendment would require that the entity with the largest economic benefit from the prisoner's labor be required to pay their wages. This would mean that, in many cases, external companies would be the ones paying the wages of prisoners even if the work is performed within a prison. This amendment would resolve the inconsistency

49 *Id.*

50 *Id.*

between cases due to the current lack of guidance provided by Congress to courts regarding prisoner coverage under the FLSA.

Many disagree with paying prisoners minimum wage because they believe that the purpose of the FLSA was to provide regulations by which workers could support a reasonable standard of living for themselves. Since prisons provide basic necessities for prisoners, many argue that convicts should not be paid minimum wage. Yet, another reason behind the creation of the FLSA was to ensure that there was equal competition amongst all employers and employees.[51] Denying prisoners minimum wage creates unfair competition in local economies.[52] As shown in *Watson v. Graves,* employers and companies that have access to cheap prison labor have an unfair advantage over other local companies.[53] Additionally, having a group of people who are forced to work for well below minimum wage affects the job opportunities of people outside of prison.[54] Even if they relinquish some level of control by employing convicts, companies still have major incentives to outsource work to prisons because of the minimal wages they would have to pay. Furthermore, companies that have convicts performing their work within a prison today do not have to pay for insurance, social security, or other taxes that employers usually pay because they technically have no employees.[55] Not paying prisoners minimum wage thus helps major corporations while taking away jobs from workers outside of prison.

Additionally, many think that paying convicts minimum wage for their jobs will raise taxes. These people presuppose that the prisons would be paying convicts for their labor. Under the proposed system wherein external companies are likely paying prisoners, the tax burden may actually decrease. Since many convicts are deducted up to eighty percent of their wages for fees like room and board, victim reparations, and familial support, paying convicts minimum

51 *Supra* note 42.

52 Terrell, *supra* note 19.

53 *Supra* note 42.

54 Aggarwal, s*upra* note 7.

55 *Supra* note 42.

wage may actually decrease the toll that prisons take on the taxpayer.[56] If the corporations using convict labor are required to pay prisoners minimum wage, convicts would have more money to pay back to prisons, victims, and their family members. This would decrease the cost of prisons and even the cost of government aid programs that those with family members in prison sometimes rely on.[57] Additionally, having some money saved for when they get out of prison, would likely reduce the rates of recidivism. Many convicts end up back in jail because they rely on the same criminal behaviors to make money as they did before they went to jail.[58] By decreasing rates of recidivism, fewer people would be in prison and therefore the burden that our prison system puts on taxpayers would very likely diminish.

One potential flaw in paying all convicts minimum wage for their work is that it could result in fewer jobs being available to convicts.[59] However, it is still likely that employers would have an incentive to use convict labor, thus preserving some jobs for prisoners. Since prisons provide food, shelter, and medical care to prisoners, it is hard to say whether companies using convict labor would have to pay for benefits like insurance even if prisoners are included under the FLSA. New laws would have to be established or existing laws would have to be amended to decide issues like these that do not fit within the scope of this paper. However, depending on the future construction of these laws, employers could still have a major financial incentive to employ convicts. Even if companies were required to pay health insurance and other benefits to convicts, they would still be able to cut down costs on working space, health programs,

56 ACLU, *Captive Labor: Exploitation of Incarcerated Workers | ACLU*, American Civil Liberties Union (Jun. 15, 2022), https://www.aclu.org/news/human-rights/captive-labor-exploitation-of-incarcerated-workers (last visited Mar 1, 2024).

57 Aggarwal, s*upra* note 7.

58 Aggarwal, s*upra* note 7.

59 Alexander B. Wellen, *Prisoners and the FLSA: Can the American Taxpayer Afford Extending Prison Inmates the Federal Minimum Wage*, 67 TEMPLE L. REV. 334, (1994). See also *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990).

company events, managerial staff (since much of that work would likely be performed by prison officials) and other aspects of a job that are not required by law but are common within companies.

There are also many ethical reasons to extend FLSA coverage to prisoners. The FLSA continues to set regulations regarding the employment of persons under the age of eighteen.[60] Without the protections from labor laws, convicted children can find themselves fighting wildfires for less than a dollar an hour.[61] All children, whether they have committed a crime or not, should be protected from child labor under the same laws. Additionally, convict labor has strong ties to the continuation of African American slavery even after the Civil War.[62] Thus, paying prisoners minimum wage would help end problems that the Thirteenth Amendment and FLSA intended to solve.

IV. Conclusion

As a result of the court system's current interpretation of the Thirteenth Amendment and the FLSA, prisoners are regularly denied minimum wage and other protections guaranteed under the FLSA for free workers; therefore, the application of this Act should be broadened to include the incarcerated to more accurately reflect the Thirteenth Amendment. The Thirteenth Amendment allows for those who have been convicted of a crime to be forced to work. It does not deny them the rights given to other employees. Thus, prisoners who work for any entity besides the prison that they reside in should be paid minimum wage and should be protected under the FLSA. If companies that use prison labor had to pay the prisoners minimum wage, prisoners would have more money to pay victim reparations and dues for room and board. This could actually decrease the financial burden that running prisons puts on taxpayers. Paying the minimum wage to prisoner-employees would also decrease rates of recidivism and open up job opportunities for those

60 *Supra* note 20.

61 Hess, *Supra* note 2.

62 Armstrong, *supra* note 15.

outside of prison.[63] Lastly, covering prisoners under the FLSA would help solve remaining immoralities in our country around child labor and slavery.

63 Aggarwal, s*upra* note 7.

The Price of Dignity: How Medicare Requirements Shape End-of-Life Care

Juliette K. Ball and Dallin M. Mildenhall[1]

I. Introduction

Across the United States of America—in both conservative and progressive states—a silent epidemic of abuse is spreading throughout the end-of-life care industry. Imagine the following scenario: an aide in a nursing home has been working alone for 8 hours to care for 30 people in various stages of dying. The work is exhausting and mainly consists of lifting patients in and out of beds and wheelchairs to avoid the development of bedsores. When not lifting patients, the aide changes disposable briefs to avoid urinary tract infections, which are frequent in nursing homes and can be deadly. After helping patients eat dinner, the race to beat the heightened confusion and aggression in patients known as "sundowning" begins, as this singular employee tries to get 30 uncooperative people into nightclothes, brushed teeth, new briefs, and medications administered within the legally mandated time frame. One person is simply not enough to get everything done. Corners get cut, infectious wounds and diseases abound, and, over time, residents are prescribed various antipsychotic drugs to make them more obedient and less prone to violent outbursts. Worker retention is low, and skilled aides with extensive experience are hard to come by.

---

1 Juliette K. Ball is a senior studying microbiology at Brigham Young University. She works as a legal clerk in the BYU Integrity and Compliance Office and plans to attend law school in Fall 2025. Dallin M. Mildenhall is a senior studying Business Management at Brigham Young University with a minor in Legal Studies. He plans to attend law school in Fall 2025.

Due to the legal code governing end-of-life care facilities, conditions such as these are common and legal, and when care facilities do actually break the law, the consequences are scarce. Today, one in every six Americans is now over the age of sixty-five, and the elderly population is only continuing to grow.[2] Billions of federal funds are spent annually on long-term end-of-life care in aforementioned facilities and the standard of care continues to fall far below the federal, state, and moral standards of the citizens who pay for and receive this care.[3] As the country faces new challenges in administering care to elderly citizens, new standards and stronger subsequent enforcement must be enacted to address and prevent the rampant abuse, neglect, and fraud that is currently wreaking havoc for these individuals during perhaps the most vulnerable times of their lives.

II. Background

A. Medicare, Medicaid, and Hospice Care

For the purpose of the paper, relevant definitions are found in the following table:

2 US Census Bureau, U.S. Older Population Grew From 2010 to 2020 at Fastest Rate Since 1880 to 1890, Census.gov, https://www.census.gov/library/stories/2023/05/2020-census-united-states-older-population-grew.html (last visited Feb 27, 2024).

3 FACT SHEET: The President's Budget: Extending Medicare Solvency by 25 Years or More, Strengthening Medicare, and Lowering Health Care Costs, https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/07/fact-sheet-the-presidents-budget-extending-Medicare-solvency-by-25-years-or-more-strengthening-Medicare-and-lowering-health-care-costs/

Medicare	A government national health insurance program in the United States for individuals age 65 and older, began in 1965 under the Social Security Administration and is now administered by the Centers for Medicare and Medicaid Services. Divided into 4 components, namely Part A, Part B, Part C (Medicare Advantage), and Part D for prescription drugs.
Medicaid	A joint federal and state program that helps cover medical costs for some people with limited income and resources.
Hospice Care	A form of healthcare that focuses on treating the emotional, physical, and spiritual pain associated with dying. Individuals who are diagnosed with life-ending illnesses and choose to no longer pursue life-extending treatments often choose hospice care to ensure care, comfort, and quality of life when their doctor believes they have six months or less to live. Hospice can be provided in a hospital, home, or assisted living facility.
Elder Abuse	Intentional action or failure to act that creates a risk of harm in adults over 60 years of age, by a caregiver or person the older adult trusts. Common types include physical, sexual, emotional/psychological, neglect, and financial abuse.
Elder Neglect	Failure to meet an older adult's basic needs, including food, water, shelter, clothing, hygiene, and essential medical care.
Skilled Nursing Care	A service that provides high-level care for elderly residents who are unable to care for themselves. Skilled healthcare professionals provide 24/7 monitoring for chronic conditions. Residents receiving care usually have higher needs than an assisted living facility can provide. Skilled nursing programs are licensed by Medicare/Medicaid.
Assisted Living	Individuals experiencing assisted living typically live in a facility with other residents receiving assistance. Services are provided by facility staff to ensure proper medication management, dress and grooming, and hygiene. Residents' ability typically falls within the range between fully independent living and a nursing home.

Formal hospice and end-of-life care is believed to have originated over a millennium ago,[4] beginning with the admission of terminally ill patients to facilities designated for the treatment of injured and sick patients, which practice was previously not permitted. Assisted living for elderly patients remained largely the same for the next nine centuries, until the mid-1950s when many of the foundational principles of modern hospice care were established at St. John's Hospice in London, England. Until the establishment of these commercial care facilities, elderly people unable to care for themselves relied heavily on their descendants, family members, and enslaved staff.[5] Institutional end-of-life care in the United States has grown to become a $91.8 billion industry as the generation born between 1946 and 1964 (known as "Baby Boomers") ages and requires further medical assistance before death.[6] In 1965, the Medicare and Medicaid programs were signed into law. Improved health outcomes and rising average lifespans will undoubtedly result in more United States residents dying at an advanced age, thus increasing the demand for end-of-life care for an ever-growing vulnerable population.

B. Current CMS Regulations and Shortcomings

The Medicare and Medicaid programs of the United States are governed by the Centers for Medicare and Medicaid Services (CMS), a sub-agency within the Health and Human Services Department of the executive branch of the federal government.[7] Other relevant sub-agencies include the Administration for Community Living and the Aging Administration. Minimal federal regulations have been

4 History of Hospice, NHPCO, https://www.nhpco.org/hospice-care-overview/history-of-hospice/ (last visited Feb 27, 2024).

5 Stephen R. Connor, Hospice: Practice, Pitfalls, and Promise (1998).

6 U.S. Assisted Living Facility Market Size & Share Report, 2030, https://www.grandviewresearch.com/industry-analysis/us-assisted-living-facility-market (last visited Feb 27, 2024).

7 Centers for Medicare & Medicaid Services, Medicare and Medicaid: Milestones 1937-2015, https://www.cms.gov/about-cms/agency-information/history/downloads/Medicare-and-Medicaid-milestones-1937-2015.pdf.

established and some states have additional independent legislation to set standards for minimum staffing requirements, time spent with patients, as well as overarching standards of duties of care providers. Extensive data and research—which will appear later—show that these efforts by the CMS and nursing facilities are often insufficient for a growing elderly population, with longer stays in nursing homes than ever before, and abuse and neglect color the experiences of patients in their dying days. Relevant case law illustrates some of these shortcomings and will be demonstrated below.

C. Montgomery Health Care Facility v. Ballard (1990)

In this case, Edna Stovall was a patient at Montgomery Health Care Facility, Inc., a nursing home owned and operated by First American Health Care, Inc. Mrs. Stovall was admitted to Montgomery Health in February 1985, suffering from several serious health problems. Mrs. Stovall did not have any bedsores upon admission to the facility and developed her first bedsores a mere week after entering Montgomery Health Facility. Over the next year, Mrs. Stovall required multiple surgeries to treat the infected bedsores her body had accumulated during her stay. Ultimately, Mrs. Stovall died from ailments related to the aforementioned infected bedsores. Ella Ballard—the administrator of Stovall's estate—filed a lawsuit against Montgomery Health and First American for negligence, and claimed that their neglect played a substantial role in causing Stovall's death. At trial, Mrs. Stovall's children testified that Montgomery Health neglected Mrs. Stovall's necessary care, failed to properly clean and treat Mrs. Stovall's bedsores, and shirked their duty to regularly turn and exercise Mrs. Stovall—all of which were necessary to prevent and treat the bedsores and to keep Mrs. Stovall healthy.

The trial court admitted into evidence complaint reports submitted to the Alabama Department of Public Health which indeed revealed that Montgomery Health Facility was not adequately staffed. This resulted in the suffering of other Montgomery Health patients, ranging from infected bedsores to lack of regular monitoring, to inadequate exercise and hygienic cleaning. Additionally, the staff members that *did* report to work were insufficiently trained in

treating infections and general healthcare practices, multiple other patients suffered from infected bedsores as well, patients were not regularly monitored or exercised and cleaned properly, and staff members lacked training in helping cure infections and in proper health care practices in general. Evidence suggested that all of these deficiencies contributed to the development or worsening of bed sores and that Mrs. Stovell's care was deficient in the same ways as the reports indicated.

The jury awarded Ella Ballard $2 million in damages. Montgomery Health and First American appealed the court's decision, arguing that the Alabama Department of Public Health complaint reports were inadmissible evidence, that First American was not liable for Montgomery Health's negligence; and that the $2 million in damages was excessive based on precedent. However, the trial court found that due to the large number of nursing home residents vulnerable to the same type of neglect found in Mrs. Stovall's case, the ruling would discourage similar, inadequate behavior from facilities in the future. The evidence in the record supports these findings. Thus, the trial court denied the defendants' motion for appeal.[8]

This case in the state of Alabama was significant in the history of nursing home staffing failure and elder neglect because prior to the 1990's, nursing home negligence cases were relatively rare, partly because the cost of litigation was so high and would exceed any return in damages. Cost of future care and lost wages contribute to a high damage sum, and neither had amounted to much in previous nursing home cases. Additionally, it can be considerably difficult to assess the physical bodily harm caused by negligent care, because the patients are already in a deteriorated physical condition and may die soon anyway. Finally, given their limited physical and mental capacity, the patients may be unable to attest to the insufficient care they received. But much changed in the 1990's with cases like the one mentioned above. This case illustrated a growing arsenal of literature for practitioners showing increasing expertise in nursing home litigation.

8 First American Health Care, Inc. v. Ella Ballard as administratrix of the estate of Edna Stovall, deceased, 565 So. 2d 221 (1990)

D. Parker v. Illinois Masonic Warren Barr Pavilion (1998)

Plaintiff Meta Krueger was admitted to Illinois Masonic Warren Barr Pavilion, a nursing home for physical therapy following a spinal injury. Although she wasn't given an official discharge date, her treatment plan set a goal for a 5-month stay, intending to enable Kruger to walk unassisted and return to her long-term residence. When she was initially evaluated, it was determined that Kruger would require assistance with walking during her stay until further evaluation. Not long after her arrival, Krueger fell while using the restroom, after which she was placed on standby assisted walking orders. Patients who are unable to walk unassisted are assigned various levels of assistance. Standby assistance means a patient is walking with a healthcare provider next to them to supervise, and minimum assistance refers to a patient walking with 25-50% of the work performed by a healthcare provider.

A few days after her first fall, Krueger fell again, this time in the hallway outside her room, and suffered a fracture to her hip which was treated in a nearby hospital. Krueger filed suit as ordinary negligence action under the *Nursing Home Care Act,* and the burden of proof was on her to prove negligence by direct or circumstantial evidence. She was admitted to Barr Pavilion for physical therapy to ambulate independently, and the nurses on duty were responsible for her care, specifically to prevent further injury via falls. One specific nurse in charge of caring for Krueger recalled that she wasn't aware of the definition of standby assistance, and she assumed this assistance would only require her presence if the patient requested it, which is the equivalent of independent walking. As a result, Krueger fell while walking unassisted, which was the responsibility of the nurses to prevent. The nurses failed in their duty to prevent her injuries, and Barr Pavilion was proven to be negligent. Four years after her second fall, a jury returned a verdict of $203,116.97 in favor of Krueger and against Barr Pavilion.[9] This case is relevant to the standards and expectations of nursing

9 Parker v. Illinois Masonic Warren Barr Pavilion (1998), 299 Ill. App. 3d 495

homes as a whole. Under the Illinois Nursing Home Care Act, facilities are responsible for patients' injuries, and insufficient communication between care providers can lead to significant injuries and even death. While the burden of proof lies with the plaintiff, the standard of negligence is quite low and the main obstacle in successful litigation remains the other hindrances of elder law, especially when victims are often unable to remember specific circumstances of neglect and are often unable to distinguish the source of injury from natural aging processes.

E. Cedar Lake Nursing Home v. US Department of Health & Human Services (2010)

In the context of this lawsuit, Cedar Lake Nursing Home participated in the Medicare program. One of the residents at Cedar Lake was a 92-year-old female known as Resident 10, who suffered from various ailments and had a tendency to wander off and attempt to leave the facility. As a result, Cedar Lake's care plan for Resident 10 required that the nursing staff keep her somewhere that she could be observed at all times, and also had a door alarm that sounded if a resident ever attempted an unsanctioned departure from the facility.

However, a contractor was installing a new alarm system and disconnected the door alarm without notifying Cedar Lake's staff. While the alarm was out of commission, Resident 10 wandered off and left the facility, and was later found walking alone next to a busy highway. The United States Department of Health and Human Services (HSS) sent workers from the Medicare division to investigate the incident. HHS determined that Cedar Lake had violated a command by not keeping Resident 10 under adequate supervision, meaning that the staff had not acted reasonably to ensure that Resident 10 was sufficiently supervised. HHS fined Cedar Lake $5,000 for the violation. Cedar Lake appealed the fine to an administrative law judge (ALJ) and an administrative appeals board, both of which affirmed the fine. Cedar Lake then petitioned the Fifth Circuit to review the matter.

The United States Court of Appeals for the Fifth Circuit rejected the petition and dismissed it for review. The main facts presented by

Cedar Lake—even when taken as true by the ALJ—failed to alter these core factual findings in any significant way. Indeed, the ALJ accepted Cedar Lake's primary factual presentation by employees testifying to the fact that the installation contractor did not inform Cedar Lake that the alarm was to be turned off. However, the court held that such facts did not show that Resident #10's escape to the highway was unforeseeable nor demonstrate that Cedar Lake's actions were reasonable under 42 C.F.R. §483.25(h). These findings of the ALJ and the Departmental Appeals Board concerning the lack of Cedar Lake's safety and supervision are affirmed under 42 C.F.R. j§483.25(h) The conclusions are not arbitrary, capricious, not in accordance with the law, or unsupported by the substantial evidence provided. Therefore, this petition for review was dismissed.[10]

The court's decision was significant because it outlined to some degree what adequate healthcare should look like, and details some of the unfortunate legal consequences that can arise from negligence, specifically elder neglect, and insufficient hospice care. Additionally, this case serves as an example of the rising prevalence of nursing home litigation cases that were previously uncommon. This case illustrated a positive example of overseeing and enforcing proper and adequate care for the elderly population.

III. Proof of Claim

A. Protections for Vulnerable Populations

1. Children

The most current and central federal legislation regarding children's protective rights revolves around the Child Abuse Prevention and Treatment Act (CAPTA), which initially passed in 2019.[11] The congressional findings of CAPTA recognize both the appalling

10 Cedar Lake Nursing Home v. US Department of Health & Human Services (2010) United States Court of Appeals, Fifth Circuit.

11 About CAPTA: A Legislative History | Child Welfare Information Gateway, https://www.childwelfare.gov/resources/about-capta-legislative-history/ (last visited Feb 27, 2024).

nature of child abuse in the United States, and the many methods that, when funded properly and used in combination with each other, can significantly alleviate suffering as a result of abuse and neglect. The pillars of CAPTA include appropriating funds for prevention and treatment programs, establishing hotline reporting requirements, central registries for abuse reports, and providing greater support to existing services such as Child Protective Services, as well as parenting classes and counseling programs. CAPTA also provides grants for research, data collection, and innovation to collect insights into the current state of abuse and find new ways to prevent and treat it, as well as encourage state accountability to report outcomes and undergo federal reviews. In short, CAPTA engages with the issue of abuse from beginning to end and provides adequate support to do so.

Federal regulations governing child care have their shortcomings and can't always be compared to regulations for end-of-life care in nursing facilities, but minimum staffing requirements and enforcement of regulatory laws are significantly better for children's services in almost every way.[12] Minimum staffing ratio requirements are highly flexible for individual need categories determined by age. While assistance needs can't usually be determined by age for elderly people (some 70-year-olds need much more help than some 90-year-olds), staffing requirements based on the category of need are non-existent in end-of-life care. Moreover, the penalties for failure to meet the requirements set by federal and state governments are high, and enforced efficiently.[13,14]

At the risk of infantilizing elderly people, the challenges of end-of-life care patients in nursing homes can be equated to the needs of children in childcare centers. Both demographics require assistance

12 Supervision: Ratios and Group Sizes | Childcare.gov, https://childcare.gov/consumer-education/ratios-and-group-sizes (last visited Feb 27, 2024).

13 Child Care Policy & Regulations | ECLKC, https://eclkc.ohs.acf.hhs.gov/child-care-policy-regulations (last visited Feb 27, 2024).

14 Federal Child Care Legislation Over the Past Decade, Center for American Progress (Jun. 21, 2023), https://www.americanprogress.org/article/federal-child-care-legislation-over-the-past-decade/ (last visited Feb 27, 2024).

with basic daily needs, such as hygiene, administration of medication, mobility, and general access to the world.[15] Patients are even more vulnerable, because while children return to their parents each day, nursing home residents live in their caretaking facility, with no guarantee of visiting family to ensure their health. When children get sick, they are encouraged to stay home to avoid spreading illness to others. When elderly people get sick, they remain in the place where they first became sick, and the quality of their care (which is usually outside of their control) will determine whether they live or die. Children eventually leave child care by becoming independent, and most nursing home patients leave when they die. If these situations are so similar, why is the approach to care so different?

The laws of a country typically represent the values and priorities of its people, and the rules controlling children's welfare indicate a recognition of children's particularly vulnerable status. Because they are more vulnerable, they receive considerable protection under the law, and the consequences for violators of that law are substantial. The same logic follows for other vulnerable groups, such as people with disabilities, but the protections afforded to elderly people are not sufficient to ensure proper protection from abuse and neglect. If the need for protection for childcare and the elderly are so similar, why is there such a disparity in approach and enforcement of care?

2. Adults with Disabilities Act

The *Americans with Disabilities Act* (ADA) is another federal legislation that focuses on protecting vulnerable populations in the United States.[16] Passed in 1990, the ADA prohibits discrimination against people with disabilities, including employment, transportation, public accommodations, communications, and access to state and local government programs and services. The purpose of the law is to ensure that people with disabilities have the same rights and

15 What Is Child Care Licensing? | Childcare.gov, https://childcare.gov/consumer-education/child-care-licensing-and-regulations (last visited Feb 27, 2024).

16 Americans with Disabilities Act, DOL, http://www.dol.gov/general/topic/disability/ada (last visited Feb 27, 2024).

opportunities as everyone else, and offer protection under the law for this vulnerable population. The ADA's protection applies primarily—but not exclusively—to individuals who meet the ADA's definition of disability. An individual has a disability if (1) He or she has a physical or mental impairment that substantially limits one or more of his/her major life activities; (2) He or she has a record of such an impairment; or (3) He or she is regarded as having such an impairment.

In 2008, the ADA's definition of disability was amended by Congress.[17] Other individuals who are protected in certain circumstances include 1) those, such as parents, who have a relationship with an individual known to have a disability, and 2) those who are coerced or subjected to retaliation for assisting people with disabilities in asserting their rights under the ADA. Approximately 46% of Americans ages 75 and older and 24% of those ages 65 to 74 report having a disability, according to estimates from the Census Bureau's 2021 American Community Survey. In total, around 41 million people in the United States qualify as having a disability under this act, making up about 12% of the American population.[18] This constitutes a significant portion of the population in the United States who would therefore qualify under the ADA as part of a vulnerable or at-risk population given that they have a disability. The ADA illustrates that the laws of a country are intended to reflect the priorities of its citizens, and ultimately are intended to promote their well-being.

The same is true with elderly populations. The ADA provides an example of a law illustrating that certain individuals and groups are inherently more vulnerable, and hence should logically receive more conspicuous and substantial protection under the laws of the land. The elderly population in the United States is not adequately protected under the ADA, even though most would qualify as "[having]

17 U.S. Department of Justice, Americans with Disabilities Act (ADA) Amendments Act of 2008 (ADAAA) Notice of Proposed Rulemaking (NPRM) Frequently Asked Questions (FAQs), https://archive.ada.gov/nprm_adaaa/adaaa-nprm-qa.htm.

18 U.S. Census Bureau, Facts for Features: Americans With Disabilities Act: July 26, 2021, https://www.census.gov/newsroom/facts-for-features/2021/disabilities-act.html.

a physical or mental impairment that substantially limits one or more major life activities." This vulnerable population does not receive adequate end-of-life care, which will be demonstrated throughout the rest of this paper, and the ADA is just one example of where the law is falling short of saving those who are dying for care.

B. Powers Granted to Medicare & Medicaid

Established in 1965, Medicare and Medicaid are two distinct government healthcare programs in the United States, created to address different healthcare needs of vulnerable populations, and each has its own set of powers and responsibilities. Both are governed by Centers for Medicare & Medicaid Services (CMS) and play critical roles in the United States healthcare system. Medicare is mainly intended to serve the elderly population and certain individuals with disabilities, while Medicaid focuses on providing healthcare coverage to low-income individuals and families. These programs are subject to regulatory federal oversight, and federal and state laws and regulations set forth the programs' powers and responsibilities.

Medicare is funded through payroll taxes, premiums paid by beneficiaries, and general federal revenues. It has specific trust funds for hospital insurance (Part A) and supplementary medical insurance (Part B and Part D). Medicaid on the other hand is funded through a combination of federal and state funds, with the federal government providing a specified matching rate for each state (the Federal Medical Assistance Percentage, or FMAP). The FMAP varies based on a state's relative wealth and other related factors.

The CMS and its associated programs are responsible for providing health insurance to individuals in the United States aged 65 and older and younger people with long-term disabilities, helping to pay for hospital and doctor visits, prescription drugs, and other healthcare services. Medicare accounts for 21% of total national health spending and 10% of the federal budget in 2021, and makes up 26% of spending on both hospital care and physician and clinical

services.[19] Medicare benefits are expected to grow to $1.8 trillion in 2031 due to an increase in the Medicare population. These funds will be used to benefit the elderly and other vulnerable populations.[20]

While the CMS often uses its granted powers to bless the lives of vulnerable populations, its Medicare and Medicaid programs are also subject to alarming cases of fraud involving a lack of oversight with funding and weak licensing requirements. While it might not seem like a viable business operation to run an enterprise that is entirely dependent upon clients who are about to die, hospice facilities and nursing homes can expect some of the largest financial returns out of any portion of the American healthcare industry. So, these for-profit operations take advantage of elderly clients to make more money. For-profit facilities made up just 30% of the field at the turn of the twenty-first century, but since then have grown to over 70%, with the number of hospices owned and run by private equity firms have tripled since 2011.[21] Nursing homes and hospice care facilities can be opened and operated by individuals without a medical background, including accountants, vacation-rental superhosts, criminal defense attorneys, and the list goes on. Once the hospice is set up and running, surveillance by the CMS is scarce. Providers get paid a set rate per patient per day, regardless of how much help is rendered. Under the Medicare payment plan, the aggregate profit margins of for-profit nursing homes are three times that of nonprofit competitors, as a small hospice housing with just twenty residents can rake in more than a million dollars per year. Most hospice care takes place at the patient's actual home, so it is relatively easy to keep operating and overhead costs low while outsourcing a majority of the labor to

19 Kaiser Family Foundation, What to Know About Medicare Spending and Financing, https://www.kff.org/medicare/issue-brief/what-to-know-about-medicare-spending-and-financing/.

20 Juliette Cubanski & Tricia Neuman, *What to Know About Medicare Spending and Financing, Kaiser Family Foundation,* Jan. 19, 2023, https://www.kff.org/medicare/issue-brief/what-to-know-about-medicare-spending-and-financing/.

21 Ava Kofman, How Hospice Became a For-Profit Hustle, The New Yorker, Nov. 2022, https://www.newyorker.com/magazine/2022/12/05/how-hospice-became-a-for-profit-hustle (last visited Feb 27, 2024).

caretaker family members that go unpaid. Additionally, providers open new nursing homes and bill Medicare until it hits the Medicare reimbursement limit. The facility is then shut down, keeps the money from Medicare, buys another operating license accompanied by a new Medicare billing number, transfers its patients over to the new setup, and hauls in the funding again. Funding and licensing fraud is becoming more common in the industry.

One would think that the CMS would catch on to this type of fraud, but the way it has designed the hospice benefit program ironically rewards and incentivizes providers for recruiting patients who are not actually on their deathbeds quite yet. The longer patients stay in the facility, the larger the profit margins for the hospice business, because patients that are more stable demand fewer and less expensive medications and treatments. While it is true that two physicians are required to certify that a patient is terminally ill, the patient can be recertified over and over again. And even if the federal government recognizes that patients might not die within the predicted six months and demands repayments from hospices when patients stay longer than the six months, many nursing homes will rig the system and find a way to retain the money by expelling patients from the facility or consistently adding to their arsenal by admitting new, non-terminally-ill patients. Loopholes abound in the nursing home and hospice facility industry—stronger oversight regarding funding and licensing requirements will be necessary for a complete eradication of fraud.

C. Nursing Home Staffing Requirements & Lack of Enforcement

Next, facility staffing requirements and subsequent lack of enforcement will be illustrated to further elaborate on the problem at hand. In 1967, pieces of federal legislation known as the Moss Amendments made to the Medicaid program included developing minimum standards and regulations for nursing home staffing

requirements to be applied uniformly by individual states.[22] The Moss Amendments provided a statutory definition of a skilled nursing facility and established specified standards for participating facilities. Part of the amendments' role was intended to lead to an investigation on nursing homes that did not comply with the minimum standards—but it failed, and the congressional intent was lost in the typical federal bureaucracy.

Federal regulators have since attempted to create multiple ways that would enable them to determine whether a nursing home has sufficient staff and if the facilities are following the rules. The *Nursing Home Reform Act* of 1987 required facilities to have sufficient nursing staff to provide services capable of attaining or maintaining the highest possible physical, mental, and psychological well-being of residents.[23] In 2001, a study commissioned by the Medicare regulator for Congress re-evaluated and re-recommended minimum numbers of nurses and aides.[24] Commencing in 2011, the CMS relied on the findings of a different study to determine how much to pay nursing homes for residents on Medicare. Reimbursements are calculated based on the level of staffing a typical nursing home provides for people with similar medical needs. It is the formula CMS also employs in its consumer-focused Nursing Home Care Compare tool. However, federal regulators have been shown not to use either the 2001 or 2011 benchmarks for enforcement.

Today, according to recent research, regulations are still inadequate for the proper care of those individuals admitted to nursing

22 National Center for Biotechnology Information, Amendments made in 1967 to the Social Security Act specified standards for participating homes, https://www.ncbi.nlm.nih.gov/books/NBK217552/#:~:text=Amendments%20made%20in%201967%20to,specified%20standards%20for%20participating%20homes.

23 Nursing Home Abuse Center, Nursing Home Reform Act, https://www.nursinghomeabusecenter.com/resources/nursing-home-reform-act/.

24 National Center for Biotechnology Information, A CMS study in 2001 found that nearly one-third of nursing homes had deficiencies that caused actual harm or jeopardy to residents, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7328494/#:~:text=A%20CMS%20study%20in%202001,harm%20or%20jeopardy%20to%20residents.

homes and facilities. Current regulations mandate that nursing homes must have a registered nurse (RN) on duty for at least 8 hours a day, 7 days a week. But out of 15,428 nursing homes in America, more than 75% (11,757 of them) had fewer nurses in 2021 than recommended under Medicare's payment formula. Regulators cited only 589 of them for short staffing, and only 4% were cited by government inspectors—even fewer were fined. When other nursing home caregivers are taken into consideration as well, around one-third of U.S. facilities fell short of the aforementioned benchmarks.[25]

Simply put, not even the minimum federal standard is being met or enforced an overwhelming majority of the time. Fines are rarely handed out. Penalties are seldom imposed. Beyond the ineffective regulations, individual states are also responsible—around 25% of states routinely miss a federal deadline to inspect a home within 10 days of receiving a safety complaint, leading to more than a third of nursing homes in the United States being overdue for an inspection. The federal manual developed by the CMS given to states to train their inspectors for years told the nursing facilities they should not investigate staffing levels unless the inspector had first found that care standards were not met. That's essentially analogous to handing out speeding tickets only to drivers who crash or who cause a crash. A year after regulations changed in 2016, that guidance was updated, allowing inspectors to look into staff at any time and without needing to connect low staffing to poor care. But the rare instances of citation—coupled with observations of inspectors—suggest some still believe they need examples of care violations. Additionally, many nurses have reported falsifying data for inspection reports out of fear that they will be held personally liable for the inadequate care given to patients, despite the complete insurmountability of the task in front of them.

Naturally, the question stemming from this alarming summarization of data is 'why?' Why are the minimum standards not being met? Why are they not being enforced? Various explanations can be

25 USA Today, Skilled nursing facilities are in crisis — Biden's reforms could help, https://www.usatoday.com/in-depth/news/investigations/2022/12/01/skilled-nursing-facilities-staffing-problems-biden-reforms/8318780001/.

given, but for the purposes of this paper, we will focus on a couple of prominent ones in particular. Nursing homes simply pay caregivers less than other healthcare sectors. The wages of employees at nursing homes are alarmingly low, paying around only $15 an hour for CNAs. This has resulted in an insufficient number of CNAs in the industry being staffed at skilled nursing facilities.[26] Inspectors in charge of monitoring skilled nursing facilities—who are often registered nurses themselves—find better-paying jobs in the private sector as well. Low wages often lead to diminished motivation on the part of the inspectors and nursing home employees. To be fair, they also have the impossible task of managing an infinite number of responsibilities due to insufficient staffing. But common sense says that nobody wants to work a job that pays that little and on the other hand requires such an unreasonable amount of effort—people will find other jobs, and they have indeed gone elsewhere instead. The aforementioned combination of low wages, insufficient staffing, subsequent lack of motivation, and managing the impossible number of tasks have proved deadly to the nursing home industry turnover rate and the proper care of vulnerable populations in the United States.

D. Staffing Requirements Correlated with Health Outcomes

It should be no surprise that nurse staffing and licensure have a direct correlation with health outcomes in a variety of settings. The relationship between nurse staffing requirements and health outcomes for patients is a critical and extensively researched aspect of healthcare delivery. Adequate nurse staffing levels profoundly impact patient safety, recovery, and overall well-being. Numerous studies have consistently shown that when there are lower nurse-to-patient ratios, patient outcomes tend to be significantly improved.[27]

26 CNA Patient Ratio Laws by State, IntelyCare, https://www.intelycare.com/facilities/resources/cna-patient-ratio-laws-by-state/ (last visited Feb 27, 2024).

27 The Benefits Of Nurse-to-Patient Staffing Ratio Laws And Regulations | NurseJournal.org, (2022), https://nursejournal.org/articles/benefits-nurse-to-patient-staffing-ratio-laws/ (last visited Feb 27, 2024).

One of the most immediate and evident impacts of appropriate nurse staffing is the reduction of adverse events and medical errors. Overworked and overwhelmed nurses are more prone to making mistakes, administering incorrect or late medications, or overlooking critical details in a patient's care. When nurse staffing is insufficient, nursing home patients are much more likely to develop infected bedsores and urinary tract infections. While these adverse events may seem small, they can spiral a patient's health and lead to decreased mobility, increased confusion, and even death. Conversely, well-staffed nursing homes and care centers are associated with lower mortality rates, decreased complications, and even greater rates of dischargement. Staffing ratios often decide how and when an individual will die.

Nurse staffing also plays a pivotal role in improving patient satisfaction and overall mental and emotional well-being.[28] Patients report higher levels of satisfaction when they receive timely care, attention, and support from nurses. The quality of time spent with nurses is also higher when ratios are lower. When nurses have the time to do more than change diapers and turn patients in their beds, they can provide emotional comfort and reassurance and listen to patients' concerns. Patients are more likely to feel valued and heard when nurses have the time and capacity to connect with them on a personal level.

E. Current Efforts to Improve End-of-Life Care

1. Advocacy Groups & Federal Spending on End-of-Life Care

Ongoing efforts by advocacy groups and policymakers have attempted to strengthen staffing requirements and enforcement.[29]

28 National Post-acute and Long-term Care Study Homepage (NPALS), (2024), https://www.cdc.gov/nchs/npals/index.htm (last visited Feb 27, 2024).

29 American Psychological Association, "End-of-Life Resources: Organizations," https://www.apa.org/pi/aging/programs/eol/organizations (last visited March 12, 2024).

This includes calls for increased transparency, stricter penalties for non-compliance, and more consistent monitoring of staffing levels.

Federal funding for nursing home enforcement has not changed since 2014 at about $397 million a year. However, in his 2022 State of the Union address, President Joe Biden detailed his goal of increasing federal funding by 25%, matching inflation over the past seven years, and in total spending $150 billion over the next ten years.[30] Nursing facility services are the second-largest category of Medicaid spending (after hospital services), and Medicaid is the primary payer for nursing facility care in the country. This increase in spending would theoretically allow older Americans and individuals with disabilities to remain in their homes and stay active in their communities as well as improve the quality of jobs for home care workers. It would also help reverse the issue of not paying nurses enough to keep them around. This would prevent less industry turnover, in addition to ensuring that staffing requirements are met. So far, it is too early to tell how much Biden's plan is helping the Medicare and Medicaid programs, but it seems like a relatively good direction to start. More federal spending might be necessary in the future—only time will tell.

2. Pending Legislation

In September 2023, the Centers for Medicare and Medicaid Services (CMS) released a proposed rule that would create new requirements for nurse staffing levels in nursing facilities.[31] The new proposed standard includes several provisions to strengthen staffing in nursing homes. It recommends a minimum of 0.55 registered nurse (RN) and

30 The White House, Remarks of President Joe Biden – State of the Union Address as Prepared for Delivery, The White House (2023), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery/#:~:text=We%20are%20the%20only%20country,ever%20created%20in%20four%20years.

31 Kaiser Family Foundation, What Share of Nursing Facilities Might Meet Proposed New Requirements for Nursing Staff Hours?, https://www.kff.org/medicaid/issue-brief/what-share-of-nursing-facilities-might-meet-proposed-new-requirements-for-nursing-staff-hours/.

2.45 nurse aide hours per resident per day; demands facilities to have an RN on staff 24 hours per day, 7 days per week; improves staffing assessment and enforcement strategies; creates new reporting requirements regarding Medicaid payments for institutional long-term services and supports (LTSS); and provides $75 million for training for nurse aides. As recorded in the proposed legislation, CMS focuses on supporting the goal of establishing stronger staffing requirements against the practicalities of implementation and costs. Among all nursing homes, fewer than 1 in 5 could currently meet the required number of hours for registered nurses and nurse aides, which means over 80% of facilities would need to hire nursing staff.[32] Additionally, 90% of for-profit facilities would need to hire additional nursing staff compared with 60% of non-profit and government facilities, which is obviously insurmountable, but the CMS is fairly indifferent to the magnitude of the issue at the moment. The percentage of nursing facilities that would meet the requirements in the proposed rule varies as far as all in Alaska (100%) to nearly none in Louisiana (1%). This new legislation re-establishes new recommendations post COVID-19 pandemic. The key to rendering the legislation effective will be how well the rules are enforced, and how often and to what degree the facilities are held accountable when they fall short.

F. Suggestions for Further Improvement

As the median age of an American continues to increase and the population of elderly people grows larger, new standards of care are necessary to meet new needs. To enhance end-of-life care in nursing homes, national minimum requirements for nurse-to-patient ratios must be set and required for Medicare funding eligibility. New policies are recommended to achieve these goals. Firstly, mandatory minimum staffing ratios must be continually updated for nursing homes, with a specific focus on end-of-life care units, factoring in

32 Many nursing homes are poorly staffed. How do they get away with it?, (2022), https://tangent.usatoday.com/in-depth/news/investigations/2022/12/01/skilled-nursing-facilities-staffing-problems-biden-reforms/8318780001/ (last visited Feb 27, 2024).

the acuteness and complexity of residents' needs. Nursing homes should be obligated to regularly report staffing ratios to various governing agencies including state regulatory bodies and the Department of Health and Human Services and its relevant sub-agencies. Furthermore, these ratios should be made publicly accessible to aid families in making informed decisions about nursing home selection and motivate facilities to maintain adequate staffing.

Because the federal government spends considerable funds on end-of-life care, heightened financial incentives and penalties can be introduced to ensure compliance with regulations. To enforce these standards effectively, audits and inspections should be more frequent and rigorous. These evaluations should not only assess staffing ratios but also focus on the quality of care provided to residents.

To address short-term staffing shortages, temporary staffing pools can be established for nursing homes to tap into during peak periods of demand for end-of-life care. Public funding should be earmarked specifically for staffing in nursing homes, with a focus on end-of-life care, helping facilities attract and retain skilled nursing staff.

Whistleblower protections must be robust to encourage nursing home staff to report staffing violations without fear of retaliation, with confidential reporting and thorough investigations. Quality of care metrics should be developed and tied to federal or state funding, with adequate staffing as a key component. Actively involving patients and their families in assessing staffing levels and care quality can be a vital resource for assessment, as their feedback can help identify issues and ensure compliance.

Finally, investing in research and data analysis to continually evaluate the impact of staffing ratios on end-of-life care outcomes can be enormously beneficial for the ongoing push for improved care. This data can inform policy adjustments to ensure that nursing homes provide the best possible end-of-life care experience for residents and their families during one of the most sensitive and important periods of life.

IV. Conclusion

Issues of abuse, neglect, and fraud are the result of multiple failures within a complex legal and medical care system. Solutions are often not obvious, easy, or cheap. However, the United States government has an obligation to its citizens to prevent the abuse of power over vulnerable populations and must honor this duty in the way it enforces the rules governing the care of elderly people. Who and what is most valuable to us is reflected in how we protect, and it is time to make greater steps toward providing much-needed protection for the elderly. Just as we must preserve our right to be born free, we must also preserve the right to die with dignity.

Plagiarism or Progress?: An Inquiry into Generative AI and Copyright

James Knight[1]

I. Introduction

In 2022, the introduction of readily available artificial intelligence (AI) changed the world. Chat GPT, Google Bard, and Microsoft Bing Chat are the most easily recognizable, but there are (and presumably will be) many other models. These Large Language Models (LLMs) have captured the imagination of the public, both literally and figuratively, germinating two camps of thought about LLMs and their role in society. In one camp of the discourse are the pessimists. The pessimists argue that the chatbots will kill human ingenuity, threaten innovation, and introduce a bevy of copyright issues.

In the other camp are the optimists. This paper will argue in favor of this kind of attitude in the legal sphere, particularly with regards to copyright issues. AI has broken the *current* copyright system. It is an alien issue to the process in procuring protection for a creator's thoughts and ideas. Machine learning and artificial intelligence have brought the advent of a host of novel creative aspects bundled with complex legal difficulties, primarily within the domain of intellectual property. US copyright law needs to be amended in order to account for these changes primarily by allowing the copyright of computer generated material to be the work of the individual who primarily was responsible for its creation, conditional on the amount of involvement of the user. While this may still require some

1 James Knight is a junior at BYU and plans on attending law school in the near future.

case by case analysis by the United States Copyright Office, it will promote innovation and usage of these new tools

The following article will both show the cracks in the legal process and provide promising reforms that can preserve the integrity of invention, creativity, and the power of artificial intelligence. The article will be outlined as follows: Part II provides the necessary background in order to understand the current day issues with copyright. Part III contains the brunt of the proof of claim. This revolves around four reasons for why work generated by AI should be protected under copyright law: (1) Copyright law is not compatible with AI; (2) Computer Generated Works (CGW) passes most other requirements in the relevant statutes; (3) work produced by AI is human; and (4) empirical evidence exists in favor of adopting this position. Part IV concludes.

II. Background

A. Legislation

The Constitution provides the foundation of copyright law. Section 1 cl 8. reads, "[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[2] In other words, the government must ensure the progress of the arts and sciences via copyright laws, i.e., the temporary right to have exclusive rights over their creation. With the rapid increase in scientific and artistic creations since the ratification of the Constitution, additional copyright law was introduced to meet the novel needs of the times. The language of the Constitution is ambiguous: What length of time is appropriate for an author

2 In *Graham v. John Deere and Co. of Kansas City*, 383 U.S. 1 (1966), the Supreme Court acknowledged that this is both a grant and limitation of power. This clause could be used to argue that Congress is limited in its power over copyright law, exclusively in the realm of promoting science and useful arts and protecting the interests of the authors/inventors who were the creators. It additionally gives this power to Congress in the first place while placing extreme limitations on it at the same time.

or inventor to have exclusive right over their creation(s)? What is an "Author" or "Inventor"? What entails having an exclusive right to a product? These questions, among others, remain unanswered in the Constitution alone. However, the Constitution provides essential direction for the development of copyright law. The creator's creations should be protected to promote artistic or scientific progress.

For the purpose of this paper, we will observe the development of copyright law with the Copyright Act of 1976. The Copyright Act of 1976 led to book-keeping changes within copyright registration and infringement, but more importantly established the Doctrine of Fair Use. The Doctrine of Fair Use came about as a result of digital media's capacity to rapidly increase the availability and output of creative content. Media outlets would have been (and would have continued to be) severely limited in their product if a license payment was required for every tiny quotation or citation. Thus, the Doctrine of Fair Use allows unlicensed usage for the purposes of criticism, comment, news reporting, teaching, research, scholarship, and parody (e.g., *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569 (1994)[3]).

Make no mistake, the Doctrine of Fair Use brings additional legal rights along with it, most prevalent of which are the Right of Attribution—the right for an author to be acknowledged as such—and the Right of Integrity—the right for an author to not have their work subjected to derogatory treatment.

3 When 2 Live Crew produced a parody of Roy Orbison's "Pretty Woman", few could have predicted that it would have serious implications for the Doctrine of Fair Use. Acuff-Rose Music, the label under which Orbison was signed, sued for copyright infringement. The 6th Circuit of the Court of Appeals ruled in favor of 2 Live Crew and validated parody within the lines of fair use. The Court ruled, "Although such transformative use is not absolutely necessary for a finding of fair use, *Sony Corp. of America v. Universal City Studios, Inc., 464 U. S. 417, 451.* The goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, see, e. g., *Sony, supra,* (BLACKMUN, J., dissenting), and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.)

The Copyright Act of 1976, with its formidable Doctrine of Fair Use, would prove insufficient with the advent of what we now call "the .com boom". The .com boom increased public availability and usage of several creations that were previously exclusive to legally authorized domains. So, in 1998, a new Act was introduced titled the Digital Millennium Copyright Act. This Act attempted to re-secure the author's exclusive ownership over their product and "promote the Progress of Science."[4] The Digital Millennium Copyright Act essentially expanded the scope of the Copyright Act of 1976 to include the internet. It also included essential changes such as providing legal protection against illegal digital duplication to encourage use of digital platforms and create safe harbors for Online Service Providers (OSPs).[5] This means that large platforms such as Google or Youtube could not be held liable for having copyright material on the platform, so long as they remove the protected content when found. An update to copyright law was necessary because of the previously mentioned complications that the digital world created within preserving intellectual property.

Unsurprisingly, with the advent of AI, new copyright legislation has been proposed to keep up with technological advancements. A proposed Digital Copyright Act of 2021 was designed to "expand the possible scope of temporary exemptions by authorizing the Copyright Office to permit third-party assistance at the direction of an intended user" and "to adopt temporary exemptions for trafficking of circumvention tools when the tool would be used to facilitate an exempted circumvention."[6] It would essentially permit exemptions in order to strike[5] a balance between copyright law and beneficial uses of creations without the author's permission in the age of fast

4 U.S. Const. art. I, § 8, cl. 8.

5 Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

6 Thom Tillis, The Digital Copyright Act of 2021, Senator Thom Tillis's Official Senate Website, https://www.tillis.senate.gov/services/files/0B0551E3-4CA2-4B49-9896-56427B7B7F77#:~:text=The%20Digital% 20Copyright%20Act%20of,to%20copyrighted%20works%20so%20that

developing digital technology. Since the concept of "third-party assistance" is ambiguous, it could easily be interpreted as assistance from generative AI.

B. Legal Precedence

In courts, most copyright cases have been resolvable given the consistent legislative advancements in copyright law. However, some cases have called into question the language of copyright laws and the fundamental concepts that ground those laws. For example, in *Feist Publications, Inc v Rural Tel. Serv. Co.*, the Court unequivocally interpreted the necessity of human authorship to qualify a work for copyright. Rural Telephone Services provided telephone services for rural communities in Kansas. As such, they provided a telephone directory of white and yellow pages to these rural communities. Feist Publications sought to provide a telephone directory for a wider geographical area that included suburban and rural communities in Kansas. Since Feist needed the white pages of the rural communities for their new product, they requested the white pages from Rural Telephone Services. Although Rural Telephones services denied that request, Feist proceeded to copy the listing. Rural sued, claiming that Feist violated copyright law.

The Court ruled that Rural Telephone Services's white pages were not entitled to copyright because the work was not authored by a human. More precisely, in the words of Justice O'Connor, "The [works] which are to be protected are *the fruits of intellectual labor,* embodied in the form of books, prints, engravings, and the like" and thereby must be "founded in the creative powers of the mind."[7] Thus, if the work is produced by a human via their creative [6] capacities, then the work is entitled to copyright protection.

The necessity of human authorship for copyright protection was further cemented in *Thaler v. Vidal*. Stephen Thaler sought two patents on the behalf of a machine called Device for Automated Bootstrapping of Unified Sentience (DABUS). These were the first inventions invented by AI for which a patent was claimed. The United

7 *Feist Publications, Inc. v. Rural Tel. Serv. Co*., 499 U.S. 340 (1991).

States Patent and Trademark Office denied the patent because AI is not a human, which is a necessary prerequisite for a patent in the United States. Thaler sued and lost both in District Court and in the Appellate Court. In the words of Circuit Judge Stark, "At first, it might seem that resolving this issue would involve an abstract inquiry into the nature of invention or the rights, if any, of AI systems. In fact, however, we do not need to ponder these metaphysical matters. Instead, our task begins – and ends – with consideration of the applicable definition in the relevant statute."[8] Since patent (and copyright) law applies only to humans, DABUS could never qualify as an inventor nor could it ever have works protected by copyright law because DABUS is not a "natural person."[9] Moreover, DABUS and the products of DABUS cannot have constitutional protections due to their non-personhood.

This trend of appealing to the non-personhood of AI has continued. In 2023, Kris Kashtanova, with the help of Midjourney (an AI program), created an entire comic book. The United States Copyright Office (USCO) granted a copyright to the comic book but only for the "human elements". USCO concluded "that Ms. Kashtanova is the author of the Work's text as well as the selection, coordination, and arrangement of the Work's written and visual elements. That authorship is protected by copyright. However, … the images in the Work that were generated by the Midjourney technology are not the product of human authorship. Because the current registration for the Work does not disclaim its Midjourney-generated content, we intend to cancel the original certificate issued to Ms. Kashtanova and issue a new one covering only the expressive material that she created."[10] In other words, the written text was protected by copyright law because a human produced them, but the images were denied copyright because a non-person (i.e., AI) produced them.

8 *Thaler v. Vidal*, No. 21-2347 (Fed. Cir. 2022)

9 See *Mohamad v. Palestinian Authority* 566 U.S. 499 (2012), p. 454 and *Thaler v. Vidal*, No. 21-2347 (Fed. Cir. 2022), p. 6.

10 United States Copyright Office, Letter to Van Lindberg, Taylor English Duma LLP, Re: Zarya of the Dawn (Registration # VAu001480196) (Feb. 21, 2023).

While the decisions of *Feist Publications, Inc v. Rural Tel. Serv. Co* and *Thaler v. Vidal* seems to support USCO's conclusion, it runs contrary to *Urantia Foundation v. Maaherra*. Here the court ruled, post *Feist Publications, Inc v. Rural Tel. Serv. Co*, that "The copyright laws, of course, do not expressly require 'human' authorship, and considerable controversy has arisen in recent years over the copyrightability of computer-generated works."[11] As we move forward, this case serves as a pivotal point in the ongoing discourse about the role of human authorship in copyright law, suggesting that the law might adapt to accommodate the creative contributions of both humans and machines in a new era of artistic and literary creation.

C. Key Terms

In this paper, the term "AI" will exclusively refer to generative artificial intelligence. By using generative models, generative artificial intelligence attempts to simulate human intelligence processes through computer science and massive data sets, capable of generating text, images, or other media. Roughly, there's a machine with complex learning algorithms which search through robust sets of data and learn from the process by iterative testing and self-evaluation.

AI also uses deep learning. Deep learning takes the generative process a step further by adding a complex set of artificial neural networks, designed to replicate the process of the human brain and provides detailed inference based on the testing and feedback it receives. This allows it to take vast amounts of information, learn, and then synthesize it into creative efforts. Similar to how humans learn from their environment over time and are a conglomerate of their experience and feedback, such is the way that AI works.

III. Proof of Claim

I will now argue that the new Copyright Act should include copyright protection for AI generated products. First, I will establish

11 *Urantia Found. v. Kristen Maaherra,* 114 F.3d 955, 957–59 (9th Cir. 1997).

that AI generated products are already compatible with the majority of copyright law. This will begin with showing its compatibility with the Constitution, followed by an exploration into the compatibility of AI products with the current copyright requirements. Second, I will propose that, contrary to popular assumption, work produced by AI is human. I will then present current empirical evidence in favor of adopting this position. I conclude with some propositions about the necessary legal nuances and restrictions that should attend this expansion of copyright law.

A. AI and the Constitution

Although current copyright law is more precise, it will be worthwhile to show that works produced by AI are well within their constitutional right to have a copyright. The Constitution reads, "[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[12] Note that the meanings of "Authors" and "Inventors" are ambiguous. Assuming that an originalist interpretation could disambiguate their meanings, it would be reasonable to assume that the Founding Fathers intended government protection of intellectual property to be about human authors and inventors. However, this does not mean that the Founding Fathers intended for the meaning of "Authors" and "Inventors" to be exclusive to humans. Such ambiguity could be a feature of this particle of the Constitution. This would make sense given that the constitutional protection of intellectual property's genuine purpose is "To promote the Progress of Science and useful Arts…". As will become evident, AI does in fact promote such progress.

Next Move Strategy Consulting projects that the market for AI is worth about 100 billion dollars currently and will expand by almost twenty times this amount to 1.847 trillion dollars by 2030.[13]

12 U.S. Const. art. I, § 8, cl. 8.

13 Next Move Strategy Consulting, Artificial Intelligence Market Report, https://www.nextmsc.com/report/artificial-intelligence-market.

Industries such as healthcare, business, education, and data analytics will all drive this growth. This data strongly indicates that AI will play a crucial role in the development of several educational, economic, and artistic domains. Admittedly, the artistic domain only accounts for a small amount of this net worth. But, it is still within the spirit of the Constitution. Furthermore, healthcare and business are heavily reliant on patent and copyright protection to procure protection of innovation. Consider the following scenario. A new drug, designed to combat a chronic illness, is created by Artificial Intelligence. Undoubtedly, such a drug would require intellectual property protection, but if works produced by AI are not protected because of the law, this drug could not receive copyright protection.

Additionally, given the integral role AI plays in the domains of life previously mentioned, there exists no incentive to utilize these tools to promote genuine progress in science. No corporation would, out of the goodness of their heart, invest billions of dollars into generative AI in order to not control the output of the creation. Incentive structures play an important role in the constitutional protection in copyright law. *Sony Corp. of America v. Universal City Studios, Inc.* set a Supreme Court precedent for the interpretation of the Copyright clause of the Constitution. The Court wrote,

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. *Rather, the limited grant is a means by which an important public purpose may be achieved.* It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired…
>
> As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the

> one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, *our patent and copyright statutes have been amended repeatedly. From its beginning, the law of copyright has developed in response to significant changes in technology….. Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.*[14]

Clearly, per the Constitution, legislation should respond to the evolving technological ecosystem. By allowing CGW to be copyrightable, it promotes competitive growth. Prices would be driven down as different manufacturers and machine learning experts race for more reliable and affordable options. More is invested in this product with the capability to streamline all aspects of human life. Allocation of assets to AI is absolutely critical because of what it can accomplish and keeping what AI creates from being protected is damaging to that future. It would go against the Constitutional request to protect and promote innovation and the interests of some authors/creators who could cut costs and save time by utilizing AI.

B. Requirements of the Copyright Act

The following questions outline the current requirements for obtaining a copyright under the Copyright Act:[15]

1. Is the work eligible for copyright protection in the United States?

2. Has the work been fixed in a tangible medium of expression?

3. Does the work constitute copyrightable subject matter?

4. Is the work sufficiently original?

---

14 *Sony Corp. of America v. Universal City Studios, Inc*., 464 U.S. 417 (1984), emphasis added.

15 U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 101 (3d ed. 2021).

5. Was the work independently created?

6. Does the work possess at least some minimal degree of creativity?

7. Was the work created by a human author?

Questions (2)–(7) will be elaborated with the primary goal being to demonstrate how AI generated content qualifies for a copyright. We will not specifically concern ourselves with (1) since this first question is the very question of this paper. So, it should follow that if (2)–(7) are answered in the affirmative, the answer to (1) should be in the affirmative as well.

1. Fixed and Tangible

Question (2) asks whether the work was fixed in a tangible medium of expression. Let's call question (2) the "fixed and tangible requirement". Evidently, the key words in this requirement are "fixed" and "tangible". According to the Legal Information Institute (LII), for a product to be "fixed" means that the product must be accessible to people. In other words, it is a physical product to which people could have access.[16] For example, a painting is fixed. "Tangibility" is trickier to define because it is similar to "fixed", but the idea is that people can interact with the product in a stable manner. This requirement is put in place because something like an idea in someone's head should not have copyright protection. Although an idea is accessible to the public (i.e., fixed), an idea is not a tangible product. Therefore, products like ideas that are not fixed and tangible cannot have access to copyright protections.

Generative AI's product certainly qualifies as both fixed and tangible. Recall that the products with which we are concerned include things like artwork, literary material, or music. AI can produce all of these products in such a way that allows people all have access, and

16 Cornell Law School, Fixed in a Tangible Medium of Expression, Cornell Law School Legal Information Institute, https://www.law.cornell.edu/wex/fixed_in_a_tangible_medium_of_expression.

the products themselves can be interacted with in a stable manner.[17] Moreover, these are the classic cases for products that warrant copyright. So, the products produced by AI are fixed and tangible.

2. Copyrightable Subject Matter

Question (3) requires that the product constitutes copyrightable subject matter. Luckily, the Copyright Act lists products that qualify as copyrightable subject matter. These products include literature; music and accompanying words; dramatic works and any accompanying music; pantomimes/choreographic works; pictorial, graphic, and sculptural works; motion pictures/other audiovisual works; sound recordings; and architectural works.[18]

As it turns out, AI has yet to invent new and unprotected artforms. In fact, AI can only produce products that are included in this list. Thus, AI's products constitute copyrightable subject matter.

3. Sufficient Originality

Question (4) is the originality requirement. The originality requirement is the root of why a copyright exists in the first place. Copyright law has always revolved around the idea that unique and new ideas should be protected for the author's benefit. By protecting originality, copyright law provides a way to market the creative products that most Americans value, which is crucial to a healthy economic system.

Originality has two legal conditions that would make a product sufficiently original. These two conditions are questions (5) and (6) in the Copyright Act's requirements. So, by addressing both questions (5) and (6), we will have provided sufficient justification to meet the originality requirement.

17 Something unstable would be an improvised speech or an impromptu dance that is not recorded in a tangible medium of expression. This is not fixed and would need to be tied down in order to be copyrightable.

18 *Supra* note 15.

First, according to question (6), the product must exhibit at least a "modicum of creativity."[19] In *Feist v. Rural*, citing precedence, the Supreme Court ruled that, "the requisite level of creativity is extremely low; even a slight amount will suffice." In other words, there is not an impossibly higher bar to meet to qualify as a creative work which partially entails sufficient originality.

This leads to the simple conclusion that AI's output meets this criterion. As it exists right now, AI is not sentient. That means its creation process is directed, at least crudely and minimally, by a person. The "creative spark" required is scattered throughout computer generated works. This spark might appear in the prompt or request that creates the end product. While the creative element may not be in the traditional creation of the content, it is in the selection and intended meaning of the work.

The second condition of question (5), however, is more difficult to address. Independent creation and the requirement thereof is where concerns, albeit addressable ones, start to arise. As described earlier, LLMs are trained on absolutely massive amounts of data. They are fed every different conceivable source of content in order to understand the future input of users.This process enables it to learn from the creations of people, creations that are oftentimes protected under copyright law. This is an area that some see in need of regulation. While a bit outside the scope of the paper, it is still a huge debate in the discussion of the copyrightability of CGW and deserves to be addressed, if only marginally.

According to the Fair Use Doctrine, products generated by AI are well within their right to use and learn from other authors' creations. The Fair Use Doctrine outlines some criteria to determine whether a product can use another copyright protected product:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of

19 *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

> the use upon the potential market for or value of the copyrighted work.[20]

The Fair Use Doctrine opens the legal space to allow AI generated products to be considered independent works. Furthermore, AI generates independent products just the same way humans do. Humans perceive their environment, learn from others' (products or ideas), and then create an independent creation. Humans absorb information and are the amalgamation of all encounters they have had with the world. Humans and AI are both trained on large amounts of information which is then transformed into original products (or ideas). Since we have no principled way to distinguish human and AI information acquisition and production, Fair Use should protect AI production just as it covers human usage of the internet for learning. While this argument requires much more in order to be fully fleshed out, we leave it at this cursory overview.

C. AI as a Tool

What remains to be determined is whether products of AI meet requirement (7)—a human author must create the work. This section will deal with that requirement. In order to understand why legislation should adjust and evolve how it defines human authorship, it will be argued that AI is a tool. Arguably, human authorship requires only a human "creative spark" to be classified as human production. For example, a music artist thinks of a song about twinkling stars. The artist then will compose music, write words, and then receive copyright protection. This kind of copyright protection shouldn't change. Yet, we live in a world where AI generated material takes skill as well, even if it involves less traditional talent. What matters is that the creative spark of a human remains.

This intuition that AI is merely a productive tool reflects similar transformative shifts in the arts. Consider the transition from traditional hand-drawn animation to digital animation. While the timeless classics of animation, such as Disney's "Snow White," hold a special place in our collective affections, the introduction of

20 Copyright Act of 1976, 17 U.S.C. § 107.

computer-generated content offers a new, dynamic avenue for contemporary engagement. These are seamless, smooth, and realistic with a greater ability for innovation. Generative AI is simply a new phase of design. AI, in coordination with human ingenuity, can be used to create more and more exciting works of art for consumers.

AI will never eradicate human creation either. At most, it cuts out the tedious parts which make creation really challenging, particularly for those who may have been disadvantaged and lacked the opportunities and resources to hone their skills.[21] AI benefits people with brilliant ideas who may not have had the chance to go to an expensive art school or who had to work two jobs to support a family but have a passion for writing.

Whatever those benefits, however, the legislative understanding of requirement (7) needs to reflect the evolving technological ecosystem in the United States. If the law views AI as more of a tool to a human author, copyright protections are warranted. This is not only legally sound and prudent, it likely will promote science and the arts, as the Constitution desires.

D. Empirical Case: The United Kingdom

One of the largest concerns of many artists/creators is that the allowance of copyright for CGW will obliterate traditional human creation. To address this, at least initially, we look to the United Kingdom and their limited duration for a copyright available for a CGW.[22] Their approach aligns with the evolving nature of AI-generated content and serves to address the unique characteristics of these creations. The United Kingdom allows AI produced works to have short-term copyrights of 50 years, while normal copyright for human-produced works maintains a long-term copyright (i.e., the life of the author plus 70 years after). To insist that CGW be safeguarded

21 Laurie Henneborn, Designing Generative AI to Work for People with Disabilities, Harvard Bus. Rev. (Aug. 18, 2023).

22 UK Government, Artificial Intelligence and Intellectual Property: Copyright and Patents, https://www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents/artificial-intelligen ce-and-intellectual-property-copyright-and-patents.

for the life of the author plus an additional 70 years seems impractical and, in fact, preposterous, given that artificial intelligence does not possess a mortal existence. While AI-generated content may become outdated over time, the notion of "killing" a computer, as one might with a traditional author, is exceedingly challenging.

Moreover, it's important to consider the societal perspective on the preservation of human creativity. Traditional artistic expressions have been a vital part of our cultural heritage, and as a civilization, we generally have no intention of destroying these forms of creative output. However, the advent of AI-generated content introduces a unique dynamic, where machine-generated works can outperform humans in terms of efficiency and convenience. This places traditional art at a notable competitive disadvantage in a landscape where equal copyright durations are applied.

Because of this, during the initial phase of this transition, advocating for a shorter copyright duration for CGW, something akin to the 50 year duration of the United Kingdom, has several advantages. Firstly, it accommodates the indefinite lifespan of AI, recognizing that AI-generated content may remain relevant and useful for extended periods. Secondly, it adds a premium to the traditional artistic processes, incentivizing human creators to continue producing unique and irreplaceable works, fostering a balanced copyright ecosystem where both AI and human creativity can coexist. In this manner, a shorter copyright duration for CGW in the early transitory period can help strike a balance between preserving traditional art and embracing the innovative potential of AI-generated works.

E. Necessary Legal Limitations and Nuances

With the growing acceptance of AI in the realm of copyright law, it's evident that implementing limitations is imperative. One critical aspect, already emphasized by the firms and corporations that possess Language Model Models (LLMs), is that deception on the part of the creators about involvement over the usage of AI in the design process is completely unacceptable. For instance, DALL-E, a chatbot celebrated for its ability to generate striking images based on

textual prompts, underscores the need for transparency and integrity in the development of AI-generated content,

> Don't mislead your audience about AI involvement. When sharing your work, we encourage you to proactively disclose AI involvement in your work. You may remove the DALL·E signature if you wish, but you may not mislead others about the nature of the work. For example, you may not tell people that the work was entirely human generated or that the work is an unaltered photograph of a real event.[23]

It is reasonable to expect that most individuals would not find it controversial to impose this particular restriction. In the past, distinguishing the medium or creative process of artistic works was typically straightforward. For instance, one could easily differentiate between a painting and a movie due to their distinct characteristics. However, the emergence of AI as a creative medium introduces a unique challenge. Unless explicitly disclosed by the author, it is often not immediately evident that a work has been generated by artificial intelligence. In the case of AI-generated poetry, for example, the output remains a collection of words, making it virtually indistinguishable from human-generated poetry when unattributed as AI-created. This blurring of lines raises legitimate concerns about whether such AI-generated content should be eligible for copyright protection.

Just as creators are expected to attribute and acknowledge the work of other authors, a similar principle should apply to AI-authored content. To address this attribution issue, a straightforward solution could involve amending copyright registration forms to allow for the inclusion of third parties, with the option to specify AI as the primary creator. However, it is crucial to ensure that the human individual responsible for the stimulation and direction of the AI's output is also acknowledged, particularly if they played a significant role in shaping the creative process. This approach not only safeguards the rights of AI-generated content but also upholds transparency and accountability in the creative landscape, offering

23 OpenAI, Terms of Use for Dall-E, https://openai.com/policies/terms-of-use.

a fair and balanced framework for recognizing the contributions of both human and machine in the generation of artistic works.[24]

One final benefit from this approach of permitting CGW, but requiring attribution, is the reduction of false claims within copyright where authors fail to attribute AI for co-authorship. This argument is one that appears frequently within the context of legalization of recreational drugs. By bringing this black market into a traditional framework, it would circumvent the shady and dangerous avenues which these products are usually peddled.[25] In one scenario, a Colorado man used an AI platform to generate a piece of art which he then used to win the Colorado State Art Fair. There was no credit given to the platform and in the absence of such, most people would assume that it is just a work of digital art fully created by the author.[26] This is something that should certainly be avoided as it is both misleading and somewhat dishonest. However, when the art form is prohibited, it is necessary for savvy creators to find ulterior methods that border on illicit. Creating an outlet for AI creative capabilities would effectively eliminate this "black market" and create a safer and more honest intellectual property environment.

Another important legal nuance involves the challenges in copyright offices being able to distinguish the difference between projects that simply used AI to make the traditional process easier or more refined compared to designs that were purely generated by artificial intelligence. Assuming the United States adopts something like the United Kingdom model, should authors only be granted a short-term copyright if they used ChatGPT to wrinkle out literary deficiencies? For a non-CGW copyright, it should go far beyond typing in a simple sentence and attempting to copyright it. The process should require thought and preparation with that "flash of inspiration". For example,

24 This paragraph was written by the author and then refined by AI. This was (1) to make it sound much better and (2) to illustrate the power of AI and people working together when properly carried out.

25 Richard J. Dennis, The Economics of Legalizing Drugs, The Atlantic (Nov. 1990).

26 James Vincent, An AI Generated Artwork's State Fair Victory Fuels Argument Over "What Art Is," The Verge (Sep. 1, 2022).

an author may simply iron out some literary wrinkles with ChatGPT after painstakingly writing a book. Or, perhaps a digital artist tweaks one thing using a program such as Midjourney to add a level of polish to their work which was otherwise impossible or inefficient. Works such as these have a sufficient amount of human effort applied to grant them long-term copyright.

The copyright office has always prided itself on the subjective nature of the work that a copyright necessitates. Defining something as creative or original or independent has many interpretations which have always required non-objective judgements. In a landmark copyright case—*Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903)[27] —the U.S. Supreme Court not only expanded copyright law to include things such as advertisements but formally introduced an acceptance of subjectivity within the process. The majority decision claimed,

> It would be a dangerous undertaking for persons trained only by the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke…. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.[28]

As it stands now, persons trained only to the law are making final decisions of the worth of copyrightable material. What is of artistic merit or value to society should not be decided merely according to legal restrictions. In the context of AI-generated content, the subjective nature of copyright evaluation introduces an additional layer

27 In this case, an owner of a traveling circus paid the Courier Lithography Company, owned by George Bleisten to create an advertisement for the circus he owned. When Wallace ran out of posters, he had the Donaldson Lithography Company create perfect copies of the advertisement owned by Bleisten who then sued. The Supreme Court ruled in his favor because advertisements should be included under copyright.

28 *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

of complexity. It is not only about defining what constitutes a creative and original work but also about deciphering the extent of AI involvement required to justify granting a copyright that is distinct from the CGW designation. This element of AI involvement, being somewhat nuanced and context-dependent, further underscores the intricacy of copyright assessment.

A final nuance is that the law should deter people from targeting specific copyrighted materials or styles. This last nuance is obvious yet needs to be expressly said. If someone were to feed a machine the work of a specific artist or author in an attempt to profit off of the same market, that individual should be rejected a copyright. For example, if I were to have a computer read the Harry Potter Books and ask it to write an eight book, in that style, it clearly isn't my work. It is direct plagiarism of another intellect. Besides failing a moral, subjective test, it does not stand the test of the other copyright guidelines previously discussed. There is no creativity involved, it's unoriginal, not independently created, and is contemptible overall.

IV. Conclusion

Copyright law does not need to be radically changed. While great efforts were made in the previous passages to show the flaws within current copyright legislation, it requires only slight updates to fit the evolving technological ecosystem. As shown previously, CGW fits within the boundaries of the vast majority of copyright requirements. However, a small tweak to the human authorship is much needed. This article is not here to argue for a radical shift in what a copyright is or getting rid of it all together. Just as the law concerning intellectual property has always been advancing and shifting, another change is required to avoid any complex legal debates. This issue is pressing and changes need to be made soon. These conflicts are at the cutting edge of technological and legal discussion and while (somewhat surprisingly) no landmark cases have been brought to trial yet, it is only a matter of time. And when that case comes to fruition, the law has, as of right now, only anachronistic answers to difficult questions. As it stands, the law impedes progress and inven-

tion and it must be made more friendly to the future if it is to live up to why it was even created initially.

The Legality of Second Chances: Employment for the Formerly Incarcerated

Ella Paligo[1]

I. Introduction

Few understand the true difficulties that accompany a criminal record. Fortunately, a small group of high school students recognized the issues associated after release in the Tennessee's Sumner County Jail and set a program in motion to address the high incarceration and recidivism rates in the state.[2] Sumner County Jail would soon become home to Operation Second Chance, a teaching initiative, to educate 70 inmates with tools and resources, specifically in regard to employability preparedness.[3]

As the Operation Second Chance team gathered for their first session at the jail, anticipation and a hint of nervousness filled the air. The team explained their mission, and then it was the inmates' turn. Each inmate, with unique stories, bravely shared a slice of their life. These life stories were filled with ongoing struggles of job loss and the inability to provide for their families. Throughout the weeks,

---

1 Ella Paligo is a freshman studying Political Science with a Legal Studies emphasis at Brigham Young University with a minor in Global Women's Studies, and a Pre-Honors Program student. Ella would also like to thank her editor, Nathan Upham. He is a junior studying Political Science at Brigham Young University.

2 Paragini Amin et al., *Incarceration Trends in Tennessee* (2019).

3 *Beech High School Students Work With Inmates*, Sumner County Schools, https://www.sumnerschools.org/index.php?view=article&id=651%3Abeech-high-school-students-work-with-inmate s&catid=46 (last visited Feb. 10, 2024).

challenges emerged—attendance varied, instructions needed fine-tuning—but each challenge became a steppingstone for improvement. They adapted, ensuring every individual received the best possible experience.

The impact resonated beyond the jail's walls. The community involvement greatly rose as individuals donated suits, dresses, and business attire for the participants that symbolized dignity and a fresh start that awaited each individual. Perhaps the most piercing moment arrived as the sessions drew to a close. The instructors distributed envelopes and paper, and the room was quiet as the residents penned letters to their future selves. They filled the pages with words of encouragement, aspirations, and reminders of their progress, sealed for a future they were determined to accomplish.

After this final session, as the team handed out the finished resumes and educational booklets, an older gentleman, one of the participants carefully examined the materials handed to him. He later shared a testimony about how much the process of creating a resume and learning about interview skills meant to him. He admitted that he had not felt hopeful about his future for a long time. He thanked the team and the teachers for their dedication and patience, expressing that these tools and knowledge would undoubtedly help him reintegrate into society upon his release. The sight of this man, holding onto a letter filled with aspirations and now equipped with resources for a better future, was a testament to the impact of the project. It highlighted the transformative power of education and support, leaving a lasting impression on everyone involved. These inmates now had a fighting chance to reenter society as a contributing citizen.

Target community-led efforts such as the one at Sumner County Jail is just one example of a greater focus on preparing inmates for post incarceration. Issues regarding the staggering reimprisonment rates have become prevalent all around the country, as there has been a 500% increase of those incarcerated since 1970.[4] With one-third

4 Mass Incarceration, American Civil Liberties Union (2023), https://www.aclu.org/issues/smart-justice/mass-incarceration#:~:text=Since%201970%2C%20our%20incarcerated% 20population,of%20every%2017%20white%20boys

of the adult U.S. population possessing a criminal record, employment has become increasingly difficult to obtain.[5] This accounts to around 77 million Americans facing post incarceration employment difficulties everyday.[6] A realization of this astonishing rise has led to legislation being passed to prevent preemptive background checks. Preemptive background checks are conducted by employers to search the candidate's history, particularly focusing on criminal background. These background checks are completed by 72% of employers.[7] Individuals with a criminal record are forced to "check the box" about their past convictions, without being left any room to explain their circumstances. As of recently, 36 U.S. states and over 150 cities have enacted such legislation deemed "Ban the Box" laws.[8] These laws set the groundwork for the argument of federal protection through "Ban the Box" legislation, to combat discriminatory hiring processes.

A significant number of states and cities currently do not have "Ban the Box" laws enacted, which exposes formerly incarcerated individuals to unequal employment opportunities. Therefore, federal protection must be implemented to avoid recidivism and reimprisonment.

5 Matthew Friedman, Just Facts: As Many Americans Have Criminal Records as College Diplomas Brennan Center for Justice (2015), https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college- diplomas#:~:text=With%20as%20many%20criminal%20convictions,are%20important%20for%20the%20economy. &text=The%20number%20of%20Americans%20with,population%20has%20a%20criminal%20record

6 Criminal Records and Reentry Toolkit, National Conference of State Legislatures (March 31, 2023), https://www.ncsl.org/civil-and-criminal-justice/criminal-records-and-reentry-toolkit#:~:text=Approximately%2077%20million%20Americans%2C%20or,housing%2C%20and%20higher%20education%20opportunities.

7 Ginny Hogan, What Goes into a Pre-Employment Background Check?, Forbes (2023), https://www.forbes.com/sites/ginnyhogan/2023/05/19/what-goes-into-a-pre-employment-background-check/?sh=61 54e7b83f48

8 Beth Avery & Han Lu, Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies National Employment Law Project (2022), https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide

II Background

The United States has one of the world's highest rates of incarceration,[9] with nearly two million individuals[10] confined in a variety of facilities, including state and federal prisons, local jails, juvenile detention centers, territorial prisons, immigration detention centers, involuntary commitment, Indian Country, military prisons, and more.[11] After being released from prison, two out of three former prisoners are arrested again within five years.[12] This amounts to more than 70 percent returning to correctional facilities within that short time period.[13] This is directly related to the immeasurable number of barriers faced by those released from correctional facilities, making reintegration into society incredibly difficult. These hurdles include lack of housing, mental health challenges, substance misuse issues, financial and familial problems, and other health-related issues. One of the largest barriers continues to be finding employment.[14]

9 Incarceration Rates by Country 2024, World Population Review, https://worldpopulationreview.com/country-rankings/incarceration-rates by-country

10 E. Ann Carson, Prisons Report Series: Preliminary Data Release Bureau of Justice Statistics (2023), https://bjs.ojp.gov/library/publications/prisons-report-series-preliminary-data-release#:~:text=The%20U.S.%20priso n%20population%20was,increase%20from%202021%20(1%2C205%2C100)

11 Wendy Sawyer and Peter Wagner, Mass Incarceration: The Whole Pie 2023, Prison Policy Initiative (2023), https://www.prisonpolicy.org/reports/pie2023.html

12 Incarceration, Healthy People (2023), https://health.gov/healthypeople/priority-areas/social-determinants-health/literature-summaries/incarceration#:~:text

13 Wendy Sawyer and Peter Wagner, Mass Incarceration: The Whole Pie 2023, Prison Policy Initiative (2023), https://www.prisonpolicy.org/reports/pie2023.htm

14 Barriers to Successful Re-Entry of Formerly Incarcerated People, The Leadership Conference on Civil and Human Rights (2017), https://civilrights.org/resource/barriers-to-successful-re-entry-of-formerly-incarcerated-people/#:~:text=Once%20rel eased%2C%20formerly%20incarcerated%20people,public%20housing%20and%20student%20loans

Even if someone with a criminal record meets all the criteria to perform a job, data shows that employers are more likely to choose the applicant who has not spent time inside a correctional facility.[15] Additionally, in states or cities without "Ban the Box" legislation, it is within the federal legal guidelines of a company or organization to not hire someone due to their criminal background. This is not viewed as discrimination, but rather a right of the employers or hiring committee. While there may be limitations on how much the record companies can consider, there is no federal law prohibiting the initial practice of not reviewing an application on the basis of criminal history.[16]

The inability of formerly incarcerated persons to obtain a job is one of the most prominent issues currently facing our criminal justice system(s). Maintaining employment allows for stability and security, which drastically improves the well-being of individuals. Jobs provide the financial means to support not only personal needs but to provide for spouses and children as well. This is exceedingly important as over half of those incarcerated are a parent.[17]Having a job significantly lowers the chances of being unhoused and misusing substances, such as drugs and alcohol. Additionally, employment can provide healthcare, mental health resources, and childcare services. Due to the impact employment has on the wellbeing of those leaving the criminal justice system, employment directly lowers the chances of recidivism. As those released from correctional facilities acquire jobs, fewer crimes are committed resulting in safer communities. Furthermore, less money comes out of taxpayer's pockets for correctional facilities that could be used for education or safer roads, better family and friend relationships, and a decrease in the

15 Criminal Conviction Discrimination Laws in Employment, Justia (October 2023), https://www.justia.com/employment/employment-discrimination/criminal-conviction-discrimination

16 Arrest and Conviction Records: Resources for Job Seekers, Workers and Employers, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/arrestandconviction

17 Lauren E. Glaze & Laura M. Maruschak, Parents in Prison and Their Minor Children, Bureau of Justice Statistics (March 30, 2010), https://bjs.ojp.gov/content/pub/pdf/pptmc.pdf

correctional facility populations. Employing formerly incarcerated people not only improves the criminal justice system(s), but society as a whole as a large majority of citizens face benefits.

It is crucial that those with a criminal record are protected in the job application process, to best maximize their chances of receiving a job offer. Federal legislation must be enacted to safeguard rights that are indispensable to every United States Citizen.

A. Key Concepts

There are a variety of historical precedents and definitions that are crucial in understanding the magnitude of the ideas discussed further in this paper. These concepts are explained in depth below.

1. Mass Incarceration

Mass incarceration is defined as, "A network of policing, prosecution, incarceration, surveillance, debt, and social control that is rooted in, builds upon, and reproduces economic and racial inequality and oppression. Some refer to this network as the carceral state, the penal state, or the criminal legal system." In understanding its context in America, it is "...the fact that the U.S. incarcerates more people than any nation in the world, including China. And the U.S. is also the leader in the prison population rate. America's approach to punishment often lacks a public safety rationale, disproportionately affects minorities, and inflicts overly harsh sentences."[18] The massive influx of prison population started in the 1970's under President Nixon's "war on drugs" and "tough on crime" approaches. Prison population continued to climb during the leadership of President Reagan, President Clinton, and most recently President Trump. It

18 What We Mean by "Mass Incarceration", Institute to End Mass Incarceration (2021), https://endmassincarceration.org/what-is-mass-incarceration/#:~:text=%E2%80%9CMass%20incarceration%E2%80%9D%20refers%20to%20the,us%3A%20poor%20people%20of%20color

would require decades of progressive reform to undo the harsh reality that has been taking shape for over the past 50 years.[19]

2. Recidivism

Furthermore, recidivism plays a key role in understanding the issue at stake. It is best understood as, "...one of the most fundamental concepts in criminal justice. It refers to a person's relapse into criminal behavior, often after the person receives sanctions or undergoes intervention for a previous crime."[20] Similarly to mass incarceration, the U.S. also has one of the highest recidivism rates nationally, with 76.6 percent undergoing the criminal justice process another time.[21] It is highly common for an individual to reoffend within a few years and be placed back in correctional facilities again.

3. Employment Discrimination

A final concept to understand is employment discrimination in relation to criminal convictions. It is stated that,

> "It can be difficult for those with a criminal record of any kind to find employment. Many employers believe that once a person has been convicted of a crime, that person will always be unreliable. Even employers in low-risk industries tend not to hire applicants with criminal records. This type of discrimination fails to account for the many people who learn from their mistakes. To varying degrees, employers may legally consider a worker's criminal history as part of the application process. There are no federal laws that

19 Louise Root, The Key to Any Successful Relationship Is Communication: Doctors and Lawyers, Take Note, 57 Hous. L. Rev. 1135 (2020).

20 Recidivism, National Institute of Justice, https://nij.ojp.gov/topics/corrections/recidivism#:~:text=Recidivism%20is%20one%20of%20the,intervention%20for%20a%20previous%20crime.&text=oneword%2FShutterstock.com%20(see%20reuse%20policy) (last visited Dec. 12, 2023)

21 Liz Benecchi, Recidivism Imprisons American Progress, Harvard Political Review (August 8, 2021), https://harvardpolitics.com/recidivism-american-progress/

> explicitly prohibit employment discrimination based on a criminal record."[22]

Employment discrimination takes place every day as the formerly incarcerated are denied just the review of their initial application.

B. Legislation—Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964, "Protects employees and job applicants from employment discrimination based on race, color, religion, sex and national origin."[23] This act protects minority groups from being discriminated against in the employment environment.

Numerically speaking, a minority is defined as the smaller of the two, or less than half. By this definition, formerly incarcerated people are a minority group as they make up 5.1% of the population in the United States.[24] They also fit the minority definition by being overrepresented in criminal justice systems, as reoffenders repeatedly going through the legal cycle.

Simultaneously, this population is economically and socially disadvantaged, especially when viewing the majority.[25] Therefore, when employers do not view job applications of former inmates, the employer discriminates against a minority group, which should be viewed as violating Title VII of the Civil Rights Act.

---

22 Criminal Conviction Discrimination Laws in Employment, Justia (2023), https://www.justia.com/employment/employment-discrimination/criminal-conviction-discrimination/

23 Title VII of the Civil Rights Act of 1964, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964 (last visited Nov. 4, 2023).

24 Thomas P. Bonczar & Allen J. Beck, Lifetime Likelihood of Going to State or Federal Prison, Bureau of Justice Statistics (March 1997), https://bjs.ojp.gov/content/pub/pdf/Llgsfp.pdf

25 Hannah Bailey, Overrepresentation in Criminal Justice Systems LSE Undergraduate Political Review (2018), https://blogs.lse.ac.uk/lseupr/2018/01/25/overrepresentation-in-criminal-justice-systems/applications) was birthed as a response to the structural discrimination faced by people with criminal records."

A number of states have recognized this discrimination and have introduced "Ban the Box" legislation in response.

> "For many job applicants around the country, one question blocks them from gainful employment and economic opportunity. A single question, often posed as a checkbox on the front of most job applications, asks about an applicant's criminal history. For many employers, it has become a way to weed out applicants before ever considering qualifications such as education and job history. This practice is widespread, and its effects on job applicants and their communities are staggering. A movement to "Ban the Box" (remove the checkbox from applications) was birthed as a response to the structural discrimination faced by people with criminal records."[26]

These laws have been established to protect the formerly incarcerated in the initial application and remove the stigma associated with possessing a criminal record.

With "Ban the Box" legislation, someone with a record is much more likely to receive a callback, and in return a job.

This legislation is not banning background checks for employers from asking about criminal history eventually, but rather giving an equitable chance to every applicant to explain their circumstances and history without their story being reduced to a single box. It is vital that this legislation is federally implemented, to give each person a fighting chance and protect inalienable rights. This paper will further argue how under law, the disregarding of applicants with a previous record is discrimination. In addition, it will examine how families and communities are harmed, and the pockets of taxpayers face negative impacts.

26 Daryl V. Atkinson & Kathleen Lockwood, *The Benefits of Ban The Box* (2014)

III. Proof of Claim

A significant number of states and cities currently do not have "Ban the Box" laws enacted, exposing formerly incarcerated individuals to unequal employment opportunities.

We must therefore implement protections on a federal level to avoid recidivism and reimprisonment. It is critical to remember that those with a criminal record are overlooked when it comes to seeking employment. This results in detrimental effects to ex-convicts' well-being. Ultimately, one of the largest consequences is the inability of individuals to break out of the criminal justice system. These factors continue to add to America's high recidivism rates and incarceration numbers, being one of the world leaders in this area.

In addition to "Ban the Box" legislation, there are a variety of other measures that must be implemented to ensure ultimate protection while also analyzing various viewpoints of this argument. In this section, it will be discussed the ways that this issue can be addressed through legislation. This will further explore "Ban the Box" laws, what it would look like with a federal implementation, and Congress's role in enforcing said legislation. From there, this paper will expound on Title XII of the Civil Rights Act of 1964 being amended to include a sixth class that is protected from discrimination. It will then explain how the U.S. Equal Employment Opportunity Commission can utilize new regulations through their respective agencies to adhere to these newly implemented standards and rules, and their legal responsibility in upholding these changes. Additionally, cases and examples that demonstrate both legal and extralegal model precedent will be used to validate the changes being suggested.

There will also be a close examination of the consequences of these large changes, and the necessary exceptions to the laws that will remain in effect which are crucial for the protection of other vulnerable groups of people.

A. "Ban the Box" Legislation

To begin, successful "Ban the Box" legislation is one of the most crucial components in attempting to combat discrimination against

ex-convicts in the hiring process. It is important to address the misconceptions surrounding "Ban the Box" laws. People commonly assume that this prohibits employers from ever inquiring about an applicant's criminal history or background when this is not the reality. Instead, under "Ban the Box" legislation, hiring officials cannot ask about criminal history in the initial application stage giving every individual hiring an equitable chance rather than immediately discounting them for their past. As of today, 37 states have enacted these laws.[27] While this is a step in the right direction, it leaves individuals in 13 states virtually unprotected. When applicants are required to "check the box" on their application detailing their history, the likelihood of receiving a call back or interview significantly decreases. Research has continually demonstrated the systematic barriers that are correlated with the formerly incarcerated being able to find employment opportunities.[28]

It has been argued that, "[The main] objective [of the "Ban the Box" movement] was to get people with criminal records to become organized and active in the fight against mass incarceration and the second-class status that comes with a criminal record."[29] A large majority of applicants feel that they would not even be considered in the process, and therefore greatly reduce the number of jobs that they seek. This legislation is fundamental in aiming to reduce the second-class status that has been given to this group of people and must be passed by Congress so that it is federally protected. People who are striving to turn their lives around do not deserve to be disregarded in every aspect.

27 Beth Avery & Han Lu, Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies National Employment Law Project (2022), https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/

28 Harry J. Holzer, Steven Raphael & Michael A. Stoll, Employment Barriers Facing Ex-Offenders (2003).

29 Daryl V. Atkinson & Kathleen Lockwood, The Benefits of Ban the Box - A Case Study of Durham, NC - The Southern Coalition for Social Justice, Policy Commons (2014), https://policycommons.net/artifacts/2191301/the-benefits-of-ban-the-box/2947278/

There has been resounding success following different states implementing this legislation. As reported, in Washington, D.C., following the implementation of the fair chance hiring legislation, there was a notable rise in the hiring of applicants with records, both in absolute numbers and as a proportion of total hires. Specifically, there was a 33% increase in the hiring of individuals with records, who then made up 21% of all new hires in the district.

Additionally, in North Carolina, since the policy was enacted two years ago, there has been a nearly threefold increase in the number of applicants with criminal records being recommended for employment. This surge led to a rise in hires from 35 to 97. Furthermore, on average, 96.8% of those recommended for hire who have records are successfully employed.[30] To note the success even further, "Ban the Box" legislation appears to be working, based on the fact that it has become incredibly easier for individuals with criminal records to find and retain employment.

B. The Second Chance Act (SCA)

In examining precedent, it has been recognized by Congress for over a dozen years the need for legislation that aids in rehabilitation and reintegration. During the 2008 April legislative session, the "Second Chance Act (SCA)" was signed into law. Being a novel piece of legislation, it was unique because it gained bipartisan support, as both Republican and Democrat lawmakers recognized their role in seeking a remedy for this injustice. In simple terms, it allows for federal funding to support methods that decrease reoffending and enhance public safety, while also cutting down on the expenses related to corrections for state and local governments."[31] Fifteen years ago, individuals recognized the inequalities that were being perpetrated by the government and sought a way to resolve the issues that are caused by mass incarceration. This act acknowledged

30 Michael Hartman, Ban the Box, National Conference of State Legislatures (2021), https://www.ncsl.org/civil-and-criminal-justice/ban-the-box

31 Greg A. Greenberg & Robert A Rosenheck, The Second Chance Act (April 2018)

that lack of employment was one of the greatest barriers to the likelihood that someone would "re-offend or be responsible citizens."[32]

While this act was a step in the right direction, it is not the final legislative destination. It is correct that employment is one of the most significant deciding factors regarding repeat offenses; and programs that provide support, resources, and opportunities are incredibly valuable and needed when it comes to those released from correctional facilities.

C. The "Fair Chance to Compete for Jobs Act"

The "Fair Chance to Compete for Jobs Act" also recognized the importance of reducing employment barriers. Signed into law by President Trump in 2020, this act restricts how agencies can ask for criminal history information until after a conditional job offer has been made."[33] It also gives applicants more liberty, giving them a citizen suit provision, the ability to file complaints or requests when they believe that the hiring body is not complying with this act. While this piece of legislation made a great stride in equity, the limitations for criminal history records are not all-encompassing and do not outright ban an employer from inquiring about any previous records.

The most effective way to reduce the chances of someone reoffending due to lack of employment is to make it so that the act of seeking employment does not raise challenges. Federal "Ban the Box" that is enacted, will give ex-felons the best chance as they will be given the right to job opportunities, as their background will not disqualify them from ever receiving a second chance. It has been proven that both sides of the political spectrum support second-chance

32 Greg A. Greenberg & Robert A Rosenheck.

33 Fair Chance To Compete for Jobs, Federal Register (2023), https://www.federalregister.gov/documents/2023/09/01/2023-18242/fair-chance-to-compete-for-jobs#:~:text=L.,a%2 0conditional%20offer%20of%20employment

legislation.[34] This is because of learned knowledge that the staggering statistics in relation to the United States criminal justice system must be resolved. In doing so, the best futures possible can be provided for ex-convicts, families, communities, taxpayers, and the legal system as a whole.

D. Expanding Protection

While legislative fixes, such as The Second Chance Act, Fair Chance to Compete for Jobs Act, and "Ban the Box" laws, are an incredibly effective way to combat disparities, there is still a lack of oversight that can occur when groups of people are not protected under Constitutionality. Title VII of the Civil Rights Act of 1964 has demonstrated the protection for diverse classes of individuals regarding employers and the hiring process. This encompasses discrimination based on color, religious affiliation, sex, and nationality.[35] This act has significantly impacted the lives of many by providing a more egalitarian opportunity for those previously affected by personal biases. Employers must focus solely on job-related criteria when deciding which applicants are suitable for the position.[36]

A protected class could be described as specific categories of individuals safeguarded by anti-discrimination laws including women, older workers, people with disabilities, minorities, and others.[37] As

34 With the Midterm Elections Fast Approaching, New Public Opinion Research From Leading Republican and Democratic Polling Firms Shows Overwhelming Bipartisan Support for Criminal Justice Reforms to Reduce Incarceration, fwd.us, https://www.fwd.us/news/2022-criminal-justice-poll-statement/# (last visited January 30, 2024)

35 Ethnic/National Origin, U.S. Department of Labor, https://www.dol.gov/general/topic/discrimination/ethnicdisc#:~:text=Title%20VII%20of%20the%20Civil,religion% 2C%20sex%20or%20national%20origin (last visited January 30, 2024)

36 The Supreme Court's Landmark Ruling Concerning LGBTQ Employees, Smart HR (September 28, 2020), https://www.smarthrinc.com/the-supreme-courts-landmark-ruling-concerning-lgbtq-employees/

37 HR Glossary, SHRM, https://www.shrm.org/topics-tools/tools/hr-glossary (last visited February 22, 2024)

of now, there are only five classes that are protected under this title. In the past, the Supreme Court of the United States of America has expanded marginalized groups receiving protection, as the factors involving employment decisions have changed and evolved.

This expansion has been evident in the cases of Bostock v. Clayton County, Georgia, Altitude Express, Inc. v. Zarda, and R.G. and G.R. Harris Funeral Homes, Inc. v. EEOC.[38] In each of these cases, individuals argued that they were discriminated against on the basis of sex. Their definition of sex went beyond the scope of the 1963 definition, by including plaintiffs who were members of the LGTQ+ community and fired after their employers learned of this. The employers argued that Title XII did not cover their sexual or gender orientation. The Supreme Court disagreed and held that Title VII of the Civil Rights Act prohibits employers from firing an individual merely because they are gay or transgender.[39] The Court decided that public meaning had evolved from the time that the statute was originally put into effect, and those meanings can and should evolve to reflect current situations.

Protective classes have expanded over time to include those with disabilities, people with HIV/AIDS status, LGBTQ+ individuals, and more. It is now the time for Congress to include those with a criminal background as a protected group of individuals. As this is implemented, there will be greater accountability for granting every person an equitable chance in the hiring process.

The U.S. Equal Employment Opportunity Commission (EEOC) plays a unique and valuable role when it comes to ex-felons seeking employment. This organization is "responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex

38 Bostock v. Clayton County, GA / Zarda v. Altitude Express / RG & GR Harris Funeral Homes Inc v. EEOC, Lambda Legal (2023), https://lambdalegal.org/case/bostock-zarda-harris/

39 Sexual Orientation and Gender Identity (SOGI) Discrimination, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination#:~:text=As%20a%20general%20 matter%2C%20an,sexual%20orientation%20or%20gender%20identity (last visited February 13, 2024)

(including pregnancy and related conditions, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information."[40] The EEOC protects the majority of organizations with 50 or more employees, employment agencies, and labor unions. They are essential in protecting the rights of employees when it comes to cases of discrimination and have the power to intervene as they see fit. While the EEOC protects a variety of groups that have historically been oppressed and discriminated against, there is a key group of individuals missing from their jurisdiction, those with a criminal record. As stated, Title VII of the Civil Rights Act of 1964 must implement a new protected class, with that class being those with a criminal record. When this goes into effect, the EEOC plays a critical role in overseeing this transition happens smoothly and lawfully. As "Ban the Box" laws and federal protection are executed, the EEOC will be the primary organization for seeing that this new class of people is indeed protected and prosecuting any employers or organizations that do not adhere to these rules, acting as a resource and advocate for this group of individuals. It is important to note that as with any piece of law or legislation, there are necessary exceptions made. In the new changes that are outlined above, there are times when lawful discrimination must take place so as to not infringe upon the rights and protections of others. In several cases, this is referred to as Bona Fide Occupational Qualification or BFOQ laws, for short. It is explained that,

> "42 U.S. Code § 2000e-2 allows for an employer to discriminate against employees and potential employees "on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona

40 Protections Against Discrimination and Other Prohibited Practices, Federal Trade Commission (2021), https://www.ftc.gov/policy-notices/no-fear-act/protections-against-discrimination

> fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[41]

This could be in the instance of churches who hire pastors and will only hire those that are of that specific religion. Additionally, the new protections will not take away legislation from other vulnerable groups. This means that a registered sexual offender would not be able to even be considered for a job that involves minors. The laws that are already enacted to ensure safety and protection in the workplace would not be negatively impacted by "Ban the Box" legislation and federal protection.

E. Federal Law Outline

As previously mentioned, a number of cities and states have already enacted "Ban the Box" legislation. These laws lay a groundwork for what federal protection would be enacted. Utah is a prime example of this. As conveyed in Utah Code 34-52-201, it explicitly prohibits an employer from not reviewing an application on the basis of past criminal history or convictions. This statute additionally outlines exceptions to the rule, such as individuals trying to work with children.[42] By having a standard law demonstrated by this Utah Code passed on a federal level, there will be a consistent guideline across the country, giving every person an equitable opportunity to obtain employment.

IV. Conclusion

The current state of mass incarceration in the United States, coupled with high rates of recidivism and pervasive employment discrimination against individuals with criminal records, calls for

41 Bona Fide Occupational Qualification (BFOQ), Cornell Law School, (2021), https://www.law.cornell.edu/wex/bona_fide_occupational_qualification_(bfoq)#:~:text=42%20U.S.%20Code%20% C2%A7%20 2000e,the%20normal%20operation%20of%20that

42 Utah Code Ann. § 34-52-201 (2023

immediate federal intervention. The system of mass imprisonment, characterized byextreme rates of incarceration among specific demographics demands a reevaluation. Initiatives, such as "Ban the Box" legislation and recent federal acts, have highlighted the need to level the employment playing field for those with criminal histories.

A significant number of states and cities currently do not have "Ban the Box" laws enacted. Therefore, we must introduce federal protection to avoid recidivism and reimprisonment. The absence of uniformity in policies across states contributes to unequal opportunities for individuals reentering society after incarceration. The disparate treatment based on preemptive criminal background checks creates an unfair barrier to employment, creating a cycle of recidivism and reimprisonment. The lack of federal laws explicitly prohibiting employment discrimination based on criminal records further exacerbates this issue.

The implementation of federal protection and legislation is imperative to rectify this situation. Such legislation would provide equitable opportunities for those with criminal histories during the job application process, offering a chance to reintegrate into society successfully.

The potential outcomes of federal intervention in employment discrimination against individuals with criminal records are manifold and impactful. First, it would promote a more inclusive job market, where past convictions do not disproportionately hinder opportunities. Second, by increasing employment among formerly incarcerated individuals, the rates of recidivism could notably decrease. Third, this shift would alleviate the strain on the criminal justice system, fostering a society where second chances are valued and repeat offenses diminish, ultimately leading to a reduction in the prison population, and economically benefiting all of America.

In essence, federal protection and legislation are essential to create a more just and equitable system for individuals with criminal backgrounds. By creating fair opportunities in employment, such measures would not only transform individual lives but also contribute to the larger goal of reforming the criminal justice system and building a more rehabilitative and inclusive society.

Clearing the Air: Addressing Utah's Pollution Crisis Through Legal Reform and Environmental Justice

Eduardo A. Rios[1] *& Catherine Patino-Celedon*[2]

I. Introduction

Structural racism and economic hardship are making it more likely for Black and Latino residents to live in polluted communities.[3] Chicago's south side is one community that is notorious for the adverse health effects that its residents suffer from. Cheryl Johnson and Peggy Salazar, vocal advocates residents of this very community recount the family members and friends who have developed asthma citing the presence of landfills, hazardous waste sites, and leaking underground storage tanks in the area. Oscar Sanchez, the co-founder of the Southeast Youth Alliance (SYA), one of south side's community advocacy organizations mentions that pollutive substances are found in the area because zoning allows for that to

---

1 Eduardo Rios is a student at Brigham Young University, Marriott School of Business majoring in Global Supply Change Management with a minor in Environmental Science & Sustainability. He is planning to attend graduate school in 2026.

2 Catherine Patino-Celedon is a student at Brigham Young University studying Psychology with minors in Sociology, Global Women's Studies, and Civic Engagement Leadership. She is planning to attend Law School in the fall of 2026.

3 City of Chicago Department of Public Health, "Air Quality and Health Report" (City of Chicago, 2022), https://www.chicago.gov/content/dam/city/depts/cdph/statistics_and_reports/Air_Quality_Health_doc_FINALv4.pdf.

happen.[4] The SYA has also been critical of Chicago's Department of Public Health (CDPH) and its unwillingness to head community input and environmental complaints, ultimately leaving many neighborhoods to be under-resourced.[5] Many other areas of the United States share a similar fate to Chicago's south side. As of January 2023, Utah residents are breathing some of the nation's worst air. Brian Moench, founder of the Utah Physicians for a Healthy Environment organization, declared the air quality in Utah as a public health emergency.[6] While community organizing is an essential part of driving change, the development of legislation is also a key ingredient in combating air pollution.

II. Background

The first legal attempt in the United States involving air pollution control was initially passed in 1955. Known as the Air Pollution Control Act, the main objective was to federally fund and direct research into air pollution. In 1963 amendments were made to the Clean Air Act (CAA) leading to the first federal legislation for air pollution control to establish a program for research about techniques for monitoring and controlling air pollution. Then, in 1967 the Air Quality Act was enacted. This act expanded federal government activities. Enforcement proceedings were initiated in areas subject to interstate air pollution transport, extensive ambient monitoring, stationary source inspections, studies on air pollutant emission inventories, monitoring, and control techniques to minimize air pollution. In the CAA of 1970, the National Ambient Air Quality Standards (NAQS) were established in the state's implementation plans. New Source Performance Standards (NSPS) were also

4 Environmental justice in Chicago: It's been one battle after another Be a Force for the Future, https://www.nrdc.org/stories/environmental-justice-chicago-its-been-one-battle-after-another (Last visited Jan 30, 2024)

5 Build a community where all youth are safe, Strong & valued SYA, https://southeastyouthalliance.org/ (Last visited Jan 30, 2024)

6 Paul Foy, Sickening fog settles over Salt Lake City area, USA TODAY, Jan. 13, 2023

established to regulate emissions, and enforcement authority was increased. Amendments were added to the CAA of 1970 in 1977 for provisions to the prevention of significant deterioration. More amendments were added in 1990 such as the authorization for programs for Acid Deposition Control, a program for 189 toxic pollutants control, permit program requirements, modifications to NAQS, expanding enforcement authority, and programs to phase the use of chemicals that deplete the ozone layer.[7]

The CAA is a federal law that regulates air emissions from stationary mobile sources. Under the CAA, the Environmental Protection Agency (EPA), a federal agency, may establish national ambient air quality standards to regulate public health and welfare and emissions of hazardous pollutants. CAA focuses on six primary pollutants: Carbon monoxide (CO)[8], lead (PB)[9], particulate matter (PM)[10], ozone (0_3)[11], nitrogen dioxide (NO_2)[12], and sulfur dioxide (SO_2).[13] The

7 Evolution of the clean air act | US EPA United States Environmental Protection Agency, https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act (last visited Oct 25, 2023)

8 Colorless, odorless, flammable gas formed by incomplete combustion of carbon.

9 Lead is a naturally occurring element that is toxic to humans, causing health effects.

10 Particulate matter, or particle pollution are solid particles that can be found in the air. For example, dust, dirt, soot, and smoke are inhalable particles that can be seen with the naked eye.

11 Ozone is a highly reactive gas that is both natural and man-made. The tropospheric or ground level zone is where the air we breathe is. This ozone concentration occurs everywhere, not just in highly urbanized areas.

12 This is a highly reactive gas that gets in the air from the burning of fossil fuels—emissions from cars, trucks, buses, power-plants, and off-road equipment.

13 Sulfur Dioxide is of great concern because this gas is an indicator for a larger group of gaseous sulfur oxides which are found in the atmosphere. This gas makes its way into the atmosphere through burning of fossil fuels.

EPA sets NAQS for these criteria pollutants that harm public health and the environment.[14]

CAA was passed in 1963 and amended to address growing problems such as acid rain, ozone depletion, and toxic air pollution. Congress passed the CAA to "protect and enhance the quality of the Nation's air resources to promote the public health and welfare and the productive capacity of the nation."[15]As a means to achieving that purpose, sections 111[16]and 112[17] direct the EPA to set national emissions standards for new and existing stationary sources.[18] Section 111 highlights new source performance standards, having nationally uniform standards, applying to all sources nationwide. Section 112 underscores hazardous air pollutants released during any operations and the control technology necessary to reduce the maximum degree of emissions.[19]

Any interested party has the right to file a petition for rulemaking. The Administrative Procedure Act (APA) provides these petitions so the public can express desire and concern for new regulations or

14 Criteria air pollutants | US EPA United States En

15 Research guides: Clean air act legal research: Overview - Clean Air Act Legal Research - Research Guides at Elisabeth Haub School of Law, Pace University, https://libraryguides.law.pace.edu/cleanairact#:~:text=The%20CAA%20was%20intended%20%22to,actions%20to%20prevent%20air%20pollution. (last visited Jan 30, 2024)

16 United States Code, 2013 Edition Title 42 - The Public Health and Welfare Chapter 85 - Air pollution prevention and control subchapter I - Programs and Activities Part A - Air Quality and Emission Limitations Sec. 7412 - Hazardous air pollutants From the U.S. Government Publishing Office, www. gpo.gov

17 *Id.*

18 42 - The Public Health and Welfare (2013)

19 Clean Air Act Overview Environmental compliance information for energy extraction, https://www.eciee.org/caa-gt.php#:~:text=Non%2Dmajor%20sources%20subject%20to,program%20when%20issuing%20the%20standards. (Last visited Jan 30, 2024)

modifications to regulations in effect.[20] The CAA, like many federal statutes, relies upon the cooperation of state environmental agencies for its enforcement. When a state does not cooperate with the Clean Air Act, the federal government is obligated to step in to enforce the Act and impose potential sanctions on states and infracts.[21] The Act calls for the removal or decrease of funds granted to states that do not cooperate with this federal environmental statute.[22]

As the cornerstone of environmental legislation in the United States, CAA has brought significant benefits to Utah residents. By mitigating pollution and reducing harmful emissions, this legislation has played a vital role in safeguarding the health of Utahns. Through that legislation, the prevalence of pollution-related health problems has been substantially reduced, such as respiratory diseases, and has contributed to a decline in premature deaths. A notable beneficiary of these health improvements is the state's youth, as cleaner air ensures a healthier environment for them to grow and thrive. Beyond its positive health effects, the CAA has also boosted productivity in Utah's workforce, leading to a more robust and efficient economy. By prioritizing air quality, this legislation has created a healthier and more productive population, which, in turn, bolsters the state's economic growth.[23]

As addressed previously, ethnic and racial communities disproportionately experience the harmful effects of air pollution. In a study conducted by the University of Utah College of Engineering, it

20 How to file a petition for rulemaking: Center for Effective Government How to File a Petition for Rulemaking | Center for Effective Government, https://www.foreffectivegov.org/node/4061#:~:text=The%20APA%20provides%20for%20petitions,to%20regulations%20already%20in%20effect. (Last visited Jan 30, 2024)

21 Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497 (2007); Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981); Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979); Natural Res. Def. Council v. EPA, 863 F.2d 1420 (9th Cir. 1988); United States v. Ohio, 535 F. Supp. 98 (S.D. Ohio 1982).

22 Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism and Conditional Spending After NFIB v. Seblius

23 The Clean Air Act: Improving public health at an affordable cost

was found that schools serving low-income students were disproportionately exposed to worse air quality during relatively clean, moderate inversion and major inversion days.[24] Similar disparities are observed among homeless populations, significantly impacted by air pollution. Nine out of ten homeless individuals have sought medical attention due to the effects of contaminated air.[25] Understanding the demographics affected by air pollution shows that NAQS are not being met, underscoring the urgent need for targeted actions to protect vulnerable communities.

According to expert evaluations, air pollution in Utah results in an annual toll of 2,480 to 8,000 premature deaths and diminishes the median life expectancy by 1.1 to 3.6 years. The economic ramifications of air pollution in Utah are staggering, ranging from $0.75 to $3.3 billion annually, accounting for up to 1.7% of the state's gross domestic product.[26] The CAA, intended to protect human health and the environment from pollutants, has not effectively addressed the needs of low-income, racial, and ethnic communities. These communities continue to bear a disproportionate burden of air pollution, showing a significant gap in the Act's implementation. To rectify these inequalities, this article advocates for a more aggressive approach by the Utah state government. Specifically, it calls for not only the full enforcement of federal requirements but also the adoption of standards that are more stringent than those set by the Environmental Protection Agency (EPA). Such measures are crucial to ensuring that the health and environmental injustices facing these vulnerable communities are adequately addressed.

24 Social disparities in Air Pollution The John and Marcia Price College of Engineering at the University of Utah, https://www.price.utah.edu/2020/05/18/social-disparities-in-air-pollution (Last visited Oct 24, 2023)

25 Angelina L. DeMarco et al., Air Pollution-Related Health Impacts on Individuals Experiencing Homelessness: Environmental Justice and Health Vulnerability in Salt Lake County, Utah, 17 Int'l J. Envtl. Res. & Pub. Health 8413 (2020).

26 Air pollution costs Utahns billions annually and shortens life expectancy by two years

A. Limitations to the Clean Air Act

Due to the limited ability of the CAA to address air pollution hotspots and climate change, this act is becoming weaker. Essentially, a federal standard of maximum levels of air pollutants in the outdoor air has been made. Each state must develop plans that outline how the federal standards will be met. These are called State Implementation Plans (SIP). This regulation requires federal approval for SIPs to regulate air pollutants; however, regulation is very stringent on a large scale, and not on a smaller regional scale.[27] Stringent on a larger scale shows that SIPs are required of the states to meet NAQS and other standards of the CAA.

> 1. States are given the responsibility due to the nuance and complexity of the way different regions across the countries are being affected by pollutants. All plans are approved by the federal government once States have created something that is going to reduce pollutants in the state. States are given financial assistance if needed to combat this issue and different resources to be successful. Federal EPA revises NAQS and SIPs under the CAA periodically to make sure states are still meeting the standards. However, regulation is not stringent on a smaller regional scale, because States are not always keeping up with regulation and federal standards, they are falling short.
>
> 2. Health and the environment continue to be harmed because of regulation issues, despite many efforts to meet NAQS. This is due to distance travel and industry facilities. There are continuous lawsuits against major polluters and regulatory challenges, but stricter laws are yet to be enforced.

Another limitation focuses on the Utah Physicians for Healthy Environment (UPHE), a non-profit organization that targets pollution-related reasons that affect Utah residents' health. Diesel Power Gear, LLC, was found to be tampering with emission control devices,

27 Limitations of the Clean Air Act Harvard Undergraduate Law Review

violating the CAA. This tampering contributed to air pollution and environmental problems, known to harm the resident's health.[28] The negative health effects can be generalized and will be discussed further in later sections. UPHE was able to successfully challenge this company resulting in Diesel Power Gear, LLC, paying $*760,000* in civil penalties, having to install defeat control devices, and having to sell inoperable vehicles due to emission control systems.[29] The environment in Utah does not allow for further addition of harmful pollutants. UPHE v. Diesel Power Gear LLC is one example of many where regulation was not stringent enough concerning the violation committed by this company. However, the emission control devices were finally installed.

Similarly, Tap Worldwide LLC (TAP) is a business that distributes automotive vehicle parts. UPHE brought an action against TAP for allegedly selling and installing aftermath defeat parts, vehicle parts that bypass defeats, and/or contributing to inoperative emission control devices in motor vehicles. UPHE brought the suit under the CAA and the Utah SIP due to the practice of selling and installing these parts. However, TAP filed to dismiss the case due to the CAA emission standard being unequivocally defined and setting a legal limit on the release of pollutants, leaving the definition narrow.

The motion to dismiss the case was denied, allowing UPHE to seek civil penalties and other relief due to these sales.[30] The entire reasoning behind TAP wanting to dismiss the case was because UPHE as an organization is not authorized under the CAA to enforce anti-tampering prohibitions. However, the CAA allows any person to commence a civil action against violations of emissions standards, or a person who leads modifications of major emitting

28 Utah Physicians for a Healthy Env't v. Diesel Power Gear, LLC, 21 F.4th 1229 (10th Cir. 2021)

29 Utah Physicians for a Healthy Env't v. Diesel Power Gear, LLC, 2:17-cv-00032-RJS (D. Utah Jul. 6, 2022)

30 *UTAH PHYSICIANS FOR HEALTHY ENVIRONMENT INC v. TAP WORLDWIDE LLC (2022)*,

facilities without permits. Power then resides in the courts to enforce emission standards.[31]

In this case, the definition of an "emission standard or limitation" was crucial to the case due to the power to bring the case resides in the violation of emission standards. TAP was almost successful in dismissing this case, a case that should not have even occurred due to the legality of tampering with these types of defeated parts. EPA should extend standards to allow citizens to carry lawsuits like this and not stall and attempt to dismiss cases.

Additionally, long-distance travel is a large contributor to air pollution in Utah. Mobile sources like cars and trucks account for 50% of Utah air pollution according to the Utah Department of Environmental Quality. This contribution to air pollution is especially worse in the winter, threatening respiratory and cardiovascular systems with the potential to kill individuals.[32] There are continuous lawsuits against major polluters and regulatory challenges, but stricter laws are yet to be enforced.[33] Further on in this article, we will mention the devastating variety of health effects individuals in Utah face due to pollution. Despite the continuous information found on the effects of pollution, and the communities most affected, we are yet to see stricter laws to significantly reduce air pollution.

B. Successes of the Clean Air Act

Pollutants in Utah are harming residents' health; despite economic greed, the CAA has helped not only Utah but the rest of the country in seeing change. To begin with, Utah has begun to convert petroleum refineries to the production of tier three fuels reducing

31 42 U.S.C. § 7604 (current through P.L. 118-34, published on www.congress.gov on 12/26/2023, except for P.L. 118-31).

32 Understanding the sources and causes of Utah's Air Pollution Utah Department of Environmental Quality, https://deq.utah.gov/communication/news/understanding-utahs-air-quality (Last visited Feb 18, 2024)

33 Rethink your relationship with Cars Utah Department of Environmental Quality, https://deq.utah.gov/air-quality/rethink-relationship-cars-clear-air-challenge (Last visited Nov 6, 2023)

sulfur emissions and cutting down vehicle fleets.[34] Tier 3 requires that petroleum refiners reduce the sulfur content of gasoline. It is a standard set by the EPA. Chevron is one of the oil corporations committed to producing and making tier three fuels available for purchase in Utah to reduce vehicle emissions. In addition to making cleaner fuel more accessible, Chevron is working to reduce emissions by replacing equipment to improve operational efficiency. They are working with organizations like the Utah Clean Air Partnership to begin implementing programs focusing on gas cans, wood stoves, and water heater exchange to reduce emissions.[35]

Sinclair Oil Corporation is another oil company committed to low-sulfur gasoline to reduce emissions. A refinery in Sinclair, Wyoming is producing low-sulfur fuel and announced its commitment to produce fuels at branded stations in Salt Lake City.[36] Four of five refineries in Utah are now producing and selling cleaner fuel to reduce emissions. Big Oil West is yet to file for a High Infrastructure Tax Credit to verify they are producing lower sulfur fuel, but once this is done five refineries in Utah will be selling cleaner fuel to reduce emissions.[37]

In the realm of infrastructure, Utah has witnessed a notable achievement under the Clean Air Act through the promotion of improved building practices. This involves adopting enhanced construction methods, such as using thicker studs and increased insulation to mitigate heating and cooling expenses. Furthermore, the

34 Clean Air Projects Envision Utah, https://envisionutah.org/clean-air-projects#:~:text=The%20Clean%20Air%20Action%20Team%20Successes%3A,emissions%20from%20Utah's%20vehicle%20fleet. (Last visited Nov 6, 2023)

35 Tier 3 chevron.com, https://saltlakecity.chevron.com/our-businesses/tier-3#:~:text=Tier%203%20is%20a%20set,(ppm)%20to%2010%20ppm. (Last visited Nov 6, 2023)

36 Tier 3 gas Tier 3 Gas | Sinclair Oil Corporation, https://www.sinclairoil.com/tier-3-gas (Last visited Nov 6, 2023)

37 Four Utah refineries now produce cleaner tier 3 fuels, and the fifth says it will soon The Salt Lake Tribune, https://www.sltrib.com/renewable-energy/2023/01/22/four-utah-refineries-now-produce/ (Last visited Nov 6, 2023)

integration of more efficient low NOx water heaters not only contributes to the reduction of pollutants but also aids in conserving energy resources, marking another success of the Clean Air Act in the state.

These successes reflect a certain pattern: asking individuals to do something about the consequences of pollution when their contributions are minimal compared to the impact corporations have on the environment. For decades, 100 companies have been found responsible for 71% of greenhouse gas emissions.[38] Many of the successes of the CAA revolve around citizens changing several aspects of their lifestyles to become more environmentally conscious. However, consumers making different choices such as taking public transportation or buying electric cars is not going to significantly reduce air pollutants in the environment.

III. Proof of Claim

A. Narrowing down the Problem

According to the EPA, the CAA is responsible for preventing over 230,000 early deaths and the frequency of respiratory diseases like bronchitis and asthma exacerbation.[39] Overall, the health effects of harmful air pollutants have the potential to affect citizens in concentrated areas; yet these effects are disproportionately affecting racial, and ethnic communities. Affecting many aspects of public health and everyday life factors such as education.

About 1 in 4 people in the United States – more than 119 million residents – live with air pollution that can hurt their health and shorten their lives, according to a new report from the American Lung Association. People of color are disproportionately affected, as

38 Provo Clean Air Toolkit - Home, https://provocleanair.org/ (Last visited Nov 7, 2023)

39 The United States clean air act turns 50: Is the air any better half a century later? UNEP, https://www.unep.org/news-and-stories/story/united-states-clean-air-act-turns-50-air-any-better-half-century-later (Last visited Nov 14, 2023)

are residents of Western cities.[40] Not everyone experiences pollution the same way in the US. Regardless of the region, communities of color endure most of the problem. The United States population is composed of approximately 41% people of color[41]; yet 54% of these individuals of 120 million, live in counties with at least one failing grade for unhealthy air. Seventy-two percent of 18 million residents (about the population of New York) live in counties with the worst air quality.[42] In the pursuit of environmental justice in the country, it has become increasingly clear that environmental racism continues to persist. We must address this issue with utmost urgency and demand a comprehensive environmental justice mandate.

The above mentions the effects of living in highly polluted areas. In 2019 a study about the association between long-term exposure to air pollution and changes in emphysema and lung function was published. This is a cohort study that followed participants in 6 US metropolitan regions from 2000-2018. It was found that there was a statistically significant association between O_3, PM, oxides of nitrogen, and black carbon with increases in emphysema. Emphysema is a chronic respiratory disease characterized by the gradual destruction of lung tissue, particularly the alveoli (small air sacs) where oxygen and carbon dioxide exchange occur. This condition is often associated with long-term exposure to irritants, such as cigarette smoke, and air pollution. The damage leads to decreased elasticity of the lungs, making it difficult for them to recoil and expel air. Symptoms include shortness of breath, wheezing, and coughing. Emphysema

40 Populations at risk: State of the Air State of the Air | American Lung Association, https://www.lung.org/research/sota/key-findings/people-at-risk#:~:text=All%20of%20the%20119.6%20million,and%20death%20from%20their%20exposure (Last visited Feb 20, 2024)

41 U.S. Census Bureau, QuickFacts, https://www.census.gov/quickfacts/fact/table/US/PST045223#PST045223

42 A quarter of Americans live with polluted air, with people of color and those in western states disproportionately affected, report says CNN, https://www.cnn.com/2023/04/19/health/state-of-the-air-2023/index.html#:~:text=Specifically%2C%20although%20people%20of%20color,of%20color%2C%20the%20report%20said. (Last visited Nov 14, 2023)

is a type of chronic obstructive pulmonary disease (COPD) and can significantly impact an individual's respiratory function and quality of life. In study follow-ups, it was found that O_3 and oxides of nitrogen were associated with increases in emphysema, and O_3 was significantly associated with a faster decline in a measure of forced expiratory volume[43](FEV): measures of how much air individuals can exhale during forced breathing.

The FEV is the most important measurement of lung function when diagnosing obstructive lung diseases, seeing how well medicines to improve breathing are working, and testing if lung diseases are getting worse.[44] The metropolitan areas where individuals lived for the study have lower ozone levels than Utah. This means we can only assume the effects of these hazardous air pollutants are affecting Utah residents more. Individuals living in highly polluted areas are withstanding the worst of environmental discrimination.

Recent legal cases, such as *Heal Utah, et al. v. EPA, et al.,*[45] highlight the critical role of the EPA in safeguarding public health. Heal Utah is a movement advocating for cleaner air, energy, and climate, as well as the elimination of pollutants by empowering grassroots organizations, using science-based solutions, and developing common–sense policies. This organization has fought to protect Utah's health and the natural world from environmental threats and

43 Meng Wang et al., Association between long-term exposure to ambient air pollution and change in quantitatively assessed emphysema and lung function, 322 JAMA , 546 (2019)

44 Forced expiratory volume and forced vital capacity: NYP NewYork-Presbyterian, https://www.nyp.org/healthlibrary/articles/forced-expiratory-volume-and-forced-vital-capacity#:~:text=Forced%20expiratory%20volume%20(FEV)%20measures,exhaled%20during%20the%20FEV%20test. (Last visited Feb 20, 2024)

45 Heal Utah et al. v. EPA et al., No. 21-9509 (10th Cir. 2023)

succeeded.[46] In the case of *Heal Utah v. EPA*, the case was centered around air pollution control on coal-fired power plants in Utah contributing to regional haze. Due to the haze impairing visibility in national parks and wilderness areas across the United States, Class 1 areas. These areas according to the CAA are to be regulated to restore visibility conditions by the year 2064 to comply with regional haze requirements.[47] The efforts to improve visibility are implemented with the best available retrofit technology (BART) and states must develop SIPs to mitigate emissions that contribute to regional haze. EPA abused discretion by approving the SIP even though measures did not satisfy CAA's national visibility goals. [48]

In addition to that, complaints submitted by petitioners during the rulemaking processes failed to be responded to and acknowledged. This case ended with the EPA endorsing Utah's decision to adopt alternative measures instead of BART to control visibility-impairing emissions at power plants.[49] This is one case where the federal government wrongfully approved a SIP with consequences for the citizens of the state and country. Power plants were not more important than the health and safety of the individuals involved yet, we saw it was approved. This article has mentioned different health effects and risks associated with high pollution and it is necessary for the CAA to be strict and enforce policies to protect the well-being

46 Heal Utah Empowers Grassroots Advocates, uses science-based solutions, Eal Utah empowers grassroots advocates, uses science-based solutions, and develops common-sense policy.Heal Utah, https://www.healutah.org/?gclid=CjwKCAiA0syqBhBxEiwAeNx9N4OrZ8UsWNi2KdU2y8zGnc-B7jW52WmdJFt6cxYHHUKpqkDuLjofdhoCHv8QAvD_BwE (Last visited Feb 20, 2024).

47 Protection of Visibility: Amendments to Requirements for State Plans, Federal Register (2017), https://www.federalregister.gov/documents/2017/01/10/2017-00268/protection-of-visibility-amendments-to-requirements-for-state-plans (Last visited Mar 12, 2024).

48 40 CFR 51.308 -- Regional haze program requirements., https://www.ecfr.gov/current/title-40/part-51/section-51.308 (Last visited Mar 12, 2024).

49 Heal Utah et al. v. EPA et al., No. 21-9509 (10th Cir. 2023), available at JUSTIA.

of individuals first before the well-being of different companies that are impacting the health of residents.

There is a proposed bill for Death Certificate Amendments in Utah: that indicates that an individual's death was attributed to air pollution.[50] This bill would allow health care professionals to indicate in death certificates that the cause of death was air pollution due to how many deaths are caused by this problem.

Air Pollution is the cause of between 2,500 and 8,000 premature deaths in Utah each year.[51] The health effects that have been highlighted in this paper point to the need for controlling air pollution in Utah due to the adverse health effects. These cases underscore the urgent need for an Environmental Justice Mandate to hold the EPA accountable for its role in environmental discrimination.

Numerous studies, including research from the Columbia University Mailman School of Public Health, have shown a direct link between air pollution exposure and poor academic performance in children.[52] There are many adverse effects of air pollution, but it is evident that the direct effects are impacting everyone, even the way children perform in an academic setting. Reducing air pollution would decrease the effects we are seeing in children at school. For this reason, the CAA must become stricter in policy and efforts to decrease air pollution. The detrimental impact of air pollution on education is undeniable and cannot be ignored.

A study conducted in Salt Lake City revealed that schools with a greater proportion of minority populations experienced higher

50 H.B. 109, 66th Leg., Reg. Sess. (Utah 2022), available at https://le.utah.gov/~2022/bills/static/HB0109.html.

51 Isabella M. Errigo et al., Human health and economic costs of air pollution in Utah: An expert assessment, 11 Atmosphere , 1238 (2020)

52 Air pollution exposure linked to poor academics in childhood Columbia University Mailman School of Public Health, https://www.publichealth.columbia.edu/news/air-pollution-exposure-linked-poor-academics-childhood (Last visited Feb 18, 2024).

exposure to pollutants.[53] Hispanic students are exposed from 2% to 12% more than the average student in the state. Delving into the moral implications inherent in such disparities, there should be immediate measures to address this crisis.

B. Environmental Justice Mandate

The EPA needs a clear and explicit environmental justice mandate within the CAA, requiring regulatory agencies to consider the disparate impacts of air pollution on minority and low-income communities when setting emissions standards and implementing pollution control measures. The geographical situation and the macroeconomic situation of each state are different and more research is necessary to comprehend the scale and impact of pollution from mobile and stationary sources.

The vague language of the CAA has not allowed the EPA to enforce all the necessary changes that should be implemented to meet environmental goals. Congress told the EPA to keep up with the evolving landscape of industries and instructed the entity to ensure there is clarity and specific standards to keep its statutes' effectiveness. To achieve a more equitable and effective approach to addressing air quality issues, it is imperative to enact targeted policy changes that explicitly mandate the consideration of environmental justice concerns. This involves a specific proposal to establish a framework that prioritizes communities most severely affected by air pollution, starting at the neighborhood level, and progressively extending to cover broader geographic zones. The proposed policy framework seeks to ensure that no community bears a disproportionate burden of the adverse effects of air pollution. By concentrating efforts on those areas struggling the most, we can initiate meaningful change at the grassroots level, gradually expanding the scope to encompass larger regions. This proactive approach aligns with the

53 Social disparities in Air Pollution The John and Marcia Price College of Engineering at the University of Utah, https://www.price.utah.edu/2020/05/18/social-disparities-in-air-pollution#:~:text=The%20researchers%20analyzed%20PM%202.5,air%20quality%20under%20all%20scenarios. (Last visited Feb 18, 2024).

overarching goal of creating a regulatory landscape that not only acknowledges the disparities in environmental impact but actively works towards rectifying them through focused and comprehensive policy adjustments.

The United States currently stands as the world's second-biggest annual emitter of greenhouse gasses, contributing a greater portion of historical emissions compared to other nations. This broader national challenge of managing environmental responsibilities is mirrored in state-level disputes over federal environmental regulations. Utah's contentious relationship with the federal government, particularly the Environmental Protection Agency (EPA), exemplifies such disputes. The state's resistance to the "good neighbor" rule, aimed at reducing ozone-forming emissions from power plants, highlights a significant tension. Senator Scott Sandall's introduction of SB57, advocating for a process allowing Utah to disregard federal laws it deems unconstitutional—specifically targeting EPA regulation—underscores this tension. Utah's opposition is primarily driven by economic concerns, arguing that compliance with the rule would impose significant costs on the state's coal-fired power plants, potentially leading to shutdowns and power shortages.

Despite EPA claims that enforcing the rule would yield substantial health and environmental benefits,[54] Utah has fiercely opposed it, allocating significant resources to legal battles.[55] The state Legislature passed a resolution denouncing the rule and has pursued multiple legal challenges, aiming to overturn or delay its implementation. However, critics argue that such resistance could result in prolonged litigation, exacerbating rather than resolving the conflict between state and federal authority. Despite opposition, SB57 passed the House and awaits final review in the Senate, indicating Utah's

54 Environmental Protection Agency, Test Methods for Evaluating Solid Waste, Physical/Chemical Methods (SW-846), Method 6010D: Inductively Coupled Plasma-Atomic Emission Spectrometry (ICP-AES) (1994).

55 Utah Legislature to pledge $2M for ozone fight with EPA The Salt Lake Tribune, https://www.sltrib.com/news/environment/2023/01/24/utah-leg-pledge-2-million-ozone/ (Last visited 2024)

ongoing defiance of federal environmental regulations.[56] Utah's confrontational stance reflects broader tensions between state sovereignty and federal authority, particularly regarding environmental policies.[57] While proponents of SB57 argue for state autonomy in challenging perceived federal overreach, opponents caution against undermining constitutional principles and anticipate protracted legal disputes. The outcome of Utah's legislative and legal maneuvers will not only shape the state's environmental policies but also set precedents for the balance of power between states and the federal government in regulating environmental issues.

C. Proposal

In the realm of environmental law and policy, the imperative to address air quality concerns extends beyond mere regulatory frameworks. It necessitates a comprehensive approach that actively involves and empowers communities affected by air pollution. The first measure would be addressing community engagement. The community could be involved in the decision-making processes related to air quality regulations and permitting is crucial. Second, regarding target investments, allocating funding and resources to implement pollution reduction strategies in disproportionately affected areas is essential. Promoting clean energy, sustainable transportation, and improved public health infrastructure can mitigate the adverse effects of corporate decisions on air quality. Third, implementing policies that facilitate a just transition for communities heavily reliant on polluting industries is a moral and economic imperative. This ensures that environmental improvements are coupled with job opportunities and economic growth, helping affected communities recover.

---

56 Environmental Protection Agency, Fact Sheet: 2015 Ozone Proposed Good Neighbor Rule (Mar. 2022). Available at: https://www.epa.gov/system/files/documents/2022-03/fact-sheet_2015-ozone-proposed-good-neighbor-rule.pdf.

57 United States Environmental Protection Agency, (2024), https://www.epa.gov/Cross-State-Air-Pollution/good-neighbor-plan-2015-ozone-naaqs

Other measures could focus on the availability of government financial assistance to improve pollution control and air quality is a crucial resource. Because the influence of big corporations has sometimes impeded the effective utilization of these resources. This highlights the need for comprehensive reform and a focus on enforcing existing regulations and closing loopholes.

It is important to acknowledge that there are instances where corporations exploit loopholes to avoid strict federal regulations, further exacerbating air quality issues.[58]One of the most common issues is the exemptions that facilities such as oil refineries, chemical plants, and incinerators have to disregard established emission standards, cease reporting their pollution, and evade penalties or repercussions for excessive emissions during startup, shutdowns, and malfunctions (SSM).[59] Despite consistent judicial rulings declaring these exemptions as unlawful, the Environmental Protection Agency (EPA) itself acknowledges their illegality.

SSM events occur frequently, particularly in the aftermath of natural disasters, which are escalating due to the climate crisis. During SSM events, industrial facilities, located in Black and Latino communities, release pollutants at significantly elevated levels compared to regular operations.[60] Due to SSM loopholes, these facilities act with impunity. The emitted pollutants encompass substances

58 Meng Wang et al., *Association between long-term exposure to ambient air pollution and change in quantitatively assessed emphysema and lung function*, 322 JAMA , 546 (2019)
Volkswagen AG Agrees to Plead Guilty and Pay $4.3 Billion in Criminal and Civil Penalties for Six, Justice.gov, January 11, 2017, https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six
https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf

59 Dangerous loopholes allow facilities to release toxic, unchecked air pollutants Earthjustice, https://earthjustice.org/press/2022/dangerous-loopholes-allow-facilities-to-release-toxic-unchecked-air-pollutants (Last visited Feb 18, 2024).

60 Dangerous loopholes allow facilities to release toxic, unchecked air pollutants Earthjustice, https://earthjustice.org/press/2022/dangerous-loopholes-allow-facilities-to-release-toxic-unchecked-air-pollutants (Last visited Feb 18, 2024).

such as soot (particulate matter), sulfur dioxide, hydrogen sulfide, carbon monoxide, and other toxic chemicals that, when combined, contribute to the formation of ozone smog. For individuals residing or working near these facilities that exploit these loopholes, the cumulative health impacts are severe, heightening the risks of various cancers, asthma, respiratory ailments, heart attacks, and premature death.[61]

Earthjustice attorney Seth Johnson emphasized, "Industrial facilities nationwide repeatedly initiate startup, shutdown, and malfunction events, exploiting illegal loopholes to release substantial amounts of harmful air pollution into neighboring communities without consequences. The EPA must promptly close SSM loopholes, as communities rely on the agency to safeguard their health and enhance their overall quality of life."[62]

Between January 14 and 17, 2024, corporations submitted documentation to the Texas Commission on Environmental Quality, the state's environmental regulator, acknowledging at least 36 instances of "unintentional" emissions attributable to freezing temperatures. Based on the companies' initial assessments, these occurrences collectively resulted in over a million pounds of air pollution. While this amount may seem modest compared to the substantial volumes of sanctioned emissions released daily in Texas, a state characterized by a significant industrial presence, these reports underscore the susceptibility of facilities to weather conditions.

Furthermore, they highlight an enduring regulatory gap in environmental oversight, permitting companies to surpass

61 Jean D. Brender et al., Residential proximity to environmental hazards and adverse health outcomes, 101 American Journal of Public Health (2011)

62 Dangerous loopholes allow facilities to release toxic, unchecked air pollutants Earthjustice, https://earthjustice.org/press/2022/dangerous-loopholes-allow-facilities-to-release-toxic-unchecked-air-pollutants (Last visited Feb 18, 2024).

authorized emission limits without repercussions under specific climatic circumstances.[63]

In Utah, US Magnesium, a mineral extractor, has faced significant scrutiny for alleged air quality infractions spanning over a decade. These infractions range from emitting excessive toxic chlorine into the airshed of the Wasatch Front to delaying required tests.[64] Despite receiving at least 30 violations from the Utah Department of Environmental Quality (DEQ) since 2013, the company managed to avoid significant financial penalties for its actions. Instead, in the fall of 2023, US Magnesium settled with the DEQ for a penalty that some regulators deemed lenient.

The timing of the settlement raised eyebrows as it coincided with a substantial donation from US Magnesium's parent company, The Renco Group, to Utah Governor Spencer Cox's campaign. The donation occurred just days before the Utah Air Quality Board, whose members are appointed by the governor, approved the settlement. However, both Cox's office and the DEQ emphasized the independence of the Air Quality Board and asserted that the governor had no direct influence over the settlement negotiations.

US Magnesium's operations involve diverting water from the Great Salt Lake for mineral extraction, a process that produces corrosive waste and toxic emissions. The company's history of environmental violations prompted DEQ to pursue penalties, culminating in a proposed settlement of $413,772 in May 2023. Concerns were raised by board members regarding the adequacy of the settlement, particularly in deterring future violations. Despite reservations from some board members, the settlement was ultimately approved with a slightly higher penalty.

The settlement drew attention to the broader issue of corporate influence in environmental regulation. Critics argue that companies

63 Texas companies reported releasing 1 million pounds of excess pollution during recent cold snap The Texas Tribune, https://www.texastribune.org/2024/01/26/texas-pollution-emissions-cold-weather-upsets/ (Last visited Feb 20, 2024).

64 Caroline C. Womack et al., Midlatitude ozone depletion and air quality impacts from industrial halogen emissions in the Great Salt Lake Basin, 57 Environmental Science & Technology, 1870–1881 (2023)

like US Magnesium should prioritize environmental responsibility over political contributions. Additionally, concerns have been raised about the effectiveness of penalties in deterring future violations, with suggestions for stricter enforcement measures such as consent decrees. Furthermore, the involvement of mineral extractors in Utah politics has come under scrutiny, with accusations of inadequate royalty payments and environmental stewardship. While certain legislators have criticized mineral extraction companies, US Magnesium has largely escaped public reprimand, despite its controversial actions regarding water usage from the Great Salt Lake.

In summary, the case of US Magnesium highlights the complex interplay between corporate interests, political contributions, and environmental regulation. It underscores the importance of transparency and accountability in ensuring the protection of natural resources and public health. Enforcing the regulations already in place is a critical initial step, but it may also be necessary to consider stricter laws to address these gaps effectively.

The 1990 Clean Air Act Amendments (CAA) aimed to address air quality issues, but challenges persist. To address these concerns, amendments, and changes should be considered, including stricter standards and improved enforcement. The 1990 CAA Amendments summary (linked above) is a valuable resource for understanding the existing regulatory framework and identifying areas requiring revision.[65]

IV. Conclusion

In conclusion, the Clean Air Act (CAA) stands as a pivotal piece of legislation that has significantly shaped environmental policy in the United States. From its inception in 1963 to subsequent amendments addressing emerging challenges, the CAA has played a crucial role in regulating air pollutants and safeguarding public health. The state of Utah has seen substantial benefits resulting from the

65 Environmental Protection Agency, "1990 Clean Air Act Amendment Summary" (Last modified 11/15/2023), https://www.epa.gov/clean-air-act-overview/1990-clean-air-act-amendment-summary.

CAA, with improved air quality leading to better public health outcomes and a more robust economy.

There are critical limitations and challenges that the CAA faces, particularly in addressing air pollution hotspots, climate change, and environmental justice concerns. The enforcement of regulations at both federal and state levels presents a complex landscape, with disparities in addressing pollution on smaller regional scales. Legal cases, such as those involving Diesel Power Gear, LLC, and Tap Worldwide LLC, highlight the ongoing challenges and the need for vigilant enforcement.

The impact of air pollution on public health, particularly in vulnerable communities, is a central concern. The disproportionate effects on racial and ethnic communities, as well as low-income populations, emphasize the urgency of addressing environmental justice within the framework of the CAA. The call for an Environmental Justice Mandate is a critical proposal to ensure that regulatory agencies consider the disparate impacts of air pollution on minority and low-income communities, holding the EPA accountable for its role in perpetuating environmental discrimination.

While successes in Utah, such as the conversion of petroleum refineries and the Provo Clean Air Toolkit, prove positive steps, this paper acknowledges that individual behavioral changes alone cannot overcome the influence of big corporations. The undue influence of powerful entities in shaping decisions affecting air quality, as seen in the fossil fuel and automotive industries, demands a reevaluation of regulatory frameworks and a commitment to closing existing loopholes.

The proposal for community engagement, targeted investments, and economic transition recognizes the need for a comprehensive approach to address environmental disparities. The availability of government financial assistance, coupled with stricter regulations and improved enforcement, can contribute to a more effective pollution control strategy. These decisive actions can collectively pave the way for a more robust, equitable, and sustainable approach to air quality regulation. The argument of this paper resonates across legal, environmental, and community spheres, ensuring that the

Clean Air Act not only endures but evolves to meet the challenges of the present and future.

In essence, while celebrating the accomplishments of the Clean Air Act, this paper calls for a reassessment and strengthening of environmental regulations to ensure that the goals of the CAA are fully realized. The health and well-being of all citizens, regardless of socioeconomic status or ethnic background, should remain at the forefront of environmental policy, reinforcing the commitment to clean air and a sustainable future.

Free Speech Limitations and Canada's Online Streaming Act

Ethan Shortinghuis[1]

I. Introduction

The Canadian government has been determining what Canadians can watch and listen to for decades.[2] The regulation of broadcast media is the primary means by which the government seeks to preserve a distinct sense of Canadian cultural identity. Protecting this identity from being overwhelmed by the influence of the United States has long been a significant concern for many Canadians, both inside and outside of the government. The United States' proximity, similar demographics, and larger size and industry have often raised questions as to whether the culture of Canada is its own or simply a product of its southern neighbor and others.[3] To avoid this, the Canadian government seeks to influence the types of content

---

1 Ethan Schortinghuis is a junior at Brigham Young University majoring in Psychology. He would like to thank the editor of this paper, Jacob Christensen, a Political Science major, for his help refining ideas and streamlining the format of this paper.

2 With a few exceptions for niche-genre stations (e.g., broadcasting only music recorded pre-1956), radio stations are required to include Canadian content for a minimum of 30-50% of their programming, depending on their content.
Canadian Content Requirements for Music on Canadian Radio, Canada Radio-television and Telecommunications Commission, https://crtc.gc.ca/eng/cancon/r_cdn.htm (Dec. 7, 2022).

3 Douglass Tood, *Is Canada a Blank Slate With No Culture? Many Beg to Differ*, Vancouver Sun (Mar. 14, 2015), https://vancouversun.com/news/staff-blogs/is-canada-a-blank-slate-with-no-culture-many-beg-to-differ.

produced, discovered, and consumed within Canada. One of their primary strategies is to require that television and radio broadcasters within Canada include content deemed sufficiently "Canadian"[4] as a certain percentage of their programming.[5]

In early 2023, the government of Canada passed the Online Streaming Act, formerly known as Bill C-11, extending federal influence over media to the more recently developed online streaming platforms. The Online Streaming Act gives federal authority to the Canadian Radio-Television and Telecommunications Commission (CRTC) to regulate Canadians' access to content from online streaming services such as YouTube, TikTok, and Netflix. This legislation aims to further protect Canadian cultural identity by supporting the creation of "certified Canadian content" and increasing its discoverability on the aforementioned digital platforms.[6]

While seeking to unify Canadians and foster a sense of common identity is not a nefarious goal, the methodology employed by the Canadian government to create and sustain this common identity is ill-suited for the task. In an attempt to accomplish this goal, the Online Streaming Act allows the government to regulate the production, distribution, and discoverability of specific types of content on online platforms, raising concerns that these objectives are being pursued at the cost of the fundamental freedoms of speech and expression.[7] While much of the public debate surrounding this

4 The certification process for "Canadian content" (also referred to as "CanCon"), evaluates different aspects of the creative work, such as the nationality of the artist, where the work was performed or recorded, and the nationality of many people who contributed to the work in question. This process does not, however, give much weight to the content of work, so that a documentary about Canada may not be considered "Canadian" if an insufficient number of Canadians worked on it. See *So What Makes it Canadian?* Canadian Radio-television and Telecommunications Commission, https://crtc.gc.ca/eng/cancon/c_cdn.htm (Oct 10, 2016).

5 Online Streaming Act, S.C. 2023, c. 8.

6 Online Streaming Act, S.C. 2023, c. 8.

7 *Canada's Liberals set sights on taxing online streaming, expanding rural broadband in federal budget,* CBC News, https://www.cbc.ca/news/politics/c11-online-streaming-1.6824314(Apr. 27, 2023, 11:19 AM)

legislation is centered merely on the inclusion of online platforms under the already controversial regulations of the CRTC, there are more subtle problems with the Act. Whether by intention or honest mistake, the Online Streaming Act leaves open the possibility of further infringement on Canadian freedoms in every part of the broadcasting process, from writer to audience. Furthermore, the Act itself is worded vaguely enough that no actionable policies are even put forth, instead relying entirely on the extra-governmental body of the CRTC to determine how the objectives and guidelines will be implemented and enforced. The CRTC would be placed in a position to exercise these powers solely at their discretion and not as a fair application of the law, as there is not enough real law to apply.

While the wording of the Online Streaming Act is vague, some may argue the CRTC would never actually abuse the power given by it in a way that infringes on Canadians' fundamental freedoms. While this is a matter of speculation and subject to debate, it is also irrelevant to the issue discussed here. Even if a law is not being used to limit the freedom of Canadians, or if it seems unlikely that such a power would ever be used, it is the responsibility of lawmakers to ensure that such powers and possibilities do not exist as far as possible. Even if the clear problems it presents mean it is unlikely to ever be employed, it is a legislative failure to have passed into law an act that clearly aims to restrict freedom of speech and expression, as will be shown hereafter.

II. Background

A. Free Speech in Canada

The protection of speech and expression in Canada is found in the Canadian Charter of Rights and Freedoms (the Charter). The Charter states: "Everyone has… freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[8] This statement has been interpreted very broadly, with nearly every possible form of expression having been found by

8 Canadian Charter of Rights and Freedoms, s. 2(b), Can.

the Supreme Court to be covered under free speech protection.[9] Even forms of expression such as hate speech, child pornography, and public speech for the purpose of engaging in prostitution are considered protected based simply on the principle of whether the content can be considered a form of expression.[10] Instead of debating whether a type of expression should qualify as protected or not, the decision left to courts typically revolves around whether infringing on the protected status of the expression can be justified under the first section of the Charter. This particular section makes the provision that the rights and freedoms guaranteed in the following sections may be restricted or withheld if such limitations can be "justified in a free and democratic society."[11] Such justification requires that a law be clearly created in the interest of upholding the principles of freedom and democracy that the laws of the country are meant to serve. The passing of laws that limit constitutional freedoms is relatively common, but to determine if such limits are justifiable, they are subjected to the "Oakes Test," as outlined below.

B. The Oakes Test

On December 17, 1981, David Oakes was arrested for the possession of eight vials of cannabis resin for the purpose of trafficking, which is a violation of the Narcotic Control Act (NCA).[12] However, the Court was only able to prove beyond a reasonable doubt that he was in possession of a narcotic, which is still a violation of the NCA but is a lesser offense than possession for the purpose of trafficking. In order to convict for the latter offense, the court relied upon section 8 of the NCA, which presumes that if the accused is found to be in

9 Thomson Newspapers Co. v. Canada (Attorney General), 1 SCR 100 (SCC 1998).

10 R. v. Keegstra, [1990] 3 SCR 697 (Can.). Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.), [1990] 1 SCR 1123. *R. v. Barabash*, [2015] 2 SCR 522, 2015 SCC 29.

11 Canadian Charter of Rights and Freedoms, s. 1, Can.

12 Regina v. Oakes, [1986] 1 SCR 103 (Can.). Narcotic Control Regulations C.R.C., c. 1041, s. 4(2).

possession of a narcotic, it is for the purposes of trafficking and allows the accused to establish otherwise on the balance of probabilities.[13]

Instead of providing evidence that the possession was not for the purpose of trafficking, Oakes brought a motion challenging the constitutional validity of section 8, seeing that it lays the burden of proving innocence on the accused.[14] This violates the Charter-guaranteed right for any person charged with a criminal offense to be presumed innocent until proven guilty.[15] This motion was held in his trial but was appealed and brought before the Supreme Court of Canada. The question posed on appeal to the Supreme Court was whether the conflict between section 8 of the NCA and the Charter resulted in the former being unconstitutional and therefore "of no force and effect."[16]

The Supreme Court dismissed the appeal and answered the question in the affirmative. In order to come to this conclusion, the Court found it necessary to determine if the NCA's restriction of the presumption of innocence was justifiable since, as explained above, the government may pass legislation restricting charter-guaranteed rights if such a restriction can be deemed justifiable in a fair and democratic society. To accomplish this, the court outlined a set of criteria and considerations that could be used to determine whether such infringement could be justified, and which has been adopted as the de facto test for all such determinations in constitutional law.[17] It has come to be known simply as the "Oakes Test" and is composed of two main parts:

> 1. Pressing and Substantial Objective
> The objective being served by the limitation must be significant and important enough to justify limiting an otherwise

13 Narcotic Control Regulations C.R.C., c. 1041.

14 Regina v. Oakes, [1986] 1 SCR 103 (Can.).

15 Canadian Charter of Rights and Freedoms, s. 11(d), Can.

16 Regina v. Oakes, [1986] 1 SCR 103 (Can.).

17 Egan v. Canada, [1995] 2 SCR 513 (Can.).
Vriend v. Alberta, [1998] 1 SCR 493 (Can.).
Canada (Attorney General) v. Hislop, [2007] 1 SCR 429 (Can.).

guaranteed right or freedom. If challenged, the Supreme Court will look for this objective to be "pressing and substantial" to the needs and operation of a free and democratic society. In R. v. Oakes, the objective of decreasing drug trafficking in general was found to be a self-evidently important goal and may, in some cases, have been adequate to justify the limitation of some rights and freedoms.[18]

2. Proportionality
The second portion is a 3-part proportionality test. [1] This test requires that the measures applied to achieve the objective are *rationally connected* to the objective itself. They cannot be arbitrary or found to be aiming at some other goal. [2] The law in question must be *minimally infringing*, being shown to restrict the guaranteed right or freedom as little as reasonably possible. [3] The negative outcomes of the measure, as it regards the right or freedom in question, must be *proportional* to the significance and positive outcomes of the objective.

C. The CRTC

In 1968, the Broadcasting Act was passed, declaring that "the Canadian Broadcasting System should serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."[19] To fulfill this mission, the CRTC was formed. The CRTC is a public organization appointed by and operated independently from the Canadian government. The organization monitors and regulates the entirety of the Canadian Broadcasting System by issuing broadcasting licenses, developing policies and regulations for broadcast content and practices, and enforcing such policies through fines,

18 Regina v. Oakes, [1986] 1 SCR 103 (Can.).

19 Broadcast Act, SC 1968-69, c 54 (Can).

revoking licenses, and court orders.[20] The CRTC is perhaps best known for mandating that certain minimum percentages of broadcast content be composed of "Canadian" content, as determined by the organization. The Online Streaming Act amends the original Broadcasting Act to extend the regulatory powers of the CRTC to include online streaming platforms such as Netflix and YouTube, the regulation of which constitutes the infringement of constitutional freedoms this paper attempts to address.

Before the Online Streaming Act can be applied in any substantive way, the CRTC must create its own specific policies and plans for how it will use the new powers granted by the legislation. As such, it should be acknowledged that there may not be adequate grounds for an actual constitutional challenge at this moment as the current text of the law, absent the more specific policies to come, does not directly or clearly violate any fundamental freedoms. However, it does provide the opportunity for such violations to occur in the future. It is these vulnerabilities and the consequences of the legislation's overall poor workmanship that will be explored in the following section.

III. Proof of Claim

The argument presented in this article is this: Besides laying the groundwork for potential infringement on freedom of expression, the Act is likely to be ineffective and even counterproductive to its intended objective due to its vague writing and misguided measures. It is for these reasons that it should be repealed on constitutional grounds.

While infringement of freedoms by legislation is not uncommon, it must be found to be justifiable in a "free and democratic society" as stated in the Charter.[21] Whether the infringement of these guaranteed freedoms can be justified will be determined through the

20 Monica Auer, *The CRTC's Enforcement of Canada's Broadcast Legislation: 'Concern', 'Serious Concern' and 'Grave Concern'*, 5 Can. J.L. & Tech. 3 (2006).

21 Canadian Charter of Rights and Freedoms, s. 1, Can.

application of the Oakes test. To argue that the Online Streaming Act is unconstitutional, the first task is to demonstrate that the freedoms of speech and expression enshrined in the Charter are in fact being infringed upon.

A. Determination of Infringement

The protection of expressive content has been broadly interpreted by the Canadian Supreme Court such that "any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(b) of the Canadian Charter."[22] Furthermore, the protections for freedom of expression extend far beyond the individual or entity that produces expressive content. In *Edmonton Journal v. Alberta (Attorney General)*, it was determined that the right of the press to report on court proceedings regarding marital dissolution was protected; The Court found it necessary to protect the right of the public to access the information made available by the reporters, who were previously restricted in what they could access and report. In *Dagenais v. Canadian Broadcasting Corp.,* [1994], the Court upheld the right of the Canadian Broadcasting Corporation (CBC) to distribute a film despite defendants in a current criminal trial suing for a publication ban of the film due to its content being related to the crime with which they were charged. This affirmed the right of the CBC to produce, transmit, and have their content consumed. These two cases show that freedom of expression protects not only those who create the content, but also those involved in the distribution and consumption of said content.

While the Online Streaming Act focuses primarily on the distribution or broadcasting aspect of the system, the Act clearly impacts the creators and consumers of the content as well. As the types of content produced and promoted are affected, regulations are also placed on distributors of online content, limiting the consumer's access to content that would otherwise be produced and distributed by those platforms.

22 Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 SCR 877 (Can.).

In response to concerns and accusations of censorship, the proponents of this legislation clarified the Act will not prevent anyone from deliberately seeking out and discovering any online content.[23] However, if those who put this bill forward did not think that influencing the discoverability of specific types of content would have an observable effect on the content Canadians ultimately consume, then they likely would not find it necessary or productive to exert such an influence. Therefore, it is clear that in both intent and effect, the Online Streaming Act limits the freedom of expression of Canadian citizens in multiple contexts.

B. Pressing and Substantial Need

Having established that this legislation can indeed result in the restriction of the rights guaranteed in the Charter of Rights and Freedoms, it is now necessary to determine if these restrictions are justifiable in a free and democratic society by the application of the Oakes test. The first requirement for the government to be allowed to violate or limit a guaranteed freedom is that the government must demonstrate that there is a pressing and substantial need for the limitation in question. *R. v. Keegstra*, for example,[24] determined that a limitation of free speech was justified due to the need to prevent hateful speech; the Court found the intent of the questioned expression was far from the values that the Charter has been interpreted to protect: "democratic discourse, self-fulfillment, and truth-finding."[25] Additionally, a "pressing and substantial objective" necessitates sufficient specificity and that the objective is distinct from the means taken to accomplish it.

The primary objective given for the Broadcasting Act, which the Online Streaming Act amended, is to ensure that "the Canadian

23 Canadian Heritage Committee, Evidence of meeting #31 for Canadian Heritage in the 44th Parliament, 1st Session, 6 June 2022, https://openparliament.ca/committees/canadian-heritage/44-1/31/pablo-rodriguez-24/.

24 R. v. Keegstra, [1990] 3 SCR 697 (Can.).

25 Canadian Charter of Rights and Freedoms, s. 2(b), Can. Canadian Broadcasting Corp. v. Canada (Attorney General)

broadcasting system… serve[s] to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."[26] The questions of whether the promotion of Canadian culture is a pressing and substantial objective and whether efforts to do so have been successful are, in reality, rather complicated. These questions raise interesting philosophical issues, including the debate between prescriptive and descriptive views of a nation's culture. Is it the job of the government to decide what the culture of its people should be, and subsequently impose that cultural ideal on the citizens? Or should the culture of a people be chosen and defined by the people themselves through their free engagement in activities and content according to their interests? This is likely where much of the divide on legislation like the Online Streaming Act originates, as different people will have different answers to these questions. The stance on these questions held by members of the Supreme Court of Canada would likely have a strong influence on whether the objective-oriented phase of the Oakes test was passed, were this legislation to be brought before them by a constitutional challenge. However, it is due to the subjective nature of the objective that it would be unlikely to pass this test – being subjective and overly broad.

One reason that specificity is required, and broadness or vagueness of an objective is a problem is that it prevents the measures taken to achieve it from being properly evaluated. In questions of justifying infringement of freedoms, the measures taken must be seen to be distinct from, and rationally connected to the objective, but if the objective is not sufficiently specific or clear, it cannot be properly seen whether or not the measures are sufficiently connected or effective enough to justify the limits being placed on constitutional freedoms.

C. Rational Connection

A significant issue with the Online Streaming Act is the rational connection to its objective. A significant part of the Oakes Test is ensuring that the measures being taken by the legislation in question

26 Broadcast Act, SC 1968-69, c 54 (Can).

are clearly aimed at achieving the objective and seem likely to be successful. This requires that both the objective and the specific measures be sufficiently specific, as a lack of specificity would prevent a clear connection from being made in either direction.

The objective that the Broadcasting Act has held for years is to protect Canadian culture through the creation and consumption of Canadian content. To achieve this, the CRTC sets minimum percentages of radio and television programs that must be composed of content deemed by the CRTC to be sufficiently "Canadian." There are arguments to be made as to the constitutionality of those requirements (to which online content will now be subjected via the Online Streaming Act), but such arguments are not the primary focus of this paper. One issue with the rational connection is that the text of the Act itself is not sufficiently specific to know what the measures to be taken will even be. The Online Streaming Act simply grants general powers to the extra-governmental body of the CRTC to create and enforce policies on the broadcasting industry writ large. Not only does this prevent the legislation itself from being properly evaluated, but it also means that the policies which are developed did not go through a process of legislative or judicial review and can be changed by the CRTC at any time.

Another issue the Online Streaming Act faces regarding its rational connection to the objective of supporting Canadian media is that it broadly seeks to promote content on online streaming platforms in the same way it has sought to promote more classical forms of media. However, the ways these systems operate are fundamentally different. While radio and television are broadcast according to organized and premeditated schedules, online streaming services operate largely on the use of algorithms. Algorithms collect data on what users show interest in and what content generates the most engagement, using that information to recommend or display certain types of content that it estimates the user is likely to engage with. The portion of the Online Streaming Act requiring online platforms to "clearly promote and recommend Canadian programming" would also require these platforms to either alter their recommendation algorithms or circumvent them in some capacities, forcing "certified Canadian content" to be recommended artificially instead of

being recommended based on popularity or interest.[27] Even if the need to extend regulatory influence to online platforms was deemed pressing and substantial, a simple extension of the same policies to these fundamentally different forms of technology does not seem like a rational means by which to achieve its objective.

D. Minimal Infringement

Once it is accepted that the measure being taken to achieve the pressing and substantial objective is rationally connected to the objective itself, the next stage of the Oakes test is to determine whether the constitutional freedom in question is infringed in a minimal capacity. It is not enough for there to simply be an alternative approach to achieve the objective, as the Court accepts a range of minimally impairing approaches. It must be demonstrated that the legislation in question infringes more than is necessary.

For the sake of argument, it will be assumed here that the Online Streaming Act passed the previous two portions of the test, namely, that the cultural need for intervention was deemed pressing and substantial, and the measures being taken were sufficiently connected to the objective. Even with these assumptions, the legislation would fail this portion of the test, as the text itself suggests both infringing and non-infringing measures. The Online Streaming Act describes the requirements for the registered participants in the broadcasting system to make maximum use of Canadian citizens, which means predominant use of Canadians in the roles of creation, production, and distribution of broadcast materials.[28] This is infringing because it limits who can perform certain roles within the production of broadcast content and limits the expression of the writer or primary creator of the content to being expressed through a certain subset of people if that content is to be promoted and consumed. However, in other similar clauses, the writing of the Act merely states that the broadcasting system should "support" the creation of programming centered on Indigenous language and other minority groups. Such

27 Online Streaming Act, S.C. 2023, c. 8, s. 3(1)(r).

28 Online Streaming Act, S.C. 2023, c. 8, s. 3(4)(f).

support could be interpreted quite broadly, including ways in which guaranteed freedoms are not restricted.

If the government were to merely support or fund the creation of a higher volume and quality of content, that could increase its likelihood to be seen online both domestically and internationally due to its quality, rather than needing to be forced into the recommendations of Canadians. The aforementioned issue of algorithmic recommendation that causes the requirements placed on radio and television to be poorly suited to online streaming platforms is the same reason that this non-infringing approach to content promotion could be more effective on these platforms. Since all content exists on the same platforms, the primary factor resulting in its discovery and consumption is quality and popularity. If the content produced within Canada increased in quality, it would stand to reason that the viewership could increase as well. While this is not a guarantee, it is an argument that the proponents of the Online Streaming Act should be required to refute before moving on to the more restrictive measures they have proposed.

E. Proportionality

The final portion of the Oakes test seeks to determine whether the benefits of limiting legislation outweigh the detriments to the freedom in question. One issue with the proportionality of this Act is that while it seeks to promote the production and distribution of Canadian content, there are ways in which it may accomplish the opposite. As the markets in which these streaming services participate are not neatly contained within national borders, these platforms and companies depend on international engagement in addition to domestic engagement with their content. Additionally, the services provided by these platforms are run algorithmically, with the computer algorithms promoting content based on the engagement it receives, among other factors. One of the stated plans of the legislation is to increase the discoverability of Canadian content by promoting it in the suggested content portions of registered

platforms.[29] If this "certified Canadian" content is promoted broadly to all audiences, then it will inevitably be shown to many people who are not interested in engaging with such content. The lack of engagement relative to the exposure the content is receiving will be recorded by the platform's algorithm, suggesting that it should be promoted less. Whether or not the legislation prevents those proportions from affecting the discoverability of the content within Canada, the Canadian government would have no way of preventing that content from being deprioritized internationally due to its unpopularity. Since the international audience of most online content is much larger than the audience residing within Canada, the potential international consequences for the discoverability of content deemed "Canadian" may very well discourage broadcasting entities from producing content of this kind. In this way, the Online Streaming Services Act could ultimately decrease the amount of "Canadian" content produced by these entities, directly opposing the aims of the legislation. Since the proportionality of legislation is typically a measurement of the benefits of obtaining the objective, this legislation could not be justified on this count as the effect of the measures works in opposition to the objective while also having detrimental effects on individuals' freedom of expression.

IV. Conclusion

The Online Streaming Act seeks to modernize Canada's legislation meant to protect Canadian identity and culture but does so by unjustly infringing on the constitutional freedom of expression. Additionally, the Online Streaming Act fails to meet the standard for specificity that would allow it to be properly evaluated or implemented in a non-arbitrary manner. The legislation allows for the CRTC to restrict Canadians' freedom of expression by directly influencing the content Canadians encounter online and indirectly influencing the types of content that will be produced and distributed. The

29 *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)*, SOR/2023-239, Canada Gazette, Part II, Volume 157, Number 24, 22 November 2023, https://canadagazette.gc.ca/rp-pr/p2/2023/2023-11-22/html/sor-dors239-eng.html.

wording of the Act is also intentionally vague to allow the Canadian Radio-Television and Telecommunications Commission to determine how it will be enforced and whom it will affect. Furthermore, the measures proposed in the Act are ultimately likely to render itself ineffective, and may even act counter to its own objective, removing any argument for the pressing need to restrict Canadians' freedoms. Despite the stated intention of the Online Streaming Act being to provide a service and a protection to the Canadian people, it would be a failure of the legislative system to allow such a broad and needlessly restrictive amendment to stand.

Authorship in the Age of Algorithms: Adapting Copyright Law for AI-Generated Content

Sydney Thomas[1]

I. Introduction

"Success in creating AI [or artificial intelligence] could be the biggest event in the history of our civilization. But it could also be the last, unless we learn how to avoid the risks"[2]
-Stephen Hawking

The first Artificial Intelligence (AI) program[3] was developed in 1955 and was able to solve general logic problems through automated reasoning. Over the past few decades, AI has become increasingly skilled and present in day-to-day life, making it difficult to find any

1 Sydney Thomas is a senior studying Spanish at Brigham Young University with a minor in International Strategy and Diplomacy. After writing this paper, she is no longer interested in pursuing a future in law and now plans to attend Graduate School in Fall 2025. Sydney would also like to thank her editor, Robyn Mortensen for the monologues they shared. Robyn is a senior studying Political Science at Brigham Young University, with minors in legal studies, communication, and ballroom. Robyn plans to attend law school in Fall 2025.

2 "*The best or worst thing to happen to humanity" - Stephen Hawking launches Centre for the Future of Intelligence*, University of Cambridge, https://www.cam.ac.uk/research/news/the-best-or-worst-thing-to-happen-to-humanity-stephen-hawking-launches-centre-for-the-future-of (last visited February 27, 2024).

3 Rockwell Anyoha, *The History of Artificial Intelligence*, Science in the News, https://sitn.hms.harvard.edu/flash/2017/history-artificial-intelligence/ (February 27, 2024).

facet of life that has not been affected by AI. In November of 2022, Chat GPT, a new AI program, was released by OpenAI. When asked what it was capable of, it answered that it could assist with a wide variety of requests such as producing a speech, debugging a code, generating art, daily planning, offering technical support, engaging in discussions on ethical dilemmas, translating documents, as well as writing college essays in a matter of minutes (though unfortunately, not this paper).[4] Chat GPT is just one of the many AI programs that have become increasingly popular over the last few years. In 2023, AI was used to produce a new Beatles song titled *'Now and Then'* even though only two of the original four band members are alive today.[5] As AI becomes increasingly prevalent, concerns regarding its unclear legal regulation have become an issue. This new technology poses threats to the privacy of consumers and to the protection of intellectual property as they are at risk of violation and copyright infringement.

AI generators rely on existing information and creations to respond to user input and requests. Generative AI programs are trained as they are "fed" (for lack of a better word) information that is publicly available on the internet. They use this information to look for patterns and processes, and go on to refine the answers that they provide in response to prompts that they have been fed from a human user.[6] Although the sources and information that AI generators pull work from are usually publicly available, the programs are not always in compliance with licensing stipulations and rules. As AI pulls information and elements from these sources, it frequently can be found in violation of copyright law. Jean Tallinn, one of the founding engineers of Skype, compared the building of advanced AI

4 ChatGPT "What Are You Capable Of," (last visited February 20, 2024).

5 Hugh McIntyre, *The Beatles Are Using AI To Release One Last Song–Why Aren't More Musicians Doing The Same?*, Forbes, https://www.forbes.com/sites/hughmcintyre/2023/10/09/the-beatles-are-using-ai-to-release-one-last-songwhy-arent-more-musicians-doing-the-same/?sh=1679185229b2 (last visited February 27, 2024).

6 Adam Zewe, Explained: Generative AI, Massachusetts Institute of Technology, https://news.mit.edu/2023/explained-generative-ai-1109 (last visited March 12, 2024).

to the building of a rocket, saying, "The first challenge is to maximize acceleration, but once it starts picking up speed, you also need to focus on steering."[7] As AI continues to grow at an exceedingly rapid pace, it is important that the United States government implement regulations to steer its use in a direction that will allow humans to utilize its transformative potential while mitigating any possible negative effects and establishing guidelines to monitor its use in everyday life. With the goal of putting AI on the right course, American lawmakers must enhance copyright law to meet the increasing concerns on ownership and privacy regarding the creative capacities of AI. They can do this by strengthening the existing fair use doctrine, increasing the property rights of creators, and creating a code of conduct to ensure AI compliance with new regulations.

In his testimony to Congress this past summer, Sam Altman, chief executive of OpenAI, said "My worst fears are that we [the technology industry]...cause significant harm to the world."[8] Mr. Altman, along with many other experts,[9] believes that AI must be regulated now in order to protect the interests of mankind. If left unregulated, AI could potentially spread disinformation,[10] replace

7 Kalev Aasmae, *Building AI is Like Launching a Rocket': Meet The Man Fighting to Stop Artificial Intelligence Destroying Humanity*, ZDNet, https://www.zdnet.com/article/building-advanced-ai-is-like-launching-a-rocket-meet-the-man-fighting-to-stop-artificial/ (last visited February 27, 2024).

8 Cecilia Kang, *OpenAI's Sam Altman Urges A.I. Regulation in Senate Hearing*, The New York Times, https://www.nytimes.com/2023/05/16/technology/openai-altman-artificial-intelligence-regulation.html (last visited February 26, 2024).

9 *Governing AI for Humanity*, United Nations AI Advisory Body (December 2023), https://www.un.org/sites/un2.un.org/files/ai_advisory_body_interim_report.pdf?_gl=1*7uaio6*_ga*MTIzMzM0MDA3MC4xNjk4Njc3NzY3*_ga_S5EKZKSB78*MTcwNzI1Nzk0My4xLjEuMTcwNzI1ODI2NC42MC4wLjA.*_ga_TK9BQL5X7Z*MTcwNzI1Nzk0My4yLjEuMTcwNzI1ODAwOS4wLjAuMA.

10 *Ai-Generated Disinformation Poses Threat of Misleading Voters In 2024 Election*, PBS News Hour, https://www.pbs.org/newshour/politics/ai-generated-disinformation-poses-threat-of-misleading-voters-in-2024-election (last visited February 27, 2024).

important human jobs in the workplace, and violate different privacy and ownership laws in a way that harms human creators. Failing to implement such regulation could make it difficult for the United States to compete with other countries[11] that have already produced such policies to govern AI. Government regulations can slow innovation and fail to adapt in a timely manner to changes in society. It is also possible that in a time where much of society is hesitant about embracing AI, it may be over-regulated, resulting in losing years of progress. However, these concerns can be mitigated through the creation of an updated and adapted version of current copyright law to ensure that human creators will be able to use innovative technologies in ways that continue to promote creativity and originality.

In 2020, the United States Congress created a national initiative to regulate AI to ensure that they would lead the development of AI regulation and "prepare the present and future United States workforce for the integration of AI systems across all sectors of the economy and society."[12] The initiative was launched in response to the rapid growth of AI over the last few years. Its objectives are to support continued AI research and development, allow for more strategic cooperation with political allies, as well as for the United States to act as a leader throughout the world in establishing regulations of AI. Many other countries are also working on their own proposed legislation at this time, thus, it is imperative that the United States quickly implements its comprehensive regulation in order to remain one of the pioneering world leaders in this new era of AI. In this paper, I will argue that AI generated works should not be protected by section 107 of the Copyright Act of 1976 unless they are able to comply with all four factors listed.

11 Mikhail Klimentov, *From China To Brazil, Here's How AI is Regulated Around the World*, The Washington Post https://www.washingtonpost.com/world/2023/09/03/ai-regulation-law-china-israel-eu/ (last visited February 27, 2024).

12 National Artificial Intelligence Initiative Act of 2020, H.R.6216, 116th Cong. (2019-2020).

II. Background

Copyright is a form of intellectual property that "protects original works of authorship as soon as an author fixes the work in a tangible form of expression."[13] Many different mediums of work are covered under this law, including illustrations, books, movies, plays, photographs, drawings, music, and much more.[14] It focuses on three key elements: fixation, creativity, and originality. These key elements ensure that authors, or creators of original works, hold certain rights instead of their creations.

A. Fixation

The U.S. Department of Copyright states that works must be "fixed" in a tangible medium in order to qualify for copyright protections. There is a wide range of accepted mediums including: literary, musical, architectural, or dramatic works, sound recordings and motion pictures as well as many others.[15] Tangible mediums of expression can be shared with others, whether that be through auditory or visual means.[16] The "fixation" of works in such mediums allows individuals other than the original creator to access them, thus making them copyrightable.

B. Creativity

Protected works must also contain some level of creativity, however the threshold for a work to be considered creative is extremely

13 The U.S. Copyright Office, *What is Copyright*, Mar. 15, 2024, https://www.copyright.gov/what-is-copyright/#:~:text=Copyright%20is%20a%20type%20of,a%20tangible%20form%20of%20expression.

14 17 U.S.C. §102.

15 *Id.*

16 Wex Definitions Team, *fixed in a tangible medium of expression*, Cornell Law School Legal Information Institute, https://www.law.cornell.edu/wex/fixed_in_a_tangible_medium_of_expression

low.[17] In *Feist Publications, Inc. v. Rural Tel. Serv. Co.*[18], Feist Publications had copied several pages from the Rural Telephone Service's (RTS) Yellowbook to create their own. RTS argued that Feist had committed copyright infringement. The Court ruled that RTS' pages were not copyrightable, and that Feist could use material from their yellow pages because the material was factual, and facts cannot be copyrighted. In order to be eligible for copyright protection, the Court stated that works must have a "modicum of creativity."[19] While the bar is low and somewhat ambiguous for what can be considered creative, this allows for authors or creators of original works to hold exclusive rights over their creations.

C. Originality

The criterion of originality is fundamental to copyright law. In Article I, Section 8 of the United States Constitution, in an effort to encourage innovations in the fields of science and useful arts, Congress guarantees authors exclusive rights to their personal "Writings and Discoveries."[20] Under copyright law, an author is identified as the creator of an original work. The author also owns the copyright for said work unless they willingly assign the copyright to another party, such as an editor. When a creator makes a work made for hire, the commissioning party is the author.[21] In the case of there being more than one author, all participants share the work's copyright jointly, unless the authors have made a different agreement among

17 *Copyrightable Authorship: What Can Be Registered*, Compendium of U.S. Copyright Office Practices, https://www.copyright.gov/comp3/chap300/ch300-copyrightable-authorship.pdf (last visited February 27, 2024).

18 *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

19 *Id.*

20 *A Brief History of Copyright in the United States*, U.S. Copyright Office, https://www.copyright.gov/timeline/ (last visited February 27, 2024).

21 *Definitions: Who is an Author?*, U.S. Copyright Office, https://www.copyright.gov/help/faq-definitions.html#:~:text=Under%20the%20copyright%20law%2C%20the,entity%2C%20such%20as%20a%20publisher (last visited February 27, 2024).

themselves.[22] Copyright owners own exclusive rights over their protected works which include the following: reproducing copies of the work, distributing copies of the work by sale, and making derivative works based on the original work.[23] Clause 8 of the first article of the United States Constitution states that originality is "prerequisite for copyright protection."[24]

D. Fair Use Doctrine

Under Fair Use Doctrine, people that are not the original creator are permitted to use another's copyrighted work without permission from the owner. The Doctrine of Fair Use allows for copyrighted works to be used in transformative ways that differ from their original purpose. Transformative works are "new, with a further purpose or different character, and do not substitute for the original use of the work."[25] There are four main factors that are required to determine if the use of a certain copyrighted work can be justified under fair use: purpose of use, nature of copyrighted work, amount or substantiality of portion used, and the effect of use on the market for the work.[26] Fair use allows for downstream creators to both benefit and create new works based off of existing ones from first creators in an original way.

It is important to note that as of now, transformative works made by downstream creators are only protected if they were created by a human. The term "downstream creators" refers to individuals who

22 *Copyright: Joint Authorship and Collective Works,* University of California, https://copyright.universityofcalifornia.edu/ownership/joint-works.html#:~:text=Co%2Dauthors%20own%20the%20work's,inherent%20in%20the%20joint%20work (last visited February 27, 2024).

23 *What Rights Does Copyright Provide?*, U.S. Copyright Office, https://www.copyright.gov/what-is-copyright/#:~:text=U.S.%20copyright%20law%20provides%20copyright,rental%2C%20lease%2C%20or%20lending (last visited February 27, 2024).

24 *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

25 U.S. Copyright Office Fair Use Index, U.S. Copyright Office, https://www.copyright.gov/fair-use/ (last visited February 27, 2024).

26 *U.S. Copyright Office Fair Use Index*, U.S. Copyright Office, https://www.copyright.gov/fair-use/ (last visited February 27, 2024).

implement portions of previous works from other original authors to create a new work. This principle was reaffirmed in August of 2023 in the case *Thaler v. Perlmutter.* In this case, the plaintiff tried to register a painting that had been generated by the Creativity Machine, an AI program.[27] The Copyright Office denied this application as the work had not been created by a living individual. The United States District Court for the District of Columbia ruled in favor of the Copyright Office, reaffirming that "Human authorship is a bedrock requirement of copyright" and that AI generated works are ineligible for copyright protection[28]. With the rise of AI, more works that could potentially be considered "transformative" are being generated in massive quantities, using copyrighted works without any consideration for proper licensing or fair use factors.

III. Proof of Claim

Section 107 of the Copyright Act of 1976 outlines the four fair use factors – purpose of use, nature of copyrighted work, amount of substantiality of portion used, and the effect of use on the market for work- and explains the qualifiers needed for a work to meet each part.[29] In the following section, we will analyze AI's ability (or inability) to meet the legal requirements that are listed under section 107 of the Copyright Act of 1976. If AI can meet all four factors, a strong argument could be made for it to benefit from Fair Use protections. However, if it does not, a new form of regulation will have to be created. It is important to note that works where the original creator is human (and not AI), that a piece can be justified under Fair Use even if it does not meet each of the four factors. In order to protect human creators, AI must be required to meet all four factors of fair use when using their work.

27 *Thaler v. Perlmutter et al,* No. 1:2022cv01564 - Document 24 (D.D.C. 2023).

28 *Thaler v. Vidal*, No. 21-2347 (Fed. Cir. 2022).

29 17 U.S.C. §102.

A. Purpose of Use

In order to determine whether or not the secondary use of a work can be justified under fair use, a court will examine how the party is using the work. While the law does not stipulate conditions to determine whether or not something is a good use, if being used for nonprofit or educational purposes, it is likely that a court will rule that the use can be justified.[30] Although educational and nonprofit uses are easier to justify in front of a court, this does not mean that commercial and noneducational uses cannot be determined as fair. It rather means that there must be a strong argument for those cases under the other three remaining factors to decide if the use can be justified. It is also important under this factor that the use of the work is transformative and adds an element that is new, or that furthers or changes the purpose of it. The new work cannot serve as a substitute for the original use of the work; it would be a violation of fair use and copyright law. In *Campbell v. Acuff-Rose Music, Inc.*, a rap group named *2 Live Crew* used portions of Roy Orbinson's "Oh, Pretty Woman" to create their own parody of the song titled "Pretty Woman."Acuff-Rose Music filed a suit against the band, accusing them of copyright infringement. The Court of Appeals ruled that the commercial nature of the use of the work (both being songs, although one a parody) rendered the use unfair, violating both this first factor and the rights of the copyright holder.[31] Artificial intelligence is used in both commercial and noncommercial ways, as well as having been utilized in educational manners (and in noneducational ways). Thus it can be seen that AI is not inherently in violation of this factor, but could be depending on the way it is being used.

B. Nature of Copyright Work

The nature of the copyrighted work is also extremely important in determining whether or not the use meets the legal requirements. It is easier to justify the use of a work that is more factual (news

30 17 U.S.C. §107.

31 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

article or technical item) than it is a work that is more imaginative and creative (novel, song, film).[32] It is also nearly impossible for the use of an unpublished work to be considered fair. In 2023, a group of artists filed suit against Midjourney, a generative AI company, stating that the company had used the work of the artists to train AI algorithms how to draw/generate art in the same style as the artists. In order to train these AI image products, they were fed billions of images, "almost all of which were copied without the artists' permission and without compensation."[33] Using this Midjourney product, consumers are able to simply enter the artists' name and then generate strikingly similar works that appear to have been made by the artists themselves. Consumers have created such images through Midjourney, and have sold them for a profit as well. Midjourney continues to promote their new product with the names of the Plaintiff without having offered any licensing agreements. While this case has not yet been ruled on, it is very unlikely that AI will be allowed to continue performing such tasks as they take advantage of creative works, doing substantial damage to human creators.

C. Amount of Substantiality of Portion Used

Under this, a court will factor in the quality and quantity of copyrighted material that has been used. It is more likely that the smaller portion of the work used, that it can be justified by fair use. However, there are situations where if a very small portion is used that could be considered the "heart" of the work, a fair use justification will not be valid.[34] For example, if a person chooses to use a few lines that make up the chorus of another person's song, this small chorus could be considered the "heart" of the work. Although the portion is small, it is still incredibly significant to the work as a whole if it is the heart of the copyrighted work. In 2023, the Supreme Court decided on the case *Goldsmith v. Warhol*. Andy Warhol created

32 17 U.S.C. §107.

33 *Andersen et al v. Stability AI Ltd. et al*, No. 3:23-cv-00201-WHO (D. Cal. filed on June 2, 2023).

34 17 U.S.C. §107.

a magazine cover of Prince based off of an image taken by Lynn Goldsmith. The court found that Warhol's image of Prince was " substantially the same as that of Goldsmith's original photograph."[35] Although this case was decided long after Warhol's death, he was found in violation of fair use as he had used essentially the whole, or "heart," of Goldsmith's work, and was also in violation of the other factors. Just like Warhol, AI has also been guilty many times of using the "heart" of a copyrighted work, or of even just using too much of a work. While it is important to note that not every AI generated work violates this factor, this factor should raise concern among communities of human creators as they stand to lose much of their own creations if AI remains unregulated. A possible solution to issues that this factor poses could be requiring AI machines to be trained or programmed in a way that allows them to easily identify the "heart" of a work, and thus take steps to ensure that they are not in violation of this factor.

D. Potential Market Effects

It is also important to consider how the unlicensed use of copyrighted material can potentially harm the current or future market for the original work. If the new work takes away from potential purposes or renders the purchasing of the original work obsolete, it is unlikely that the court will find this use fair.[36] In *Andersen et al v. Stability AI Ltd*.,[37] as discussed earlier, Midjourney's generative AI products allowed consumers to create art that looked very similar to that of other artists, and many consumers then sold these new pieces without any licensing deals with the original artists. This has caused significant financial damage to the artists as they have lost business as well as parts of their artistic expression. Here it is clearly seen

35 *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*, 598 U.S. ___ (2023)

36 17 U.S.C. §107.

37 *Andersen et al v. Stability AI Ltd. et al*, No. 3:23-cv-00201-WHO (D. Cal. filed on June 2, 2023).

that in the case of *Andersen et al v. Stability AI Ltd*[38] AI has violated this factor as it has caused significant market effects that have hurt human creators. This case makes it extremely difficult to argue that fair use doctrine could be applied to this technology as AI has clearly limited the power of individuals to compete with it.

IV. Conclusion

The rapid growth and increasing presence of artificial intelligence in society presents a critical period in which we must decide how to best regulate it. Its innovative abilities pose many concerns about its impact on copyright law and the ways in which it impacts communities of human creators. Fair Use Doctrine requires reevaluation and must be updated if it is able to be applied to AI-generated products. Ongoing legal battles between AI corporations and individuals show that the current doctrine is insufficient for present-day needs. Going back to the words of Jean Tallinn, AI is a rocket that has accelerated quickly- and must be steered in the right direction. Requiring AI to comply with all factors of fair use doctrine, increasing the property rights of creators, and creating a code of conduct to ensure AI compliance with new regulations are vital to accomplish this goal. It is imperative that human creators are able to continue working in their fields without having to worry about competing with artificial intelligence, and the best way that we will be able to protect them as a society is through implementing such measures.

38 *Id.*

The TikTok Dilemma: Regulating TikTok for Minors in the Age of Free Speech

Julia Waters[1]

I. Introduction

On February 28th, 2022, Chase Nasca, a 16-year-old American, took his own life. Chase was walking home from the gym when he sent one final message to his friend: "I can't do this anymore." The young teen proceeded to stand on the railroad tracks in downtown Long Island where he waited for his life to end. His parents tried to understand why he would take his own life as he did not have a history of depression, anxiety or other mental health issues. Chase had many friends, and his parents described him as a very social teenager. As his parents dove further into the reasons he chose to cut his life short, they stumbled across his TikTok account. Chase's "For You Page" contained more than 1,000 videos about suicide, self-harm, violence, and depression. His parents did not know when their son opened his TikTok account, but he received his first cell phone in sixth grade.[2] After this discovery, Chase's parents filed a wrongful death lawsuit against TikTok's company owner, ByteDance, attempting to hold the company liable for their son's death because of the depressive content that seemed to be force fed to their young

1 Julia is attending Brigham Young University, majoring in English with an emphasis in Professional Writing and Communication. She plans on attending law school after graduation.

2 Parents of LI Suicide Teen Break Down During TikTok Hearings on Capitol Hill," New York Post, March 23, 2023, accessed November 7, 2023, https://nypost.com/2023/03/23/parents-of-li-suicide-teen-break-down-during-tiktok-hearins-on-capitol-hill/.

son. The lawsuit is currently underway, but a favorable outcome for Chase's parents does not seem likely.[3]

Many critics of the social media platform have highlighted its video content algorithms as harmful. As Chase's death reveals, TikTok has the power to push an agenda of self-harm and suicidal ideation with resounding effects on adolescents and children. Videos that are psychologically disturbing inhibit a higher dopamine reaction,[4] making viewers more inclined to continue watching, which increases TikTok's ad revenue.[5] Unfortunately, Chase's story is not a unique one. There has been an exponential increase of tragic stories concerning social media's influence on the thoughts and actions of young adolescents.[6] One of the biggest culprits of this statistic is TikTok.[7] While no lawsuit or legislation has been successful in

3 Social Media Victims Law Center Sues ByteDance and TikTok in the Death of 16-Year-Old Chase Nasca; Parents Travel to Washington, D.C., to Hear Congressional Testimony of TikTok CEO," Business Wire, March 21, 2023, accessed November 7, 2023, https://www.businesswire.com/news/home/20230321005908/en/Social-Media-Victims-Law-Center-Sues-ByteDance-and-TikTok-in-the-Death-of-16-Year-Old-Chase-Nasca-Parents-Travel-to-Washington-D.C.-to-Hear-Congressional-Testimony-of-TikTok-CEO

4 Julia Pugachevsky, "Why Some People Can't Stop Watching Gruesome, *Graphic War Videos*," Business Insider, October 2023, accessed October 28, 2023, https://www.businessinsider.com/why-some-people-cant-stop-watching-gruesome-graphic-war-videos-2023-10.

5 Kalley Huang, Isabella Simonetti & Tiffany Hsu, "TikTok Ads and Their Impact on Social Media," *The New York Times*, November 14, 2022, accessed October 22, 2023, https://www.nytimes.com/2022/11/14/technology/tiktok-ads-social-media.html.

6 Aksha M. Memon, Shiva G. Sharma, Satyajit S. Mohite, & Shailesh Jain, The Role of Online Social Networking on Deliberate Self-Harm and Suicidality in Adolescents: A Systematized Review of Literature, 60 Indian J. *Psychiatry* 384, 384-392 (2018), https://doi.org/10.4103/psychiatry.IndianJPsychiatry_414_17.

7 Olivia Carville, TikTok's Algorithm Keeps Pushing Suicide to Vulnerable Teens, *Bloomberg Businessweek* (Apr. 20, 2023, 6:01 AM), updated Apr. 21, 2023, 12:27 AM, https://www.bloomberg.com/news/features/2023-04-20/tiktok-effects-on-mental-health-in-focus-after-teen-suicide

restricting the influence of TikTok on children's mental health, there is legislation with alternative goals in progress. Currently in the state of Montana, there is legislation underway to ban TikTok. The ban focuses on the data collection practices of the app. However, while using TikTok at a young age can be extremely harmful, this paper argues that Montana's complete ban would be unconstitutional. It would be a clear violation of citizens' first amendment rights even if the ban would succeed at preventing the harmful effects on adolescents and children.

The allegations regarding Montana's ban are based on the claim that the Chinese government is accessing American data and exploiting it for their own agenda,[8] although there is little to no evidence to prove this is true. While lawmakers in Montana recognize there are many issues concerning TikTok, the premises for the ban are incorrect. As of May 2023, 70% of teenagers between the age of 13-18 interact with TikTok on a monthly basis.[9] At some point, the revealed issues will demand restrictions. The only restrictions regarding content are located in Section 230 of the Communications Decency Act of 1996, which contains vague and nonspecific guidelines for content moderation. This leaves entities unregulated with no clear and defined outlines for what is required of platforms. Additionally, Section 230 protects entities from being liable for the content that is posted to their platform.

While this aspect of Section 230 protects entities from becoming bankrupt, this lack of accountability, which leaves social media designers with no incentive to vet content on their platforms, creates potential for harm. As seen in Chase Nasca's tragic story, TikTok contains content that influences vulnerable children in disastrous ways. In this context, this paper will argue:

1. The unconstitutional aspects of Montana's TikTok ban,
2. Propose legislation that will require age verification, and

8 Dan Milmo, TikTok's Ties to China: Why Concerns Over Your Data Are Here to Stay, *The Guardian* (Nov. 8, 2022), https://www.theguardian.com/technology/2022/nov/07/tiktoks-china-bytedance-data-concerns.

9 Laura Ceci, TikTok Usage in the U.S. 2023, by Age, *Statista* (Feb. 13, 2024), https://www.statista.com/statistics/1095196/tiktok-us-age-gender-reach/.

3. Amend Section 230 to create liability for entities.

II. Background

In 2020, controversy emerged regarding TikTok's data collection practices and company ownership. Within all levels of the U.S. government, bans, restrictions, and bills were being proposed and put in place to protect citizens from the allegations surrounding TikTok, and its parent company ByteDance. Over three years later, government actions are still occurring even while valid evidence for the claims are lacking. The most recent and one of the more controversial actions currently developing is the banning of the entire app in the state of Montana.

A. Montana's TikTok Ban (2024)

This ban was set to go into effect in January of 2024, becoming the first of its kind to ban the entire social media app on both public and private devices. Through a culmination of two years of work, Montana's Attorney General, Austin Knudsen, drafted the law.[10] Knudsen fought for this bill because of his strong belief the app posed a national security threat to the citizens of Montana. His claims piggybacked off of the so-called "fear" that Americans were being spied on by the Chinese government through the app. This fear originated from the claims that ByteDance, the parent company of TikTok, was stealing user information and individuals' location for international espionage.[11] This belief has been spread throughout the media based on the fact that the app is owned by a Chinese company and has Chinese-based employees.

If the Chinese government asked the app to turn over their collected data, then ByteDance would be legally obligated to do so.

10 Sapna Maheshwari, How Montana's Attorney General Made Banning TikTok a Top Priority, *N.Y. Times* (Sept. 2, 2023), https://www.nytimes.com/2023/09/02/business/media/montana-tiktok-ban.html.

11 CPI, Montana Appeals US Judge's Decision Blocking TikTok Ban, PYMNTS (Jan. 3, 2024), https://www.pymnts.com/cpi-posts/montana-appeals-us-judges-decision-blocking-tiktok-ban/.

Knudsen was willing to prohibit the app entirely because of the potential misuse of data. Shou Zi Chew, the CEO of TikTok, repeatedly denied allegations of ever sharing data to the Chinese Communist Party in March of 2023.[12]

Another reason why Montana is also enforcing the ban, is due to the fact that TikTok fails to remove dangerous content and even promotes risky behavior on their app. Coupled with the allegations surrounding the Chinese Communist Party's ability to access the data collection, Knudsen felt the app was dangerous enough to completely ban it within state lines. TikTok greatly opposes the ban as it will cut a portion of their user amount and net income as well as detrimentally impact those who receive their personal income from the app. TikTok owners believe the federal government will completely block the ban, claiming the ban is a violation of first amendment rights to free speech by silencing users' access to a public forum.[13] Other opponents of this prohibition believe it "intrudes on the federal government's authority over foreign affairs and national security."[14] In other words, they claim this is not within the state's jurisdiction, and if action were to be taken, it should be on a federal level. Conversely, Knudsen asserts it causes "unjustifiable harm"[15] which leaves TikTok unprotected by the first amendment and allows states to regulate the app.

12 David Shepardson & Rami Ayyub, TikTok Congressional Hearing: CEO Shou Zi Chew Grilled by US Lawmakers, *Reuters* (Mar. 24, 2023), https://www.reuters.com/technology/tiktok-ceo-face-tough-questions-support-us-ban-grows-2023-03-23/.

13 Dani Anguiano & Kari Paul, TikTok Creators Sue to Block Montana's Ban on the Platform, *The Guardian* (May 19, 2023), https://www.theguardian.com/technology/2023/may/18/tiktok-creators-sue-to-block-montanas-ban-on-the-platform.

14 Sapna Maheshwari, How Montana's Attorney General Made Banning TikTok a Top Priority, *N.Y. Times* (Sept. 2, 2023), https://www.nytimes.com/2023/09/02/business/media/montana-tiktok-ban.html

15 Meghan Bobrowsky, TikTok Tells Montana Judge State Ban Is 'Completely Overboard', *Wall Street Journal.* (Oct. 12, 2023), https://www.wsj.com/tech/tiktok-seeks-montana-lifeline-as-state-ban-looms-cec4bab5.

The ban is filled with prohibition, penalties, and enforcement sections that specify how the ban will be applied. Essentially, the ban prohibits TikTok from being used within the jurisdiction of Montana. This includes government devices, employee devices, and personal devices of any kind. In sum, all residents of Montana will no longer be able to legally access TikTok in any way. This is achieved through removing TikTok from the App Store and Google Play Store, so it is unavailable for download within the state of Montana. If an individual already has TikTok downloaded on their phone when the ban is enacted, then it will no longer be accessible to them. Any entity that allows the use or download of TikTok is liable for a $10,000 fine for every time the ban is violated and can continue to be fined $10,000 for each day it continues. This means both TikTok and any app downloading entity can be held liable for allowing TikTok to be downloaded. The Department of Justice is responsible for enforcing penalties for any violation of this ban.[16]

As mentioned before, this ban was set to go into effect in January of 2024, however, a federal judge has temporarily halted the ban because of TikTok's lawsuit.[17] Regardless of the outcome of this case, Montana's pending success has been because of the fear citizens have surrounding the allegations about TikTok's data collection practices. There has been extreme agitation caused by the conspiracies and claims actively being published in the media. As a practical example, a simple Google search will reveal hundreds of articles concerning the potential dangers of TikTok's data collection practices. An estimated 59% of Americans feel that TikTok is a national security threat.[18] At every government level in the United States, the

16 Mont. S.B. 419, 68th Leg. (2023), https://leg.mt.gov/bills/2023/billpdf/SB0419.pdf.

17 Samantha Delouya & Brian Fung, Judge Blocks Montana's TikTok Ban from Taking Effect on January 1, *CNN Business* (Nov. 30, 2023), https://edition.cnn.com/2023/11/30/business/judge-blocks-montana-tiktok-ban/index.html.

18 Colleen McClain, Majority of Americans See TikTok as a National Security Threat, *Pew Research Center* (July 10, 2023), https://www.pewresearch.org/short-reads/2023/07/10/majority-of-americans-say-tiktok-is-a-threat-to-national-security/.

law lacks control over the app, which has concerned lawmakers and citizens alike. There have also been numerous previously attempted bans and restrictions in the past years that exemplify the fact that TikTok is becoming a growing concern in the country.

B. TikTok Inc v. Trump (2020)

TikTok Inc v. Trump occurred in 2020 when the CEO of TikTok brought action against the executive order Donald Trump implemented.[19] Former United States President, Donald Trump, employed his executive powers to enact a nationwide ban of TikTok.[20] Trump deemed the app a "national emergency." However, in the ruling of *TikTok Inc v. Trump*, Trump's use of executive powers was ruled a violation of the first amendment, Due Process Clause of the Fifth Amendment, and the Administrative Procedure Act (APA). Other countries like Afghanistan and India have successfully banned the app on all devices like Trump intended. Trump's lack of success could be attributed to the United States' unique freedoms that set it apart from other countries. It is not in line with the government's constitution to ban a platform where the public can freely speak and influence others. Moreover, without any solid evidence, laws, bans, and executive orders cannot be enacted on mere speculation and conspiracy. Additionally, Trump did not go through the court system and instead took immediate action, which contributed to the ban's failure. The ban of a social media app was also ruled outside of the jurisdiction of an executive order.

Banning the app would have caused "irreparable harm"[21] to TikTok's platform. Specifically, the ban would be damaging to TikTok as users would be driven to different platforms, thus diminishing the popularity and monetary gain TikTok receives. The United States is the country with the most TikTok users as shown by a recent statistic

19 TikTok Inc. v. Trump, 507 F. Supp. 3d 92 (D.D.C. 2020).

20 Exec. Order No. 13942, 3 C.F.R. (2020), https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-addressing-threat-posed-tiktok/.

21 *Id.*

with a staggering 143 million people currently using TikTok[22] in the United States. If TikTok's largest audience could no longer interact with the app, the number of employees for the company would decrease. This would also affect the users who make a profit and a living from posting on their account as their source of income would be inaccessible to them. Trump's attempt to exercise his executive powers ultimately failed to meet the requirements demanded at the Supreme Court level.

C. Arkansas Social Media Safety Act (2023)

The Arkansas' Social Media Safety Act was another approach to restrict TikTok and other entities like Facebook, Instagram, and Snapchat.[23] It was set to go into effect on September 1st of 2023, but was blocked by a federal judge before it was enacted. Arkansas proposed this act to "address the dangers that minors face online." The act attempted to combat these dangers by furthering age verification account methods on social media platforms. This would protect minors who are below the age limit on social media apps from harmful and influencing content, keeping social media apps accountable to the age restrictions they have set for themselves.

Additionally, this would confirm all users' ages to prevent child predators from posing as younger accounts. The current lack of age verification has led to harassment, catfishing, sexual exploitation of children, grooming, and additional harmful contact between parties.[24] Within the proposed act, minors would have to receive parental permission to download the app and then submit age identifying documentation to a third-party verification company. Once the age is confirmed, the company would delete the documentation. The

22 Laura Ceci, TikTok Users by Country 2024, *Statista* (Feb. 1, 2024), https://www.statista.com/statistics/1299807/number-of-monthly-unique-tiktok-users/.

23 NetChoice, LLC v. Griffin, No. 5:23-cv-05105 (W.D. Ark. filed 2023).

24 Child Crime Prevention & Safety Center, Children and Grooming: Online Predators (2023), https://childsafety.losangelescriminallawyer.pro/children-and-grooming-online-predators.html

Arkansas Social Media Safety Act was blocked from being enacted because it was termed to be too vague to understand what was being prohibited. The court felt it "forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application."[25] A lack of specificity and distinct restrictions within the proposed act was what ultimately prevented this act from impacting change within the world of social media.

D. 52.204-27 Prohibition on a ByteDance Covered Application (2023)

The only successful ban of TikTok on a federal level is the 52.204-27 Prohibition on a ByteDance Covered Application which went into effect in June of 2023. This federal ban of TikTok on government devices forbids all federally contracted devices from having apps that are owned by the company ByteDance.[26] ByteDance owns several other prominent apps,[27] however, TikTok is the most popular out of all of them. This is the only complete ban that has successfully passed and been set in motion on a federal level regarding TikTok. This prohibition was put into place because of concerns regarding the app's data collection practices and national security concerns within the federal government. The ban has not been deemed unconstitutional at this time because it is not an entire ban of the app, only access on specific devices. The prohibition is not an infringement of an individual's freedom of speech because every individual can still access the app on a device. The United States is not the first country to ban the app on government devices. Currently, Australia, Canada, Denmark, France, and the Netherlands have similar bans that block government employees from accessing TikTok on their work devic-

25 *Id.*

26 Dept. of Defense, 52.204-2 Security Requirements, 52 Fed. Reg. (2024), https://www.acquisition.gov/far/52.204-2.

27 Nitish Pahwa, TikTok's Chinese Owner Has a Bunch of Other Popular Apps, *Slate* (Mar. 22, 2023), https://slate.com/technology/2023/03/tiktok-bytedance-capcut-hypic-ban-marvel-snap.html.

es.[28] Clearly, the potential threat to privacy is not only a growing concern in the United States, but it is also an issue recognized on a global level.

E. The Communications Decency Act of 1996, Section 230 (1996)

The Communications Decency Act originated in 1934 and created the Federal Communications Commission (FCC) to facilitate the telephone and radio industries. Since then, it has been amended and updated due the entrance of new and evolving technological challenges.[29] Section 230 is one of those amendments. It plays a large role in content moderation and liability within social media. Section 230 of the Act states "that [n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[30] Meaning, no computer service is held liable about the content posted on their platform regardless of its constitutionality. The term "good faith" is vague and undefined, so entities are not held to a defined standard in terms of content moderation and vetting. Additionally, Section 230 protects social media companies from being held liable from any offensive messages or ideas being posted. Practically, if an individual was offended or negatively affected by a post or message, they would not be able to sue the entity it was posted on. A challenging intersection is created because social media entities are protected

28 Kelvin Chan, Here are the Countries That Have Bans on TikTok, AP News (Apr. 4, 2023), https://apnews.com/article/tiktok-ban-privacy-cybersecurity-bytedance-china-2dce297f0aed056efe53309bbcd44a04.

29 Federal Communications Commission, The FCC's Authority to Interpret Section 230 of the Communications Act (Oct. 21, 2020), https://www.fcc.gov/news-events/blog/2020/10/21/fccs-authority-interpret-section-230-communications-act.

30 Bureau of Justice Assistance, The Communications Act of 1934, U.S. Department of Justice (2024), https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1288.

from being liable for individuals' personal agency to post what they want. It also does not hold entities accountable for the content found on their platforms. With all the attempted bans and restrictions of TikTok, it is inevitable this problem will come to a head with the hope that it is for the benefit of the app and its users alike.

Montana's TikTok ban, based on the uncertainty of the app's data practices, sparks an important conversation about the intersection between law and social media. Finding common ground on both sides of the ban can be done by focusing on the harmful effects surrounding underage users. This next section of the argument will discuss the unconstitutionality of Montana's TikTok ban, how TikTok needs to be limited by placing federal level restrictions on the app regarding their content moderation and the enforcement of the age requirement.

III. Proof of Claim

There are two claims this argument will make regarding TikTok. The first is that Montana's TikTok ban stands in violation of first amendment rights. The second is, rather than banning the app, federal restrictions should be put in place to combat the danger TikTok poses regarding children and adolescents. These federal restrictions would affect other social media apps like Facebook, YouTube, and Instagram. However, this paper's focus will spotlight TikTok because of the contention the app has caused at the state and federal level. The solution to this issue should be viable for the company, the app's users, and those who oppose the app. Its focus needs to be placed on the most vulnerable parties. If the action against TikTok continues in the manner that Montana's ban has been heading, then it will cause irreparable damage to the platform and its account holders.

A. Opposition to Montana's TikTok Ban

The first amendment states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise

thereof; or abridging the freedom of speech…"[31] Montana's ban of a social media platform is an abridgement of citizen's freedom of speech.

TikTok possesses a large scope of influence on citizens' opinions and their ability to share those opinions. A ban on the app because of non-evidence-based fear is a silencing of numerous voices. Recent cases, specifically *Missouri v. Biden*, have set precedent regarding the censorship of social media and the first amendment implications that arise. When applied to Montana's ban of TikTok, it is clear this ban is in violation of first amendment rights.

In the case of *Missouri v. Biden* of 2021, the Biden Administration was accused of wrongfully moderating content and promoting censorship on social media platforms.[32] Evidence suggested that the administration was both suppressing and encouraging certain information regarding the COVID-19 pandemic and 2020 presidential election. The case was ruled a violation of the first amendment rights because of the significant evidence of citizens' voices being silenced through the government's encouragement of moderation by the social media companies. Most of the content that was removed was in line with social media's policies and was protected speech under the constitution but was being labeled as "misinformation," meaning that it was categorized as fake news. There were numerous claims that content being promoted on social media tended to endorse the agenda of the Biden Administration. As private entities, social media companies are personally responsible for the content moderation of their platform. Any outside forces attempting to moderate constitutionally protected content that is posted on a platform is violating an individual's free speech.[33] In *Missouri v. Biden*, it is apparent that both the social media companies and the user's right to

31 Library of Congress, First Amendment, U.S. Constitution, Constitution Annotated, https://constitution.congress.gov/constitution/amendment-1/

32 State of Missouri, et al. v. Joseph R. Biden, Jr., et al., No. 3:22-CV-01213 (W.D. La. Mar. 20, 2023).

33 Laurel Wamsley & Shannon Bond, What a Ruling Barring Federal Interaction with Social Media Means, NPR (July 5, 2023), https://www.npr.org/2023/07/05/1186108696/social-media-us-judge-ruling-disinformation.

speech was being infringed upon. The government's coercion had a heavy influence on the social media's ability to make their own decisions about what was being moderated on their platform. Likewise, users and content creators were struggling to be able to share their opinions and reach an audience if they were not in line with the Biden Administration's beliefs.

Similarly, Montana's TikTok ban is a violation of TikTok's first amendment right to create a platform fostering public speech. It is also a violation of a user's right to access the platform. A full ban of TikTok would be against the very ideals the country was built on, setting a dangerous precedent allowing government overreach with regard to free speech. Similar to how the Biden Administration is unable to remove content because they disagree with its message, Montana should not be able to ban an app because they do not agree with or feel comfortable with the data collection practices of TikTok. Without any real evidence, it is a speculative claim and should not hold weight in their state government.

For many, there is uncertainty regarding China's access to TikTok's data because of the struggle to find any evidence to support the claim. Due to this, the situation should be treated with caution. A few of the allegations regarding China collecting data can be mitigated by the placement of restrictions on the app for minors. Restrictions on minors' access to the app would significantly reduce the use of the app in the United States and therefore, reduce the data collection ability of ByteDance. If the allegations happened to be true, these restrictions would protect the most vulnerable population—children under 13—from having their data collected by a foreign entity. Additionally, TikTok has incorporated a new method of data collection to help ease the minds of American users because of the massive allegations about the data collection practices. As of March 23, 2023, they transitioned their data collection practice. They have been working with the Committee on Foreign Investment in the United States (CFIUS) and have transitioned their data collection to a new entity called the TikTok US data collection (USDS).[34]

34 TikTok, About Project Texas, TikTok, https://usds.tiktok.com/usds-about/ (last visited May 16, 2024).

This change minimizes data transfers across regions and limits employee access.[35] All the data collection practices for the United States are now overseen by a U.S.-based security team. The implementation of new data collection practices has cost TikTok around 1.5 billion dollars. However, even with this change, there is still public speculation about the validity of TikTok's intentions. Montana's main reasoning for the ban being based on the belief that TikTok is a national security threat is erroneous. The state government does not have jurisdictional rights of dealing with national security threats—that is the job for the federal government.[36] There is no definitive evidence that the Chinese Communist Party has seized the data that TikTok has gathered.[37] There is the claim of one former ByteDance employee, Yintao Yu, that the Chinese Communist Party (CCP) has been accessing the data through backdoors in the data collection for political purposes,[38] but they were unable to provide any verifiable evidence like paperwork or messages to substantiate the claim. Mere speculation and the claims of one individual cannot deem TikTok a national security threat. However, Montana was correct in their caution to the potential mental health threat that TikTok poses to adolescents.

B. Negative Effects of TikTok Use on Adolescents

TikTok's targeted demographic is adolescents and young adults. Statistics have shown that about 25% of users are between the ages

35 Michael Beckerman, Our Approach to Keeping U.S. Data Secure, TikTok Newsroom (July 5, 2022), https://newsroom.tiktok.com/en-us/our-approach-to-keeping-us-data-secure

36 Objective 2.1: Protect National Security, U.S. Dep't of Justice, Strategic Plan (2024), https://www.justice.gov/doj/doj-strategic-plan/objective-21-protect-national-security

37 Yaqiu Wang, The Problem with TikTok's Claim of Independence from Beijing, Human Rights Watch (Mar. 24, 2023), https://www.hrw.org/news/2023/03/24/problem-tiktoks-claim-independence-beijing.

38 Brian Fung, Analysis: There is Now Some Public Evidence That China Viewed TikTok Data, CNN Business (June 8, 2023), https://www.cnn.com/2023/06/08/tech/tiktok-data-china/index.html.

of 10-19.[39] With the United States having an estimated 73.7 million active monthly users, this puts TikTok users within the age range of 10-19 at about 18.4 million people.[40] This number is only expected to grow in the coming years. As the popularity of TikTok has increased, more studies are examining the effects on younger children and teenagers. The International Journal of Environmental Research and Public Health conducted a study in 2021 that revealed that adolescents who frequently watch TikTok are more susceptible to experience stress, anxiety, and depression.[41] This study also revealed a mediating effect between TikTok use and memory loss in adolescents. The Italian Journal of Pediatrics conducted a more recent study in 2022 aimed at discerning if watching TikTok contributed to the promotion of eating disorders in young girls.[42] They found that TikTok users between the ages of 12-16 felt more insecure about themselves, their body, and their weight when watching TikTok videos. "For 59.0%, using TikTok reduced self-esteem, while 26.9% reported TikTok-related significant changes in their daily lives, and 3.8% reported experiences of body-shaming."[43] While the negative effects of TikTok are just being identified by the scientific world, there is already a correlation between using the app at a young age and certain outcomes.

39 Josh Howarth, TikTok User Age, Gender, & Demographics (2024), Exploding Topics (Jan. 12, 2024), https://explodingtopics.com/blog/tiktok-demographics.

40 Matthew Woodward, TikTok User Statistics 2024: Everything You Need to Know (2024), https://www.searchlogistics.com/learn/statistics/tiktok-user-statistics/ (last visited June 4, 2024).

41 Peng Sha & Xiaoyu Dong, Research on Adolescents Regarding the Indirect Effect of Depression, Anxiety, and Stress between TikTok Use Disorder and Memory Loss, 18 Int'l J. Environ. Res. Pub. Health 8820 (2021), https://doi.org/10.3390/ijerph18168820.

42 Jacopo Pruccoli, Marta De Rosa, Lucia Chiasso, Annalisa Perrone & Antonia Parmeggiani, The Use of TikTok Among Children and Adolescents with Eating Disorders: Experience in a Third-Level Public Italian Center During the SARS-CoV-2 Pandemic, 48 Ital. J. Pediatr. 138 (2022), https://doi.org/10.1186/s13052-022-01308-

43 *Id.*

The drastic negative effects of TikTok need to be addressed appropriately. The government regulates minors' access to other harmful things such as alcohol and drugs, so why should they not be allowed to regulate other harmful substances, including electronic ones? The Center for Countering Digital Hate did a report in 2022 regarding eating disorders, suicide, and violent content promotion on TikTok.[44] They found that TikTok hashtags that contained eating disorder content had over 13.2 billion views. They also found that suicide content was promoted within the first 2.6 minutes of downloading the app and eating disorder content was recommended in 8 minutes with accounts that were registered as 13-year-olds. In response to this, TikTok stated that it "was not representative of a real person." In order to challenge that, a CNN business reporter, Clare Duffy, posed as a 13-year-old to create a TikTok account to see what kind of videos would pop up on her feed.[45] She scrolled through the videos on the "For You Page," a page with suggested content driven by TikTok's algorithm, for 30 minutes each day for five days, watching through the entirety of each video and then scrolling past it. Within 17 minutes of Duffy's experiment, she found videos that had underlying themes of suicide and violence through a song being sung by a man playing the guitar. A couple minutes later, she watched a video that had a young woman who was wearing spandex shorts and shaking her body in sexually suggestive ways towards the screen.

After thirty minutes of scrolling, Duffy proceeded to use the suggested search feature on TikTok to see what suggestions TikTok created for the user. Duffy typed the letters, "ki," in the search bar, and the second suggestion for the user was "kintiktok" which guided Duffy to an array of videos about "kinks," which is a slang word for

44 Center for Countering Digital Hate, Deadly by Design (2022), https://counterhate.com/research/deadly-by-design/

45 Clare Duffy, CNN Takes Over a 14-Year-Old's TikTok Account. 17 Minutes In, This Is What We Saw, CNN Business (Apr. 18, 2023), https://www.cnn.com/videos/business/2023/04/18/teen-tiktok-experiment-clare-duffy-zw-orig.cnn-business.

"a particular sexual preference or behavior that is unconventional."[46] The videos that she found were descriptions of this behavior or even a re-enactment of certain sexual preferences. Once Duffy clicked on this search suggestion, an "Others Searched For" section appeared and suggested similar content for the user. A user could happen upon those videos while searching for something entirely different.

Duffy then searched terms regarding self-harm and eating disorders and was able to easily watch dozens of videos. While some of those videos were in regard to recovering from those struggles, there were still some that sat in a gray area in terms of what the content was really promoting. On the fifth day, Duffy changed the user's account settings to be on "restricted mode," which TikTok defines as "limit[ing] the exposure of content that may not be suitable for everyone."[47] Duffy proceeded to search the terms regarding sexual content, self-harm, suicide, and eating disorders that she had searched previously without the restricted mode in place and found that she could access almost all of the same videos. The restricted mode did not seem to restrict anything for the user. While there may be protest around this experiment because Clare Duffy intentionally sought out less appropriate content, the fact remains that she was still able to access content that was not within TikTok's community guidelines.

C. TikTok's Community Guidelines

TikTok's guidelines have four goals for their platform: (1) remove violative content, (2) age restrict mature content so it is only viewed by adults, (3) maintain "For You" feed eligibility standards to help ensure any content that may be promoted by their recommendation system is appropriate for a broad audience, and (4) empower

46 "Kink," Dictionary.com, https://www.dictionary.com/browse/kink (last visited June 4, 2024)

47 TikTok, Restricted Mode, TikTok Help Center (2024), available at https://support.tiktok.com/en/safety-hc/account-and-user-safety/restricted-mode

the community.[48] When users download this app, they enter into an agreement to follow TikTok's community guidelines, and TikTok agrees to strive to make the platform adhere to these guidelines. Previous evidence points to the fact that neither party has held up their end of the deal, ultimately harming the malleable minds of vulnerable children accessing the app.

TikTok has defined outlines for what are considered sensitive and mature themes that are not permitted on their platform. Within their guidelines they state, "We do not allow sexual activity or services. This includes sex, sexual arousal, fetish and kink behavior, and seeking or offering sexual services."[49] Within Duffy's mere five-day period she was able to locate a trending hashtag on TikTok that extensively discussed and represented "kink" behavior. It appears that this content is something TikTok does allow on their platform regardless of what they have stated. Additionally, TikTok's guidelines express that nudity is also not tolerated on the platform. While there are base outlines, the more ambiguous areas are based on the statement of not allowing, "significant body exposure," a vague and subjective statement. TikTok also states that they "do not allow seductive performances or allusions to sexual activity by young people, or the use of sexually explicit narratives by anyone."[50] Again, this content can be searched and viewed by any user in a matter of seconds as represented by Duffy's small-scale experiment. Any individual with a desire to access that content can easily do so on this platform.

Under the umbrella of community guidelines, there is a specific section regarding youth safety and well-being,[51] specifically, for the age range between 13-16 years old. There are four aims within that section:

48 TikTok, Community Guidelines (2024), available at https://www.tiktok.com/community-guidelines/en/

49 Id at Sensitive and Mature Themes.

50 Id.

51 Id at Youth Safety and Well-Being.

1. Limiting access to certain product features

In the aim of limiting access to certain product features, TikTok does not allow 13-15-year-old users to get direct messages or have downloads or shares of their videos, automatically sets their account to private, only allows comments to be posted to their videos if the minor follows that person and restricts any user from stitching the minor's videos. While all of this does sound like a true effort by TikTok to protect child privacy and security, the user can be dishonest about their date of birth in their account settings to bypass all of this protection.[52] TikTok does not have any age verification method in place to ensure that minors are accurately reporting their age. Implementing this would also protect minors from predators posing as young adolescents on the app.

2. Developing content by levels of thematic comfort[53]

The next aim of TikTok regarding content levels is a recently released feature where users can inform TikTok of certain hashtags or videos that they are not interested in seeing in their feed, and TikTok will filter the videos out. After viewing a video or hashtag that users don't want to see, they report the content to TikTok. This helps to individualize what a user sees on their feed and helps them to avoid things that may be personally offensive or harmful. Unfortunately, this feature can only be utilized after the user has viewed the content and is not a filter that can be placed before you scroll. Additionally, an adult account can also pair to a teen account to control the content filter for the teenager. However, there is a lack of publicity surrounding the parental accounts and the content feature filter. TikTok should make it a focus to share the tools they have created for parents and encourage them for minors with TikTok.

52 Sapna Maheshwari, TikTok Claims It's Limiting Teen Screen Time. Teens Say It Isn't., N.Y. Times (Mar. 23, 2023), https://www.nytimes.com/2023/03/23/business/tiktok-screen-time.html

53 Cormac Keenan, More Ways for Our Community to Enjoy What They Love, TikTok Newsroom (July 13, 2022), https://newsroom.tiktok.com/en-us/more-ways-for-our-community-to-enjoy-what-they-love

3. Using restrictive default privacy settings[54]

The third aim of TikTok means the platform automatically makes accounts of 13-15-year-olds private when they first create it. To change this, the 13-15-year-olds are able to click a button to switch their profile to public. Then, any TikTok user can see and interact with the content they are posting. While it protects underage users who are not aware of what public and private accounts are, it is not a difficult task for someone to switch to a public account if they desire. Default privacy settings should be the expectation for all accounts, not the exception for a small portion of underage users. TikTok should be keeping individuals' personal content and information private unless they choose to publicize it.

4. Making content created by anyone under 16 ineligible for the For You feed[55]

The fourth step to protect underage users by TikTok has failed with no attempt to rectify the situation. There are hundreds of viral TikTok stars that are under the age of 16 with their videos being posted on the For You page as that is essentially the only way to gain virality on the app. TikTok claims that if they see accounts that they believe are underage, they will prevent it from being suggested on the For You page. However, there has not been any true attempt banning underage accounts, and because of that, it has detrimentally damaged children.

To illustrate, 13-year-old TikTok star, Ava Majury, gained one million followers in the span of a single year.[56] She posted dancing and lip-syncing videos on her public account. She gained followers because her videos were being suggested on other users' For You

54 Teen Privacy and Safety Settings, TikTok Help Center (2024), https://support.tiktok.com/en/account-and-privacy/account-privacy-settings/privacy-and-safety-settings-for-users-under-age-18

55 Community Guidelines, TikTok (Effective May 17, 2024), https://www.tiktok.com/community-guidelines/en/youth-safety/

56 TikTok Star Ava Majury Discovers the Dark Side of Fame, N.Y. Times (Feb. 17, 2022), https://www.nytimes.com/2022/02/17/us/politics/tiktok-ava-majury.html

page. She began to get many direct messages from an adult male follower for weeks on multiple social media platforms—direct messages that should have been disabled for a user between the ages of 13-15. The man began to stalk Ava and eventually showed up at her house with a gun. The stalker broke down the door and attempted to shoot his gun. However, Ava's father, Rob Majury, shot and killed the stalker before he was able to harm anyone. This near tragic experience was an eye-opening facet into the danger of children posting publicly.

None of TikTok's steps toward the safety and well-being of children was able to defend Ava because none of TikTok's protections were in place for her account. TikTok never banned Ava's account from showing up on the For You feed when it is explicitly stated in their community guidelines that accounts of users between 13-15 years of age would not be put on the suggested feed. Ava was able to receive direct messages from the predator, which is against TikTok's aim of limiting access to certain product features. With Ava's extreme popularity, these discrepancies should not have slipped under Tiktok's radar. TikTok's lack of incentive and focus on these aims has caused harm and will continue to cause harm to underage users.

D. Addiction and Mental Health

As TikTok has increased its user base over the years, more addiction in adolescents is being discovered. TikTok's addictive nature stems from its algorithm and 15 second dopamine-inducing videos. The app's algorithm collects data about how many times an individual watches a video, if they like, comment on, or share the video, how quickly they scroll past something, what they have been searching for, and what video made them stop watching and close the app. The culmination of this data helps TikTok create a customized "For You" page full of videos they think the user would most like. Because of this algorithm, it is not uncommon for users to spend hours scrolling through videos that are perfectly tailored to their interests. In 2022, TikTok had the highest average screen time for children out of all

social media apps, at an estimated 113 minutes per day.[57] That means the average adolescent is watching an estimated 452 videos everyday assuming that all of the videos they watched were 15 seconds long. That average has only grown since TikTok's release in 2016.[58]

The second aspect of TikTok that entices individuals to increase their use of the app is video length. The strategically timed videos are the ideal length to keep the watcher's attention but not too short that nothing occurs within the video. When a user watches a TikTok video that they enjoy, their brain releases dopamine. Dopamine is a neurotransmitter that contributes to body functions like mood, motivation, attention, and memory.[59] Dopamine addiction is becoming an increasingly prevalent problem for TikTok. As users continue to watch more videos, they enforce the reward system that creates neural pathways that wire the brain.[60] Users then watch videos, expecting to receive a dopamine rush even if they cannot correctly identify they are feeling that rush. Dopamine addiction is also strongly tied with extremely addictive drugs like amphetamine and cocaine.[61] While it is recognized that these drugs are different from TikTok, watching TikTok creates similar reward systems and neural pathways that make it difficult to resist indulging. As stated in the paper earlier, sad and psychologically disturbing videos inhibit a higher dopamine release, which in turn increases TikTok's ad revenue. TikTok is deliberately showing individuals content that is harmful

57 Laura Ceci, Time Spent by Children on Top Social Apps U.S. 2023, Statista (Mar. 26, 2024), https://www.statista.com/statistics/1301888/us-time-spent-by-children-on-social-media-apps

58 Anisha Kohli, Why TikTok's New Teen Time Limit May Not Do Much, TIME (Mar. 2, 2023), https://time.com/6259863/tiktok-time-limit-teens/.

59 Ann Pietrangelo, Dopamine Effects on the Body, Plus Drug and Hormone Interactions, Healthline (Nov. 5, 2019), https://www.healthline.com/health/dopamine-effects.

60 Valentina Fernandez, Social Media, Dopamine, and Stress: Converging Pathways, Dartmouth Undergraduate Journal of Science. (Aug. 20, 2022), https://sites.dartmouth.edu/dujs/2022/08/20/social-media-dopamine-and-stress-converging-pathways

61 Roy A. Wise & Chloe J. Jordan, Dopamine, Behavior, and Addiction, 28 J. Biomed. Sci. 83 (2021), https://doi.org/10.1186/s12929-021-00779-7

because they care more about engagement rather than the safety of adolescents.[62] TikTok's algorithm can nearly guarantee a video the user will enjoy, making the dopamine rush happen continuously. This, paired with a never-ending supply of videos to scroll through, can easily lead to an addiction for youth who are developing cognitively. TikTok's unique combination of tools to create such an enticing platform is what sets it apart from other social media apps and addictions.

1. Mental Integrity

TikTok is an infringement of users' mental integrity,[63] which is defined as an "individual's mastery of his mental states and his brain data so that, without his consent, no one can read, spread, or alter such states and data in order to condition the individual in any way."[64] TikTok's goal is to increase users and its users' watch time.[65] The reward system that is developed for individuals who spend time on the app, condition the individual to need to open and watch videos. This then can alter a person's mental state to be conditioned to use TikTok.

62 Sapna Maheshwari, TikTok Appears to Push Harmful Posts to Young Users, Researchers Say, N.Y. Times (Dec. 14, 2022), https://www.nytimes.com/2022/12/14/business/tiktok-safety-teens-eating-disorders-self-harm.html.

63 Thomas Douglas & Lisa Forsberg, Three Rationales for a Legal Right to Mental Integrity, in Palgrave Studies in Law, Neuroscience, and Human Behavior, (2021), https://doi.org/10.1007/978-3-030-69277-3_8.

64 Andrea Lavazza, Freedom of Thought and Mental Integrity: The Moral Requirements for Any Neural Prosthesis, 12 Front. Neurosci. 82 (2018), https://doi.org/10.3389/fnins.2018.00082.

65 Ben Smith, How TikTok Reads Your Mind, N.Y. Times (Dec. 5, 2021), https://www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html

More reports of depression, anxiety, and violent thoughts are being correlated with TikTok use.[66] While the United States does not have any clear legal defining outlines on what mental integrity is, they do have outlines regarding bodily integrity. The Fourteenth Amendment states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[67] Essentially, the right to bodily integrity is protection of outside sources from violating the life, liberty, and property of your body. Right to your bodily integrity should be linked to mental integrity—your brain is part of your body. The human brain controls both voluntary and involuntary functions in the body including physical movements, thinking and planning, blood pressure and heartbeat, to name a few.[68] The brain and body are inseparably linked. The health of the brain is then linked to the health of the body. Therefore, the right to liberty includes the right to freedom of thought.[69] TikTok infringes on adolescents' right to freedom of thought because of the negative effects on mental health.[70] The addictiveness of the app takes away children's freedom.

66 Peng Sha & Xiaoyu Dong, Research on Adolescents Regarding the Indirect Effect of Depression, Anxiety, and Stress between TikTok Use Disorder and Memory Loss, 18 Int J Environ Res Public Health 8820 (2021), https://doi.org/10.3390/ijerph1816882

67 The House Joint Resolution Proposing the 14th Amendment to the Constitution, June 16, 1866; Enrolled Acts and Resolutions of Congress, 1789-1999; General Records of the United States Government; Record Group 11; National Archives.

68 Tamara Bhandari, Mind-Body Connection is Built into Brain, Study Suggests, Washington University School of Medicine in St. Louis (April 19, 2023), https://medicine.wustl.edu/news/mind-body-connection-is-built-into-brain-study-suggests

69 Liberty, Legal Information Institute, https://www.law.cornell.edu/wex/liberty (last visited June 6, 2024).

70 Rachel Ehmke, Social Media Effects on Teens | Impact of Social Media on Self-Esteem, Child Mind Institute, https://childmind.org/article/how-using-social-media-affects-teenagers (last visited June 6, 2024).

In *McFall v. Shimp (1978),*[71] Robert McFall, the plaintiff of the case, contracted a rare bone marrow disease and needed a life-saving bone marrow transplant. David Shimp was a close match for the transplant but did not want to donate to the plaintiff. McFall argued that Shimp should be required to donate since it would be a lifesaving transplant. The Pennsylvania judge, John Flaherty, denied the plaintiff's request because he stated, "society and government exist to protect the individual from being invaded and hurt by another."[72] This case more narrowly defined bodily integrity. Shimp was not obligated to alter his physical state for the benefit of another. Even though it is a choice to download TikTok, adolescents and children are being hurt by TikTok for the app's personal monetary gain. TikTok is an infringement on children's freedom of thought because they are unable to learn important skills in their mental development. There is a lack of socialization, direct communication, and self-esteem. Without these skills, children and adolescents' success in the real world will be damaged.[73]

2. Federal Child Protection

The United States federal law has built-in protections for individuals under 18 because of the vulnerability of children. The Child Abuse Prevention and Treatment Act (CAPTA) protects children from abuse, neglect, and all forms of maltreatment.[74] Created in 1974, it established national definitions for child abuse and neglect. It is continually amended as new forms of mistreatment in children are identified and new forms of assistance are discovered. CAPTA is

71 Robert McFall v. David Shimp, No. GD78-17711, 10 Pa. D. & C. 3d 90 (C.P. Allegheny Co. 1978)

72 McFall v. Shimp, 10 Pa. D. & C. 3d 90

73 "Why Is Social Development Important In Early Childhood?" The Amazing Explorers Academy, October 20, 2023, https://www.aexplorers.com/why-is-social-development-important-in-early-childhood

74 The Child Abuse Prevention and Treatment Act (CAPTA), Administration for Children and Families, U.S. Department of Health & Human Services, February 6, 2019, current as of August 1, 2023, https://www.acf.hhs.gov/cb/law-regulation/child-abuse-prevention-and-treatment-act-capta

a great representation of actively identifying problems and adjusting solutions to protect children from this changing world. Ultimately, adolescents must be specifically advocated for in the law in order to be protected. There is too much scientific evidence that points to TikTok having a negative effect on children for it to be coincidental. There is a real problem, and the federal government has the power to intercede in a fair and constitutional way.

Protecting children from harmful substances is evident throughout the United States' legal history. In *South Dakota v. Dole* the Minimum Legal Drinking Age laws were established in 1984.[75] The Secretary of Transportation withheld federal funds from states who did not implement the legal drinking age to be 21. This was in response to the increase of drinking and driving from young people. South Dakota felt that the withholding of funds was a violation of Congressional power and the twenty-first amendment. However, the Supreme Court determined that this was legal for Congress to provide incentive because the restrictions were "in pursuit of the general welfare."[76] This prohibited people under the age of 21 from drinking, possessing, or buying alcoholic beverages. This decreased the prevalence of young drunk drivers, which in turn protected the young adults, drinkers, other drivers on the road, and pedestrians. Additionally, harmful effects that were found in adolescents who drank alcohol included changes in brain development, addiction, school performance problems, suicide, and violence. Whereas adults are developed enough to responsibly drink, adolescents are susceptible to irresponsibility because of their underdeveloped brains. The federal government was able to recognize the harm that alcohol caused for young adults and implement restrictions that did not ban the substance entirely, but protected vulnerable individuals from accessing it until they were ready for that influence. This argument intends to propose the same thing for TikTok and other social media sites alike.

75 The 1984 National Minimum Drinking Age Act, Alcohol Policy Information System, National Institute on Alcohol Abuse and Alcoholism, https://alcoholpolicy.niaaa.nih.gov/the-1984-national-minimum-drinking-age-act

76 South Dakota v. Dole, 483 U.S. 203 (1987).

E. Proposed Legislation

As established previously, an entire ban of TikTok would be unconstitutional. The solution to this issue requires a middle ground that benefits both sides of the argument. TikTok should have federal level guidelines regarding required age verification and content moderation. This proposal of a federal bill entails required age verification paired with a reformation of Section 230 to provide incentive for content moderation. This would prevent future bans of the entire app because it would resolve many of the concerns surrounding the entity and create it as a safer place for all users. Required age verification would ensure that the platform is only accessed by the individuals that it was intended for. This prevents harm for children under 13 accessing potentially addictive and self-deprecating content. This change would help repair the negatively affected mental health of adolescents and decrease their access to harmful and influential content with potentially permanent consequences. This would not be the first time that the federal government has taken action against TikTok as they successfully banned TikTok from certain devices with its *52.204-27 Prohibition on a ByteDance Covered Application* in 2023. This issue is significant enough to be brought to a federal level as it has been brought up multiple times and will continue to be brought up until a resolution can be met.

1. Required Age Verification

TikTok's minimum age requirement for the app is 13 years old. However, there are many underage accounts since individuals can be untruthful about their date of birth when registering for the account. Having a required age verification in this proposed legislation would (1) ensure that children under 13 are not accessing TikTok, (2) guarantee that underage users that have different restrictions as outlined by TikTok in their community guidelines would be held to those standards, and (3) ensure that predators cannot pose as young adolescents on the app. Overall, this would help make TikTok a safer place for all minors without affecting any adult users negatively.

While the Arkansas Social Media Safety Act failed due to its vagueness, its general outline to put in age verification processes

should be integrated into a federal restriction for this app. The proposed idea will pull from the outline that Arkansas attempted to set in place.

Additionally, Meta, the company that owns social media apps like Facebook and Instagram, is attempting to put in required age verification on a trial-run basis.[77] Their ideas surrounding verification processes will also be incorporated into this section of the proposal.

Once the user has created the account, they will need to send in either (1) official age-identifying documentation along with a selfie that matches the identifying documentation, (2) a video of the account holder speaking based on video prompts, or (3) have three verified accounts over the age of 18 socially vouch for a user's age. Age-identifying documentation should be determined as valid identification with the individual's name and picture on it, i.e., a driver's license, student ID, state-issued photo ID, or passport. If an individual does not have any of this documentation or does not feel comfortable sharing it, they can choose to send in the video of themselves where biometric scanning and AI technology can estimate a user's age. When the user takes the video, they will be prompted to make certain poses or say certain things to confirm that the video is being taken in real time and by the account holder. As a third option for the account holder, they can opt to be socially vouched for by three others. Socially vouching is a process where the user selects three other mutual profiles that are verified to be over the age of 18 who are sent a request to confirm the account holder's age.

All documentation and videos that are sent in would not be directed through or accessible by TikTok. They would be sent to a third-party company that verifies age documentation and utilizes technology to estimate age based on facial features and structures.[78] These third-party companies would delete the video or picture as soon as they verify the account holder's age.

77 "Introducing New Ways to Verify Age on Instagram," Meta, June 23, 2022, https://about.fb.com/news/2022/06/new-ways-to-verify-age-on-instagram

78 "Age Verification for Social Media," Yoti, accessed June 6, 2024, https://www.yoti.com/social-media

Examples of these companies are LastPass, Yoti, Google Authenticator, and Duo Security.[79] They are currently being used by a plethora of entities for this very purpose. If the company detects an underage account, the account will be banned for 30 days and then deleted if the user is not able to successfully repeal the ban. If the account is verified to be between the ages of 13-18, then TikTok's specific restrictions for those ages will be set in place. While the second two methods for verifying age will not give the exact age of the user, it will be a promising estimate that will help to remedy the dangers of unrestricted underage accounts. It may be imperfect, but it will at least be a greater protection than what is currently in place.

These three methods of identifying age would all be fast, reliable, and would not impede on the app's ability to function. The verification process would not be extensive or difficult for the account holder, ensuring that it would not drive users away from TikTok's platform and to another. Individuals under the age of 13 would not be able to access the app as outlined by TikTok and users between the ages of 13-18 would have different restrictions that contribute to their wellbeing and safety. For current users of TikTok, the change in age verification would minimally affect them. Once the legislation is in place, they would need to sign in to their account and submit one of the types of age-verifying documentation to access their account.

Account holders who are under 13 will be banned from the app if they are unable to verify that their age is over 13. This process is safe and secure. Reliable third-party companies that verify ages are audited and certified. Similar to the way that clubs, concerts, and other social events ask for ID in order to enter, TikTok is able to enforce that as a requirement in their guidelines. In fact, TikTok does require a photo ID and a picture of the individual if a user's account is banned to verify the account and repeal the ban to be

79 Top 10 Yoti Authentication Alternatives & Competitors in 2024," G2, accessed June 6, 2024, https://www.g2.com/products/yoti-authentication/competitors/alternatives

removed. If this is a procedure that TikTok is already familiar with, then it should be enforced for all account creation.[80]

Enforcing account verification is not uncommon. Popular dating apps like Hinge, Bumble, and Tinder all use verification that confirms that the user matches with the pictures posted to their account.[81] Their purpose for this is to guarantee a secure, safe and reliable platform.[82] It only requires users to pose a specific way in a photo or send in a video of themselves, similar to the proposed legislation. Other benefits of this change would be to protect children against child predators who may be posing as different people in their accounts. If an account is raising suspicion in terms of an adult posing as a child, then TikTok can investigate the age of the account holder. This can be used as evidence for TikTok to ban an account that is targeting children. Enforcing the age verification is a safeguard against the exploitation of minors. Currently, TikTok can become a platform for sexual exploitation through direct messaging and comments on posts. Verifying an account holder's age can help TikTok to categorize and restrict certain features like direct messaging and commenting on minors' accounts in order to protect them from unwanted predatorial attention.

While this aspect of the federal restrictions may not need to be exactly as outlined, TikTok needs to make an effort to reasonably verify ages for all account holders that is beyond the user putting in their own date of birth. All the suggestions above have been tried and successful for other apps that verify similar aspects of a user's account. There also needs to be an understanding that an adjustment like this may take a great deal of trial and error. Because restrictions in the digital world are relatively new, there quite frankly is not a lot of experience with how some of the specific aspects may end up

80 Underage Appeals on TikTok," TikTok Help Center, accessed June 6, 2024, https://support.tiktok.com/en/safety-hc/account-and-user-safety/underage-appeals-on-tiktok

81 Online Dating Identity Verification," Safe Dating Verification, accessed June 6, 2024, https://www.incognia.com/use-case/online-dating-identity-verification

82 Id.

working. However, in the age-verification processes that have been tested, the above three have been the most successful.[83]

2. Content Moderation and Liability

Creating federal restrictions on content moderation and liability would be included in this act by the reforming of Section 230, creating more incentive for the entity. The only outline regarding moderating content in Section 230 is based on an entity's "good faith." Blind trust in a platform that influences millions of American children is alarming. Section 230 is severely in need of reform, as it was created in 1996. As our modern-day progresses, our legislation needs to grow with the advances of the internet.

Social media companies can be considered common carriers, which gives them the right to vet through videos, set community guidelines, ban accounts, take down posts, and remove comments. Where public carriers are open to the general public and speech cannot be restricted there, common carriers have the right to moderate content and interactions since users agree to the app's terms and conditions before downloading.[84] As a common carrier, TikTok has a lack of any incentive and it leaves the entity unaccountable. TikTok should be held responsible by reforming Section 230 to have entities liable for posts that are not constitutionally protected, namely child pornography, defamatory speech, false advertising, true threats, and obscenities.[85] Additionally, TikTok should be held liable for not attempting to maintain its community guidelines. Similar to Montana's ban, there should be monetary charges for videos whose content is not constitutionally protected. If TikTok is being held liable, then they will make vetting through videos a higher priority.

83 "Introducing New Ways to Verify Age on Instagram," Meta, June 23, 2022, accessed June 6, 2024, https://about.fb.com/news/2022/06/new-ways-to-verify-age-on-instagram

84 John Villasenor, Social Media Companies and Common Carrier Status: A Primer, Brookings (October 27, 2022), https://www.brookings.edu/articles/social-media-companies-and-common-carrier-status-a-primer/

85 First Amendment and Censorship," American Library Association, accessed June 6, 2024, https://www.ala.org/advocacy/intfreedom/censorship

The Supreme Court case *Gonzalez v. Google* is a currently active case about ISIS attacks in Paris, France in 2015.[86] Nohemi Gonzalez, a 23-year-old, was killed during one of these series of attacks. The Gonzalez family claimed that YouTube, which is owned by Google, aided and abetted the popular terrorist group.[87] Before, during, and after these attacks, ISIS released YouTube videos taking responsibility. There was also evidence that Google recommended ISIS content on YouTube based on the user's previous search history. Additional claims include that ISIS was able to threaten and intimidate civilians as well as gain monetary donations on YouTube through its videos. Currently, the two main claims that are being decided on by the Supreme Court are (1) if Section 230 protects the platform from liability of the content that they recommended and (2) if social media could provide enough assistance to truly aid and abet a terrorist group.[88]

While the decision is still a pending one, its outcome will change the implications of Section 230. Regardless of what is decided, there is undeniable evidence that YouTube hosts a platform that allows an agenda of violence and harm to influence its users. There is enough influence on individuals from social media that a terrorist group was able to increase their following and threaten people across the world. The impact of ISIS's single account speaks to the dangerously influential nature of social media. TikTok has a similar influence as YouTube does, however, it may be even larger because there are more users and more time is spent on that app by account holders. Platforms can effectively take down harmful content, and even if they do not post it, they host the entity that does. As social media can be considered a type of common carrier, the public can access the

86 Gonzalez v. Google LLC, 2 F.4th 871 (9th Cir. 2021)

87 Deborah Fisher, Gonzalez v. Google (2023), The Free Speech Center, published May 23, 2023, last updated February 18, 2024, https://firstamendment.mtsu.edu/article/gonzalez-v-google/

88 Deborah Fisher, Gonzalez v. Google, Taamneh v. Twitter (9th Circuit) (2021), The Free Speech Center, published August 12, 2023, last updated February 18, 2024, https://firstamendment.mtsu.edu/article/gonzalez-v-google-taamneh-v-twitter-9th-circuit/

private company. The public is told what type of app they are signing up for in the community guidelines, but then they are able to access content they are told should not be accessible there.

That being said, there are an estimated 34 million videos posted per day.[89] It is impossible to moderate every video that is being posted on TikTok. However, if content that is not in line with the community guidelines is linked to a trending hashtag on TikTok, as observed by Clare Duffy, that is confirmation that TikTok is not moderating content in good faith. John Thune, a U.S. Senator from South Dakota proposed a bill regarding content moderation on TikTok. The bill was called the PACT Act or the Internet Platform Accountability and Consumer Transparency Act.[90] It was recently introduced and at this point is merely a proposal, but there are helpful ideas regarding content moderation. Thune proposed bipartisan legislation with the goal of "protecting online consumers by giving them more control of their online experience."[91] A similar bill is also in the works and was proposed by Mark Warner, a Senator from Virginia.[92] Neither proposal has made any significant progress currently. This proposal is based on the ideas that John Thune and Mark Warner have outlined in their legislation.

89 Ch Daniel, TikTok Users and Growth Statistics (2024), SignHouse, last updated December 29, 2023, https://www.usesignhouse.com/blog/tiktok-stats

90 Makena Kelly, The PACT Act Would Force Platforms to Disclose Shadowbans and Demonetizations, The Verge (June 24, 2020), https://www.theverge.com/2020/6/24/21302170/facebook-google-brian-schatz-john-thune-section-230-content-moderation

91 U.S. Senator Brian Schatz, Schatz, Thune Reintroduce Legislation To Strengthen Rules, Transparency For Online Content Moderation, Hold Internet Companies Accountable, U.S. Senate (February 16, 2023), https://www.schatz.senate.gov/news/press-releases/schatz-thune-reintroduce-legislation-to-strengthen-rules-transparency-for-online-content-moderation-hold-internet-companies-accountable

92 U.S. Senator Mark R. Warner, Legislation to Reform Section 230 Reintroduced in the Senate, House, U.S. Senate (February 28, 2023), https://www.warner.senate.gov/public/index.cfm/2023/2/legislation-to-reform-section-230-reintroduced-in-the-senate-house

The amending of Section 230 should include two adjustments. The first is it should be mandatory that TikTok discloses its content moderation methods and practices to the Federal Trade Commission (FTC). They would be required to send a quarterly report, specifically outlining what kind of content has been removed or demonetized. This includes sharing statistics about the hashtags, video sounds, and illegal content that has been removed. This report will also include all the content removed that was not in line with the community guidelines. There will be information such as how many videos are being posted, how many videos they remove a day, how long it is before a video with inappropriate content has been removed, and other specific information that will be informative about their moderation. The hope would be that because TikTok will be mandated to send in a report, then they will make a greater effort to moderate content. The FTC will then be able to witness and report that TikTok is indeed making an effort to moderate content. In addition to this, the FTC will be able to publicize these statistics in order to confirm to concerned users or adolescents' parental guardians that something is being done besides merely the spoken word of the platform. This will serve as an incentive because if they are not doing significant work, it will be publicized, which may drive away account holders.

The second amendment would reform the section so that unconstitutional content would not be protected by Section 230 after a certain period of time. The time should range between 48-72 hours of being posted publicly before becoming liable. This is the range that is seen in most proposed bills regarding social media. However, as emphasized previously, because there is a lack of information regarding how restrictions on content moderation would be applied, it would have to be more specifically researched by lawmakers before setting a specific time range. If lawmakers are first able to access the statistics concerning their content moderation, this would help to set a designated time for the app to remove that content. Once they know what the typical time range that TikTok is able to locate and remove content that is not in line with their policies, they can set a deadline that is backed with evidence and is not unreasonable for the app to meet. The main idea is that a set time period would need to

be determined to give TikTok a hard and fast deadline that works as an incentive to moderate content, while still leaving enough time for TikTok to locate and remove the content. Users would also have the opportunity to report the video and draw the entities' attention to the inappropriate content. A reasonable amount of time would ensure that it would not redirect all of TikTok's resources and employees to focus on this aspect but also enforce a strong enough deadline that they would have a renewed focus on moderating content. If illegal content is not removed from their platform in the designated time period, monetary charges would be enforced by the FTC per video. In turn, the charges would contribute to the FTC's effort in locating illegal and unconstitutional content. A suggested amount within the Arkansas Social Media Safety Act and in *TikTok INC v. Trump* is $10,000 per video. This would be a moderate amount of money but not significant enough that it would cause TikTok to go bankrupt or affect their ability to maintain employees as TikTok made an estimated 9.4-billion-dollar revenue in 2022.[93] This amendment should serve as a collaborative experience with TikTok and the FTC.

3. Implications

With the proposal of this legislation and the amendment of Section 230, there are implications that will likely occur. It is important to discuss and analyze any impact stemming from the proposal. The first is that TikTok is not currently utilizing a third-party company for ban repeal verification, and any transition over to this model could demand a high monetary cost. The cost for age verification is an estimated 12 cents per account.[94] Using the estimated 143 billion American users, this puts the overall estimated cost to be at about 17 million dollars. However, compared to the 9.4-billion-dollar revenue

93 Mansoor Iqbal, TikTok Revenue and Usage Statistics (2024), Business of Apps (April 18, 2024),https://www.businessofapps.com/data/tik-tok-statistics.

94 Worth Sparkman, Arkansas Judge Considers Blocking Social Media Law Before Sept. 1, Axios NW Arkansas (Aug. 16, 2023), https://www.axios.com/local/nw-arkansas/2023/08/16/arkansas-social-media-law-hearing-judge

they received last year, it would not be a large enough amount to detrimentally affect the company (the cost would be about .0018% of their revenue from last year). In addition, Meta has been implementing age verification from third-party companies and still successfully running their business at similar efficiency. Meta has apps like Instagram and Facebook which have a similar user amount and revenue per year, proving that this is a reasonable possibility for TikTok. Additionally, there is a likelihood that more people would create accounts because the stricter requirement makes them feel more secure. This would increase TikTok's revenue, possibly making it a positive change for their net value in the long run.

Another implication is that TikTok will pay the FTC after being held liable, which will add an additional cost on top of the cost required to remove unconstitutional content. Furthermore, individuals may be wary of third-party verification systems. As an outside company, it may make people uneasy about sending in their identification, pictures, or videos of themselves. Yet, there will truly be no way to satisfy users who find uneasiness in this aspect of the proposal because if they were sent directly to TikTok, they most likely would still be wary of them accessing that information, especially after the controversy about data collection practices. That is why there would be three options for the account holder, so they choose whichever they feel most comfortable with. Additionally, the majority of these third party companies are verifiable and frequently authenticated by government officials around the world.

A third implication is that users could potentially create verified accounts and then sell or give them away to underage users. With the proposed legislation, there will still be ways that individuals can get around the age restrictions. There will likely never be a foolproof method to verify the ages of accounts, nonetheless, age verification will help to rectify most of the accounts that are not being age restricted.

TikTok is very controversial in both state and federal governments. It is similar to other social media platforms like Instagram, Facebook, and YouTube. All three of those popular apps have attempted to replicate something similar to TikTok's videos with Instagram Reels, Facebook Reels, and YouTube Shorts, and they

each use some variation of an algorithm to recommend videos to a user. Ideally, the reformation of Section 230 would apply to all social media platforms. It would be unlawful to just reform the act with one app in mind. However, this would be a positive change for all of social media, and if they are already succeeding in their content moderation, it will not be a large change for them. Other social media apps have had fewer issues, meaning that their ability to moderate content is already on a higher level than TikTok. This will be a change, but a much needed one for all platforms that have the ability to influence individuals to such a high degree. This paper's specific focus on TikTok is because of the increasing disputes at both state and federal levels. TikTok has more harmful effects than other apps as seen in Clare Duffy's experiment, Chase Nasca's death, and Ava Majury's near death experience. Many of these dangers can be remedied by the legislative changes that this argument proposes.

IV. Conclusion

In modern times, children and adolescents of America are born into a time enveloped in unchecked social media. This content affects their right to liberty and creates addictive tendencies, and as lawmakers and citizens, it is vital to take responsibility for protecting the vulnerable. Countless restrictions and bans of TikTok have been attempted with no success. While none of them has been successful, the continued efforts are indicative of an up-and-coming problem that will have to be addressed. The end solution needs to be beneficial for all parties involved and be carried out in a constitutional and fair way.

Montana's TikTok ban is a representation of how misguided legal action can damage citizens, companies, and their right to free speech. No matter how upset or unsure lawmakers are about TikTok's data collection practices, the claims are based on hearsay. The successful enactment of this ban by the state government raises the question of what other actions lawmakers might be capable of undertaking. Section 230, an outdated and insufficient outline for present day social media, is in desperate need of reform. The legislation proposed in this paper provides both a fair and responsible way to

hold social media platforms accountable and protect children from its negative effects. By requiring valid age verification and reforming Section 230 to make social media platforms liable, the world of social media will become a safer place. This proposal comes with the understanding that it will not be perfect, and it will not be an easy change. However, attempting to rectify the consequences that TikTok and social media have on children after they have grown up in a world of this constant harmful influence will be a much greater task.