## EDITOR'S NOTE

The *Federal Communications Law Journal* is proud to present the third and final Issue of Volume 76. FCLJ is the nation's premier communications law journal and the official journal of the Federal Communications Bar Association (FCBA). We are excited to present the third Issue of this Volume showcasing the diverse range of issues encompassed by technology and communications law. We are honored to be including a rebuttal to a previous Article we published, highlighting the importance of rigorous debate.

This Issue begins with an article from Donald B. Verrilli, Jr, a partner at Munger, Tolles & Olson LLP, and Ian Heath Gershengorn, a partner at Jenner & Block LLP. In their Article, the authors warn against potential FCC action to broadband Internet as a Title II telecommunications service and explore the potential ramifications of such action, given the current state of the Supreme Court's major questions doctrine.

This Issue then includes a rebuttal by Adam Candeub, professor at Michigan State University's College of Law, addressing Lawrence Spiwak's article *Regulatory Implications of Turning Internet Platforms into Common Carriers* featured in Volume 76, Issue 1.

This Issue also features four student Notes, all of which explore pressing legal topics in the area of technology law.

First, Tomasso Piccirilli explores the unique nature of data breach class actions and how a judges-as-fiduciaries model could improve outcomes in those cases.

In our second Note, Winnie Zhong argues for an expanded duty of care for physicians in combatting online medical misinformation.

In our third Note, Amber Grant proposes a reframing of the *Rogers* test for a new era of trademark issues, specifically those involving NFTs.

Fourth, Simon Poser proposes a new test to define when surveillance becomes too widespread, detailed, and targeted such that even limiting deployment to public areas encroaches on an individual's right to privacy.

Finally, this Issue concludes with four briefs of cases involving technology and communications law that were granted the writ of certiorari by the Supreme Court for the October 2023 term.

The Editorial Board of Volume 76 would like to thank the FCBA and The George Washington University Law School for their continued support of the Journal. We also appreciate the hard work of the authors and editors who contributed to this Issue.

The Federal Communications Law Journal is committed to providing its readers with in-depth coverage of relevant communication law topics. We welcome your feedback and encourage the submission of articles for publication consideration. Please direct any questions or comments about this Issue to fclj@law.gwu.edu. Articles can be sent to fcljarticles@law.gwu.edu. This Issue and our archive are available at http://www.fclj.org.

Catherine Ryan
*Editor-in-Chief*

# FEDERAL COMMUNICATIONS LAW JOURNAL

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## *Federal Communications Law Journal*

The *Federal Communications Law Journal* is published jointly by the Federal Communications Bar Association and The George Washington University Law School. The *Journal* publishes three issues per year and features articles, student notes, essays, and book reviews on issues in telecommunications, the First Amendment, broadcasting, telephony, computers, Internet, intellectual property, mass media, technology, privacy, communications and information policymaking, and other related fields.

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Through its many professional, social, and educational activities, the FCBA offers its members unique opportunities to interact with their peers and decision-makers in the communications and information technology field, and to keep abreast of significant developments relating to legal, engineering, and policy issues. Through its work with other specialized associations, the FCBA also affords its members opportunities to associate with a broad and diverse cross-section of other professionals in related fields. Although the majority of FCBA members practice in the metropolitan Washington, D.C. area, the FCBA has eleven active regional chapters, including: Atlanta, Carolina, Florida, Midwest, New England, New York, Northern California, Southern California, Pacific Northwest, Rocky Mountain, and Texas. The FCBA has members from across the U.S., its territories, and several other countries.

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## ARTICLES



The subject of net neutrality has bounced from the political arena to the Federal Communications Commission to the courts for more than a decade. And the FCC's recent effort to enact neutrality regulations grounded in Title II of the Communications Act is unlikely to provide a lasting resolution of the issue. While federal courts once gave substantial "*Chevron*" deference to regulatory agencies like the FCC administering broad authorities granted by Congress, under the currently ascendant "Major Questions Doctrine," that deference has been significantly reined in and agencies today may not promulgate rules addressing matters of great economic and political significance unless Congress has provided "clear congressional authorization" for them to do so. There is virtually no doubt the current Court will consider the enactment of net neutrality rules via reclassification of broadband as a Title II telecommunications service a "major question." Then-Judge Kavanaugh has already stated in a previous case that this proposition is "indisputable," and "any other conclusion would fail the straight-face test." And because nothing in Title II of the Communications Act itself or in any other statute gives the Commission the clear and unambiguous authority to resolve this major question, the Court is almost certain to strike down this latest iteration of net neutrality regulation. As a practical matter, in the Major Questions era, the only path to lasting net neutrality is Congressional legislation providing a clear and stable framework for broadband regulation.



Lawrence J. Spiwak's article *Regulatory Implications of Turning Internet Platforms into Common Carriers*, published in FCLJ Volume 76, Issue 1, argues that laws imposing common carrier-type viewpoint discrimination on social media regulation, such as Texas's H.B. 20, are in fact calls for intrusive public utility regulation. This is not the case. Common carrier law is a set of legal rules for industries such as railroads, message and cargo carriers, telegraphs, and telephones that typically require non-discriminatory service

and special liability standards. Since the late Middle Ages to this day, courts have enforced these simple common carrier rules in a variety of different contexts, and they can do so with H.B. 20. In contrast, public utility law, with its origins in the late 19th and early 20th centuries is comprehensive, intrusive, and highly technical regulation, typically requiring rate regulation, government permission to enter and exit the market, quality of service standards as well as and universal service obligations. Common carrier non-discrimination requirements do not implicate, require, or lead to the broader regulation of public utility law.

## NOTES

### A Fiduciary Judge's Guide to Improving Outcomes for Victims in Federal Data Breach Class



Federal class actions are under increasing scrutiny. In the wake of *Clapper* and *Transunion* standing requirements have only become more stringent. With that, a key avenue of relief for victims of data breaches is slowly fading. Now, the few data breach class actions that make it to federal courts take on an elevated level of importance. Unfortunately, the agency problems that plague class actions are exacerbated in the data breach context due to increased information costs and judicial skepticism over data breach harms. If Judges wish to improve outcomes for victims of data breaches, then judges must change the way they evaluate data breach class actions and take more active roles as fiduciaries for absent class members. This means adopting more modern understanding of the value of personally identifiable information, prioritizing plaintiff favored settlements, adopting incentive aligning fee award structures, prioritizing the best notice possible, and disfavoring non-monetary relief.

### Combating Online Physician Medical Misinformation: Expansion of Fiduciary Duty of Care



In recent years, with the Internet becoming a popular resource for the public to seek medical information, the spread of medical misinformation has increased substantially. Broad dissemination and consumption of misleading medical information can pose serious risks to public health, and it is particularly alarming to see reports of licensed physicians becoming a common source of medical misinformation who can draw on their professional status to gain inordinate attention. An outstanding issue is how the proliferation of medical misinformation should be regulated and by whom. This Note argues that the state medical boards should assume the responsibility to discipline physicians who disseminate medical misinformation. Recognizing the current constitutional limits on the government's powers to regulate private citizens' public speech, this Note proposes to extend the current physician-patient fiduciary relationship beyond the traditional clinical setting and argues that physicians owe a duty of care to the public when they invoke their professional status and voluntarily disseminate medical information on public platforms. State medical boards are authorized to impose disciplinary action against

## COMMUNICATIONS LAW: ANNUAL REVIEW

# Title II "Net Neutrality" Broadband Rules Would Breach Major Questions Doctrine

**Donald B. Verrilli, Jr. & Ian Heath Gershengorn***

TABLE OF CONTENTS



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# I. INTRODUCTION

The Federal Communications Commission (the Commission) is once again considering how broadband Internet access service should be regulated.[1] The goal of enacting core open Internet principles so that all consumers can enjoy free and unimpeded access to lawful Internet content of their choosing is laudable. The key question, however, is *who* gets to decide how such principles should be translated into law. As it has before, the Commission wants to take that responsibility for itself. The Commission proposes to treat broadband service as though it were a traditional common carrier service and subject it to the same regulatory regime under Title II of the Communications Act of 1934 that has historically governed basic telephone service. But that would be wasted effort. Any attempt by the Commission to impose such broad regulatory requirements under current statutes would be struck down by the Supreme Court. And the contentious litigation leading to that inevitable result would waste countless resources for the government, industry, and the public while distracting all parties from more promising efforts, such as obtaining congressional action to resolve these important issues. The Commission should not go down that path.

Consider first the law. The Supreme Court is likely to invalidate any attempt by the Commission to impose Title II regulation on broadband Internet access service. As the last two Terms have made clear, the major questions doctrine is here to stay, and that doctrine resolves this case. The Supreme Court will surely consider the question of whether to classify broadband as a Title II telecommunications service subject to common carrier regulation to be a "major question"—that is, one involving a matter of major economic and political significance. As then-Judge Kavanaugh noted, that proposition is "indisputable," and "any other conclusion would fail the straight-face test." The Court has made crystal clear that when a federal agency seeks to address a major question, the agency must have "clear congressional authorization" for the regulations it imposes. The statutory text on which the Commission proposes to hang its hat lacks the clear statement of authority that the Supreme Court demands. Nothing in Title II of the Communications Act itself or in any other statute gives the Commission the clear and unambiguous authority to classify broadband as a Title II telecommunications service subject to common carrier regulation, and the Commission cannot reasonably conclude otherwise.

We recognize that the Commission determined in 2015 that it had the authority to reclassify broadband Internet access services as Title II telecommunications services,[2] and the D.C. Circuit upheld that determination.[3] The Commission, however, can take little solace from that ruling. The Supreme Court never got to consider the lawfulness of the Commission's 2015 decision, and the Commission rescinded that decision and

1. Safeguarding and Securing the Open Internet, 88 Fed. Reg. 76048 (proposed Oct. 19, 2023).

2. Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, 5603 para. 1 (2015) ("Title II Order").

3. U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016).

abandoned the Title II approach to broadband regulation in 2018. The Supreme Court's commitment to the major questions doctrine has intensified in the years since the D.C. Circuit's ruling, as the high court's recent decision reaffirming the doctrine in *West Virginia v. EPA* makes clear. Even at the time, it was clear to then-Judge Kavanaugh that the panel's ruling upholding the Commission's classification decision was foreclosed by the major questions doctrine.[4] There is every reason to think that the views Judge Kavanaugh expressed would command a majority on the Supreme Court today.

Given that legal reality, the Commission's proposal to reclassify broadband as a Title II telecommunications service is a serious mistake that will ultimately fail, and at great cost. The administrative proceedings to develop the new regime will require a massive commitment of resources from the government and private parties alike, and the ensuing court challenges will do the same. Moving ahead in this way thus would distract the Commission from its other priorities—ones fully within the scope of its congressional authority. Moreover, as a practical matter, the Commission's actions will prevent the parties from focusing on the real solution here: crafting legislation that will provide a clear and stable framework for broadband regulation. Only that approach will provide a solution that survives changes to the political make-up of the Commission and does so in a way that the Supreme Court could uphold.

To be sure, the wisdom and propriety of the Supreme Court's major questions doctrine is a matter of debate. Some (including both of us) believe that the Court has gone too far in restricting federal agency authority to meet new and pressing challenges. But like it or not, a robust major questions doctrine is now a fact of regulatory life. A Commission decision reclassifying broadband as a Title II telecommunications service will not survive a Supreme Court encounter with the major questions doctrine. It would be folly for the Commission and Congress to assume otherwise.

## II. THE SUPREME COURT'S ARTICULATION OF THE MAJOR QUESTIONS DOCTRINE

The Supreme Court's understanding of the appropriate relationship between federal administrative agencies and the judiciary has undergone a sea change over the past two decades. Federal agencies can no longer expect to receive substantial deference from the courts when they interpret statutory provisions defining the nature and scope of their regulatory authority, particularly when they pursue expansive or creative interpretations of statutes to adopt rules of major consequence. Whether or not the Supreme Court formally overrules *Chevron*,[5] the days in which federal courts uncritically uphold any reasonable agency interpretation of the statute it administers are over. The Court has not upheld an agency action on the basis of *Chevron* deference in almost a decade. When the Court reviews federal agency action for conformity to law, it routinely decides for itself what the statute means.

4. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 426 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

5. Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

And the Supreme Court has not hesitated to invalidate agency actions that lower courts have upheld under *Chevron* when the Court concludes that the agency's course of action cannot be reconciled with the most straightforward reading of the relevant statute.[6] In systematic fashion, the Court is reclaiming the primary authority to determine the meaning of the statutes that federal agencies implement.

Perhaps the most powerful manifestation of this reconfigured relationship between the courts and administrative agencies is the "major questions doctrine." The Court has rooted the doctrine in the Constitution's separation of powers, which the Court has understood to mean that policy choices about matters of great economic and political significance should be made by the democratically accountable Congress in the exercise of its Constitutional authority to make the nation's laws, and not by unaccountable administrative agencies acting under the purported authority of ambiguous statutes. To implement that principle, the Supreme Court has made clear, and emphatically reaffirmed this year, that an administrative agency does not possess the authority to promulgate rules addressing matters of great economic and political significance unless Congress has provided "clear congressional authorization" for such rules.[7] Importantly, the Court has not said merely that it will decide for itself whether ambiguous statutory text is best read as giving the agency the authority to resolve the major question in the manner that the agency has. It has gone a good deal further. If the statute invoked by the agency lacks a clear congressional authorization for agency action on a major question, then the agency lacks the authority to act *at all*. Put simply, if the statute is not unambiguous, a reviewing court must invalidate the agency policy.[8]

The major questions doctrine has been gathering steam since at least the Court's 2000 decision in *FDA v. Brown & Williamson Tobacco Corporation*.[9] In that case, the Court invalidated the FDA's decision in the 1990s to regulate tobacco products as drugs. The statutory text of the Food, Drug and Cosmetics Act defined "drugs" and "devices" subject to the FDA's jurisdiction in a manner that could reasonably be read as covering tobacco products. But the Court refused to defer to the FDA's reading of the terms, stating that it was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[10] Instead, the Court looked to the overall structure of the statutory scheme, a fifty-year history of the FDA's leaving tobacco

6. *See* Am. Hosp. Ass'n v. Becerra, 596 U.S. 724, 727 (2022).

7. Biden v Nebraska, 143 S. Ct. 2355 (2023).

8. Commentators have noted the existence of both a "weak" and a "strong" version of the major questions doctrine. *See, e.g.*, Cass R. Sunstein, *There are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021). As applied in its so-called "weak" version, the doctrine denies federal agencies *Chevron* deference when they interpret ambiguous statutory provisions of deep "economic and political significance" that are "central to [a] statutory scheme." King v. Burwell, 576 U.S. 473, 486 (2015) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)). But it is the "strong" version of the doctrine that has emerged as dominant. Under the strong version, an agency not only loses the benefit of *Chevron* deference, it is denied authority to act at all unless it can demonstrate clear congressional authorization to regulate with respect to the matter at issue.

9. 529 U.S. 120 (2000).

10. *Id.* at 160.

unregulated, and the fact that Congress had enacted numerous pieces of legislation "addressing the problem of tobacco use and human health" without ever suggesting that the FDA had regulatory authority over tobacco products. Based on those considerations, the Court concluded that it was "clear . . . that Congress ha[d] precluded the FDA from regulating tobacco products."[11] The Court was unwilling to accept that Congress left it to the agency's discretion to determine whether to take a step with such vast "economic and political significance."[12] The bottom line for the Court in *Brown & Williamson* was that a decision to subject tobacco products to FDA-style regulation was not one an agency could make on its own. Such a decision was important enough, and its ramifications significant enough for the economy and the public, that it should be made by the body the Constitution assigns the authority to make law: Congress.[13]

The Supreme Court took a similar approach in 2014 in *Utility Air Regulatory Group v. EPA* when it invalidated an EPA decision to include greenhouse gases under certain permitting provisions of the Clean Air Act.[14] As in *Brown & Williamson*, the Court did not focus its analysis on whether purportedly ambiguous statutory text could reasonably be construed to encompass the action that the EPA sought to take. Instead, the Court emphasized that allowing the EPA to apply its permitting process to sites that emitted greenhouse gasses "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[15] As in *Brown & Williamson*, the Court was deeply skeptical, stating that when "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism."[16] Instead, the Court "expect[s] Congress to *speak clearly* if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[17] Ambiguous text simply will not suffice.

In the past two Terms, the Supreme Court has applied the major questions doctrine with particular vigor. In four separate cases, the Court has invoked the doctrine to reject a federal agency's exercise of its authority to address significant national problems through interpreting ambiguous statutory provisions.

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11. *Id.*
12. *Id.* at 159.
13. *See also* Gonzales v. Oregon, 546 U.S. 243 (2006). In *Gonzales*, the Court considered whether the Controlled Substances Act gave the Attorney General the power to forbid physicians from prescribing controlled substances for assisted suicides. The Attorney General possessed statutory authority to de-register physicians, thus preventing them from writing prescriptions for certain drugs, if the Attorney General concluded that de-registration was in the public interest. The Attorney General issued an interpretive rule declaring that physicians could not prescribe controlled substances for assisted suicides. *Id.* at 261. The Court invalidated the rule, concluding that in the absence of a clear statutory grant of authority, it would not assume that Congress gave the Attorney General a sweeping power to declare an entire class of activity outside the course of professional practice. *Id.* at 262.
14. 573 U.S. 302 (2014).
15. *Id.* at 321, 324.
16. 573 U.S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U.S. at 159).
17. *Id.* (quoting *Brown & Williamson*, 529 U.S. at 160) (emphasis added).

In resolving the challenge to the broad Covid-related moratorium on residential evictions imposed by the Centers for Disease Control (CDC), for example, the Court's per curiam opinion in *Alaska Association of Realtors v. Department of Health and Human Services* rejected the CDC's reading of the statutory text.[18] Notably, the Court concluded that even if the statutory text "were ambiguous, the sheer scope of the CDC's claimed authority under [the statute] would counsel against the Government's interpretation" because the Court "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'"[19] Nothing short of an unambiguous grant of statutory authority could justify the CDC's decision to take a major step like imposing an eviction moratorium.

The Court followed the same approach in the Occupational Health and Safety Administration (OSHA) vaccine-mandate case, *National Federation of Independent Business (NFIB) v. Department of Labor*.[20] There, the per curiam opinion for six Justices did not engage in a careful parsing of the statutory text on which OSHA relied—text that arguably was broad enough on its face to authorize the vaccine mandate.[21] Instead, the Court again held that Congress must "speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[22] The Court explained that OSHA's vaccine mandate qualified as an exercise of vast economic and political significance: "It is . . . a significant encroachment into the lives—and health—of a vast number of employees."[23] It was therefore not enough that the Occupational Safety and Health Act might plausibly be read to give OSHA the authority to impose a workplace vaccine mandate. The question was whether the statute "*plainly* authorizes the Secretary's mandate."[24] Finding no clear authorization, the Court held that the agency action was unlawful.[25]

In a concurring opinion joined by Justices Alito and Thomas, Justice Gorsuch went further still. He argued that there are important constitutional

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18. Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2487-88 (2021) (per curiam).

19. *Id.* at 2489 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324). Justice Kavanaugh made a similar point in an earlier opinion regarding a stay of the district court's order holding the moratorium unlawful. His opinion cited *Utility Air Regulatory Group*, and noted that "clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend [its] moratorium." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2321 (Kavanaugh, J., concurring).

20. 595 U.S. 109 (2022) (per curiam).

21. The statutory text authorizes OSHA to promulgate emergency temporary health standards for workplaces wherever OSHA determines "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1).

22. *NFIB*, 595 U.S. at 117 (quoting *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489).

23. *Id.*

24. *Id.* (emphasis added).

25. To be sure, the Court did uphold the health-care-worker vaccine mandate, promulgated by the Centers for Medicare and Medicaid Services (CMS) through Medicare and Medicaid regulations. Biden v. Missouri, 595 U.S. 87 (2022) (per curiam). But as the Court saw it, the health care worker mandate was limited in its scope and application. *See id.* at 92. And CMS has routinely used its statutory authority to impose conditions of participation in Medicare and Medicaid. *See id.* at 92-93.

underpinnings to the major questions doctrine. As he understood it, the doctrine "ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives."[26] Thus, under the major questions doctrine, "any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands."[27] In his view, the Court should—indeed must—presume that Congress did not grant federal agencies the power to effectively make law through regulatory action on matters of vast economic and political significance based on ambiguous statutes that do not directly address the matter at hand. Were agencies to exercise authority over such matters, they would act in derogation of the "non-delegation doctrine"—which holds that Congress may not "divest[] itself of its legislative responsibilities" through the excessive delegation of legislative power to administrative agencies.[28]

Then, with striking clarity, the Court reaffirmed the importance of the major questions doctrine in *West Virginia v. EPA*.[29] There, the Court held that the Environmental Protection Agency (EPA) did not have statutory authority under 42 U.S.C. § 7411(d) to devise a regulatory program that would directly shift the nation's overall mix of electricity generation from coal to gas and from both to renewable energy. Chief Justice Roberts, writing for the Court, noted that the major questions doctrine applies in "cases in which the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress intended to confer such authority."[30] In those cases, "a plausible textual basis" for the agency's actions is not enough.[31] Instead, the agency must point to "clear congressional authorization" for the authority it claims."[32] As the Court put it, "enabling legislation is generally not an open book to which the agency may add pages and change the plot line."[33] Accordingly, the Court will presume that "'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"[34]

Chief Justice Roberts' opinion articulates several factors that the Court considers relevant to the "clear authorization" inquiry. As the Court viewed it, § 7411(d) was an insufficient basis for the agency's exercise of broad authority because that provision was a "long-extant" "gap filler" that had rarely been invoked and had only been invoked as authority for a different regulatory approach.[35] The Court also based its holding on the conclusion that the EPA's exercise of authority "effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an

26. *NFIB*, 595 U.S. at 124 (Gorsuch, J., concurring).
27. *Id.*
28. Gundy v. United States, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting).
29. 597 U.S. 697 (2022).
30. *Id.* at 721.
31. *Id.* at 723.
32. *Id.* at 724 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).
33. *Id.*
34. *Id.* (quoting *U.S. Telecom Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting from denial of rehearing en banc)).
35. *West Virginia*, 597 U.S. at 724.

entirely different kind."[36] And, the Court placed some weight on its conclusion that it is "'highly unlikely that Congress would leave' to 'agency discretion' the decision of how much coal-based generation there should be over the coming decades," and that Congress consistently considered and rejected a regulatory program of the kind adopted by the EPA.[37]

Justice Gorsuch, joined by Justice Alito, once again filed a concurring opinion to "offer some additional observations about the doctrine."[38] He echoed the majority's assertion that the doctrine applies especially to "a matter of great political significance," as well as regulations affecting "a significant portion of the American economy."[39] And he noted tell-tale signs of agency overreach, including locating "broad and unusual authority" in "oblique statutory language"; using "an old statute" to "solve a new and different problem"; and invoking a "previously unheralded power" in the absence of a "long-held Executive Branch interpretation of a statute."[40]

Finally, just this past June, the Court in *Biden v. Nebraska* reaffirmed its commitment to the major questions doctrine when it struck down President Biden's federal student loan forgiveness program.[41] In the student loan case, the Secretary of Education had invoked his broad statutory authority during the pandemic to "waive or modify any statutory or regulatory provision applicable to the student financial assistance program . . . as the Secretary [of Education] deems necessary in connection with a . . . national emergency."[42] The Court, in a 6-3 decision, held that the Secretary nonetheless lacked authority for his actions. Chief Justice Roberts began his analysis by noting that "[t]he question here is not whether something should be done; it is who has authority to do it."[43] And, invoking *West Virginia v. EPA* and the major questions doctrine, he concluded that it was Congress—and not the Secretary of Education—that had the requisite authority. As the Court saw it, "the economic and political significance of the Secretary's action is staggering by any measure;"[44] "Congress is not unaware of the challenges facing student borrowers;"[45] and the loan forgiveness program "raises questions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy."[46] Against that backdrop, the Court concluded, the "indicators from our previous major questions cases are present."[47]

Along the way, the Court rejected the dissent's contention that *West Virginia v. EPA* and the major questions doctrine were inapplicable where, as

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36. *Id.*at 728 (quoting MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994)).
37. *Id.* at 729.
38. *Id.* at 735 (Gorsuch, J. concurring).
39. *Id.* at 744 (Gorsuch, J., concurring) (internal quotations omitted).
40. *Id.* at 747 (Gorsuch, J., concurring) (cleaned up).
41. 143 S. Ct. 2355 (2023).
42. *Id.* at 2363 (quoting 20 U.S.C. § 1098bb(a)(1)).
43. *Id.* at 2372.
44. *Id.* at 2373 (internal quotation omitted).
45. *Id.*
46. *Id.* (citing Jeff Stein, *Biden Student Debt Plan Fuels Broader Debate Over Forgiving Borrowers*, WASH. POST (Aug. 31, 2022, 6:00 AM), https://www.washingtonpost.com/us-policy/2022/08/31/student-debt-biden-forgiveness/ [https://perma.cc/R3WW-DEF8].).
47. *Biden*, 143 S. Ct. at 2374.

here, decisions regarding student loans "are in the Secretary's wheelhouse."[48] Instead, the majority believed, "in light of the sweeping and unprecedented impact of the Secretary's loan forgiveness program, it would seem more accurate to describe the program as being in the 'wheelhouse' of the House and Senate Committees on Appropriations."[49] In any event, the Court concluded, "the issue now is not whether *West Virginia* is correct"; instead, "the question is whether that case is distinguishable from this one. And it is not."[50]

What is the upshot of these decisions? First, the major questions doctrine imposes a significant constraint on the power of administrative agencies to regulate on matters of great economic and political significance: the agency must have a clear mandate from Congress before it can move forward. Second, while the precise contours of what constitutes a "major question" remain uncertain at the margins, agency actions that would impose serious regulatory burdens on a significant portion of the American economy or a significant portion of the American population, or that entail enormous costs to regulated entities or the public, or that have garnered substantial attention from Congress and the public, will qualify.[51] Third, if the agency's proposed regulation would amount to a substantial and unprecedented expansion of the scope and intrusiveness of its regulatory authority, the Court will likely find that the requirements of the major questions doctrine apply. Fourth, if Congress has repeatedly considered the matter on which the agency proposes to regulate and has not enacted legislation, that fact will weigh in favor of finding that the matter is beyond agency authority. And fifth, agency authority is more likely lacking in the absence of a consistent and long-standing agency construction that it has such authority.

The bottom line is this: an administrative agency may regulate on a matter of major economic and political significance only if Congress has unambiguously conferred on it the statutory authority to impose the regulation. And that is true even if the agency believes—sincerely—that its actions are needed to prevent great harm. The Supreme Court's decisions over the past two years leave no doubt on that score. In the CDC eviction moratorium case, the OSHA vaccine mandate case, and the federal student loan case, the Court applied the major questions doctrine to constrain federal agency authority even with respect to emergency actions taken to respond to an unprecedented public health crisis that killed more than a million Americans and upended the nation's economy. And in the EPA case, the Court curtailed the EPA's authority to address climate change, one of the most pressing threats to our planet. Under the Court's doctrine, it is Congress—not the agency—that must respond.

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48. *Id.*
49. *Id.*
50. *Id.* (cleaned up).
51. *U.S. Telecomm. Ass'n*, 855 F.3d at 422-23 (Kavanaugh, J., dissenting from denial of rehearing en banc) (noting that relevant factors include "the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue").

## III. UNDER BINDING SUPREME COURT PRECEDENT, THE COMMISSION LACKS AUTHORITY TO RECLASSIFY BROADBAND AS A TITLE II SERVICE.

Against this legal backdrop, the question of whether the Commission possesses the authority to subject broadband Internet access services to traditional common-carrier regulation under Title II of the Communications Act is an easy one: The Commission lacks that authority. Under the Court's current doctrine, the issue of reclassification of broadband under Title II is a "major question" and the Commission lacks the "clear congressional authorization" that the Court requires.

### *A. Classification of broadband as a Title II service subject to utility-style regulation implicates a major question.*

There is no doubt that under current law, the decision whether to reclassify broadband as a telecommunications service is a decision of great economic and political significance, and thus presents a major question. Indeed, when faced with this precise issue, then-Judge Kavanaugh called it "indisputable" that reclassification under Title II presented a major question, and he asserted that "any other conclusion would fail the straight-face test."[52]

The nation's experience during the COVID-19 pandemic vividly illustrates the point. It is difficult to imagine how our economy, to say nothing of our family and social lives, could have persevered these past few years without the wide availability of reliable, effective broadband service. Broadband services provided the indispensable link that allowed hundreds of millions of Americans to do their jobs, go to school, and maintain vitally important personal and family relationships. Even before the experience of the pandemic, the Commission itself recognized, when it reclassified broadband Internet access service as a telecommunications service in 2015, that the "open Internet drives the American economy and serves, every day, as a critical tool for America's citizens to conduct commerce, communicate, educate, entertain and engage in the world around them."[53]

Justice Kavanaugh made the same point when the issue was presented to the D.C. Circuit:

> The net neutrality rule is a major rule because it imposes common-carrier regulation on Internet service providers . . . . In so doing, the net neutrality rule fundamentally transforms the Internet by prohibiting Internet service providers from choosing the content they want to transmit to consumers and from fully responding to their customers' preferences. The rule therefore wrests control of the Internet from the people and private Internet service providers and gives control to the

52. *U.S. Telecomm. Ass'n*, 855 F.3d at 424 (Kavanaugh, J., dissenting from denial of rehearing en banc). Judge Brown made the same point. *Id.* at 402 (Brown, J., dissenting from denial of rehearing en banc).

53. Title II Order, *supra* note 2.

> Government. The rule will affect every Internet service provider, every Internet content provider, and every Internet consumer. The financial impact of the rule—in terms of the portion of the economy affected, as well as the impact on investment in infrastructure, content, and business—is staggering.[54]

The nature, scope, and effects of common carrier regulation of this indispensable element of our national economic and social lives thus raise precisely the concerns that bring the major questions doctrine into play.

Further illustrating the critical importance of broadband reclassification is the amount of attention reclassification has received in Congress, and in the public debate more broadly. Indeed, like the regulation of tobacco at issue in *Brown & Williamson*, broadband Internet access service has its own "unique political history" and its own "unique place in American history and society."[55] Classifying such service as a Title II service subject to common-carrier regulation "implicates serious policy questions, which have engaged lawmakers, regulators, businesses, and other members of the public for years."[56] Congress has repeatedly considered—though has never enacted—legislation that would have imposed common-carrier regulations on providers of broadband Internet access service.[57] Nor has Congress abandoned the effort: In July of last year, Senator Markey, Senator Wyden, and Congresswoman Matsui introduced yet another net-neutrality bill, touting both the importance of the issue and the need for congressional action.[58] Conversely, in 2021, Congress actually enacted legislation that establishes a framework for broadband service that includes low-income and deployment subsidies, consumer protection rules, and price transparency requirements, and establishes a policy of broadband equal access and non-discrimination, all without reference to Title II.[59]

Similarly, each time the Commission has sought to address this broadband Title II classification question, it has received (literally) millions of comments from industry, public interest organizations, and members of the

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54. *U.S. Telecomm. Ass'n*, 855 F.3d at 423 (Kavanaugh, J., dissenting from denial of rehearing en banc).

55. *See id.*; *see also Brown & Williamson*, 529 U.S. at 159.

56. Verizon v. FCC, 740 F.3d 623, 634 (D.C. Cir. 2014).

57. *U.S. Telecomm. Ass'n*, 855 F.3d at 423; *see also, e.g.*, Save the Internet Act of 2019, H.R. 1644, 116th Cong. (2019).

58. Net Neutrality and Broadband Justice Act of 2022, S. 4676, 117th Cong. (2022). Sponsors of the legislation emphasized that the Internet is "essential" to the national economy (statement of Senator Markey) and noted the need for Congress to provide "clear rules of the road." Doris Matsui, U.S. House Representative, statement to Introduce Legislation to Reinstate Net Neutrality, Reverse Damaging Trump-Era Dereguatlion (July 28, 2022) https://www.markey.senate.gov/news/press-releases/senators-markey-wyden-and-rep-matsui-introduce-legislation-to-reinstate-net-neutrality-reverse-damaging-trump-era-deregulation [https://perma.cc/MU8J-2NRH].

59. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, div. F, tit. V ("Broadband Affordability") (2021).

public, all of whom sought to explain the significant perceived consequences and benefits of Commission regulation.[60]

Nor is there any doubt that classifying broadband Internet access service as a Title II telecommunications service would "bring about an enormous and transformative expansion in [the agency's] regulatory authority . . . over the national economy."[61] Then-Judge Kavanaugh called the Commission's last net neutrality rule "one of the most consequential regulations ever issued by any executive or independent agency in the history of the United States."[62] Whether or not the Commission exercises the full scope of its authority under Title II in regulating broadband services, classifying broadband Internet access service as a Title II service would indisputably give the Commission the *power* to impose the full range of common-carrier regulation should it choose to do so.[63] So, in the relevant sense, reclassifying broadband Internet access services as Title II services would vastly expand the Commission's authority over those services.

The Commission itself has acknowledged as much. It stated in the 2015 *Title II Order* that classifying broadband Internet access service as a telecommunications service would bring about "a sudden, substantial expansion of the actual or potential regulatory requirements and obligations" for broadband Internet access services.[64] In this respect, the Commission's approach during the brief period when it classified broadband service as a Title II telecommunications service is telling. As the Commission quickly realized, many Title II provisions cannot sensibly be applied to broadband Internet access services because those provisions refer to traditional telephone service or equipment and long predated the broadband era.[65] The Commission thus had to invoke its authority under Section 10 of the Communications Act to forbear from enforcing the large majority of common-carrier requirements that would otherwise have applied to broadband service under Title II—and the Commission will have to do so again if it seeks to reclassify broadband today. It is thus clear that if the Commission purports to reclassify broadband under Title II—as it did in 2015—the Commission would not in any real sense be implementing a policy

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60. *U.S. Telecomm. Ass'n*, 855 F.3d at 423 (Kavanaugh, J., dissenting from denial of rehearing en banc) (noting that the FCC had received "some 4 million comments on the proposed rule, apparently the largest number (by far) that the [Commission] has ever received about a proposed rule").

61. *Util. Air Regul. Grp.*, 573 U.S. at 324.

62. *U.S. Telecomm Ass'n*, 855 F.3d at 417 (Kavanaugh, J., dissenting from denial of rehearing en banc).

63. As then-Judge Kavanaugh observed:

> The rule transforms the Internet by imposing common-carrier obligations on Internet service providers and thereby prohibiting Internet service providers from exercising editorial control over the content they transmit to consumers. The rule will affect every Internet service provider, every Internet content provider, and every Internet consumer. The economic and political significance of the rule is vast.
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> *Id.*

64. Title II Order, *supra* note 2, at para. 495.

65. *See, e.g.*, 47 U.S.C. §§ 221, 223, 225-28, 251-52, 258.

choice by Congress but would instead be using statutory forbearance authority to create a bespoke regulatory framework from scratch. Under the Supreme Court's understanding of the major questions doctrine, such an approach is an exercise of the legislative power itself, not an implementation of legislative judgments already made by Congress. It is precisely the exercise of such "legislative" authority by agencies that the doctrine seeks to constrain.[66]

### *B. The Commission lacks clear statutory authority to reclassify broadband under Title II.*

The Commission lacks authority to resolve this major question because it cannot point to any clear statutory authority granting it the power to classify broadband Internet access service as a Title II telecommunications service. That is unsurprising. The Congress that passed the Communications Act in 1934 obviously could not have envisioned the Internet as we have it today, and thus that act surely did not provide the necessary clear authorization. Nor did the Telecommunications Act of 1996 do the trick. That act was passed against the background of a regulatory history that distinguished between "basic" services and "enhanced" services, a distinction that roughly mirrors the current statutory distinction between "telecommunications services" and "information services." "Enhanced services" included the kind of services that are now made available by broadband Internet access service providers.[67]

The 1996 Act also specifically defined "interactive computer service[s]" to include any "information service . . . including specifically a service . . . that provides access to the Internet."[68] That definition suggests that Congress contemplated that "a service . . . that provides access to the Internet" would be governed under a new and distinct regulatory scheme for "information service" providers—not under the decades-old common carrier regime that governed traditional telephone service. In these respects, the present situation again resembles *Brown & Williamson*, in which Congress enacted legislation addressing the regulation of tobacco against a backdrop of FDA regulations that distinguished tobacco from "drugs."[69] Whatever else may be the case, Congress has not *clearly* authorized the FCC to classify broadband Internet access as a Title II telecommunications service.

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66. To be sure, forbearance authority itself is a form of express authorization for the Commission to exercise discretion in the application of Title II. But the extensive nature of the Commission's forbearance went well beyond tailoring Title II to reflect changes in market conditions and was aimed at nothing less than achieving an entirely new regulatory construct. *See* Title II Order, *supra* note 2, at para. 5 (touting the exercise of forbearance authority "to forbear from application of 27 provisions of Title II of the Communications Act, and over 700 Commission rules and regulations"). Moreover, the Commission's need to exercise such massive forbearance authorization to make the policy function reenforces that the Commission's reclassification of broadband as a Title II telecommunications service qualifies as a major question.

67. *See, e.g.,* Bell Atl. Tel. Cos., *Memorandum Opinion and Order*, 3 FCC Rcd 6045, paras. 3, 7 & n.8 (1988) (treating "gateway services" allowing "a customer with a personal computer . . . to reach . . . databases providing business, . . . investment, . . . and entertainment information" as "enhanced services").

68. 47 U.S.C. § 230(f)(2).

69. *Brown & Williamson*, 529 U.S. at 144.

Likewise relevant to the analysis is the fact that the Commission's own regulations have, for decades, left broadband service providers free from the more burdensome regulations that a Commission Title II reclassification would impose. That is consistent with the "light-touch" regulatory approach that Congress anticipated when it amended the Communications Act in 1996, and it is *inconsistent* with the notion that the Commission has, from the start, had the clear congressional authorization to impose a restrictive regulatory regime—created for traditional telephone service—on broadband Internet access. Moreover, as noted, Members of Congress have continued to propose and debate legislation that would regulate broadband Internet access, an unusual situation if (as the Commission would seem to believe) Congress had already established a clear framework for the Commission to do so. In short, the Commission lacks clear congressional authorization for Title II reclassification, and thus the major questions doctrine precludes the Commission from doing so on its own initiative under the existing statutory framework.

### *C. Brand X is not to the contrary.*

The Supreme Court's 2005 decision in *Brand X Internet Services v. National Cable Telecommunications Association*[70] does not justify reclassifying broadband Internet access service as a Title II telecommunications service. To the contrary, as then-Judge Kavanaugh pointed out, if anything, *Brand X forecloses* the Commission from reclassifying broadband Internet access service as a Title II common carrier service.[71]

In *Brand X*, the Supreme Court *upheld* the Commission's policy of treating broadband Internet access service as an information service—a policy that has been in place for all but two years since the Commission first implemented the 1996 Act. In so doing, the Court rejected the argument that the statutory text of the Communications Act compelled the Commission to classify broadband as a Title II telecommunications service subject to traditional common-carrier regulation. The Court held that the statutory "term 'telecommunications service' is ambiguous" in its application to broadband Internet access service.[72] Having concluded that the Act "fails unambiguously to classify facilities-based information-service providers as telecommunications-service offerors," the Court upheld as reasonable the Commission's decision to regulate them as information service providers.[73] The predicate of the Court's ruling, therefore, was that the Communications Act did not unambiguously require the Commission to classify broadband Internet access service as a Title II telecommunications service. That ruling effectively dictates how the major questions doctrine will apply to any attempt on the part of the Commission to so classify broadband Internet access service now.

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70. 545 U.S. 967, 996-97 (2005).

71. *U.S. Telecomm. Ass'n*, 855 F.3d at 425 (Kavanaugh, J., dissenting from denial of rehearing en banc).

72. *Brand X Internet Servs.*, 545 U.S. at 970.

73. *Id.* at 996-97.

We recognize that two respected judges on the D.C. Circuit—Chief Judge Srinivasan and Judge Tatel—have interpreted *Brand X* as interpreting the existing statutory scheme to provide a sufficiently clear grant of authority to satisfy the major questions doctrine. We believe that conclusion is incorrect, and we believe the Supreme Court will reject it. The Supreme Court in *Brand X* had no occasion to consider—and did not consider—how the major questions doctrine might affect that case. That is because, as then-Judge Kavanaugh has explained, the Commission's decision to classify broadband Internet access service as an information service did not entail the "exercise [of] expansive regulatory authority over some major social or economic activity."[74] Instead, the "light touch" regulation that resulted from the Commission decision at issue in *Brand X* was not, in the words of *Utility Air Regulatory Group*, "an enormous and transformative expansion of [the Commission's] regulatory authority."[75] A decision by the Commission to classify broadband Internet access services as information services therefore did not implicate the concerns animating the major questions doctrine.

In contrast, a decision to classify broadband as a Title II telecommunications service would implicate those concerns in the most fundamental ways. Put differently, the statutory ambiguity at issue in *Brand X* could be resolved in favor of classifying broadband Internet access service as an information service without triggering the limitations of the major questions doctrine. However, the very existence of that ambiguity would preclude classifying broadband Internet access service as a Title II telecommunications service, because such a decision would vastly expand the Commission's authority and would transform the way a federal agency regulates a vitally important element of our economy and the personal and social lives of hundreds of millions of Americans.

In all events, as the Court's decisions from the past two Terms show, the Supreme Court's commitment to the major questions doctrine has intensified considerably in the nearly two decades since *Brand X* was decided. There is every reason to think that a majority of the Supreme Court will view the question of whether the Commission possesses the authority to classify broadband Internet access services as Title II telecommunications services exactly as then-Judge Kavanaugh did in his dissenting opinion in *U.S. Telecom*.

### *D. The Commission's invocation of regulatory concerns beyond net-neutrality would not change the major questions outcome.*

Likely recognizing these challenges, the Commission's "Securing and Safeguarding the Open Internet" NPRM attempts to shore up the legal footing for Title II reclassification by invoking regulatory needs that go beyond net neutrality, such as public safety, national security, and emergency preparedness.[76] But such new purposes would not alter the Court's major questions analysis. Despite the overriding importance of these policy aims –

74. 855 F.3d at 425-26 n.5.
75. 573 U.S. at 324.
76. *See* Securing and Safeguarding the Open Internet, 88 Fed. Reg. 76048 (Nov. 3, 2023).

and the deference regulatory agencies have received in the past when addressing such issues under ambiguous statutory grants of authority – today, even the most dire threats can only be addressed by an agency pursuant to an unambiguous grant of authority from Congress. As the pandemic cases make clear, the seriousness of the problem has no bearing on the agency's power to act.

Indeed, by invoking additional issues that go beyond core Internet management concerns that have been the subject of prior net neutrality rulemakings and that are addressed at length in other more-specific statutes,[77] the FCC could risk setting back its legal case by raising the specter of an unbounded agency "claim[ing] to discover in a long-extant statute an unheralded power to regulate[.]"[78] While we express no opinion on the Commission's authority to pursue these additional policy aims under Title II or any other provision of law, invoking them does not provide any new support for the claim that Congress has granted the FCC clear authority to impose Title II regulations on broadband service.

## IV. GIVEN THE LACK OF CLEAR AUTHORITY, THE COMMISSION SHOULD NOT PROCEED TO REGULATE BROADBAND UNDER TITLE II.

Against this legal framework, the Commission would be ill-served by a decision to reclassify broadband under Title II. To be sure, even when a loss is certain, the Commission may be tempted for political reasons to "get caught trying," and leave it to the Court to pronounce its judgments. But that would be a mistake.

Rulemakings of this sort are massive undertakings, and parties have collectively spent millions of dollars to comment on the proposed rules. The ensuing litigation can be just as costly. If past is prologue, one can expect numerous challenges and countless amicus briefs as part of years of costly litigation. And for what? Just so the Supreme Court can confirm what is already apparent: The Commission lacks authority to act.

Worse, the cost of Commission action here is measured not just in dollars spent, but in opportunities wasted. Our time in government and representing private parties has convinced us that rulemakings of this scope impose enormous demands on agency leadership and staff, to the detriment of other agency priorities that can be pursued lawfully. And, as a practical matter, the agency process and inevitable ensuing litigation freezes the legislative process, as Congress, industry, and the public await the Court's judgment.

Moreover, there can be long-term adverse consequences for regulators tempted to let the Court "play the heavy" and strike down the

77. Congress has enacted robust laws to ensure the safety and resilience of US communications networks, including specific, non-Title II provisions of the Communications Act the Communications Assistance for Law Enforcement Act, the Secure and Trusted Communications Networks Act of 2019, and the Secure Equipment Act of 2021. *See, e.g.*, § 302; 47 U.S.C. § 1001; 47 U.S.C. §§ 1601-08.

78. 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 159).

agency action. Court decisions can have unpredictable consequences, and decisions restricting agency authority may impede agency regulatory efforts in a range of areas for years to come.

In the end, a better course is clear. Congress should enact legislation to resolve this issue once and for all. Absent that, the Commission could use its finite resources to pursue more legally defensible policy initiatives, such as adopting light-touch net neutrality rules under Section 706 of the Telecommunications Act, thereby avoiding Title II reclassification that would be inevitably doomed under the major questions doctrine.[79] Only if these paths are pursued can we avoid the inevitable Supreme Court decision vacating any FCC Order reclassifying broadband under Title II. Only if these paths are pursued can we avoid the massive waste of resources for the government, industry, and the public, as well as the lost opportunity to pursue more pressing policy goals such as deploying robust broadband service to all Americans. And only if these paths are pursued will the complicated policy issues surrounding broadband regulation be resolved within an enduring and lawful regulatory scheme that will achieve the laudable objectives that the Commission seeks.

## V. CONCLUSION

Whatever one's views about the wisdom of the major questions doctrine, there is no denying that a clear majority of the Supreme Court is prepared to wield the doctrine to limit agency discretion to address matters of major economic and political significance. The proposal to classify broadband Internet access service as a Title II telecommunications service and to treat it as a form of traditional common carriage is precisely the kind of issue to which the Court is likely to apply the doctrine. The consequences of such a step for our economy and our society are potentially enormous; the public has been engaged in a years-long debate about what policies are best suited to maximizing the potential of broadband; and Congress has repeatedly considered, and is still considering, what regulatory framework will best allow broadband Internet access service to flourish. At the same time, the Commission lacks the clear authorization that the Supreme Court requires: neither the Communications Act nor the 1996 Telecommunications Act unambiguously authorizes the Commission to take such a step, an unsurprising conclusion given that the Internet as we know it today did not exist when those statutory provisions were enacted. The result is thus preordained; any Commission attempt to impose Title II regulation will be invalidated. The Commission and Congress should heed these clear warnings and should instead seek to establish enduring net neutrality rules through

79. The D.C. Circuit has previously held Section 706 to be a valid source of authority for such light-touch rules. *See Verizon*, 743 F.3d at 628 ("The Commission, we further hold, has reasonably interpreted section 706 to empower it to promulgate rules governing broadband providers' treatment of Internet traffic, and its justification for the specific rules at issue here—that they will preserve and facilitate the "virtuous circle" of innovation that has driven the explosive growth of the Internet—is reasonable and supported by substantial evidence.").

Section 706 of the Telecommunications Act or through congressional legislation, not through Title II.

# Response to "Regulatory Implications of Turning Internet Platforms into Common Carriers"

**Adam Candeub***

TABLE OF CONTENTS



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# I. INTRODUCTION

An article by Lawrence Spiwak in the Federal Communications Law Journal, *Regulatory Implications of Turning Internet Platforms into Common Carriers*,[1] critiques my article[2] and one by Eugene Volokh,[3] both of which examine the legality of nondiscrimination obligations on social media firms and other communications networks.

# II. RESPONSE TO SPIWAK'S ARTICLE

## *A. NetChoice v. Paxton*

The arguments *Regulatory Implications* forwards have obvious applications to the Supreme Court's decision in *NetChoice v. Paxton* expected this year.[4] This case will review the constitutionality of H.B. 20, a Texas state law that requires the dominant social media companies to refrain from viewpoint discrimination, applying a common carrier type non-discrimination requirement that telephones, telegraphs, and airlines currently work under. Given the importance of the case, I asked the editors for an opportunity to respond to the critique, and they kindly agreed.

My article, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230* ("Bargaining for Free Speech"), points out that communications law and regulation, in a broad sense, grants certain privileges, particularly toleration of monopoly, in exchange for non-discrimination obligations or liability protections.[5] I contrasted that "deal" with Section 230 of the Communications Act of 1934, which gives Internet platforms, including the dominant social media firms, big carrots but no sticks, relieving the Internet platforms of liability in exchange for no corresponding public benefit, such as non-discrimination obligations.[6] Although written years before its passage, the article shows that Texas's H.B.

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1. 76 FED. COMM. L.J. 1, 7-19 (2023) [hereinafter *Regulatory Implications*].

2. *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391 (2020).

3. *Treating Social Media Platforms Like Common Carriers?* 1 J. FREE SPEECH L. 377 (2021).

4. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 446 (5th Cir. 2022*), cert. granted in part sub nom.* NetChoice, LLC v. Paxton, 144 S. Ct. 477 (2023).

5. *Id.* at 396 ("In exchange for liability relief from tort or antitrust law and for other government-granted privileges, a dominant network firm provides public goods it can uniquely offer: a universal communications platform enabling free speech and promoting democratic institutions."). *See also* S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co., 556 F. Supp. 825, 1095 (D.D.C. 1982), *as amended* (Jan. 10, 1983), *aff'd*, 740 F.2d 980 (D.C. Cir. 1984) ("Under the controlling decisions of the Supreme Court, it is undisputed that matters subject to a pervasive scheme of public utility or common carrier regulation are not subject to the antitrust laws.") (cleaned up); Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2003) ("One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm [the Telecomm. Act of 1996]. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.").

6. *NetChoice*, 49 F.4th at 465-66.

20 is very much in the tradition of common carrier communications regulation in imposing non-discrimination obligations.

Rather than respond to this straightforward argument, *Regulatory Implications* creates a strawman: my article supports public utility regulation for the Internet or social media. The article states that it "assume[s] *arguendo* [that] . . . . calls for common carrier regulation of Internet platforms are, in fact, calls for public utility regulation similar to FCC regulation of telephone companies, [and asks] then what would such a regulatory regime for Internet platforms look like . . . the purpose of this paper is to offer a few insights"[7] and claims, that I "sit squarely in the public utility camp for platform regulation."[8]

That's a false assumption and a false claim. Public utility regulation is the economic regulation of utilities, such as electricity, gas, water, and sometimes telephones particularly their consumer pricing, usually assuming that these services are a natural monopoly.[9] It typically involves comprehensive rate and service regulation. In contrast, common carrier anti-discrimination requirements are judge-made rules with their origins in the late Middle Ages.[10] Like their more modern cousins, public accommodation law,

7. *Regulatory Implications, supra* note 1, at 4, 6.

8. *Id.* at 7. My article does not mention public utility law at all, except by once referencing a book with the phrase in its title. The article was about common carrier non-discrimination requirements. It is undisputed that public utility law and common carrier law are different. Common carrier law is a set of rules originating in the 14th century or so in England dealing primarily with non-discrimination and liability. *See* Thomas B. Nachbar, *The Public Network*, 17 COMMLAW CONSPECTUS 67, 76 (2008) ("At common law, and as a matter of custom pre-dating legal recognition, certain industries have been regulated under nondiscrimination regimes. The most familiar form of nondiscrimination rules are those imposed on so-called 'common carriers,' businesses carrying persons or goods from place to place."). Public utility law, in contrast, is a late 19th century invention with much broader regulatory implications. *See* William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. ON REG. 721, 754-57 (2018) ("Building on the experience of state railroad commissions and the Interstate Commerce Commission, state regulation of public utilities emerged around the turn of the century . . . These were quintessential Progressive-era laws, built on principles of scientific management and regulation by experts. Statutory mandates were typically broad and open-ended, founded on the goal of ensuring that rates were just, reasonable, and nondiscriminatory in order to strike the appropriate balance between ratepayers and investors.").

9. *See* ALFRED KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (1988); Meredith Hurley, *Traditional Public Utility Law and the Demise of A Merchant Transmission Developer*, 14 NW. J. L. & SOC. POL'Y 318, 320-21 (2019) ("[D]uring this era [late 19th century], public utility law developed primarily around supporting vertically integrated utilities by granting them regulated monopolies and by protecting them from competing firms. In the early twentieth century, many states established state Public Utility Commissions (PUCs) to heavily regulate both the public utilities or investor-owned utilities."). *See generally* Harry M. Trebing, *Public Utility Regulation: A Case Study in the Debate Over Effectiveness of Economic Regulation*, 18 J. OF ECON. ISSUES 223-50 (1984) ("In its modern form, [public utility regulation] began in Munn v. Illinois 94 U.S. 113 (1876), when the U.S. Supreme Court upheld the power of the state to regulate prices for a firm that possessed the economic power to exploit its customers.").

10. James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 227 (2002) ("Since at least the middle ages, most significant carriers of communications and commerce have been regulated as common carriers.").

these rules simply require businesses to serve all comers without discrimination.[11] Most retail businesses today operate under such mandates.

As the title of my article makes clear, it was talking about common carrier law, which is historically administered by courts. The article *never discusses public utility law at all*, and any reading otherwise misinterprets my article. Further, it is a common misconception that Title II of the Communications Act of 1934 embraces a comprehensive public utility model; it is at best partial.[12] *Regulatory Implications* appears to adopt this view in its discussion of Sections 201, 202, and 203 of the Act. But, the Communications Act of 1934 does not; it regulates "common carriers,"[13] which courts have interpreted to refer to the historical meaning of the term[14]—so that my discussion of the Act does not necessarily implicate public utility principles at all.

Further, I have never called for a "dedicated regulator" to treat social media as public utilities. Indeed, I have attacked ferociously the administrative state in many of my writings. [15] My article concludes, with the second of two mentions of administrative agencies, stating a "new deal is necessary, starting with, at least, a proper judicial understanding of section 230 and then statutory or regulatory reform, which is within the power of the FCC or FTC. These reforms would include an anti-discrimination requirement that dominant platforms share blocking technologies with users so that individuals, not corporate platforms, set the boundaries of on-line speech."[16] My interest is in simple common carrier-type non-discrimination rules, and I am at best agnostic about whether administrative agencies should

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11. Day v. Owen, 5 Mich. 520, 523 (1858) ("[A] common carrier can not refuse to carry any person of legal conduct and intention upon the ground of any physical or personal quality or defect, or to suit the preference or antipathies of other passengers."); Kevin Werbach, *Only Connect*, 22 BERKELEY TECH. L.J. 1233, 1246 (2007) ("Common carriage is primarily a non-discrimination approach.").

12. Barbara A. Cherry, *Historical distortion: How misuse of "public utility and "natural monopoly" misdirects U.S. telecommunications policy development*, 2015 Regional Conference of the International Telecommunications Society (ITS) (Oct. 25-28, 2015) ("In the FCC's open Internet proceeding, I filed a research paper coauthored with Jon Peha (Cherry & Peha, 2014), which was written to redirect inquiry to the proper legal basis for classifying a service – simply the coexistence of certain technical and commercial functionalities of the service – as a common carriage ('telecommunications service') under Title II of the federal Communications Act. This redirection was necessary to refute the mischaracterization, whether intentional or unintentional, that such classification is based on assessment of market structure, market power or monopoly. This research paper (Cherry & Peha, 2014) relied in significant part on my prior research that explains how conflation between the two legal statuses of common carrier and public utility has contributed to such mischaracterization (Cherry, 1999, 2006, 2008b)."). Further, the Communications Act, through its use of the term "common carrier," incorporates historical understandings of common carrier law. *See* NARUC v. FCC, 525 F.2d 630, 640 (1976).

13. Part I of Title II of the Communications Act (title "Common Carrier Regulation") explicitly regulates common carrriers. *See* 47 U.S.C. §§ 201-03. Section 201 regulates "common carriers."

14. Nat'l Ass'n of Regul. Util. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) (Courts "have concluded that the circularity and uncertainty of the common carrier definitions set forth in the statute and regulations invite recourse to the common law of carriers.").

15. *See, e.g.*, D.A. Candeub, *Preference and Administrative Law,* 72 ADMIN. L. REV. 607 (2021)*;* D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 52 (2017).

16. *Bargaining for Free Speech*, *supra* note 2, at 433.

take the lead, although elsewhere my preference for court-adjudicated standards is clear.

Rather than require the complex pricing schemes of public utility law, social media non-discrimination laws, like House Bill 20 (H.B. 20), require simple non-discrimination mandates, of the sort which regulate railroads,[17] restaurants,[18] FEDEX,[19] and telegraphs,[20] and which courts have enforced for centuries. And, that's all my article—or, for that matter, supporters of H.B. 20—argue for. My article states "simple de-platforming . . . can be analyzed under a non-discrimination framework. The question of whether one is discriminatorily terminated from a network is not a deep technical issue. Rather, it is akin to the discrimination question in civil rights and employment law that courts routinely answer."[21]

### *B. H.B. 20*

Armed with this misreading that my article advocates comprehensive public utility regulation of social media, *Regulatory Implications* suggests non-discrimination of the type H.B. 20 requires is, in fact, invasive public utility rate regulation and then proceeds through a litany of hypotheticals.

First, "[r]ather than regulate internet platforms' economic conduct (e.g., prices), however, the government would regulate the platforms' speech. The problem, of course, is that because neither common carriage nor public utility

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17. "A railroad may decline to carry persons . . . and refuse such as persist in not complying with its reasonable regulations, or whose improper behavior -- as by their drunkenness, obscene language, or vulgar conduct -- renders them an annoyance to other passengers. But it cannot make unreasonable discriminations between persons soliciting its means of conveyance, as by refusing them on account of personal dislike, their occupation, condition in life, complexion, race, nativity, political or ecclesiastical relations." EDWARD LILLIE PIERCE, A TREATISE ON AMERICAN RAILROAD LAW (1857); Councill v. W. & Atl. R.R. Co., 1 I.C.C. 339, 347 (1887). *See also* Heard v. Ga. R.R. Co., 1 I.C.C. 428, 435-36 (1888); Henderson v. United States, 339 U.S. 816, 818 (1950).

18. Boynton v. Virginia, 364 U.S. 454, 462-63 (1960).

19. FedEx Corp. v. United States, 121 F. App'x 125, 126 (6th Cir. 2005); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 379 (2021) ("And though UPS and FedEx aren't bound by the First Amendment, they are common carriers and thus can't refuse to ship books sent by "extremist" publishers.").

20. Primrose v. W. Union Tel. Co., 154 U.S. 1, 14, (1894) ("Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce, and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination.").

21. *Bargaining for Free Speech*, *supra* note 2, at 431. But, instead of responding to *Bargaining for Free Speech*, in *Regulatory Implications*, the author quotes me out of context claiming "Candeub expressly calls for a new 'regulatory deal' for network regulation which would 'probably require an administrative agency' and because he draws heavily from communications law and policy debates, he appears to sit squarely in the public utility camp for platform regulation." *Regulating Implications*, *supra* note 1, at 7. The article fails to mention that my reference to an "administrative agency" was specifically in regard to non-discriminatory *search engine* results. *See supra* note 2, at 431 ("The question of search results is, of course, far more complex--and much has been written about how fairness in search results could be maintained. It would probably require an administrative agency, either the FCC or FTC, to examine search algorithms.").

regulation were ever intended to serve this function, how that regulatory regime would work in practice is unclear."[22]

To the contrary, the history of common carrier law shows how it imposed non-discrimination mandates on businesses carrying speech and messages—even accepting the tendentious assertion that the messages carriers bear are their own expression. For instance, common carrier principles were applied to telegraphs when they refused to carry news stories critical of telegraph companies in the 19th century.[23] And, indeed, judicial rulings hold that requiring carriers to bear others' messages does not convert those messages into carrier expression. Companies that carry *others'* speech cannot claim it as their own. This is the conclusion that the Fifth Circuit in *NetChoice* came to, pointing out that the platforms, themselves, have strenuously advocated such a view in Section 230 cases.[24] Even more important, the Supreme Court appeared to side with this view just last term in *Taamneh*, stating that Internet search platforms' "'recommendation' algorithms are merely part of that infrastructure. All the content on their platforms is filtered through these algorithms, which allegedly sort the content by information and inputs provided by users and found in the content itself. As presented here, the algorithms appear agnostic as to the nature of the content."[25]

Second, my article looks to other examples in communications law in which, in a broad sense, the government granted certain privileges, such as tolerating monopoly, in exchange for non-discrimination obligations or liability protections. My examples are network neutrality regulation, the 1992 Cable Act, and broadcast licensing. I contrast these examples with Section 230 of the Communications Act of 1934, which offers all carrot and no stick, relieving the Internet platforms of liability in exchange for no corresponding public benefit. *Regulatory Implications* claims that "Candeub misstated the law, but his analogies are uniformly inapposite" and tries to show how each analogy is "inapposite."[26]

The FCC's 2015 network neutrality order that reclassified broadband access as a common carrier and imposed minimal non-discrimination

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22. *Regulatory Implications*, *supra* note 1, at 6.

23. "The telegraph was the first communications industry subjected to common carrier laws in the United States . . . But by the end of the nineteenth century, legislators grew 'concern[ed] about the possibility that the private entities that controlled this amazing new technology would use that power to manipulate the flow of information to the public when doing so served their economic or political self-interest' . . . . For example, Western Union, the largest telegraph company, sometimes refused to carry messages from journalists that competed with its ally, the Associated Press—or charged them exorbitant rates. And the Associated Press in turn denied its valuable news digests to newspapers that criticized Western Union. Western Union also discriminated against certain political speech, like strike-related telegraphs. And it was widely believed that Western Union and the Associated Press 'influenc[ed] the reporting of political elections in an effort to promote the election of candidates their directors favored.' In response, States enacted common carrier laws to limit discrimination in the transmission of telegraph messages." *Paxton*, 49 F.4th at 470-71.

24. *Paxton*, 49 F.4th at 467-68 (The Platforms' position in this case is a marked shift from their past claims that they are simple conduits for user speech and that whatever might look like editorial control is in fact the blind operation of "neutral tools.").

25. Twitter, Inc. v. Taamneh, 598 U.S. 471, 499 (2023).

26. *Regulatory Implications*, *supra* note 1, at 9.

requirements—is a typical common carrier-type regulation.[27] *Regulatory Implications* claims that network neutrality is not an example of a regulatory deal because the FCC forbore from Title II's more burdensome public utility-type regulation and therefore the "FCC's reclassification strategy was more jurisdictional than philosophical." It's not clear what this means; perhaps the claim is correct, but I'm not sure what a "philosophical reclassification strategy" is, however.

*Regulatory Implications* argues that network neutrality is a type of price regulation. Fair enough. It sets traffic interconnection rates at zero—and that from a public utility pricing perspective may not be a justified move. Agreed. Of course, the application of the argument is someone lessened given that modern networks do, indeed, have marginal termination rates that are close to zero—a fact that reciprocal compensation under Section 251 of the Telecommunications Act revealed decades ago.[28]

But then *Regulatory Implications* argues that my article failed to deal with the fact that the Act only prohibits "unjust and unreasonable" discrimination—and that standard cannot be applied to social media. Well, regardless of the application of the Communications Act of 1934 to H.B. 20 (and there is none), it is true that common carrier and public utility law certainly allow "reasonable" discrimination based on different services. *Regulatory Implications* correctly points to *Orloff v. FCC* as an example of a case examining the "reasonable discrimination" principle.[29] This case allowed Verizon to offer different cell phone plans to different customers.[30]

And, here, *Regulatory Implications* makes a serious error—because it seems to insist that social media non-discrimination laws include a secret public utility pricing plan. It argues that reasonable discrimination rules cannot apply to social media, claiming that "If the government wants to exert more control over how Internet platforms curate content, then the full panoply of public utility regulation is probably required so that the regulator can decide, for example, whether Donald Trump is 'similarly situated' to an Instagram influencer."[31]

But H.B. 20 doesn't require that. It's a common carrier—public accommodation-type law. It only requires that whatever rules and standards the platform uses in moderating content, it cannot apply them in a viewpoint discriminatory way. Unlike what a public utility regulation requires, H.B. 20 does not require a "pricing" of Donald Trump—after all, social media provides its services for free! And, most important, the social media firms

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27. Protecting and Promoting the Open Internet, *Final Rule* 30 FCC Rcd. 5601, 5604 ¶ 6 (2015). Although the order was upheld by the D.C. Circuit in United States Telecom Ass'n v. FCC, 855 F.3d 381, 382 (D.C. Cir. 2017), the FCC later abrogated it. In the Restoring Internet Freedom, *Declaratory Ruling, Order, Report and Order*, 33 FCC Rd. 311 (2018) [hereinafter *Restoring Internet Freedom Declaratory Ruling*].

28. Ace Tel. Ass'n v. Koppendrayer, 432 F.3d 876, 880 (8th Cir. 2005) ("[T]he MPUC reasonably concluded that the additional costs for terminating a telephone call were approximately zero[.]").

29. *Regulatory Implications*, *supra* note 1, at 13; *see also* Orloff v. FCC, 352 F.3d 415 (D.C. Cir. 2003), *cert denied*, 542 U.S. 937 (2004).

30. *Orloff*, 352 F.3d at 420.

31. *Regulatory Implications*, *supra* note 1, at 13-14.

already adopt different pricing schemes for their real customers, the advertisers.

More basically, pricing problems, which are indeed issues of public utility regulation, are not present in simple common carrier non-discrimination regulation. Contrary to the logic of *Regulatory Implications,* restaurants, retailers, airlines, and telephone companies can without any diminishment of economic efficiency serve all people of all races, religions, and backgrounds without making determinations of whether they are similarly situated—and should be charged different prices. The social media firms can serve their users in the same fashion.

And, nondiscrimination and public accommodation laws are simple to follow; almost every public-facing business today follows them, from retail shopping to ski resorts.[32] Indeed, common carriers under their nondiscrimination obligations must serve all regardless of race, religion, or other status.[33] We need neither regulatory agencies nor public utility law to enforce those obligations; courts enforce these anti-discrimination mandates.

Rather than recognize the obvious harm of social media censorship, *Regulatory Implications* looks to an article by an economist, George Ford,[34] cited in the FCC's Restoring Internet Freedom Order.[35]

Spiwak's article claims Ford's work "conclusively demonstrated that industry investment suffered as a result of reclassification [the FCC's decision to regulate ISPs as common carrier in 2015 network neutrality order]."[36] The article therefore implies that Texas's non-discrimination requirement on platforms will have a similar negative impact on social media capital investment—without giving any evidence of such a similar effect.

In the article relied upon,[37] Ford finds a decrease in ISP industry investment *since 2010*. Reclassification occurred in 2015. How this article shows investment "suffered as a result of reclassification" is a mystery. Actually, Ford contends that the *threat* of reclassification, which he asserts occurred when President Obama took office, caused the decrease in investment. Apparently, then, *Regulatory Implication's* real beef is with Democratic presidents. But, by providing a fair social media environment that is more fair to conservatives, the Texas social media law will likely help with that problem.

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32. *See, e.g.*, N.J. Stat. Ann. § 10:5-4 (West 1993).

33. Morgan v. Virginia, 328 U.S. 373, 374-75, 383-86 (1946); Mitchell v. United States, 313 U.S. 80, 94-95 (1941) (finding that federal law prohibits common carriers from discriminating based on race and requires them to provide equal access to accommodations).

34. Dr. George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, No. 17-02 PERSPECTIVES, PHX. CTR. ADVANCED & ECON. LEGAL PUB. POL'Y STUDIES (2017), https://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf [https://perma.cc/DKW2-594X] (subsequently published as George S. Ford, *Regulation and Investment in the U.S. Telecommunications Industry*, 50 APPLIED ECONS. 6073, 6082 (2018)).

35. *Restoring Internet Freedom Declaratory Ruling*, at paras. 95-98, *aff'd by, in part, vac'd by, in part, rem'd by* Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019) (*citing* Ford, *Net Neutrality, Reclassification and Investment*, *supra* note 34).

36. *Regulatory Implications, supra* note 1, at 14 (Discussing Protecting and Promoting the Open Internet, *Final Rule*, 30 FCC Rcd. 5601, 5604 ¶ 6 (2015)).

37. Ford, *supra* note 34, at 6073-84.

*Regulatory Implications* continues in the same vein critiquing my analysis of cable and broadcast law—and claims I misuse the economic concept of a "public good." For the sake of space, I leave these matters to the curious and thoughtful reader and trust her judgment.

I will just remark on one last point. Before the Twitter files and *Missouri v. Murthy*[38] exposed the extent of platform collusion with government to censor Americans, my article foresaw the threat. It quotes the much more-prescient Professor Seth Kreimer, writing in 2006, who foresaw "[r]ather than attacking speakers or listeners directly, governments [will] enlist private actors within the chain as proxy censors to control the flow of information" on the Internet.[39] And, that's what government did to silence critics of federal and state COVID responses, reporters covering Hunter Biden's laptop, and other unpopular voices critical of the government.

The stifling of leading public health experts or major news stories on the cusp of an election is partisan interference with the democratic process. Texas' H.B. 20 prohibiting viewpoint discrimination would have made such interference illegal.

## III. CONCLUSION

*Regulatory Implications* finds my claim paradoxical that non-discrimination rules would make it more difficult for government to pressure the platforms to silence its critic—because those rules are government-created. I do not dispute the claim that regulation tends to bring administrative agencies and regulated entities closer. Of course it does. But, common carrier non-discrimination law, adjudicated by the courts, is unlikely to do so. And has not done so during the centuries before comprehensive public utility regulation run by administrative agencies emerged in the late 19th and early 20th century. Common carrier-type non-discrimination laws, like H.B. 20, give individuals a legal leg to stand on when faced with ever greater government and business collusion aimed at free speech. One would hope that all free market enthusiasts, of which I certainly count myself, would look favorably on the law.

38. Missouri v. Biden, 80 F.4th 641, 657 (5th Cir. 2023), *opinion withdrawn and superseded on reh'g*, 83 F.4th 350 (5th Cir. 2023), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023) ("Relying on the above record, the district court concluded that the officials, via both private and public channels, asked the platforms to remove content, pressed them to change their moderation policies, and threatened them—directly and indirectly—with legal consequences if they did not comply. And, it worked—that 'unrelenting pressure' forced the platforms to act and take down users' content.").

39. *Bargaining for Free Speech*, *supra* note 2, at 432.

# A Fiduciary Judge's Guide To Improving Outcomes for Victims in Federal Data Breach Class Actions

**Tomasso Piccirilli***

TABLE OF CONTENTS



* J.D., May 2024 , The George Washington University Law School; B.A. December, 2019, History and Economics, American University Honors Program. I would like to thank the entire FCLJ editorial team for their support and feedback. I would especially like to thank Adam Schulman, without whom I would never have discovered class action law.

## I. INTRODUCTION

We have all left our phones unlocked, clicked on phony links, or used bad passwords. Even if you practiced perfect data security, the fact of the matter is that data breaches have become an inevitable part of online life, and at least some of your personal data is out there on the dark web, waiting to be used by criminals. Still, you would hope that major corporations would at least try to protect your data. Instead, for many companies, an audit of their data security records reveals astonishing histories of negligence, and consumers can do very little about it.

Take Facebook for instance.[1] In 2018, it was revealed that Facebook's refusal to implement its own security policies resulted in the sale of over eighty-seven million users' data through the political consulting firm Cambridge Analytica.[2] That same year, the New York Times discovered Facebook had been sharing user data with third parties without users' permission.[3] In 2019, three separate databases were found on the dark web containing the Personally Identifiable Information (PII) of between 200 and 540 million Facebook users.[4] Later that year, privacy watcher KrebsOnSecurity revealed that Facebook had stored the passwords of between 200 and 600 million users in unencrypted plaintext.[5] In June of 2020, Facebook disclosed an issue that enabled third-party app developers to access the personal data of users' friends, including emails, names, and hometowns, without their consent.[6] Finally, in 2021, PII for users in 106 countries was posted online as a result of a data scraping that Facebook was aware of since 2019.[7] In total those eight instances over a three-year period resulted in the potential exposure of the personal information of well over 1.5 billion users.

The combination of Facebook's bad data security practices, refusals to act on its own policies, and overall cavalier handling of user data resulted in

1. Facebook has since reorganized into Meta. Press Release, Meta, Introducing Meta: A Social Technology Company (Oct. 28, 2021), https://about.fb.com/news/2021/10/facebook-company-is-now-meta/ [https://perma.cc/29XD-36QL].

2. Michael X. Helligenstein, *Facebook Data Breaches: Full Timeline Through 2022*, FIREWALL TIMES (Jan. 18, 2022), https://firewalltimes.com/facebook-data-breach-timeline/; [https://perma.cc/N5YW-XFQ5].

3. *Id.*

4. *Id.*

5. *Facebook Stored Hundreds of Millions of User Passwords in Plaintext for Years*, KREBSONSECURITY (Mar. 21, 2019), https://krebsonsecurity.com/2019/03/facebook-stored-hundreds-of-millions-of-user-passwords-in-plain-text-for-years/ [https://perma.cc/2TD9-DY4Q].

6. Kurt Wagner, *Facebook admits another blunder with user data*, FORTUNE (July 1, 2020), https://fortune.com/2020/07/01/facebook-user-data-apps-blunder/ [https://perma.cc/SQ8M-JGS2] (Facebook claimed to have fixed this issue in 2018).

7. Emma Bowman, *After Data Breach Exposes 530 Million, Facebook Says it Will Not Notify Users*, NPR (Apr. 9, 2021), https://www.npr.org/2021/04/09/986005820/after-data-breach-exposes-530-million-facebook-says-it-will-not-notify-users [https://perma.cc/K3NC-9BF5].

a $5 billion fine from the Federal Trade Commission (FTC) in 2019.[8] This fine, the largest ever issued by the agency, was still less than one month of revenue for the tech giant.[9] Despite both the fine, and any bad press, Facebook continues to grow, reaching over three billion users in 2023.[10]

As for the affected users, whose data Facebook both relies on and mishandles, their primary relief has come via federal class actions. The most recent of which, relating to the aforementioned FTC fine, resulted in an over 700-million-dollar settlement with affected users.[11] *In re Facebook Internet Tracking Litigation* has been a decade-long saga that threatened to go all the way to the Supreme Court just over the issue of whether or not the suit can proceed.[12] Such lengths and complications are becoming the norm in data breach class actions as courts and advocates alike express concern over their long-term utility compared to agency actions or multi-state challenges.[13]

This skepticism has led to the Supreme Court adopting stringent *actual harm* requirements to show standing in class action suits. As articulated in *TransUnion*, class members now must establish that the harm alleged has a "close relationship" with traditionally recognized harms.[14] This presents a heightened barrier for data breach class actions where judges are reluctant to recognize the harms associated with exposed data such as an increased vulnerability to fraud and anxiety.[15]

Recent commentary has focused on the agency problems inherent to class actions. The low individual stakes for class members result in poor oversight of the actors. This poor oversight enables "sweetheart settlements," wherein class counsel enters defendant favored settlement agreements in exchange for hefty attorney's fees.[16] This is especially problematic because most class actions settle before reaching trial, making class actions less

8. Lesley Fair, *FTC's $5 billion Facebook settlement: Record-breaking and history making*, FTC (July 24, 2019), https://www.ftc.gov/business-guidance/blog/2019/07/ftcs-5-billion-facebook-settlement-record-breaking-and-history-making [https://perma.cc/DBD5-MWGE].

9. Fair, *supra* note 8; Facebook Reports Second Quarter 2019 Results, META INV.RELS. (July 24, 2019), https://investor.fb.com/investor-news/press-release-details/2019/Facebook-Reports-Second-Quarter-2019-Results/default.aspx [https://perma.cc/A377-V839].

10. Dixon, *Number of monthly active Facebook users worldwide as of 3rd quarter 2022*, STATISTA (Oct. 27, 2022), https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/ [https://perma.cc/9WDF-UAH9].

11. In re Facebook Internet Tracking Litig., No. 5:12-md-02314-EJD, 2022 U.S. Dist. LEXIS 205651 (N.D. Cal. Nov. 10, 2022).

12. Facebook, Inc. v. Davis, 141 S. Ct. 1684 (2021).

13. *See generally* Elysa M. Dishman, *Class Action Squared: Multistate Actions and Agency Dilemmas*, 96 NOTRE DAME L. REV. 291 (arguing that multistate actions produce better outcomes for class members).

14. TransUnion LLC v. Ramirez, 594 U.S. 413, 417 (2021) ("To have Article III standing to sue in federal court, plaintiffs must demonstrate . . . whether the harm asserted has a 'close relationship' to a harm traditionally recognized as providing the basis for a lawsuit in American courts . . .") (internal citation omitted).

15. *See infra*, Part III.A.

16. John C. Coffee Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 633 (1987) ("At its simplest, the classic form of opportunism in class actions is the 'sweetheart' settlement, namely one in which plaintiff's attorney trades a high fee award for a low recovery.") (internal citation omitted).

reminiscent of traditional litigation and more akin to negotiations between the class's counsel and defendant's counsel.[17]

To combat these agency issues, judges serve a unique fiduciary role in the class action context, representing the interests of unnamed class members whose rights are bargained away.[18] Presiding judges bear the responsibility of ensuring that class counsel adequately represent the interests of unnamed class members in settlement negotiations.[19] This extends to more than just ensuring that settlement negotiations are at "arms-length," thus absent explicit collusion.[20] Judges must critically examine what, if any, value unnamed class members are receiving as a part of a settlement. This is especially true in the data breach context, where the aforementioned agency problems are amplified, due to the large nebulous nature of the classes, the general undervaluing of data exposure as harm and the overvaluing of non-monetary relief such as *cy pres*, injunctive relief, and credit monitoring.

Data breaches are naturally ideal candidates for class action suits.[21] Generally, data breaches cause small monetary harm to incredibly large groups of individuals.[22] The aggregation of similarly affected individuals is necessary for data breach suits because the low potential for damages makes bringing individual suits impracticable. Data breach class actions also serve an important role in consumer protection, not merely compensating consumers, but also incentivizing corporations to better protect data they otherwise would not see value in protecting.[23] As courts erect increasingly high barriers to data breach class actions, those few that survive take on an elevated level of importance and require a higher judicial standard if they are to continue to serve their purpose.

If federal class actions are to remain an effective means of relief for victims of data breaches, judges must take greater advantage of their role as fiduciaries and examine settlement agreements more skeptically. To that end, judges should adopt a more modern understanding of data breach harms, and

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17. Bryan G. Garth, *Studying Civil Litigation Through the Class Action*, 62 IND. L.J. 497, 501-04 (1987) (noting that most class actions settle prior to trial, resulting in certification being the focal point of the litigation); Coffee, *supra* note 16, at 627 (suggesting that class actions should be evaluated through the lens of collective bargaining negotiations).

18. *See In re* Dry Max Pampers Litig., 724 F.3d 713, 715 (6th Cir. 2013) ("[C]lass-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations. And thus there is always the danger that the parties and Counsel will bargain away the interests of unnamed class members in order to maximize their own."); *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 175 (3d Cir. 2013) (Courts must "make sure that class Counsel are behaving as honest fiduciaries for the class as a whole.) (internal quotation omitted).

19. *In re Baby Products Antitrust Litig.*, 708 F.3d at 175.

20. *See id.* at 1175 (evidence of arms-length negotiations not enough to prove adequacy of representation); Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 125 (2003) (arms-length requirement a "poor solution" to concerns over non-adversarial negotiations).

21. *See supra* Part II.A.

22. *See supra* Part II.A.

23. *See Brian T. Fitzpatrick, Do Class Actions Deter Wrongdoing?*, in THE CLASS ACTION EFFECT 183 (Catherine Piche, ed., Editions Yvon Blais, Montreal, 2018).

consequently lower barriers to standing. When examining relief, judges should prioritize long-term change over short-term settlements, and should be particularly skeptical of when a settlement occurs, how the fee awards align interest, and the form of notice from the settlement. Additionally, judges should critically examine non-monetary relief to determine whether unnamed class members are likely to receive appropriate compensation from the settlement.

While there is a healthy debate on whether a model outside of federal class actions should exist to compensate consumer victims of data breaches, this Note does not take a side in the matter. Instead, this Note aims to outline an avenue to improve the efficacy of federal data breach class actions; even if there are alternatives for plaintiff classes, that should not preclude improving the existing system. To that end, this Note begins with a discussion of data breaches, focusing on their key characteristics and the harm associated with exposed PII. The Note then examines class actions, including their requirements and challenges, while paying particular attention to the dual purposes of class actions as compensation and deterrence devices. Following that, the Note then outlines five key potential areas of improvement in data breach class actions: lowering the standing requirement to properly reflect the harms of exposed data, taking a long-term approach when evaluating class members' interests, adopting incentive aligning fee structures, prioritizing the use of e-notice; and more critically examining non-monetary forms of relief.

## II. BACKGROUND

### *A. Characteristics of Data Breaches*

A data breach is any unauthorized exposure of sensitive information.[24] Sensitive information encompasses a wide range of data, from what is traditionally viewed as confidential information such as patents and state secrets, to identifying information such as names and addresses.[25] The word *any* in this context, truly means *any*, a data breach is no less a data breach if the information stolen is names and addresses than if it is a state secret.

Data breaches may not require proof that the exposed data was used or even actually stolen.[26] Practically speaking, not all breaches require a hack. Instead, an oversight such as an unsecured login, or unencrypted data set may leave data exposed for an extended period of time, granting access to anyone. In these instances, it may be impossible to show if any data was illegitimately accessed. The data, however, may still be considered exposed and a breach may still be considered to have occurred. This means that a data breach may not require there to be proof of a hacker. Simply leaving sensitive information

24. *What is a Data Breach*, CISCO, (Jan. 20, 2023, 9:55 AM) https://www.cisco.com/c/en/us/products/security/what-is-data-breach.html [https://perma.cc/P794-9367].

25. *Cyber Incidents*, DEP'T. HOMELAND SEC., https://www.dhs.gov/cyber-incidents [https://perma.cc/J5LJ-V2AK] (last visited Jan. 20, 2023, 10:01 AM).

26. *What is a Data Breach, supra* note 24 ("Information that might be stolen or *unintentionally* exposed to unauthorized *viewers*.") (emphasis added).

exposed (as Facebook did in 2019 when they stored passwords in plaintext) constitutes a data breach.[27] Data breaches, consequently, reflect a very traditional understanding of privacy, someone simply seeing your private information is a violation of one's ability to decide the extent to which one's private life is exposed.[28]

In the class action context, data breaches most often refer to exposures of Personally Identifiable Information (PII). PII includes names, addresses, associations, location information, health information and financial information about an individual or group of individuals.[29] The collection and use of PII to create targeted advertisements is the crux of modern Internet transactions and represents the principal monetization model for free services such as Facebook and Twitter.[30] The actual value of PII depends both on the type of data collected and who is using the data. Estimate valuations of all the data Facebook collects on an individual average at around $200 per user.[31] Estimate valuations of user data to criminals largely depend on the volume and type of the information exposed. A single login may be worth as little as a dollar, but a medical file can be valued at up to $1,000.[32]

It is easiest to understand why this large umbrella of data is grouped together when viewed through the lens of a criminal. Every piece of PII, be it the name of someone's dog to someone's fingerprint, enhances a criminal's ability to commit fraud. Take a phishing attack for example. Phishing attacks are a type of social engineering attack that involves the sending of fraudulent communications from a source that appears reputable, tricking the target into acting on behalf of the criminal. For instance, an email claiming to be from your company's HR department requiring you to input your login information to verify or dispute Internet activity allegedly in violation of company policy. This email, which would record your login information and send it to a third party, appears more legitimate if it references a website you actually visit, or a friend you frequently message. Similarly, the classic "prince in need," scam in which a scammer pretends to be a foreign prince who needs a cash advance

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27. *Facebook Stored Hundreds of Millions of User Passwords in Plaintext for Years*, *supra* note 5.

28. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890) (arguing privacy invasions involve the interference with a persona ability to decide the extent to which personal information is revealed).

29. *Department of Homeland Security Handbook for Safeguarding Sensitive PII*, DEP.'T HOMELAND SEC. (Dec. 4, 2017) https://www.dhs.gov/sites/default/files/publications/dhs%20policy%20directive%20047-01-007%20handbook%20for%20safeguarding%20sensitive%20PII%2012-4-2017.pdf [https://perma.cc/W8LY-Y8J6].

30. Kris Gunnars, *How Does Facebook Really Make Money? 7 Main Ways*, STOCK ANALYSIS (Jan. 21, 2023, 10:30 AM) https://stockanalysis.com/article/how-facebook-makes-money/ [perma: https://perma.cc/QQ2Z-3XCA].

31. Robert J. Shaprio, *What Your Data is Really Worth to Facebook*, WASHINGTONIAN MONTHLY (July 12, 2019) https://washingtonmonthly.com/2019/07/12/what-your-data-is-really-worth-to-facebook/ [https://perma.cc/K6RH-JSG4] (calculating the value to Facebook of the data it collects per user is $202).

32. Brian Stack, *Here's How Much Your Personal Information Is Selling for on the Dark Web*, EXPERIAN (Dec. 6, 2017) https://washingtonmonthly.com/2019/07/12/what-your-data-is-really-worth-to-facebook/ [https://perma.cc/KU4D-ZVTL].

but will repay you ten-fold can be made more believable if the person needing money is not some far off prince but a distant family member. Viewed through the lens of a criminal, the value of PII is not the immediate harm of possession or access, but the subsequent harms of potentially fraudulent use.

### *B. The Dual Purposes of Class Actions*

Fundamentally, class actions serve to aggregate many individual damages claims into a single lawsuit. This aggregation accomplishes two things: it provides a tool for justice for those who otherwise would be unable to sue, and it keeps businesses in check by discouraging widespread minor abuses over fear of costly suits.[33]

These distinct functions of class actions are inseparable. In the long run, better corporate behavior saves consumers money, and protects them from injustices.[34] In comparison to the actual payouts consumers receive, corporate deterrence may be the more important benefit.[35] This logic underpins the non-monetary relief plaintiffs often receive in class actions, including both injunctive relief and *cy pres* relief, defined as the forfeiture of payouts to class members in favor of payouts to charities or other interest groups.[36] However, because injunctive relief and other non-monetary relief cannot compensate consumers for existing harms, non-monetary relief should not be considered a substitute that can entirely replace direct compensation.[37]

### *C. Exacerbated Agency Problems Present in Data Breach Class Actions*

Like all class actions, data breach class actions incur significant conflicts of interest between clients and attorneys. Similar to other principal-agent relationships, class actions face agency costs, including: (1) the cost of monitoring the agents, (2) the agents' bidding costs, and (3) residual costs of opportunistic behavior.[38] Coined by Professor John C. Coffee Jr., these agency costs have existed since the inception of class actions and most

33. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 803 (9th ed. 2014) ("[W]hat is most important from an economic standpoint is that the violator be confronted with the costs of his violation--this preserves the deterrent effect of litigation--not that he pay them to his victims.").

34. *See* Russel M. Gold, *Compensation's Role in Deterrence*, 91 NOTRE DAME L. REV. 1997, 2003 (2016) (arguing that deterrence and compensation are intertwined objectives because large cash payouts serve as a form of deterrence not only as fines but by inflicting reputational harm).

35. *See* James D. Cox, *The Social Meaning of Shareholder Suits*, 65 BROOK. L. REV. 3, 39-43 (1999) (arguing that deterrence is a more important goal than compensation).

36. *See* Myriam Giles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 322 (2010) (noting the view of some courts that *cy pres* "distributions confer little or no benefit to class members, but rather serve the broader public interests of . . . deterrence").

37. *See* Frank v. Gaos, 139 S. Ct. 1041, 1047 (2019) ("[*C*]*y pres* payments are not a form of relief to the absent class members and should not be treated as such[.]") (Thomas, J., dissenting).

38. Coffee, *supra* note 16, at 629-30.

traditionally surface in what are called sweetheart settlements, in which class counsel exchange high fees for a lower overall settlement.[39] While sweetheart settlements are possible in any civil litigation, class actions feature exacerbated agency problems. First, class actions tend to have higher information costs because the critical decisions, such as when and for how much to settle, have low visibility. Second, the low overall financial recovery for individual plaintiffs provides little incentive to justify the costs of monitoring settlement negotiations.[40] Third, no public market exists to align the attorney's interest with that of their clients. Consequently, class actions function opposite to normal market activity in which a principal hires their agent.[41] Instead, in class actions, the agent often looks for their principals.[42] Class action attorneys hunt for suitable plaintiffs to bring a profitable suit.[43] As a result, the theoretically aggrieved party, the plaintiff, is likely not as interested in the case as their attorney.[44]

High agency costs have led to two problems: first an overfilling of class actions in the hope to barrel forward settlement agreements as a form of undue influence and the inadequate representation of even well-warranted class actions. Those are distinct problems for the broader system, but for class members they result in the same issue: rights being bargained away in exchange for returns that do not suit their interests.

For courts, these are distinct problems with competing solutions: reducing the number of class actions in order to improve their average quality or alternatively, improving outcomes for class members. On the one hand, having stricter requirements for class certification reduces the number of potential blackmail suits. Conversely, increased fighting over certification drains resources from class representatives increasing defendants' leverage in settlements.[45] In response, courts and the Advisory Committee on Civil Rules of the Judicial Conference of the United States have prioritized curtailing the number of class actions. Consider the 2003 amendments to Federal Rule of Civil Procedure 23, which defines the procedures for federal class actions. These amendments were designed to make certifying classes under Rule 23(b)(3) more arduous by adding an interlocutory appeal provision to the

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39. *Id.* at 633 ("At its simplest, the classic form of opportunism in class actions is the "sweetheart settlement," namely one in which plaintiff's attorney trades a high fee award for a low recovery.").

40. *Id.* at 630.

41. *Id.* at 629.

42. *Id.*

43. *Id.*

44. John C. Coffee Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 882-893 (1987) (characterizing class Counsel as entrepreneurial lawyers, noting the lack of perceived stakes for class members); Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21. REV. LITIG. 25, 27-28 (2002) ("[N]amed representative plaintiffs have proven to be merely figureheads[.]").

45. *See* Bruce Hay, David Rosenberg, "*Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1390-91 (2000) (arguing that one way to combat sweetheart settlements is to increase standards for certification by minimizing future injury claims).

class certification process.[46] Courts have viewed them even more broadly, seeing the 2003 as a general decree that certification should be increased, and federal courts have imposed more rigorous certification standards as a result.[47]

Expansions of Rule 23(e) have included some efforts to improve the behavior of class counsel. The 2018 amendments to Rule 23(e) now condition the approval of settlements upon demonstrations that the settlement occurred at "arms-length," and that the proposed settlement is "the effectiveness of any proposed method of distributing relief to the class."[48] These rules, however, are entirely based on a judge's discretion, and commentators have criticized these provisions for being too dependent on information presented by attorneys, who may not provide all the information needed to assess the settlement.[49]

Similarly, Rule 23(a)(4) conditions certification on a demonstration that "the representative parties will fairly and adequately protect interests of the class."[50] Like Rule 23(e) this requirement has been criticized as being largely performative.[51] Prior to the lawsuit progressing, there is little way of knowing whether the representative parties will represent the interests of the class. In practice, the only feasible screening question is whether the lawyers are qualified, which in a reversal of the Rule's purpose, means that serial class action lawyers are more likely to be viewed as a party that will represent the interests of the class.[52]

In the data breach context, all of the above issues are compounded. Courts' increasing wariness of data breach harms increases the relative leverage of defendants. Moreover, the lack of oversight and high information costs are greater in the data breach context because absent class members may not understand the actual value of the data taken. This is especially true for plaintiffs who have yet to experience financial harm from a data breach, and thus are not yet invested in proper compensation. Consequently, protecting absent class members becomes an even more judge-centric task.

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46. FED. R. CIV. P. 23 advisory committee's comments on the 1998 and 2003 amendments

47. John C. Coffee Jr., & Stefan Paulovic, *Class Certification: Developments over the Last Five Years 2002-2007*, 8 CLASS ACTION LITIG. REP. S-787, S-787 (Oct. 26, 2007); *see also* John C. Coffee Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice*," 30 CARDOZO L. REV. 407, 431 (2008) ("Class action certification standards have been significantly tightened across the spectrum of federal court litigation over recent years, and, surprisingly, the most dramatic changes have been in the area of securities class actions.").

48. FED. R. CIV. P. 23(e)(2)(B); FED R. CIV. P. 23(e)(1)(C)(ii).

49. *See generally* Brian Wolfman, *Judges! Stop Deferring to Class-Action Lawyers*, 2 U. MICH. J.L. REFORM 80 (2013) (arguing that judges simply take class counsel at their word when they should not).

50. FED. R. CIV. P. 23(a)(4).

51. *See* Wolfman, *supra* note 49, at 87.

52. *See generally id.*

## III. ANALYSIS

### *A. Current Stringent Standing Requirements Fail to Reflect the Harms of Data Breaches, and Exacerbate Existing Agency Issues*

Class actions must be brought in federal court, which imposes a standing requirement on the plaintiff(s).[53] The standing requirement derives from Article III of the Constitution.[54] In order to bring a case into federal court, a plaintiff bears the burden of satisfying three elements of constitutional standing. First, the plaintiff must have suffered an "injury in fact," a violation of a legally protected interest. The injury alleged must be "actual or imminent, not "conjectural" or "hypothetical."[55] Second, the plaintiff's claim must arise from an injury that is "fairly traceable to the challenged conduct of the defendant."[56] The harm that occurred must be traceable to the defendant's conduct. Third, a favorable court ruling must be able to redress the plaintiff's injury.[57]

As discussed above, the nature of data breaches means that the injury alleged often boils down to an increased risk of harm or fraud.[58] As a result, even in instances of patent wrongdoing on the part of the defendants, many data breach suits fail to even get in the door for lack of standing.[59] This is because courts have been reluctant to acknowledge an increased risk of fraud as a sufficiently imminent injury.[60] In the past two decades, hundreds of cases have been brought alleging improper care of plaintiffs' data resulting in exposure.[61] Most cases, however, have turned not on the handling of the data but on whether or not the exposed data resulted in harm sufficient to grant standing.[62] No matter how deficient defendants' data protection might have been, most cases do not proceed unless plaintiffs show not only that the data was exposed, but that the exposed data was used by the time the suit was brought.

In *Reilly*, plaintiffs alleged that Ceridian had failed to secure its clients' personal data and presented evidence the company not only knew the data was unsecured, but knew that hackers had accessed it.[63] Despite this evidence the court dismissed the case, holding that the plaintiff's allegations of

53. U.S. CONST. art. III.
54. *Id.*
55. Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016).
56. *Id.*
57. *Id.* (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).
58. *Supra* Part II.A.
59. *Supra* Part II.A.
60. *See* Daniele J. Solove, *Risk and Anxiety: A Theory of Data Breach Harms*, 96 TEX. L. REV. 737, 739 (2018).
61. *See* Sasha Romanosky et. al., *Empirical Analysis of Data Breach Litigation*, 11 J. EMPIRICAL LEGAL STUD. 74, 93 (2014).
62. Solove, *supra* note 60, at 739 ("The majority of cases, however, have not turned on whether defendants were at fault. Instead, the cases have been bogged down with the issue of harm.").
63. Reilly v. Ceridian Corp., 664 F.3d 38, 43 (3d Cir. 2011).

increased harm were mere conjecture that had not yet come true, and thus did not meet the standing requirements.[64] This mindset is pervasive—an increased risk of harm, no matter how apparent, is not enough to grant standing in a majority of lower courts.[65]

This reluctance to acknowledge an increased risk of fraud as an injury in fact has only increased in the wake of the Supreme Court's holding in *Clapper v. Amnesty International*.[66] In *Clapper*, attorneys, journalists, and human-rights activists challenged the constitutionality of a provision of the Foreign Intelligence Surveillance Act, extending the government's authority to conduct surveillance over suspected terrorists.[67] The plaintiffs alleged that they had taken burdensome precautions, including only meeting with clients face to face, out of fear that the government was surveilling their calls.[68] The Supreme Court, however, struck down the case down on the grounds that the plaintiffs had not alleged an "injury in fact," since they had no proof they were being surveilled, and thus brought the harm of traveling those distances upon themselves.[69] The *Clapper* court did note, in a footnote, that the injury in fact may be satisfied if there was a "substantial risk harm would occur."[70]

Where standing has been granted in the wake of *Clapper*, it has been granted on a hybrid theory: if some plaintiffs can show actual harm, then all plaintiffs affected by the breach can demonstrate a "substantial risk harm would occur" to satisfy standing. In *Remijas v. Neiman Marcus Group*, the Seventh Circuit found the risk of harm "immediate and very real" because the data "was in the hands of hackers who used malware to breach the defendant's systems" and "fraudulent charges had shown up on some of its customers."[71] The Ninth Circuit held similarly in *Krottner v. Starbucks Corporation*, conferring standing because there was a subsequent attempt to open a bank account following the data breach.[72]

This hybrid approach faces new challenges in the wake of *TransUnion LLC v. Ramirez*.[73] In *TransUnion*, plaintiffs sued the credit reporting agency TransUnion for violations of the Fair Credit Reporting Act. Due to an oversight in TransUnion's systems, individuals who shared a name with people on the terrorist watch list were incorrectly being flagged as on the

64. *Id.* at 43.

65. *See e.g.*, Peters v. St. Joseph Servs. Corp., 74 F. Supp. 3d 847, 854 (S.D. Tex. 2015) (holding that the increased risk of future identity theft stemming from data breach not to be a sufficient injury); Storm v. Paytime, Inc., 90 F. Supp. 3d 359, 365-66 (M.D. Pa. 2015) (holding that increasing risk of identity theft does not suffice as injury, even though hackers had breached payroll company's computer and accessed personal information).

66. *See generally* Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013). (holding that journalissts and activists did not have standing to challenge the Foreign Intelligence Surveillance Act because they had not experienced an injury in fact).

67. *Id.* at 401.

68. Brief for Petitioners at 10, 35, *Clapper*, 568 U.S. 398 (No. 11-1025).

69. *Clapper*, 568 U.S. at 422.

70. *Id.* at 414-15 n.5.

71. Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 693-94 (7th Cir. 2015) (acknowledging that plaintiffs were "careful" to point out instances of fraud already occurring).

72. Krottner v. Starbucks Corp., 628 F.3d 1139, 1142-43 (9th Cir. 2010).

73. *TransUnion LLC*, 141 S. Ct. 2190.

watch list.[74] A class of over 8,000 individuals whom TransUnion warned were affected, and who were not given notice of their rights pursuant to the Fair Credit Reporting Act sued.[75] The court held that of the over 8,000 class members who had misleading credit reports, only the 1,853 who could show that they suffered reputational harm as a result had standing to sue.[76] The crux of the majority's holding dealt with a "close relationship" standard in which plaintiffs now have to show that the harm alleged is closely related to a traditionally recognized harm, another barrier to data breach class actions.[77] Equally concerning is the Court's division of the class to only those who had already suffered the harm because it calls into question whether the hybrid theory still holds.

Like *Clapper* before, a narrow reading of *TransUnion* should not close the door on an increased risk of future harm granting standing. In *TransUnion* the increased risk of harm was not actually at issue, those plaintiffs who did not already suffer reputational harm were unlikely to do so since TransUnion had fixed the error.[78] This separates the harm in *TransUnion* from that of a data breach, since once data is exposed and taken it cannot be reversed. Even fraud protection does not catch everything, so hackers having data always increases the risk of harm. Still, the potential for a blanket reading of *TransUnion* is dangerous and could present yet another barrier to data breach class actions.

*TransUnion* poses a more speculative harm to data breach class actions. While an increased risk of fraud is the primary form of harm from a data breach, there is a second form of harm: increased anxiety as a result of a privacy violation.[79] As the definition of a data breach itself acknowledges, simply having personal information exposed is a privacy violation.[80] This is most obvious when the information is sensitive. Having personal medical information potentially exposed for instance, creates anxiety. Any data breach can and often does result in anxiety as people are justifiably afraid of leaks of data or fraudulent transactions.[81] While many people have identity theft and fraud protection, no system is perfect and consumers who know their data has been breached have to pay greater attention to every transaction on their accounts. The data breach is the direct cause of this anxiety.

The law has grown to recognize anxiety, and other so-called "ethereal" harms in other areas. Warren and Brandeis, progenitors of the modern privacy torts catalogued this change. Assault, for instance, signifies

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74. *Id*. at 2191.
75. *Id*.
76. *Id.* at 2214.
77. *See id.* at 2204.
78. *See id.*
79. Solove, *supra* note 60, at 739 ("The majority of cases, however, have not turned on whether defendants were at fault. Instead, the cases have been bogged down with the issue of harm.").
80. *What is a Data Breach*, CISCO, (Jan. 20, 2023, 9:55 AM) https://www.cisco.com/c/en/us/products/security/what-is-data-breach.html [https://perma.cc/P794-9367].
81. Solove, *supra* note 60, at 739; *see also Krottner*, 628 F.3d at 1142-43 (acknowledging that plaintiffs do justifiably feel an increased anxiety from the potential of a breach).

the recognition of a harm caused by the anxiety produced by fear. Modern law also recognizes infliction of emotional distress as a harm, and breaches of confidentiality as a harm. In case after case involving violations of privacy, courts cite fear of humiliation or embarrassment and the increased anxiety that comes with it as the basis for damages.

Unfortunately, courts have yet to apply privacy torts to the data breach context.[82] As leading information privacy law expert Daniel Solove puts it, "the inconsistency between these different contexts is quite stark."[83] Even still, this can and should provide a secondary ground upon which standing can be granted. In cases in which particularly sensitive data was definitively exposed, standing should be granted. Thought of another way, recognizing the potential humiliation and anxiety associated with exposed data is crucial to the deterrence function of class actions. Corporations should be more incentivized to protect more sensitive data. While this is reflected in the potential damages associated with more sensitive data, having this also be reflected in the ability for suits involving sensitive data to be granted standing reinforces this purpose.

### *B. Judges as Fiduciaries Should Prioritize Plaintiff Favored Settlements Over Immediate Payouts.*

Despite its flaws, Rule 23(e) grants judges broad discretion to determine whether to approve a settlement. In essence, Rule 23(e) empowers judges to act as fiduciaries. Judges take a more active role in class action litigation than they do in individual litigation. For example, judges must decide whether the case will proceed as a class action on behalf of absent parties. In making this decision, judges must also decide who represents the class, whether and on what terms class members will settle, and how much the class will pay its counsel. Determining damages and settlements is particularly important in the judge's fiduciary role. As explained by the Sixth Circuit,

> [c]lass-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval. In contrast, class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations. And thus, there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own.[84]

82. Solove, *supra* note 60, at 771.
83. *Id.*
84. *In re Dry Max Pampers Litig.*, 724 F.3d at 715.

Accordingly, courts fill a fiduciary function on behalf of absent class members to ensure that class counsel are "behaving as honest fiduciaries for the class as a whole."[85] Rule 23(e) provides a basic framework for the way judges should treat this duty. First, Rule 23(e) makes clear that the judge's role involves more than ensuring negotiations are conducted at arms-length; the proposed settlement must additionally "fairly and adequately protect interests of the class."[86] As stated by the American Law Institute (ALI), "in reviewing a proposed settlement, a court should not apply any presumption that the settlement is fair and reasonable."[87] This means judges should not, as critics point out they do, simply take attorneys at their word.[88]

The Restatement (Third) of the Law of Agency states that agents should do what their principals would "reasonably" want them to do absent explicate instruction otherwise.[89] This means judges must act as rational class members who intend to maximize their recovery from the suit.[90] Considering the two goals of class actions, maximizing recovery means more than maximizing immediate payouts; instead reasonable fiduciaries must also ensure that the settlement still serves as adequate deterrence against future bad behavior. This suggests that the rational class member would not prioritize a quick payout over a plaintiff favored settlement. Judges as fiduciaries, then, must heavily guard against premature settlements.[91]

### *C. In Order to Mitigate Agency Problems, Judges Should Prioritize Fee Awards Which Align the Incentives of Class Counsel and Class.*

In pursuit of these macro-level objectives, there are several key micro-level considerations judges must make, perhaps the most important being what fee awards class counsel should be entitled to. There are two primary methods to calculate fees. The first of which is the lodestar method, which aims to directly reward time investment.[92] Under this fee calculation method, courts award attorney's fees by multiplying the number of hours class counsel expended on the litigation by a reasonable hourly rate for the region and

85. *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 175.

86. FED R. CIV. P. 23(e)(1)(C)(ii).

87. Am. Law Institute, Principles of the Law of Aggregate Litig. § 3.05(c) (2010).

88. *See generally* Wolfman, *supra* note 49 (arguing that judges simply take class counsel at their word when they should not).

89. RESTATEMENT (THIRD) OF THE L. OF AGENCY § 8.01; RESTATEMENT (THIRD) OF L. OF AGENCY § 2.02 cmt. B ("The agent's fiduciary duty to the principal obliges the agent to interpret the principal's manifestations so as to infer, in a reasonable manner, what the principal desires to be done in light of facts of which the agent has notice at the time of acting.").

90. *See generally* Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L. REV. 1151 (2021).

91. *See id.* at 1153 (finding that at least sophisticated clients largely prefer to monitor against premature settlements rather prioritize expediency).

92. *See in re* Bluetooth Headset Prod. Liab. Litig., 654 F.3d 935, 942-43 (9th Cir. 2011) (defining lodestar method and reversing trial court's award of a fee using lodestar method where the trial court made no calculation of the lodestar amount).

experience of the lawyer.[93] Judges in this method have discretion to award a multiplier based on the circumstances.[94] The second method is the percentage method whereby courts select a percentage of the ascertainable common fund or the common benefit to award as a fee.[95]

Regardless of fee method, there are statutory restraints on the maximum compensation. Many jurisdictions have created a cap on fee awards at only twenty-five percent of any recovery, with some reducing that percentage if the recovery is more than $100 million.[96] While this is a trend, a study of eighty data breach settlements from 2010 to 2020 found that the average proportion of attorney's fees to the total settlement fund was 35.06%.[97] Relative to class actions as a whole this number is high, as a 2004 study found that the mean attorney's fees in class actions generally was only 21.9%.[98]

Because judges have discretion to approve attorneys' fees, they have discretion to examine how well the attorney's fees align the interests of plaintiffs with their counsels. Rule 23(e) was amended in 2018 to explicitly require consideration of "the effectiveness of any proposed method of distributing relief to the class" and assurance the class's recovery is commensurate with "the terms of any proposed award of attorney's fees."[99] Applying economic models to the question of what judges should do in class action, Professor Brian T. Fitzpatrick proposes either a payment model based a) on a fixed or escalating percentage of the recovery, or (b) a percentage of the recovery plus a contingent lodestar.[100] Both recovery methods help guard against premature settlement.[101] Though not discussed by Fitzpatrick, a second benefit of such recovery methods is that they could potentially discourage ineffective forms of non-monetary recovery such as injunctive or *cy pres* by helping prioritize purely monetary recovery. Moreover, the contingent lodestar method would enable judges to tie awards to areas such as payout rate, forcing class counsel to demand better notice when they otherwise would not be incentivized to do so.[102]

None of the above is to say that these methods are the only acceptable forms of fee awards. Instead, Fitzpatrick's proposals present a model for examining attorneys through the lens of interest alignment. Making these calculations is risky for judges as fiduciaries who both want to maximize class members' value and ensure that class counsel is properly compensated for their work, incentivizing future class action suits. The lengthy and costly

93. Morris A. Ratner, *Class Counsel as Litigation Funders*, 28 GEO. J. LEGAL ETHICS 272, 280 (2015).

94. *Id.*

95. *Id.*

96. *See* Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1376 (9th Cir. 1993) ("In common fund cases such as this, we have established 25% of the common fund as the 'benchmark' award for attorney fees.") (internal citation omitted).

97. Katherine Cienkus, *Privacy Class Action Settlement Trends: Industry Practice or Improper Incentives?*, 40 REV. LITIG. BRIEF 1, 33 (2021).

98. *Id.* at 34

99. FED. R. CIV. P. 23(e).

100. Fitzpatrick, *supra* note 90, at 1163.

101. *Id.* at 1164.

102. *Id*.

proceedings of a class action mean that class counsel often devote large amounts of time and money to pursuing the suit. These are not risk-free undertakings and class counsel is not guaranteed a payout from the suit. The result is that no matter which method, loadstar or percentage, is used, courts often factor in time expended when evaluating reasonability.[103] This opens the door for a system in which class counsels favor time-intensive rather than cost-intensive cases, inadvertently exacerbating the agency problem and leading to premature settlements right before expensive points in a case (e.g. right before having to hire expensive expert witnesses).[104] Like evaluating the settlement as a whole, when evaluating fees, judges must be wary of not just what the settlement was but when the settlement was made.

### *D. Within Their Fiduciary Capacity, Judges Should Follow Notice Best Practice, Including Expanded Use of e-Notice, and Easy to Understand Language.*

Rule 23 requires that any settlement feature the "best notice practicable under the circumstances."[105] The Supreme Court crystallized its notice preferences in *Eisen v. Carlisle and Jacqueline*, requiring that "individual notice… be sent to all class members who can be identified with reasonable effort."[106] In an ideal world, this would mean every single class member receives direct notice of a settlement. In the modern world of large-scale litigation, particularly data breach litigation, where class sizes can be well over 100 million and whose members are often ambiguous, clear direct notice to all class members is unrealistic. Unfortunately, this gap between what is ideal and what is possible has led to inaction by courts, who have largely failed to embrace e-notice, or critically examine the actual language of the notice, two common sense improvements to notice requirements.[107] This is problematic because notice is inseparable from claims, as the Supreme Court explained in *Eisen*, notice is "the touchstone of due process."[108] The 2018 Amendments to Rule 23 somewhat acknowledge these problems, requiring judges to now consider "the effectiveness of any proposed method of disturbing relief to the class."[109]

The Advisory Committee has codified its concern over the language of notices in Rule 23(e)(2)(C)(ii) requiring that "The notice must be clearly and concisely stated in plain, easily understood language."[110] Despite this, courts rarely examine the language of a notice, and notices are often still

103. *Ratner*, *supra* note 93, at 280.
104. *Id.*
105. FED. R. CIV. P. 23(c)(2)(B).
106. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 156-58 (1974).
107. *See* Robin J. Effron, *The Invisible Circumstances of Notice* 99 N.C. L. REV. 1521, 1534-38 (2021) (arguing that subpar notice examination is a function of courts stubborn preference on letter mail).
108. *Eisen*, 417 U.S. at 173-74 (interpreting the Advisory Committees' notice requirements as serving the requirements of due process).
109. FED. R. CIV. P. 23(e)(2)(C)(ii).
110. *Id.* at 23(c)(2)(B).

indecipherable for the layperson.[111] This is not merely a conceptual problem, data supports the conclusion that simplified notices of settlement improve claims rates. A 2019 FTC study examining claims rates in consumer fraud class actions found that the "claims rate was higher in cases where the notices used visually prominent, 'plain English' language to describe payment availability."[112] Despite this the FTC found that only forty percent of the notices they reviewed contained plain English payment language, and even less of those were concise.[113] This is consistent with the findings of contemporary scholarship which suggests that language examination rarely occurs.[114]

E-notice also represents an avenue of growth for courts. Like plain language, the effect of e-notice is both conceptually and empirically clear. If more *potential* class members receive notice, then consequently more *actual* class members will receive the notice. The best way to see this effect is through class action objectors, who "are almost twice as common in cases involving E-Notice."[115] Objectors serve a key role as guardians of unnamed class members, objecting to settlements on behalf of class members who feel they are not being adequately compensated. The presence of class action objectors is an important factor for courts, as their presence serves as yet another check on potentially self-serving practices by class counsel at the expense of unnamed class members. Their presence also indicates an area where expanded notice may be in the interest of unnamed class members but not in the interest of class counsel. Still, e-notice has been an area of innovation in recent years, largely driven by plaintiffs' attorneys. The use of social media and targeted advertising for notice have both expanded.[116]

In the data breach context, direct notice is rarely possible for most class members, but intermediate improvements to the notice and language of notices can be tremendously impactful. Because overall cyber literacy is low, it is even easier to turn potential claimants away by drowning them in technical language. The lack of use of e-notice like targeted advertising is especially perplexing in the data breach context where users of a breach can be notified when they visit the site.

### *E. When Evaluating Remedies, Judges Should Strongly Disfavor Injunctive, Cy Pres, and Credit Monitoring as Forms of Relief.*

Rule 23(e) empowers judges to examine remedies. That extends to more than just accepting the purported cost of a remedy to defendants, but also the actual remedy generated for class members. Thus, improving settlement outcomes requires an understanding of what remedies to a data

111. Lahav, *supra* note 20, at 84-85 (noting that some many notice agreements are "inaccessible to a reader trained as an attorney").

112. F.T.C., CONSUMER AND CLASS ACTIONS: A RETROSPECTIVE AND ANALYSIS OF SETTLEMENT CAMPAIGNS 1-2 (2019).

113. *Id*. at 35.

114. Lahav, *supra* note 20, at 84-85.

115. Christine P. Bartholomew, *E-Notice*, 68 DUKE L.J. 217, 258 (2018).

116. *See* Effron, *supra* note 107, at 1557-58.

breach are possible and appropriate. Generally, there are five forms of relief in federal data breach class actions: credit monitoring and fraud protection, direct cash payouts, coupons, *cy pres*, and injunctive relief.[117] Each form of relief has its own appeal, and there is no right combination of remedies for every case. For fiduciaries, each form of remedy requires its own analysis and should raise its own set of red flags. Much like choosing your own adventure game, when presented with a certain type of remedy a certain problem should be examined.

### 1. Credit Monitoring and Fraud Protection

When the harm from a data breach primarily is the increased risk of fraud, identity theft protection and credit monitoring represent an obvious value to consumers. The value of this remedy, however, is contingent on whether the settlement happened at a timely point relative to the breach and whether the consumers in question already had identity theft protection. If for instance, the settlement did not occur until five years after the suit in question, many of the victims may already have been defrauded rendering the protection useless. In many instances, corporations preemptively offer identity theft protection when notified of a breach, and many banks and credit agencies offer identity theft protection as a perk.[118] Even if consumers do not already have identity theft protection through a bank or credit agency, they likely do so through another suit. Currently there are at least eleven suits of class sizes of over one million individuals in which credit monitoring was a

117. *See* Cienkus, *supra* note 97, at 14-24 (conducting analysis on prevalence of the major relief types in privacy class actions).

118. Vincent R. Johnson, *Credit-Monitoring Damages in Cybersecurity Tort Litigation*, 19 GEO. MASON L. REV. 113, 125-28 (2011) (commenting on the trend of voluntarily offering credit-monitoring after a breach); *See also*, *RedCard Benefits & Identity Services*, TARGET (Jan. 22, 2023, 10:41 PM) https://www.target.com/c/redcard-benefits-identity-safeguards/-/N-4srzk, [https://perma.cc/36FL-8P53] (Target's RedCard identity protection guide details identity protection services included with the card such as fraudulent purchase alerts.).

part of the settlement and that credit monitoring is still active.[119] This is not including the settlements for *In re Yahoo Inc.* and *In re Capital One Inc. Customer Data Security Breach Litigation*, each of which are on appeal or have final approval pending but would include credit monitoring for 194 million people and ninety-eight million people respectively.[120] Though overlap is unknown at this point there are theoretically 568 million people who have or will have access to credit monitoring through class actions, which is almost double the population of the United States. This calls into question whether credit monitoring has any value. At the very least, judges should look at it skeptically. If class counsel cannot prove that this is a value-add to class members, then it should not be treated as one.

### 2. Direct Cash Payments

By far the most common form of compensation from data breach suits is direct cash payments.[121] Largely this is the remedy preferred by commentators and judges. Section 3.07(a) of the American Law Institute Principles succinctly states: "If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members."[122] This rule follows from the principle that "[t]he settlement-fund proceeds, generated by the value of

119. *In re* Equifax Inc. Customer Data Sec. Breach Litig., No. 17-md-2800-TWT, 2020 U.S. Dist. LEXIS 7841, at *152 (N.D. Jan. 13, 2020) (194 million affected individuals, two year minimum credit monitoring or reimbursement of credit monitoring); *In re* Experian Data Breach Litig., No. 15-cv-01592 AG, 2019 U.S. Dist. LEXIS 81243, at *19 (C.D. Cal. May 10, 2019) (Fifteen million affected individuals, two years of credit monitoring); *In re* Premera Blue Cross Customer Data Sec. Breach Litig., No. 15-md-2633-SI, 2019 U.S. Dist. LEXIS 127093, at *66 (D. Or. July 29, 2019) (10.6 million affected individuals, two years of credit monitoring); Adlouni v. UCLA Health Sys. Auxiliary, No. BC 589243, 2015 WL 13827028, at *19 (Cal. July 25, 2019) (4.5 million affected individuals, two years of credit monitoring); Atkinson v. Minted, Inc., No. 3:20-cv-03869-VC, 2021 WL 6028374 (N.D. Cal. Dec. 17, 2021) (4.1 million affected individuals, two years of credit monitoring); Cochran v. Kroger Co., No. 21-cv-01887-EJD, 2021 WL 6028374, at *14 (N.D. Cal. Mar. 24, 2022) (3.82 million affected individuals, at least three years of credit monitoring); *In re* Med. Informatics Engi'g, Inc., Customer Data Sec. Breach Litig., No. 315-md-2667, Dkt. 192, 3 (N.D. Ind. Jan. 30, 2020) (More than three million estimated affected individuals, two years of credit monitoring); *In re* Banner Health Data Breach Litig., No. 2:16-cv-02696-PHX, 2020 WL 12574227 (D. Ariz. Apr. 21, 2020) (slip copy) (2.9 million affected individuals, two years of credit monitoring); *In re* 21st Century Oncology Customer Data Sec. Breach Litig., 380 F. Supp. 3d 1243, 1245 (M.D. Fla. Mar. 11, 2019) (2.2 million affected individuals, two years of credit monitoring); Fox v. Iowa Health Sys., No. 3:18-cv-00327-JDP, 2021 WL 826741, *11-12 (W.D. Wis. Mar. 4, 2021) (1.4 million affected individuals, one year of credit monitoring, deferable for up to one year).

120. *In re* Yahoo Inc. Customer Data Sec. Breach Litig., No. 16-MD-02752-LHK, 2020 U.S. Dist. LEXIS 129939, at *50, *89 (N.D. Cal. July 22, 2020); *In re* Cap. One Inc. Customer Data Sec. Breach Litig., No. 19-md-2915, 2022 U.S. Dist. LEXIS 234943 (E.D. Va. Sept. 13, 2022).

121. *See* Cienkus, *supra* note 97, at 21.

122. *In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1063 (8th Cir. 2015) (citing ALI Principles §3.07 cmt. (b)) at n. 15).

the class members' claims, belong solely to the class members."[123] The actual amount consumers receive not only depends on the total settlement fund, but whether the compensation model is fixed or varied based on the total number of payments.[124] Most commonly, the total cash each consumer would receive was fixed regardless of the total size of the settlement fund, though in a minority of instances damages were awarded based on the total number of claims, or based on which tier of plaintiff a class member fell into.[125] These latter forms of settlement divide class members into tiers based on the harm suffered, e.g. whether a fraudulent charge actually occurred.[126]

Large settlements present a theoretical but overstated problem for direct cash payment remedies. *Fraley v. Facebook Inc.* presents an example of how this problem is overstated.[127] The parties initially proposed a *cy pres*-only settlement for the class of 100 million individuals alleging that cash distributions "[are] simply not practicable in this case, given the size of the class."[128] This complaint was rebuffed by Judge Seeborg, demanding a new proposal on the grounds that size alone did not prove infeasibility.[129] In the end, the parties settled on a restructured-claims-made settlement which distributed funds directly to the class.[130] Suggestions that direct cash settlements would not work might indicate a deeper problem in the lawsuit, questioning whether a class action was the proper form of suit. Any reluctance on the part of class counsel to enter a settlement with direct cash payouts suggests that either class counsel is not adequately representing the interests of class members or that there is a fundamental problem with the suit.

### 3. Coupons

Coupon settlements provide compensatory monetary rewards in the form of vouchers for a given company.[131] Functionally, they are the same as direct cash payouts, except that they provide only limited value to claimants. Coupon settlements have largely fallen out of favor after the Class Action Fairness Act of 2005 added the requirement that attorney's fees be based "on the value to class members of the coupons that are *redeemed*."[132] Therefore, even if a coupon settlement with 20,000 members all received a $10 coupon is valued at $200,000, attorneys' fees cannot be calculated until coupons are redeemed. Coupons generally have an incredibly low redemption rate, as unlike in a direct cash payment there is both an acquisition and a use barrier

123. Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 474 (5th Cir. 2011) (citing ALI Principles §3.07 cmt. (b)) at n. 15).

124. *See* Cienkus, *supra* note 97, at 14-24.

125. *See id.*

126. *See id.*

127. Fraley v. Facebook, No. C 11-1726 RS, 2012 WL 5835366, *6 (N.D. Cal. Aug. 17, 2012).

128. *Id*. at 1.

129. *Id*. at 2.

130. *Id*.

131. *See* Cienkus, *supra* note 97, at 16-18.

132. 28 U.S.C. § 1712(a) (emphasis added).

to the class member. For example, in *Montferrat v. Container Store, Inc.* only about 1,600 of the 87,000 class members submitted claims for coupons.[133]

### 4. Cy Pres

*Cy pres* settlements are those which substitute small payments to consumers for payments to third parties, usually charities that support data privacy causes or to university boards.[134] These settlements have a certain appeal when viewed through the lens of improving the industry. By supporting charities, data privacy causes will theoretically receive more public support. Between 2010 and 2020 there were eighty privacy settlements that substituted compensation for class with *cy pres* relief (usually in conjunction with injunctive relief). A benefit of *cy pres* relief is that the damages a company faces are not contingent on the actual redemption rate of class members.

*Cy pres* settlements are not without controversy, particularly in instances in which they take the place of monetary reward.[135] Because they do not actually compensate class members many courts now view *cy pres* settlements as an avenue of last resort. Moreover, *cy pres* settlements exacerbate the aforementioned agency problem because the inclusion of a *cy pres* distribution may increase a settlement fund, and thus attorneys' fees, without providing any benefit to the class.[136] *Cy pres* settlements also create a new set of agency problems when the targeted recipients are already recipients of funds from the defendants.[137] *Cy pres* settlements, then, require heightened scrutiny, since they deprive class members of direct compensation while opening numerous avenues for conflicts of interest.

### 5. Injunctive Relief

Injunctive relief is the most included feature in settlements, usually alongside compensation. The focal points of multiple settlements have included commitments to update privacy policies, and increase security measures to avoid a similar breach. If direct cash payments serve the goal of compensating plaintiffs for harm, injunctive relief serves class action's second goal of cleaning up industries. The problem is that often class actions substitute injunctive relief for compensation. Take *In re Yahoo Mail Litigation* in which the attorney's fees constituted almost all of the settlement,

133. *See* Cienkus, *supra* note 97, at 17-18 (looking at the claims rate of *Monteferrante* to discuss disfavoring of coupons settlements).

134. *See id.* at 19.

135. *See id.* at 21.; *See e.g.*, *In re* BankAmerica Corp. Secs. Litig., 775 F.3d at 1063 (Many courts "have criticized and severely restricted" *cy pres*.).

136. *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting) ("[*C*]*y pres* payments are not a form of relief to the absent class members and should not be treated as such[.]").

137. Renewed Objection of Theodore Frank, *In re* Google Inc. Cookie Placement Consumer Priv. Litig., 934 F.3d 316, 320 (3d Cir. 2019) (proposed *cy pres* university boards were recipients of funds already from defendant, members of class Counsel also sat on selected boards).

but required Yahoo to make technical changes to how it analyzed user emails for advertising purposes.[138] While this sounds like a case of a class action fulfilling its goal, it relies on a myriad of faulty assumptions. For one, assuming an injunctive has monetary value to plaintiffs requires one to assume that corporations would not make these changes *absent* the relief. This assumption is particularly weak in the case of large corporations, since a large settlement in and of itself would likely cause them to make the technical changes to prevent future suits. In those instances, by including injunctive relief as a part of the overall value of the settlement, defendants are in essence forcing plaintiffs to pay for something defendants would have likely chosen to do anyway. In some instances, changes to policies simply do not matter. Again, take Facebook, between 2018 and 2022 three of Facebook's major incidents were repeat offenses of things the company claimed to have fixed. Injunctive relief, then, is no relief.

## IV. CONCLUSION

Data breaches are ideal class action suits. The aggregation of the many small damages claims resulting from a data breach into a single suit is the only viable form of compensation for consumers, and an important deterrence to bad corporate behavior. Though ideal, data breach class actions have become victims of the growing wave of hostility against federal class actions. Increased standing requirements that fail to reflect the actual harm of data breaches are increasingly preventing data breach class actions from proceeding. Those that do proceed suffer from increased agency problems due to a lack of understanding of data breach harms and remedies which makes it harder to spot bad settlements. Data breach class actions are not a lost cause, Rule 23(e)'s empowering of judges as fiduciaries can mitigate the aforementioned agency problems with only minor changes. For one, judges do not have to be so stringent in standing requirements. Adopting a more modern understanding of data breach harms as not only substantially increasing the risk of future harm, but also as being violations of consumer's privacy which cause mental anguish would let more suits in the door and help increase the relative bargaining power of the class. When evaluating settlements, judges should keep in mind the dual purposes of class actions as compensation and deterrence devices, and thus prioritize plaintiff favored settlements over expedient ones, while being mindful of premature settlements. Judges should also critically examine fee award structures and ask not simply whether the compensation is fair but whether the proposed fee award actually aligns incentives. Judges should also evaluate notice requirements critically to ensure maximum possible notice, data breaches are ideal candidates for the expanded use of e-notice. Finally, judges should be more critical of non-monetary remedies, strongly disfavoring credit monitoring, cy pres and injunctive relief.

138. *In re* Yahoo Mail Litig., No. 13-CV-4980-LHK, 2016 U.S. Dist. LEXIS 115056, *12 (N.D. Cal. Aug. 25, 2016).

# Combating Online Medical Misinformation by Physicians: Expansion of Fiduciary Duty of Care

**Winnie Zhong***

TABLE OF CONTENTS



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# I. INTRODUCTION

In the midst of a global public health crisis, the spread of false and misleading medical information is of increasing concern.[1] Medical misinformation could easily cause confusion and encourage people to decline verified treatments, reject public health procedures, and approach alternative measures that are unproven or even contrary to established science.[2] The pandemic has brought to our attention how medical misinformation can threaten people's health and well-being, but the problem did not begin with the pandemic and will not end with it.[3] The Internet, with a growing presence of social media platforms in disseminating rapid and far-reaching medical information, has only fueled even broader accessibility of medical misinformation.[4]

Recognizing the need to promote trustworthy medical information is crucial for public health, there have been significant efforts to address the issue.[5] For example, popular technology platforms have increased efforts to remove misleading posts and directing Internet users to information provided by credible medical sources.[6] However, these efforts do not necessarily tackle the source of the misinformation and may fail to deter individuals from engaging in such practice in the future. In particular, licensed physicians are among the most trusted medical professionals, and the public credibility of their medical messages is enhanced by their professional status.[7] However, there have been increasing reports of licensed physicians spreading harmful or misleading medical information via social media platforms, and people generally rely on the authority given their medical status.[8]

Given the rampant spread of online medical misinformation with the potential of devastating consequences,[9] this Note argues that state medical boards should impose disciplinary action against licensed physicians who disseminate medical misinformation on social media platforms. There are constitutional challenges in how medical licensing boards are state agencies subject to the First Amendment and are thus limited in their ability to bring

1. *See* U.S. DEP'T OF HEALTH & HUM. SERV., CONFRONTING HEALTH MISINFORMATION: THE U.S. SURGEON GENERAL'S ADVISORY ON BUILDING A HEALTHY INFORMATION ENVIRONMENT, at 4 (2021).

2. *See id.*

3. *See* Fabio Tagliabue et al., *The "Pandemic" of Disinformation in COVID-19*, 2 SN COMPREHENSIVE CLINICAL MED. 1287, 1287 (2020).

4. *See* Laura D. Scherer et al., *Who Is Susceptible to Online Health Misinformation? A Test of Four Psychosocial Hypotheses*, AM. PSYCH. ASS'N, at 1 (2021).

5. *See* U.S. DEP'T OF HEALTH & HUM. SERV., *supra* note 1, at 6.

6. *See id.*

7. *See* Carl H. Coleman, *Physicians Who Disseminate Medical Misinformation: Testing the Constitutional Limits on Professional Disciplinary Action*, 20 FIRST AMEND. L. REV. 113, 141 (2022).

8. *See* Brian Castrucci, *Covid Vaccine and Treatment Misinformation Is Medical Malpractice. It Should Be Punished*, NBC NEWS (Jan. 8, 2022, 1:47 PM), https://www.nbcnews.com/think/opinion/covid-vaccine-treatment-misinformation-medical-malpractice-it-should-be-punished-ncna1287180 [https://perma.cc/396Y-K5KQ].

9. *See id.*

disciplinary action based on the content of physicians' speech.[10] This Note attempts to reconcile these challenges through a framework of extending the legal obligation of duty of care within the traditional physician-patient relationship to a duty owed by physicians to the general public. In particular, the Note focuses on physicians' duty of care in the application of medical knowledge expected of a reasonably competent physician.[11]

This Note proposes to extend the physician-patient fiduciary relationship in a clinical setting to situations where physicians disseminate medical information on public platforms voluntarily. Physicians should assume a duty of care in ensuring the information they provide is accurate based on available scientific evidence. The Note incorporates the corporate standard of duty of care, where directors and officers must inform themselves of all material information available to make business decisions that, in their prudent judgment, best promote the interests of the company and its shareholders.[12] Physicians should be required to exercise a similar standard of care, which would require them to make reasonable efforts to investigate established areas of science and gather verified information available prior to disseminating medical information to the public, particularly through online social media platforms, to ensure objectivity in the information they share.[13] When physicians breach this duty of care by disseminating information that is in direct contradiction to available medical evidence, state medical boards should impose disciplinary action to protect the public.[14]

Section II of this Note provides a background of the current prevalence of the dissemination of medical misinformation on the Internet. It reviews the existing efforts taken by major social media platforms in tackling the problem and a detailed analysis of the limitations when solely relying on these platforms acting as private entities to regulate the medical information ecosystem. Section III of this Note focuses on the role of the state medical boards acting as state agencies in addressing the spread of medical misinformation. This section directs the focus to licensed physicians, who are able to invoke their professional authority to lend credibility to their messages. In addition to laying out the existing professional standards and enforcement efforts taken by state medical boards, the section analyzes the current constitutional challenges of imposing disciplinary action against

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10. *See* Carl H. Coleman, *License Revocation as A Response to Physician Misinformation: Proceed With Caution*, HEALTH AFFS. FOREFRONT (Jan. 5, 2022), https://www.healthaffairs.org/do/10.1377/forefront.20211227.966736/ [https://perma.cc/R8YX-Q654].

11. *See Duty of Care Required by Physicians*, USLEGAL, https://physicians.uslegal.com/duty-of-care-required-by-physicians/ [https://perma.cc/DA6A-4T7J] (last visited Apr. 1, 2023).

12. *See* Jason Gordon, *Duty of Care (Board of Directors) - Explained*, THE BUS. PROFESSOR (Sept. 25, 2021), https://thebusinessprofessor.com/en_US/business-governance/duty-of-care-explained [https://perma.cc/KH9A-4EEA].

13. *See Ethical Physician Conduct in The Media: Code Medical Ethics 8.12*, AM. MED. ASS'N, https://code-medical-ethics.ama-assn.org/ethics-opinions/ethical-physician-conduct-media [https://perma.cc/RV6P-DR6Z] (last visited Apr. 1, 2023).

14. *See* Drew Carlson & James N. Thompson, *The Role of State Medical Boards*, AMA J. OF ETHICS (2005), https://journalofethics.ama-assn.org/article/role-state-medical-boards/2005-04 [https://perma.cc/BN2Q-5D42] (last visited Apr. 1, 2023).

online medical speech. Section IV proposes a framework of extending the fiduciary relationship to one between physicians and the public beyond the traditional in-patient setting. It focuses on the duty of care, requiring physicians to undertake thorough research and gather all available information before providing medical knowledge to the public. Under this expanded fiduciary duty, physicians found disseminating medical misinformation could face disciplinary action from state medical boards.

## II. PREVALENCE OF DISSEMINATION OF ONLINE MEDICAL MISINFORMATION

In recent years, an important challenge for major social media platforms has been responding to the dissemination of medical misinformation. Medical misinformation on the Internet is particularly alarming because the Internet has become a dominant source of information when seeking medical advice or guidance.[15] While these platforms are now taking on a more significant societal role to take decisive actions in response to medical misinformation, their efforts are not without shortcomings and may not be the most efficient ways to address the issue.

### *A. Defining the Spread and Trends of Medical Misinformation*

Medical misinformation has generally been defined as information that is "contrary to the epistemic consensus of the scientific community regarding a phenomenon."[16] By definition, an epistemic consensus among the medical community is constantly changing as a result of technological advancements, aging populations, new methods for the treatment of diseases, and policy reforms.[17] False information can be spread either negligently in a form of misinformation or with deliberate intent to knowingly mislead the public in a form of disinformation.[18] While misinformation refers to information with false or inaccurate facts, disinformation is false information that the author deliberately intends to mislead with misstating facts.[19] It is difficult to differentiate disinformation from misinformation because of the problem of ascertaining intent. Therefore, unless the intent behind a message is clear, this

15. *See* Dawn C. Nunziato, *Misinformation Mayhem: Social Media Platforms' Efforts to Combat Medical and Political Misinformation*, 19 FIRST AMEND. L. REV. 33, 37 (2020).

16. Coleman, *supra* note 7, at 117; *see also* Briony Swire-Thompson & David Lazer, *Public Health and Online Misinformation: Challenges and Recommendations*, 41 ANN. REV. PUB. HEALTH 433, 434 (2019). Some sources have preferred a broader definition of misinformation. The U.S. Surgeon General defined misinformation as "information that is false, inaccurate, or misleading according to the best available evidence at the time." U.S. DEP'T OF HEALTH & HUM. SERV., *supra* note 1, at 4.

17. *See* Swire-Thompson & Lazer, *supra* note 16, at 434.

18. *See Misinformation and Disinformation*, AM. PSYCH. ASS'N (APA), https://www.apa.org/topics/journalism-facts/misinformation-disinformation [https://perma.cc/3CAH-BSX3] (last visited Apr. 1, 2023).

19. *See id.*

Note will use *misinformation* as an "umbrella term to include all forms of false information related to health."[20]

The Internet plays an ever-expanding role in the distribution of medical misinformation. Internet users increasingly utilize various social media platforms to seek and share information, which provides an unprecedented opportunity for medical professionals to disseminate medical-related knowledge using this communication medium.[21] Studies have shown that, as of 2013, seventy-two percent of web users looked online for health information.[22] Misinformation tends to spread quickly on social media platforms for several reasons. First, these platforms incentivize users to share content to get likes, comments, or subscriptions, which prioritizes "engagement rather than accuracy, allowing emotionally charged misinformation to spread more easily than emotionally neutral content."[23] Second, platform algorithms generally recommend user content based on its popularity or similarity to previously seen content, so a user exposed to misinformation may simply see more and more of it.[24]

As these public platforms have gained wide participation among medical professionals, they have also lowered the cost of generating information. Several studies have evaluated the quality of health information on the Internet based on accuracy and completeness, and many of them concluded that the quality of online health information was problematic.[25] A study conducted by YouTube in 2020 using keywords related to COVID-19 found that over one-quarter of the most viewed relevant videos contained misleading information, reaching sixty-two million viewers worldwide.[26] Skyler Johnson shared his personal experience in combating medical misinformation on the Internet. In battling his wife's cancer, the couple went online to search for useful medical information but found themselves in "a sea of falsehoods, distortions, and half-truths."[27] His team conducted a study where they reviewed fifty of the most trending social media articles on cancers and found that nearly a third of them provided harmful information.[28]

The COVID-19 pandemic has only accelerated the presence of medical misinformation on the Internet. According to researchers, "social media has become a widely accepted channel for public health information and risk communication by government officers, public health agencies, and the

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20. Yuxi Wang et al., *Systematic Literature Review on the Spread of Health-related Misinformation on Social Media*, 240 SOC. SCI. & MED. 1, 2 (2019).

21. *See* Victor Suarez-Lledo & Javier Alvarez-Galvez, *Prevalence of Health Information on Social Media: Systemic Review*, J. OF MED. INTERNET RSCH., at 2 (Jan. 1, 2021).

22. *See* Susannah Fox & Maeve Duggan, *Health Online 2013*, PEW RSCH. CTR. (Jan. 15, 2013), https://www.pewresearch.org/internet/2013/01/15/health-online-2013/ [https://perma.cc/8SYW-DNE5].

23. U.S. DEP'T OF HEALTH & HUM. SERV., *supra* note 1, at 5.

24. *See id.*

25. *See* Swire-Thompson & Lazer, *supra* note 16, at 439.

26. *See* Heidi Oi-Yee Li et al., *YouTube as a Source of Information on COVID-19: A Pandemic of Misinformation?*, BMJ GLOB. HEALTH, at 1, 6 (Apr. 24, 2020).

27. Kim Krisberg, *Health misinformation a 'threat to public health'— Leaders call out sources of disinformation, social media sites*, THE NATION'S HEALTH (Feb. 2022), https://www.thenationshealth.org/content/52/1/1.1 [https://perma.cc/L4AE-RH6E].

28. *See id.*

general population."[29] Moreover, studies focusing on health misinformation have found that false information diffuses significantly faster and farther on social media sites than does true or verified information.[30] While the problem has long existed, there have been relatively few attempts to examine its real harmful impact. The general public is "[d]rowning in a sea of articles, videos, memes, and posts" and may not have the necessary knowledge or resources to evaluate the credibility of online content.[31] Therefore, it is necessary to address the issue of medical misinformation, especially concerning the oversized role of the Internet in its distribution.

### *B. Existing Approaches and Challenges by Major Social Media Platforms*

With the rampant spread of medical misinformation on the Internet during the pandemic, popular social media platforms have been confronted with an unprecedented societal responsibility to take action in response to the dissemination of false medical information.[32] Anti-vaccine activists have reached more than sixty million followers on Facebook, YouTube, Instagram, and Twitter, and have been using these platforms to spread high volumes of conspiracy statements and false information about the safety of COVID-19 vaccines.[33] Content from some of the major social media sites sharing health misinformation "had almost four times as many Facebook views in April 2020 as equivalent content from the sites of ten leading health institutions, such as the World Health Organization."[34] As a result, these popular social media platforms, including Facebook, Twitter, YouTube, and Google, are burdened to take extensive measures and impose policies to tackle harmful medical information on their sites.

Facebook has responded by primarily "removing speech that it considers to be imminently harmful, while providing counter-speech in response to misleading or false speech on its platform that it deems not to be imminently harmful."[35] Specifically, Facebook partnered with a technology company called Meedan to improve its fact-checking access to health experts, attempting to reduce the overall distribution of misinformation once its

29. Lan Li, et al., *The Response of Governments and Public Health Agencies to COVID-19 Pandemics on Social Media: A Multi-Country Analysis of Twitter Discourse*, FRONTIERS IN PUB. HEALTH, at 11 (Sept. 28, 2021).

30. *See* Swire-Thompson & Lazer, *supra* note 16, at 437.

31. Suzanne Nossel, *How to Save People From Drowning in a Sea of Misinformation*, SLATE (Dec. 15, 2021), https://slate.com/technology/2021/12/information-consumers-misinformation-adrift-media-literacy.html [https://perma.cc/HG2R-Y3RN].

32. *See* Nunziato, *supra* note 15, at 37.

33. *The Disinformation Dozen*, CTR. FOR COUNTERING DIGIT. HATE, at 4 (Mar. 24, 2021).

34. Elizabeth Culliford, *On Facebook, Health-Misinformation 'Superspreaders' Rack Up Billions of Views: Report*, THOMSON REUTERS (Mar. 25, 2020), https://www.reuters.com/article/us-health-coronavirus-facebook/on-facebook-health-misinformation-superspreaders-rack-up-billions-of-views-report-idUSKCN25F1M4 [https://perma.cc/PP94-KAFJ].

35. *See* Nunziato, *supra* note 15, at 38.

algorithm has rated the particular content to be false.[36] During the pandemic, Facebook conducted a close review of its online content to avoid the spreading of conspiracy theories and anti-vaccine rhetoric.[37] Between April and June of 2020, it "applied warning labels to 98 million pieces of COVID-19 misinformation and removed seven million pieces of content that could lead to imminent harm", directing over two billion online users to credible sources of health information.[38] Facebook removed a post from then-President Donald Trump's re-election campaign account when he compared COVID-19 to the flu, a comparison that medical professionals have verified to be unfounded and downplayed the dangers of the coronavirus pandemic.[39]

Google and YouTube have tackled medical misinformation primarily by employing counter-speech to direct users to credible sources when they search for terms that are likely to produce misinformation. For example, in addition to its standard search results generated by intricate algorithms, Google adopted an approach wherein COVID-19 related searches would trigger algorithmic alerts to generate prominent articles from reputable sources and mainstream publications such as the WHO.[40] YouTube updated its service policy to prohibit any content that directly contradicts credible sources like the WHO and videos fueling COVID-19-related conspiracies.[41] Twitter played an overwhelming role in the dissemination of medical misinformation, especially during the pandemic. The company took a much more aggressive approach to address the problem, which includes removing harmful posts containing medical misinformation, directing users to accurate information provided by authoritative sources, adding "context to potentially misleading tweets and a prompt that asks users if they want to read an article before retweeting it", and suspending accounts flagged with mistaken tweets.[42]

An advantage of having social media platforms to manage the spread of medical misinformation is that their efforts are not subject scrutiny under the First Amendment, because they are private entities rather than state

36. *See* Sara Fischer, *Exclusive: New Facebook partnership tackles health misinformation*, AXIOS (July 27, 2021), https://www.axios.com/2021/07/27/facebook-partnership-fact-checkers-health-misinformation [https://perma.cc/89AN-B9A4].

37. *See* Michelle Crouch, *12 Things You Can't Post About the Coronavirus on Facebook*, AARP (Feb. 24, 2021), https://www.aarp.org/health/conditions-treatments/info-2021/facebook-blocks-coronavirus-misinformation.html [https://perma.cc/22YG-RQ9Z].

38. *See* Culliford, *supra* note 34.

39. *See* David Ingram, *Facebook Removes Trump Post That Compared Covid-19 to Flu*, NBC NEWS (Oct. 6, 2020), https://www.yahoo.com/now/facebook-removes-trump-post-compared-155134923.html [https://perma.cc/8GQJ-NA98].

40. *See* Nunziato, *supra* note 15, at 47-48.

41. *See id.* at 49-50.

42. Brittany Trang, *Twitter Has Spent Years Trying to Combat Health Misinformation. Will Musk's Takeover Make That Harder?*, STAT (Nov. 1, 2022), https://www.statnews.com/2022/11/01/how-musks-twitter-takeover-could-impact-misinformation/ [https://perma.cc/6DF7-GQMB].

actors.[43] Section 230 of the Communications Act of 1934 provides that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[44] Courts have interpreted this provision to immunize social media platforms from liability for publishing, removing, or restricting access to another's content, giving broad discretion to platforms when implementing content regulation.[45] In other words, social media companies are generally shielded from restrictions imposed by the First Amendment, enabling them to implement limited checks against misleading content. More importantly, most of the platforms' efforts involved directing users to credible information instead of implementing censorship, which is consistent with the "free trade in ideas" model of free speech introduced by Justice Holmes in *Abrams v. United States*, where he argued that the ultimate good is reached in a competition where speakers are engaged in the free trade of ideas.[46]

However, the efforts undertaken by these major platforms are not without problems. Facebook suffered from delays in implementing its policies such that "it can take up to [twenty-two] days for the platform to downgrade [false and/or misleading content]."[47] Further, the implementation of these content moderation policies can be largely dependent on the current state of the world. The dire impacts brought about by medical misinformation online during the pandemic have "ushered in a sea change in the platforms' attitudes and approaches toward regulating content online."[48] Many of these platforms only began to take extensive actions when the volume of such misleading information jumped alarmingly during the pandemic. These policies can also be easily changed or revoked due to various business reasons. With Elon Musk's takeover of X, formerly Twitter, the company announced that it will no longer enforce its policy against COVID-19 misinformation, a decision some perceived as "a clear signal that COVID misinformation is back on the menu."[49] X disbanded its Trust and Safety Council, comprised of "external expert organizations" to advise on tackling harmful content on the platform, and these business decisions may

43. *See* Lata Nott & Brian Peters, *Free Speech on Social Media: The Complete Guide*, FREEDOM FORUM, https://www.freedomforum.org/free-expression-on-social-media/#:~:text=The%20First%20Amendment%20protects%20individuals,websites%20as%20they%20see%20fit [https://perma.cc/5AZV-T8EQ] (last visited Apr. 1, 2023); *see also* Nunziato, *supra* note 15, at 89-90.

44. 47 U.S.C. § 230(c) (2018).

45. *See* JASON A. GALLO AND CLARE Y. CHO, CONG. RSCH. SERV., R46662, SOCIAL MEDIA: MISINFORMATION AND CONTENT MODERATION ISSUES FOR CONGRESS at 1 (2021).

46. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

47. Nunziato, *supra* note 15, at 42 (quoting *How Facebook Can Flatten the Curve of the Coronavirus Infodemic*, AVAAZ at 2 (Apr. 15, 2020), https://avaazimages.avaaz.org/facebook_coronavirus_misinformation.pdf [https://perma.cc/FJ7G-KYEU]).

48. *Id.* at 34.

49. Annie Burky, *As Twitter Rolls Back Its Ban on COVID Misinformation, Some Health Experts Worry About Threat to Public Health*, FIERCE HEALTH (Jan. 6, 2023), https://www.fiercehealthcare.com/health-tech/usage-anti-vax-terms-increase-twitter-following-end-platforms-covid-19-misinformation [https://perma.cc/56P7-9W99].

substantially influence X's ability to effectively moderate misleading content on its platform.[50]

Relying solely on social media platforms does not target the root of the issue or the source of the misinformation. Even if these platforms attempt to remove misleading information or direct users to more credible sources, there may still be a substantial amount of false content remaining on the platforms. Individuals spreading misleading medical information could make countless attempts to repost their content even after they have been removed or censored. In the absence of federal or state regulations in the United States to prohibit the spread of misleading medical information online, platform interventions are rather restricted to promoting a healthy online community for medical content. Therefore, the focus should be shifted towards regulating the individuals who promulgate medical misinformation.

## III. CALLS FOR DISCIPLINARY ACTION AGAINST LICENSED PHYSICIANS

With online medical misinformation becoming a major public health threat, it is particularly alarming to observe licensed physicians spreading false medical information, given their role as trusted sources of medical knowledge.[51] The medical profession has urged state medical boards to impose disciplinary action against physicians who disseminate medical misinformation.[52] However, existing efforts by state boards have faced considerable challenges with limited availability.

### *A. Focusing on the Dissemination of Medical Misinformation by Medical Professionals*

The combination of the pandemic landscape and the widespread use of social media has fueled viral dissemination of misinformation. Adding to the issue is a minority of medical professionals who, leveraging their expertise, have actively spread medical misinformation. Considering the source of medical misinformation is the first step in combating its proliferation: source credibility is often evaluated based on the expertise and trustworthiness of the underlying source.[53] Among a large amount of medical information, the public tends to evaluate the credibility of the content based on the underlying source. "Whereas expertise is the extent to which the source is able to give accurate information, trustworthiness reflects the extent that one is willing to provide accurate information."[54] And a reader generally prefers relying on

50. Donie O'Sullivan, *Twitter Disbands Its 'Trust and Safety Council' that Tackled Harassment and Child Exploitation*, CNN (Dec. 13, 2022), https://www.cnn.com/2022/12/12/tech/twitter-disbands-trust-and-safety-council/index.html [https://perma.cc/4FXC-A74P].

51. *See* Coleman, *supra* note 10.

52. *See id.*

53. *See* Krisberg, *supra* note 27.

54. Swire-Thompson & Lazer, *supra* note 16, at 440.

trustworthiness over expertise when evaluating the effectiveness of a source of content.

Numerous sources with diverse incentives, including news media, politicians, governmental bodies, and medical professionals, contribute to the dissemination of medical misinformation online. Research has shown that people have varying levels of trust in individuals and institutions of different backgrounds.[55] In addition to federal and state medical authorities, the public relies heavily on local medical professionals.[56] In particular, while medical professionals are a relatively uncommon source of medical misinformation, they are highly regarded by the public and receive disproportionate attention because of their professional status.[57] Physicians who make false claims "often couch them in technical language that sounds convincing to nonscientists."[58] Therefore, when medical professionals advocate unproven or dangerous medical advice to the public, they are likely able to draw on their professional expertise and trustworthiness.

During the height of COVID-19 transmission, a small group of physicians promulgated misleading information and anti-vaccination sentiments. Dr. Andrew Kaufman, an Arizona doctor, and a YouTube celebrity, told his followers that COVID-19 vaccines are full of poison and the viruses do not exist.[59] Dr. Joseph Mercola, a successful anti-vaccine entrepreneur, has been selling supplements and false cures as alternatives to COVID vaccines, and posting claims, such as the idea that "hydrogen peroxide treatment can successfully treat most viral respiratory illnesses" on social media accounts with over three million followers.[60] Dr. Rashid Buttar, an osteopathic physician, posted on Twitter alleging that "COVID-19 was a planned operation" and claimed that COVID-19 tests have living microorganisms in a video posted on Facebook.[61] Studies have shown a negative correlation between reliance on these conspiracy beliefs and vaccine intentions, potentially leading to detrimental consequences.[62]

Reaching a larger scale, Dr. Mehmet Oz has been widely criticized for his popular television show, which has included a considerable amount of medical advice that was not evidence-based. While selling his medical professional status, he has promoted alternative medical advice with no

55. *See* U.S. DEP'T OF HEALTH & HUM. SERV., *supra* note 1, at 11.

56. *See id.*

57. *See* Coleman, *supra* note 7, at 117.

58. Rita Rubin, *When Physicians Spread Unscientific Information About COVID-19*, 327 JAMA 904, 905 (Mar. 8, 2022).

59. Jonathan Jarry, *The Psychiatrist Who Calmly Denies Reality*, MCGILL (Sept. 24, 2020), https://www.mcgill.ca/oss/article/covid-19-pseudoscience/psychiatrist-who-calmly-denies-reality [https://perma.cc/J4RW-JX3Z].

60. CTR. FOR COUNTERING DIGIT. HATE, *supra* note 33, at 13.

61. Victoria Knight, *Will 'Dr. Disinformation' Ever Face the Music?*, KHN (Sept. 22, 2021), https://khn.org/news/article/disinformation-dozen-doctors-covid-misinformation-social-media/ [https://perma.cc/6GCA-EFNM]; *see* CTR. FOR COUNTERING DIGIT. HATE, *supra* note 33, at 24.

62. *See* Daniel Allington et al., *Media usage predicts intention to be vaccinated against SARS-CoV-2 in the US and the UK*, 39 VACCINE 2595, 2601 (2021).

scientific foundation.[63] According to the British Medical Journal (BMJ), it was found that approximately half of the recommendations provided on Dr. Oz's talk shows either lack supporting evidence or are contradicted by the best available evidence.[64] Many physicians have shared stories of patients following Dr. Oz's advice resulting in devastating harm. A patient admitted that her skin had broken out with orange, itchy bumps after she applied a homemade fruit face mask that she learned from Dr. Oz's show, and she alleged that "I thought I could trust him because he's a doctor."[65] "Physicians' speech invokes medical authority, so when they speak, patients tend to listen," which attracts public reliance on their credibility for the messages conveyed.[66]

These medical professionals have used their credentials to provide medical advice that has no evidentiary basis or is contrary to established science, and their words are often assigned great importance, even in areas where they lack expertise.[67] Individuals browsing the Internet need to realize that recommendations provided by medical experts "may not be supported by higher evidence or presented with enough balanced information to adequately inform decision making."[68] Responding directly to the source of information as a way to regulate medical misinformation disseminated by professionals could be an effective way to reduce its spread on social media platforms.

### *B. Existing Enforcement Efforts and Legal Challenges of Justifying Disciplinary Action*

In all states, physicians could be subject to professional disciplinary action for activities that occur outside of the physician-patient relationship based on a generalized allegation of "unprofessional conduct."[69] For example, some state medical boards have proposed disciplinary action against physicians who provide non-evidence-based testimony as expert witnesses in malpractice lawsuits.[70] The American Medical Association (AMA) passed a resolution asserting that providing expert testimony constitutes a practice of

63. *See* Jeffrey Cole, *Dr. Phil, Dr. Oz, and Dr. Drew: Do No Harm (Unless It Is Good for Ratings)*, DIGIT. CTR. (Apr. 7, 2021), https://www.digitalcenter.org/columns/doctors-do-no-harm/ [https://perma.cc/YZQ9-ELRZ].

64. *See* Christina Korownyk et al., *Televised Medical Talk Shows-What They Recommend and the Evidence to Support Their Recommendations: A Prospective Observational Study*, BMJ, at 1 (Dec. 17, 2014), https://pubmed.ncbi.nlm.nih.gov/25520234/ [https://perma.cc/NL4Q-A8YN].

65. Bethany Rodgers, *Pa. Physicians Group Shares Stories of Patients Following Oz Show Advice*, GOERIE (Oct. 19, 2022, 10:05 PM), https://www.goerie.com/story/news/politics/2022/10/20/pennsylvania-doctors-blast-dr-oz-for-spreading-medical-misinformation-backing-john-fetterman/69564455007/ [https://perma.cc/6QTC-5H6F].

66. *See* Coleman, *supra* note 10.

67. *See* Philip A. Pizzo et al., *When Physicians Engage in Practices That Threaten the Nation's Health*, 325 JAMA 723, 723 (Feb. 23, 2021).

68. Christina Korownyk et al., *supra* note 64, at 4.

69. *See* Coleman, *supra* note 7, at 125.

70. *See* Pizzo et al., *supra* note 67, at 724.

medicine.[71] While existing case law in this area is inconclusive, state boards retain the authority to impose disciplinary action against any physician found to have delivered false witness testimony in a malpractice lawsuit.[72] Professionals have argued that the same rationale should apply to justify disciplinary action against physicians who "violate the standards of professionalism in policy advisory roles" of disseminating medical information to the public, and this argument is particularly compelling because medical misinformation on the Internet can reach a significantly broader audience, given the number of people potentially in danger.[73]

The combination of the COVID-19 landscape and the widespread use of social media has brought increasing calls in the medical community to discipline physicians who disseminate medical misinformation to the public.[74] Proponents of disciplinary action argue that the Hippocratic Oath to "do no harm" should transcend "individual patient-physician encounters to situations in which physicians make medical recommendations for populations."[75] When physicians use the language and authority of their profession to promote false medical misinformation, they are more than expressing their own opinions but have rather "crossed the line from free speech to medical practice" or something "akin to malpractice."[76] Dr. Arthur L. Caplan argued that physicians who disseminate views "based on anecdote, myth, hearsay, rumor, ideology, fraud or some combination of all of these" should have their licenses rescinded and "states have the right tools to do so."[77]

Voluntary professional associations have advocated for license revocations or other disciplinary action against physicians who promulgate medical misinformation, as their harmful claims often garner significant attention.[78] The AMA's Code of Ethics states that physicians should respect their medical expertise and make sure that any public statements they provide must be "accurate", conveying known risks and benefits, "based on valid scientific evidence."[79] The Federation of State Medical Boards (FSMB) has warned physicians that spreading misinformation and disinformation about COVID-19 could lead to suspension or revocation of medical license.[80] The FSMB explains that "[d]ue to their specialized knowledge and training,

71. *See* B. Sonny Bal, *The Expert Witness in Medical Malpractice Litigation*, 467 CLINICAL ORTHOPAEDICS & RELATED RSCH. 383, 385 (2009); *see also* Pizzo et al., *supra* note 67, at 724.

72. *See* B. Sonny Bal, *supra* note 71, at 388.

73. Pizzo et al., *supra* note 67, at 724.

74. *See* Coleman, *supra* note 7, at 123.

75. Pizzo et al., *supra* note 67, at 723.

76. Richard A. Friedman, *We Must Do More to Stop Dangerous Doctors in a Pandemic*, N.Y. TIMES (Dec. 11, 2020), https://www.nytimes.com/2020/12/11/opinion/scott-atlas-doctors-misinformation.html [https://perma.cc/8ADG-GX78].

77. Arthur L. Caplan, *Revoke the License of Any Doctor Who Opposes Vaccination*, WASH. POST (Feb. 6, 2015), https://www.washingtonpost.com/opinions/revoke-the-license-of-any-doctor-who-opposes-vaccination/2015/02/06/11a05e50-ad7f-11e4-9c91-e9d2f9fde644_story.html [https://perma.cc/CZU4-T2K3].

78. *See* Tony Yang & Sarah Schaffer DeRoo, *Disciplining Physicians Who Spread Medical Misinformation*, 28 J. OF PUB. HEALTH MGMT. & PRAC. 595, 595 (2022).

79. *See* AM. MED. ASS'N., *supra* note 13.

80. *See* Coleman, *supra* note 10.

licensed physicians possess a high degree of public trust and therefore have a powerful platform in society," so they must share information that is "factual, scientifically grounded and consensus-driven for the betterment of public health."[81] Other professional associations have issued similar guidance.[82]

Relying on non-binding professional organizations often "lacks teeth" as non-member physicians could simply continue to engage in such practices. According to Jacob M. Appel, the psychiatry and assistant director at the Icahn School of Medicine, regulation of physician speech is better left to state authorities who have the power to act against all licensees "regardless of their standing with professional organizations."[83] State medical boards, with their licensing authorities over licensed physicians, have an important role to play in the enforcement of effective standards. In some states, there are laws explicitly authorizing disciplinary action against physicians who make misleading statements to the public. New York prohibits medical statements made in connection with advertising that is "false, fraudulent, deceptive, misleading, sensational, or flamboyant." [84] Other states have proposed broader statutes to cover false statements "unrelated to the solicitation of patients or customers." [85] Minnesota established that the medical board may refuse to grant a license or impose disciplinary action against any physician who engages in any improper conduct "likely to deceive or defraud the public."[86] California's legislature approved a bill in 2022 that would allow regulators to punish doctors for spreading false information about COVID-19.[87] While the bill does not address comments online or on television, it is an attempt to legislate a remedy for the spread of false information by medical physicians.[88]

However, many cases involving investigations against physicians alleged to be disseminating medical misinformation have not resulted in disciplinary action for several reasons. First, while FSMB expects its member boards to conduct more investigations, some states have restricted the board's powers. During the pandemic, state legislators have introduced bills to protect

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81. *FSMB: Spreading COVID-19 Vaccine Misinformation May Put Medical License At Risk*, FSMB (July 29, 2021), https://www.fsmb.org/advocacy/news-releases/fsmb-spreading-covid-19-vaccine-misinformation-may-put-medical-license-at-risk/ [https://perma.cc/88HR-45LN].

82. *See* Warren Newton et al., *Statement About Dissemination of COVID-19 Misinformation*, AM. BD. OF PEDIATRICS (Sept. 9, 2021), https://www.abp.org/news/press-releases/statement-about-dissemination-covid-19-misinformation [https://perma.cc/Q88B-KZSR].

83. Jacob M. Appel, *If It Ducks Like a Quack: Balancing Physician Freedom of Expression And the Public Interest*, 48 JM. J. MED ETHICS 430, 433 (2022) (describing the inability of the APA to enforce to prevent diagnosis of public figures as psychiatrists merely resigned APA membership and continue to engage in such practice).

84. N.Y. EDUC. LAW § 6530(27)(a)(1) (2021).

85. Coleman, *supra* note 7, at 126.

86. MINN. STAT. § 147.091(g)(1) (2021).

87. *See* Steven L. Myers, *California Approves Bill to Punish Doctors Who Spread False Information*, N.Y. TIMES (Aug. 29, 2022), https://www.nytimes.com/2022/08/29/technology/california-doctors-covid-misinformation.html [https://perma.cc/BS3S-7J4H].

88. *See id.*

medical professionals from being punished by regulatory bodies for spreading COVID-19 misinformation or unproven remedies.[89] For example, the chair of the Tennessee House Government Operations Committee believed that the state medical board's warning on the revocation of medical licenses had overstepped its boundary and threatened to terminate the board if it did not remove the warning.[90] Second, some state boards simply lack the legal tools to discipline physicians for actions taken on social media platforms, because the precedents for unprofessional behavior have been more narrowly tailored to speech made directly to individual patients, so the legal structures in many states are not suited to discipline doctors who broadcast misinformation on social media platforms.[91] The head of the Medical Board of California acknowledged that the legal processes of the country were not designed to discipline physicians making broad statements about discredited treatments in the public.[92]

Unlike social media platforms, medical boards are "entities of the state" subject to constitutional limitations.[93] The Tenth Amendment authorizes states to establish laws and regulations "protecting the health, safety, and general welfare of their citizens," and each state has established and authorized state medical board to govern the practice of medicine and regulate physicians.[94] All of the state medical boards issue licenses for the practice of medicine, "investigate complaints, discipline those who violate the law, conduct physician evaluations, and facilitate rehabilitation of physicians."[95] However, the protection of freedom of speech under the First Amendment applies to all branches of the government, including state medical boards. Therefore, while state medical boards are given such licensing authorities, they may run into First Amendment challenges and be limited in their ability to penalize licensed physicians based on the content of their speech when they are speaking outside of the professional context.[96]

As mentioned above, California Governor Gavin Newsom introduced a bill in 2020 that sought to penalize doctors who spread misinformation about COVID-19 during patient care, but the bill is now facing lawsuits challenging

89. *See* Michael Ollove, *States Weigh Shielding Doctors' COVID Misinformation, Unproven Remedies*, STATELINE (Apr. 6, 2022), https://stateline.org/2022/04/06/states-weigh-shielding-doctors-covid-misinformation-unproven-remedies/ [https://perma.cc/4YNN-E5ZH].

90. *See id.*

91. *See* Darius Tahir, *Medical Boards Get Pusheback as They Try to Punish Doctors for Covid Misinformation*, POLITICO (Feb. 1, 2022), https://www.politico.com/news/2022/02/01/covid-misinfo-docs-vaccines-00003383 [https://perma.cc/D7BH-UQH7].

92. *See id.*

93. Alison M. Whelan, *How Should State Licensing and Credentialing Boards Respond When Government Clinicians Spread False or Misleading Health Information?*, 25 AMA J. OF ETHICS 210, 213 (2023).

94. *Guide to Medical Regulation in the United States*, FED'N OF STATE MED. BD., https://www.fsmb.org/u.s.-medical-regulatory-trends-and-actions/guide-to-medical-regulation-in-the-united-states/introduction/ [https://perma.cc/6UFL-H9Q6] (last visited Apr. 1, 2023).

95. *Id.*

96. *See* Whelan, *supra* note 93, at 212-13.

it as a violation of free speech under the First Amendment.[97] The bill designates the spread of misleading COVID-19 information as "unprofessional conduct" subject to "punishment by the agency that regulates the profession" in hopes of avoiding First Amendment challenges.[98] However, the California Medical Association faces two lawsuits alleging that the law was intended to "silence dissenting views" and the legal system of the country "opts toward a presumption that speech is protected."[99] Dr. Tracy Hoeg, one of the plaintiffs in the lawsuits, argued that the bill imposes "self-censorship" and "self-silencing" of "dissenting views" onto physicians.[100] In response to these arguments, Governor Newsom acknowledged the protection of free speech under the First Amendment but emphasized that the law focused specifically on "clear deviations from established standard of care" with a "malicious intent" to spread false information.[101]

Freedom of speech is not absolute. The Supreme Court has determined three types of speech restrictions of varying levels of scrutiny: content-based, commercial, and professional.[102] State medical boards' disciplinary proceedings can be considered content-based restrictions, which are presumptively unconstitutional and are upheld only if they can satisfy the "strict scrutiny" standard of review, which requires the government to show that the limitations promote a "compelling state interest" and are the "least restrictive means" available.[103] While proponents of board disciplinary action argue that disseminating medical misinformation could have a devastating impact on public health, it is likely not the only or the least restrictive means for achieving the state's public health goals, because counter-speech offers an alternative option to counter false information with accurate messages.[104]

Some critics argue that when physicians offer medical advice, they are essentially engaging in a form of professional practice and should be subject to disciplinary action if their statements deviate from accepted medical standards as if providing the same information in a single-patient setting.[105] It is intuitively assumed that when a doctor advises a patient or a lawyer offers legal advice, they are exercising professional speech.[106] The "professional speech" doctrine is a concept employed by some courts to "define and often limit the free-speech rights of professionals when rendering advice or

97. *See* Brendan Pierson, *California Law Aiming to Curb COVIDM Misinformation Blocked by Judge*, THOMSON REUTERS (Jan. 26, 2023), https://www.reuters.com/business/healthcare-pharmaceuticals/california-law-aiming-curb-covid-misinformation-blocked-by-judge-2023-01-26/ [https://perma.cc/8RRX-PKBS].

98. *See* Steven L. Myers, *Is Spreading Medical Misinformation a Doctor's Free Speech Right?*, N.Y. TIMES (Nov. 30, 2022), https://www.nytimes.com/2022/11/30/technology/medical-misinformation-covid-free-speech.html [https://perma.cc/5WLQ-M2X3].

99. *Id.*

100. *Id.*

101. *Id.*

102. *See* Yang & DeRoo, *supra* note 78, at 596.

103. *See id.*

104. *See* Coleman, *supra* note 10.

105. *See* Coleman, *supra* note 7, at 137.

106. *See* Claudia E. Haupt, *Professional Speech*, 125 THE YALE L. J. 1238, 1245 (2016)

counsel", and its existence is implicit in some court cases.[107] However, despite its recognition, the Supreme Court has never expressly defined a doctrine of "professional speech" under the First Amendment, leaving the analysis of the appropriate level of protection for professional speech inconclusive.[108]

Recent court decisions involving professional speech include the Ninth Circuit's ruling in *Pickup v. Brown*, which upheld a California law that penalizes licensed mental health providers for performing therapies to alter the sexual orientation of minors.[109] The Court found that "within the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished."[110] However, while free-speech rights may be diminished with providing medical advice in a professional relationship, the Court held that First Amendment protection is "at its greatest" when a medical professional engages in a "public dialogue," adhering to the value of the First Amendment to protect public speech on matters of public concern.[111] For example, "a doctor who publicly advocates a treatment that the medical establishment considers outside mainstream, or even dangerous, is entitled robust protection under the First Amendment . . . even though the state has the power to regulate medicine."[112]

In 2018, the Supreme Court attempted to elaborate on the application of the First Amendment on professional speech in *National Institutes of Family Advocates v. Becerra (NIFLA)*. The Supreme Court struck down a California statute requiring crisis pregnancy centers to notify women that the state provides free or low-cost services, including abortions, asserting that most content-based restrictions on speech are "presumptively unconstitutional" and may only be upheld if they are "narrowly tailored to serve compelling state interests."[113] The Ninth Circuit decided not to apply strict scrutiny to such a content-based regulation after concluding that the notice regulates "professional speech."[114] The Supreme Court disagreed with the lower court and affirmed that it "has never recognized professional speech as a separate category of speech subject to different rules" beyond the First Amendment.[115] Nonetheless, *NIFLA* left open the standards for governing physician-patient communications, noting that "states may regulate professional conduct, even though that conduct incidentally involves speech."[116]

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107. David L. Hudson Jr., *Professional Speech Doctrine*, THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1551/professional-speech-doctrine [https://perma.cc/TMR2-QW5E] (last visited Apr. 1, 2023); *see* Haupt, *supra* note 106, at 1245; *see also* Conant v. McCaffrey, 172 F.R.D. 681, 694 (N.D. Cal. 1997) ("Although the Supreme Court has never held that the physician-patient relationship, as such, receives special First Amendment protection, its case law assumes, without so deciding, that the relationship is a protected one.").

108. *See* Haupt, *supra* note 106, at 1245.

109. *See* Pickup v. Brown, 728 F.3d 1208, 1215 (9th Cir. 2013).

110. *Id.* at 1228.

111. *Id.* at 1227.

112. *Id.*

113. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 766 (2018).

114. *Id.*

115. *Id.* at 755-57.

116. *Id.* at 768.

The holdings in *Pickup* and *NIFLA* may imply that states have considerable discretion in disciplining physicians for professional speech within medical procedures. However, the decisions are not broad enough to cover public statements regarding public health matters not directly related to medical procedures for individual patients.[117] This means that state boards may still need to bear the high burden of satisfying the strict scrutiny standard to survive a constitutional challenge in disciplining content-based speeches. Accordingly, a broader disciplinary framework should be imposed to regulate physician professional speech on public platforms.

## IV. JUSTIFYING DISCIPLINARY ACTION AS AN EXTENSION OF FIDUCIARY DUTY OF CARE

The foregoing analysis suggests that existing efforts by social media platforms, the medical community, and the existing professional speech regulation are unlikely to play a major role in responding to medical misinformation on the Internet. Because courts have given considerable discretion to states to discipline physicians for speech tied to professional conduct, medical boards, acting as state agencies to "serve the public by protecting it from incompetent, unprofessional, and improperly trained physicians," should assume the duty to discipline physicians who breach their duty of care to the public by spreading medical misinformation.[118] In accordance with the Federation of State Medical Boards (FSMB), disciplinary action may include suspension or revocation of the physician's medical license.[119] State medical boards regulate the activities of more than one million health professionals in the country, so it is certain that they could play an essential role in holding physicians accountable for medical misinformation online.

However, as discussed above, state medical boards are limited in their ability to sanction physicians based on speech on public platforms with existing standards. To avoid the likely reality that these physicians may face no legal repercussions, this Note proposes to expand the current duty of care owed by physicians. Under the expanded framework, a duty of care arises between a physician and the public when a licensed physician willingly volunteers to share medical information on public platforms, particularly on the Internet. The standard of such duty of care is analogous to that owed by directors and officers to the corporation they work for, wherein they are required to fully inform themselves of all material information before making any reasonable business decision.[120] When the medical information provided is found to be in direct contradiction to the prevailing medical evidence, the

117. *See* Yang & Schaffer Deroo, supra note 78, at 596.

118. Carlson & Thompson, *supra* note 14; *see also Nat'l Inst. of Fam. & Life Advocs.*, 585 U.S. at 767.

119. *See* Coleman, *supra* note 10.

120. *See Duty of Care*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/duty_of_care#:~:text=The%20duty%20of%20care%20is,corporation's%20stakeholders%20or%20broader%20society [https://perma.cc/Y2F7-TSFB] (last visited Apr. 1, 2023).

licensed physician has breached his or her duty of care, and the state medical board may impose penalties accordingly.

### *A. Physicians as Fiduciaries and Limitations of Courts to Remedy Breaches of Fiduciary Duties*

Physicians are relied upon for their training and knowledge by patients as the "gatekeepers" to medical services "for access to medical aid, thus creating a relationship of dependency."[121] In general, physicians assume a legal duty to provide an adequate standard of care to their patients acting as fiduciaries for the patients.[122] Fiduciary obligations are imposed in relationships where one party places trust, confidence, and reliance on another party who has a fiduciary duty to act in their best interest.[123] Fiduciary duty was introduced by law to "protect vulnerable people in their transactions with others."[124] The physician-patient relationship has long been recognized as one of the traditional fiduciary relationships, where the physician acts for the benefit of a patient with express or implied consent.[125] The professional duty of a physician is to bring his or her medical skill and expertise to patients with inferior knowledge in the area.[126]

After a physician-patient relationship is recognized, physicians are under an obligation to perform their professional services by "the prevailing standard of professional competence in the relevant field of medicine."[127] In a medical malpractice claim, physicians owe a duty of care to patients "to exercise that degree of care, skill, and diligence customarily demonstrated by physicians in the same line of practice."[128] The "medical standard of care" generally refers to the type of care that "a reasonably skilled and competent medical provider with a similar level of education within the same area would

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121. Sam F. Halabi, *Against Fiduciary Utopianism: The Regulation of Physician Conflict of Interest and Standards of Care*, 11 U.C. IRVINE L. REV. 433, 444 (2020).

122. *See* David Orentlicher, *The Physician's Duty to Treat During Pandemics*, 108 AM. J. PUB. HEALTH 1459, 1459 (2018).

123. *See* Dheeraj Vaidya, *Fiduciary Relationship*, WALLSTREETMOJO, https://www.wallstreetmojo.com/fiduciary-relationship/ [https://perma.cc/M3P6-N8UE] (last visited Apr. 1, 2023).

124. Andrea Donaldson, *Breach of Fiduciary Duty Claims Against Physicians*, PAC. MED. L. (Oct. 22, 2019), https://www.pacificmedicallaw.ca/blog/breach-of-fiduciary-duty-claims-against-physicians/ [https://perma.cc/5J7B-6FUZ].

125. *See* Saniya Suri, Note, *Action, Affiliation, and a Duty of Care: Physicians' Liability in Nontraditional Settings*, 89 FORDHAM L. REV. 301, 307 (2020); *see also* M.A. v. United States, 951 P.2d 851, 854 (Alaska 1998) ("[W]e have recognized that the unique nature of the physician-patient relationship confers upon physicians a fiduciary responsibility toward their patients.").

126. *See* Wiseman v. Alliant Hosps., Inc., 37 S.W.3d 709, 713 (Ky. 2000) ("The fiduciary relationship between the parties grants a patient the right to rely on the physician's knowledge and skill.").

127. Halabi, *supra* note 121, at 449.

128. Julie Jaquays, *Doe v. Cochran: Does Reducing Physicians' Duty of Care Owed to Third Parties to Identifiable or Identified Victims Unduly Restrict the Scope of Foreseeability*, 39 QUINNIPIAC L. REV. 599, 601-05 (2021); *see also* Dallaire v. Hsu, 23 A.3d 792, 798 (Conn. App. Ct. 2011).

have provided to a patient under the same circumstances."[129] Some obligations within the physician's standard of care may include "retention of a competent support staff, making and keeping adequate records, and keeping current with diagnostic and treatment advances."[130]

However, the accepted standard of care is not a list of guidelines but a duty "determined by a given set of circumstances that present in a particular patient, with a specific condition, at a definite time and place."[131] Factors taken into account may include the physician's medical expertise and the traditional accepted medical practices.[132] Due to the unpredictability of the standard of care, courts have rarely analyzed a physician's duty of care within the fiduciary relationship with patients.[133] At times, courts have rejected to rely on various clinical practice guidelines to ascertain a physician's fiduciary duty of care. In *Hinlicky v. Dreyfuss*, the plaintiff tried to introduce the Physicians' Desk Reference (PDR) to establish the standard of care.[134] The Court argued that the PDR alone could not be employed as prima facie evidence to establish a standard of care and that expert testimony is required to provide an explanation.[135] While expert testimony is generally required to establish the standard of care in claims against physicians by patients, many physicians may refuse to testify within the patient's community.[136]

Despite the general recognition of a fiduciary relationship between physicians and patients, courts have been hesitant to remedy breaches of physician fiduciary duties.[137] First, "plaintiffs must bring all their claims arising out of the same transactional nucleus of facts in the same civil action" under the rules of civil procedure, so patients are burdened to bring claims in contract and torts in addition to suing for breach of fiduciary. Second, courts tend to reject attempts to sue for breach of fiduciary duties "in favor of medical malpractice."[138] The Arizona Supreme Court in *Hales v. Pittman* argued that "a patient may pursue a malpractice action premised on a negligence theory" and the law should not be expanded to "recognize a new cause of action based on breach of trust."[139] Malpractice lawsuits are not a sufficient option in combating medical misinformation on the Internet as most

129. *What Is Standard of Care in Medical Malpractice*, RAYNES & LAWN (Dec. 13, 2021), https://rayneslaw.com/what-is-standard-of-care-in-medical-malpractice/#:~:text=The%20medical%20standard%20of%20care%20refers%20to%20the%20type%20of,which%20the%20alleged%20malpractice%20occurred [https://perma.cc/9YNT-FV2W].

130. Halabi, *supra* note 121, at 450.

131. Howard Smith, *A Model for Validating an Expert's Opinion in Medical Negligence Cases*, 26 J. LEGAL MED. 207, 208 (2005).

132. *See What Is Standard of Care in Medical Malpractice*, *supra* note 129.

133. *See* Halabi, *supra* note 121, at 455.

134. *See* Hinlicky v. Dreyfuss, 848 N.E.2d 1285, 1291 (N.Y. 2006).

135. *See id.*

136. *See* Halabi, *supra* note 121, at 455-56.

137. *See id.* at 452.

138. *See id.* at 454.

139. Hales v. Pittman, 576 P.2d 493, 497 (Ariz. 1978).

require proof of a clear physician-patient relationship.[140] Although some courts have recognized malpractice actions in the absence of a traditional physician-patient relationship, those cases tend to involve a physician providing medical advice for an "identified third party" when it is foreseeable that the third party will rely on that advice to be harmed.[141] While one may argue that it is reasonably foreseeable that web users will rely on physicians' words and be harmed by such misleading information, it is seemingly impossible to identify a particular party likely to be harmed on the Internet.

### *B. Expanding Physicians' Legal Duty of Care Beyond the Traditional Framework*

A fiduciary duty of care is imposed once a physician-patient relationship is established, and the patient must then prove the physician's practice deviates from the applicable standard of care. When physicians and patients interact in a direct clinical setting, where a patient is referred to a physician and is then treated or operated on by the physician, a clear physician-patient relationship is established, where the physician owes the patient a duty of reasonable care.[142] However, as discussed above, the responsibilities underlined within a traditional physician-patient relationship are insufficient to address medical misinformation by physicians on the Internet. This Note proposes to expand the current framework of fiduciary duty where physicians owe a duty of care to the general public.

Some courts have held that a duty of care may exist in the absence of a well-recognized fiduciary relationship. In *Rowland v. Christian*, the Supreme Court of California applied a public policy approach in addressing the duties owed by possessors of land to entrants on their properties.[143] The Court argued that the rigid justifications for the common law distinctions between trespassers, invitees, and licensees are insufficient and adopted a new test in which the liability of possessors of land depends on whether they acted as a reasonable person in warning entrants of the probability of injury on the premises.[144] Though the *Rowland* case dealt with landowners, California courts have gradually applied this approach to assess whether a duty of reasonable care was appropriate in other contexts of relationships.[145] Other courts have found that physicians may owe a duty of care when providing medical advice to someone who was not previously their patient. In *Green v.*

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140. *See* Ande v. Rock, 647 N.W.2d 265, 276 (Wis. Ct. App. 2002) (granting defendants' motions to dismiss because parents, who sued state employees for claims related to children's cystic fibrosis, made no showing of a physician-patient relationship which is necessary to support a medical malpractice claim).

141. *See* Warren v. Dinter, 926 N.W.2d 370, 375-76 (Minn. 2019) (allowing medical malpractice action against hospitalists who refuse to admit patients with symptoms of undiagnosed infection).

142. *See* Mead v. Legacy Health Sys., 283 P.3d 904, 910 (Or. 2012); Suri, *supra* note 125, at 305.

143. *See* Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968).

144. *See id*. at 567-68.

145. *See* Patrick D. Blake, *Redefining Physicians' Duties: An Argument for Eliminating the Physician-Patient Relationship Requirement in Actions for Medical Malpractice*, 40 GA. L. REV. 573, 595 (2006).

*Walker*, the Fifth Circuit imposed a duty of care in a non-traditional physician-patient relationship between the examining physician and examinee because the physician has superior knowledge in his profession.[146]

Courts have found that a duty of care exists in other circumstances involving nontraditional physician-patient relationships. Physicians have increasingly exerted a greater influence on public healthcare through nontraditional interactions, such as performing informal curbside consultations or independent assessments at request.[147] In the Internet age, physicians and individuals seeking medical information have access to distinct technological resources. When the framework of a physician-patient does not cover nontraditional medical interactions, courts have and should continue to recognize the need to deviate from the traditional understanding of a fiduciary relationship and "find a duty of care notwithstanding the lack of such a physician-patient relationship."[148] To justify disciplinary action against licensed physicians responsible for the dissemination of medical misinformation, the scope of a physician's duty of care should be extended by courts beyond the restricted definition of direct contact with patients.

The AMA's Code of Ethics states that physicians, except in emergencies, are free to choose "whom to serve, with whom to associate, and the environment in which to provide medical care."[149] Physicians off-duty assume no affirmative duty to provide medical advice on Facebook or X, formerly Twitter. However, "an off-duty doctor is expected to provide the same degree of care, diligence, and skill as would reasonably expected of a competent physician."[150] As stated by William Sage, a professor of law and medicine at Texas A&M University, physicians certainly do not relinquish their free speech rights upon obtaining medical licenses, but they can be held accountable for providing inaccurate medical recommendations, such as advising a dangerous medication. [151] Accordingly, once physicians invoke their medical status and volunteer to share medical information with the public, particularly through online platforms reaching millions of potential patients, a fiduciary relationship should have been formed where physicians owe a duty of care in the information they provide. In other words, a legal duty of care should be imposed when a physician, announcing of his or her medical status to invoke authoritative attention, willingly and knowingly volunteers to provide medical advice on any public platform. Even if physicians do not voluntarily announce their medical status, social media platforms often contain clues that allow Internet users to infer their

146. *See* Green v. Walker, 910 F.2d 291, 294-95 (5th Cir. 1990).

147. *See* Suri, *supra* note 125, at 305.

148. *Id.* at 307.

149. *See AMA Code of Medical Ethics*, AM. MED. ASS'N. (2006).

150. Jennifer Corbett, *Liability of an Off-Duty Doctor or Physician*, LEGALMATCH, https://www.legalmatch.com/law-library/article/liability-of-an-off-duty-doctor-or-physician.html #:~:text=The%20hospital%20must%20have%20directed,by%20an%20off%2Dduty%20physician [https://perma.cc/4R66-DV6Z] (last visited Apr. 1, 2023).

151. *See* Stacy Weiner, *Is Spreading Medical Misinformation a Physician's Free Speech Right? It's Complicated*, AAMC (Dec. 26, 2023), https://www.aamc.org/news/spreading-medical-misinformation-physician-s-free-speech-right-it-s-complicated [https://perma.cc/MV9M-U8F3].

professional standing. Therefore, the responsibility falls on the physicians to monitor and manage their social network profiles.

The basis of the above rationale can be analyzed through the Fifth Circuit's ruling in *Kadlec Medical Center v. Lakeview Anesthesia Associates*, involving a case of alleged misrepresentations from the defendant's referral letters.[152] In *Kadlec Medical Center*, Dr. Berry was terminated by Louisiana Anesthesia Associates (LAA) for his drug use problems and applied for a new job where two colleagues from LAA provided recommendation letters describing Dr. Berry as an excellent anesthesiologist without mentioning his problematic behavior.[153] The Fifth Circuit held that "although a party may keep absolute silence and violate no rule of law or equity, . . . if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to [disclose] the whole truth."[154] Similarly, while physicians are not legally obligated to provide medical information to the public when acting on their own initiative outside of a professional setting, once they do so, they assume "a duty to insure that the information volunteered is correct."[155] A physician's professional status should carry "additional legal obligations" to exercise a similar degree of care as that ordinarily exercised in active practice when using their specialized knowledge and specialization to lend credibility to their words.[156]

### *C. Implementation of the Extended Duty of Care in the Dissemination of Medical Information*

For medical boards to effectively impose disciplinary action against physicians for disseminating medical misinformation, a clear standard of care regarding physician speech should be defined. The fundamental principles of duty of care in corporate law could be useful in formulating an expanded duty of care framework for physicians. The rule limiting liability of directors under the business judgment rule is a foundation built into the structure of corporate law. The business judgment rule is a "presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[157] At the same time, a fiduciary duty is held by corporate directors to put the interests of the company and its shareholders over their personal interests when making business decisions and evaluating opportunities.[158] Absent evidence of a violation of fiduciary duty, the business judgment rule shields directors from judicial scrutiny of their business

152. *See* Kadlec Med. Ctr. v. Lakeview Anesthesia Assocs., 527 F.3d 412, 415-17 (5th Cir. 2008).

153. *See id.* at 416.

154. *Id.* at 419.

155. *Id.*

156. *Green*, 910 F.2d at 295.

157. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

158. *See* Mike Lincoln, *Your Duties as a Directors: The Basics*, COOLEY GO (Apr. 11, 2022), https://www.cooleygo.com/director-fiduciary-duties/#:~:text=Directors%20have%20fiduciary%20duties%20of,the%20Company%20and%20evaluating%20opportunities [https://perma.cc/7LJ6-UMC2].

decisions.[159] Duty of care in a corporate context refers to a fiduciary responsibility held by directors of a corporation to exercise the utmost care in making business decisions.[160]

*Smith v. Van Gorkom* was the first case where the Delaware Supreme Court found a breach of the duty of care in connection with a board's business judgment, which involved a class action against the board of the target company in a flawed merger agreement process.[161] In *Van Gorkom*, the Court affirmed that a director has the fiduciary duty "to act in an informed and deliberate manner in determining whether to approve an agreement of merger before submitting the proposal."[162] However, the board of directors breached its duty of care because it did not act with "informed reasonable deliberation" before engaging in a merger transaction.[163] For example, the board failed to inquire into the chief executive officer's role in drafting merger terms, review the merger agreements in detail, seek outside expert opinion on the purchase price, and engage in more extensive discussions in addition to the two-hour meeting when approving the sale.[164] The directors lacked sufficient information about the value of the corporation and simply failed in their duty of "knowing, sharing, and disclosing information that was material and reasonably available for their discovery."[165]

The corporate duty of care can be summed up as requiring directors of a company to stay informed by conducting sufficient investigation and taking all material information reasonably available into account before making business decisions to promote the company's best interests.[166] Some of the ways that directors could exercise the duty of care include ensuring all material information is reasonably available, investigating viable business alternatives, consulting experts for credible information, referring to meeting minutes, staying abreast of outside developments and changes, and making sure a decision is not made based solely on the opinion of one candidate.[167] The principles underlying the corporate duty of care could be applied in the context of physicians promulgating medical information to the public. When physicians owe a duty to the public in the medical information they voluntarily disseminate, they should fulfill their fiduciary duty by engaging in extensive scientific research, similar to the expectations required of corporate directors.

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159. *See* Adam Hayes, *What is the Business Judgment Rule? With Exemptions & Example*, INVESTOPEDIA (Apr. 27, 2022), https://www.investopedia.com/terms/b/businessjudgmentrule.asp [https://perma.cc/AVD9-B45Y].

160. *See* Will Kenton, *What Does Duty of Care Mean in Business and Financial Services?*, INVESTOPEDIA (Dec. 26, 2022), https://www.investopedia.com/terms/d/duty-care.asp [https://perma.cc/2KCC-SD6Y].

161. *See* Smith v. Van Gorkom, 488 A.2d 858, 863 (Del. 2009).

162. *Id.* at 873.

163. *Id.* at 881.

164. *See id.* at 875-81.

165. *Id.* at 893.

166. *See* Kenton, *supra* note 160.

167. *See id.*

Principle V of the AMA Principles of Ethics expresses that "a physician shall continue to study, apply, and advance scientific knowledge, maintain a commitment to medical education, make relevant information available to patients, colleagues, and the public, obtain consultation, and use the talents of other professionals when indicated."[168] And Principal VII states that a physician shall assume a responsibility to engage in activities "contributing to the improvement of the community and the betterment of public health."[169] These ethical principles articulate the responsibility of physicians to provide credible information based on scientific evidence, rather than engaging in unregulated proliferation of false medical information.[170] A duty of care should be imposed, mandating physicians to take advantage of their medical expertise, perform a diligent scientific investigation of all available evidence, remain informed of relevant developments in the area, and consult medical professionals to ensure the accuracy of the information they share to the public are supported by substantial scientific evidence.

Medical professionals should be trusted with their specialized knowledge and training, and the rule simply reinforces their unique responsibility to direct the public to reliable sources of medical information. Similarly, even though a corporate board's decisions might not always be the most profitable for the company, directors must nonetheless engage in a thoughtful and careful decision-making process to avoid subjecting the company to dreadful circumstances. A breach of the duty of care thus arises from defects within the decision-making process rather than the substantive quality of the decision itself.[171] When physicians inform themselves of all scientifically available evidence and seek advice from other medical experts, they should be able to refrain from sharing information contrary to the weight of scientific evidence. When physicians make statements that contradict well-established medical evidence, medical boards can make a strong argument that the physicians have breached their duty of care, because they should have recognized the information as false or at least entertained serious doubts as to its credibility if they had performed diligent research.

Regulators have been concerned that allowing the medical boards to revoke physicians' licenses could result in a chilling effect on valuable speech.[172] An argument against penalizing physicians based on speech content is that medical knowledge is an ever-expanding practice, and physicians should be allowed to express opinions on new studies with the First Amendment protecting the open expression of ideas.[173] Physicians may be concerned that the boards may be "free to penalize physicians whenever they

168. *AMA Principles of Medical Ethics*, AM. MED. ASS'N. (Apr. 29, 2016), https://www.ama-assn.org/delivering-care/ama-principles-medical-ethics [https://perma.cc/FKN9-Z2B5].

169. *Id.*

170. *See* Joel T. Wu & Jennifer B. McGormick, *Why Health Professionals Should Speak Out Against False Beliefs on the Internet*, AMA J. ETHICS (2018), https://journalofethics.ama-assn.org/article/why-health-professionals-should-speak-out-against-false-beliefs-internet/2018-11 [https://perma.cc/JJ4E-5GXJ] (last visited Apr. 1, 2023).

171. *See* Robert J. Rhee, *The Tort Foundation of Duty of Care and Business Judgment*, 88 NOTRE DAME L. REV. 1139, 1147 (2013).

172. *See* Coleman, *supra* note 7, at 139.

173. *See* Myers, *supra* note 98.

express opinions that conflict with prevailing professional norms, even if those opinions cannot be shown to be objectively false."[174] This Note recommends state boards to organize a special committee similar to the Special Litigation Committee (SLC) in shareholder derivative litigation. An SLC is a tool that a corporation can employ to address derivative litigation when shareholders believe that the board of directors failed to pursue the corporation's best interests.[175] The committee is made up of independent or impartial individuals to consider whether derivative claims against directors for breach of fiduciary duty are advantageous for the company by conducting investigations, reviews, and evaluations.[176] The purpose of an SLC is to ensure that its members can objectively evaluate the merits of a derivative suit for the company.[177]

Similarly, whenever a physician is found disseminating information on public platforms contrary to the prevailing medical evidence, a committee composed of medical professionals and a member of the public should independently investigate the case. By establishing a special committee to review disciplinary actions, a physician confronted with potential liability is afforded the chance to contest the decision before the committee. This allows physicians to explain the prudent research they have conducted, drawing from available evidence, and to demonstrate the good-faith efforts made to fulfill their duty of care. Nonetheless, how to regulate such speech is a challenging question, especially when a physician believes in good faith that the majority medical consensus is wrong despite the weight of existing evidence. One possible way to ensure the right to express contrarian opinions is to require physicians, in addition to showcasing the diligent research and study they had performed, to make clear to audiences the absence of medical authority or existing scientific evidence to justify their position.

It is important to realize that the disciplinary authority of medical boards is a neutral one and does not seek to censor free speech or silence dissenting views. Because medical progress depends heavily on rigorous scientific research, the purpose of the extended duty is not to dissuade physicians from sharing potentially valuable speech but rather to encourage their exercise of reasonable caution in staying updated with advancements in medical practice, which involves invoking their professional authority judiciously to ensure the best interests of the public. Licensed physicians are free to express their views on current medical topics but are only asked to exercise reasonable care by taking the time to investigate and ask questions ensuring that they are well-formed surrounding their speech.

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174. Coleman, *supra* note 7, at 139.

175. *See* Michael Pike & Daniel Lusting, *Shareholder Derivative Claims: What is A Special Litigation Committee (SLC)?*, PIKE & LUSTIG, LLP (Feb. 28, 2022), https://www.turnpikelaw.com/shareholder-derivative-claims-what-is-a-special-litigation-committee-slc/ [https://perma.cc/RK7T-W9YN].

176. *See* Scott Hirst, *Special Litigation Committees in Shareholder Derivative Litigation*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REGUL. (Apr. 25, 2010), https://corpgov.law.harvard.edu/2010/04/25/special-litigation-committees-in-shareholder-derivative-litigation/ [https://perma.cc/KD27-PHJT].

177. *See id.*

## V. CONCLUSION

The promulgation of medical misinformation with social media platforms playing an ever-expanding role in today's information ecosystem has become an alarming concern. In particular, physicians expressing statements on medical matters that run contrary to the consensus of scientific evidence, such as advocating dangerous cures or opposing public health measures, pose a serious challenge to regulatory bodies and a "grave threat to societal welfare."[178] To overcome the constitutional challenges under the First Amendment and justify disciplinary action by state medical boards, the traditional fiduciary duty of a physician-patient relationship should be expanded where a duty of care arises between a physician and the public when the physician voluntarily disseminates medical information on public platforms. Because physicians carry professional credibility that gives their voices inordinate weight, they owe a duty of care to perform diligent scientific research prior to disseminating any medical information. State medical boards are justified to discipline licensed physicians who breach their duty of care by providing information unambiguously refuted by a substantial body of medical evidence, a framework likely to play a major role in combating the issue.

178. Appel, *supra* note 83, at 430.

# "Free" Speech: Reframing the *Rogers* Test to Adequately Balance Rights in a Rapidly Evolving Digital Era

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TABLE OF CONTENTS



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## I. INTRODUCTION

Every day, whether it's through browsing the Internet, listening to podcasts, or scrolling on social media, it's hard not to see a mention of bourgeoning technology and how it may impact the future of society. Non-fungible tokens (NFTs) are one example of that kind of technology. Celebrities such as Snoop Dogg and Stephen Curry and companies including Adidas are just a fraction of the celebrities and large entities that have tried to capitalize on the profitability that exists within the NFT space.[1] Where once ownership of items and assets existed only in the physical world, now, another realm for ownership has been created. Individuals can own, buy, sell, trade, and display digital assets virtually.[2] The technologies involved in NFTs are rapidly evolving, meaning the market today may not be the market in the near future.[3] Due to their complexity and rapid innovation, NFTs present a variety of challenges for the legal landscape.

In trademark law, NFTs create a new way for parties to potentially infringe upon the trademarks of others. The NFT space is home to a variety of works, and with that, there is an increased need for brands to protect themselves and their products.[4] The benefit of such a space is that it can foster creativity and the further innovation of cutting-edge technology. A challenge in this space, however, has been the prevalence of alleged counterfeit and pirated items.[5] Parties have been able to create NFT versions of trademarked items and generate sizeable profits from those NFTs.[6] The novelty of these issues means that as courts confront them, their rulings can set precedent for both the real and virtual world.[7]

In trademark infringement litigation, several circuits have utilized the test set forth by the Second Circuit in *Rogers v. Grimaldi*, otherwise known

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1. *See* Subin Hong, *9 celebrities who have entered the NFT world, from Leo Messi to Justin Bieber*, LIFESTYLE ASIA (Jan. 5, 2022, 4:11 PM), https://www.lifestyleasia.com/hk/culture/the-arts/celebrity-nfts-cryptocurrency-metaverse/ [https://perma.cc/C9HD-UUH6].

2. *See* Ollie Leech, *What are NFTs and How Do They Work*, COINDESK (Aug. 23, 2022, 10:43 AM), https://www.coindesk.com/learn/what-are-nfts-and-how-do-they-work/ [https://perma.cc/3JKU-AVR6]; Robyn Conti, *What is an NFT? Non-Fungible Tokens Explained*, FORBES ADVISOR (Mar. 17, 2023, 12:57 AM), https://www.forbes.com/advisor/investing/cryptocurrency/nft-non-fungible-token/ [https://perma.cc/AY7L-ZRHJ].

3. COINDESK, https://www.coindesk.com/indices/cmi/ [https://perma.cc/3LPS-VV4L] (last visited Mar. 4, 2023).

4. Conti, *supra* note 2.

5. Svetlana Ilnitskaya, Dir. of Customer Strategy, Corsearch, Remarks before the U.S. Patent and Trademark Office (Jan. 24, 2023), https://www.uspto.gov/sites/default/files/documents/NFT-Roundtable-TRADEMARK-Jan24-TRANSCRIPT.pdf [https://perma.cc/AT4L-XYAT], at 10-12.

6. Kevin Collier, *NFT Art Sales are Booming. Just Without Some Artists' Permission*, NBC NEWS (Jan. 10, 2022, 3:53 PM), https://www.nbcnews.com/tech/security/nft-art-sales-are-booming-just-artists-permission-rcna10798 [https://perma.cc/8FEY-LUVY]; Ilnitskaya, *supra* note 5, at 11-12.

7. Andrew Steinwold, *The History of Non-Fungible Tokens (NFTs)*, MEDIUM (Oct. 7, 2019), http://108.166.64.190/omeka222/files/original/453bc3985fdc186319dcaa6c0fcc9f8a.pdf [https://perma.cc/CS6N-FMDG].

as, the *Rogers* test, to assess whether an alleged infringing use of another's trademark is permitted as an expressive work under the First Amendment.[8] In trademark infringement litigation concerning NFTs, district courts have been confronted with the *Rogers* test's potential application to NFTs in that context.[9] As more cases of this category continue to be confronted by courts, some argue that the *Rogers* test is not the appropriate test to analyze NFTs, as it may not account for the nuance of what is largely uncharted territory for trademarks.[10] Further, the *Rogers* test may also not be the right test because of its inconsistent application across all trademark infringement suits.[11] NFT trademark infringement litigation is raising novel legal issues that call into question the workability of the *Rogers* test overall. Absent reform, the *Rogers* test will not strike the appropriate balance between the protection of trademark holders' intellectual property rights and the public's interest in the protection of freedom of expression under the First Amendment as applied to new technologies such as NFTs.

Through a look into the use of the *Rogers* test across trademark infringement suits and in the newer class of NFT trademark infringement suits, this Note will highlight the inconsistencies in the *Rogers* test's application, examine the application of *Rogers* in NFT trademark infringement suits, and propose a reframed version of the *Rogers* test that, if adopted by all federal circuits, would achieve a proper balance between the protection of intellectual property rights through trademark law and First Amendment protections over artistic expression. The changes to the *Rogers* test will also make the test more adaptable to technological advances in our ever-changing society, beyond NFTs. Part II will provide background into trademark law and the *Rogers* test. Part III will further discuss the application of the *Rogers* test, address the issues with applying the *Rogers* test, and propose adjustments to the *Rogers* test that would have beneficial results for trademark owners, artists, and the average consumer.

8. Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989); Anthony Zangrillo, *The Split on the Rogers v. Grimaldi Gridiron: An Analysis of Unauthorized Trademark Use in Artistic Mediums*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 385, 403-14 (2017) (discussing the different applications of the *Rogers* test by the Second, Ninth, and Sixth Circuits).

9. Hermes Int'l v. Rothschild, 603 F. Supp. 3d 98, 102-03 (S.D.N.Y. 2022); Yuga Labs, Inc. v. Ripps, No. CV 22-4355-JFW(JEMx), 2022 WL 18024480, at *1 (C.D. Cal. Dec. 16, 2022).

10. *See* Kasey Boucher & Jonathan M. Gelchinsky, *Federal Court Rules MetaBirkin NFTs Entitled to First Amendment Protection in Hermès Trademark Case*, NAT'L L. REV. (May 20, 2022), https://www.natlawreview.com/article/federal-court-rules-metabirkin-nfts-entitled-to-first-amendment-protection-herm-s. [https://perma.cc/6T7U-ZS2L]; *See also* Isaiah Poritz, *MetaBirkins NFT Suit Ripe for Rogers Trademark Test, Judge Says* BLOOMBERG L. (May 19, 2022), https://news.bloomberglaw.com/ip-law/metabirkins-nft-suit-ripe-for-rogers-trademark-test-judge-says [https://perma.cc/XQW9-MF7W].

11. *See generally* Zangrillo, *supra* note 8.

## II. BACKGROUND

Before analyzing the *Rogers* test and its challenges as applied to a technologically advancing world, it is important to understand the foundations of trademark protection under U.S. law.

### *A. Trademark Law Basics*

The United States Patent and Trademark Office defines a trademark as "any word, phrase, symbol, design, or a combination [of those things] that identifies [the source of one's] goods or services."[12] Traditionally, designations that are trademarkable include one or more letters, a word, image, shape, or color.[13] Trademarkable designations have (less frequently) also included sounds, fragrances, and flavors.[14] Trademarks do not have to be registered by the United States Patent and Trademark Office to be afforded legal protections.

Trademarks perform four tasks that courts have found are deserving of legal protection.[15] The four tasks are, "(1) to identify one seller's goods and distinguish them from goods sold by others, (2) to signify that all goods bearing the trademark come from or are controlled by a single source, (3) to signify that all goods bearing the trademark are of an equal level of quality, and (4) as a key part of advertising and selling the goods and services."[16] Additionally, trademarks are a visual symbol of the goodwill and reputation that has been established by a product or service.[17]

Marks must be distinctive to be protected as trademarks.[18] If a designation performs the job of identifying and distinguishing the goods or services with which it appears, it is "distinctive."[19] In determining distinctiveness, courts have created four categories for trademarks based on the relationship between the mark and the product.[20] A mark may be: (1) arbitrary or fanciful, (2) suggestive, (3) descriptive, or (4) generic.[21] An arbitrary mark is one that shows no logical relationship to the underlying product or service.[22] "Victoria's Secret," which bears no logical relationship to its products—clothing and women's intimates—is an example of an arbitrary mark.[23] A suggestive mark suggests a characteristic of the underlying product or service but requires some thought to reach a conclusion

12. U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/trademarks/basics/what-trademark [https://perma.cc/63M6-8XXW] (last visited Mar. 4, 2023).
13. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3.1 (5th ed. 2022).
14. *Id.*
15. *Id.* at § 3.1.
16. *Id.*
17. *See* Matal v. Tam, 582 U.S. 218, 244 (2017).
18. 15 U.S.C. § 1127.
19. MCCARTHY, *supra* note 13, at § 3.1; 15 U.S.C. § 1127.
20. *See* Abercombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976).
21. MCCARTHY, *supra* note 13, at § 11.1.
22. *Id.* at §§ 11:12-:13.
23. *See* Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 426 (2003).

as to what the product or service is.[24] "COPPERTONE" for suntan lotion would be an example of a suggestive mark. A descriptive mark generally describes a characteristic or the entirety of the underlying product or service such as "American Airlines" to describe an airline in America.[25] Lastly, a generic mark describes the general category of the underlying product.[26] If a mark falls into the generic category, it is not entitled to trademark protection.[27] For example, a coffee brand entitled "Coffee" would be generic and not entitled to trademark protection.

### *B. Trademark Law Goals and an Introduction to Infringement*

Trademark law has several goals. One goal is to protect the public from being deceived.[28] Another goal is to protect markholders from misappropriation or trademark infringement.[29] There is a benefit to consumers when brands are recognizable by their trademarks. Brands develop trust from their customers and establish a reputation over time. Trademarks help to maintain consumer trust and brand reputation through the confirmation of the source of a product or service.[30] Section 1114 of the United States Code states that a trademark is infringed when, "without the consent of the trademark registrant . . . [there is] use in commerce . . . any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive . . . "[31] Commerce is crucial to trademark law; if there is no use in commerce then there is no mark to protect.[32] Section 1114 is part of what is also known as the Lanham Trademark Act, the federal statute governing trademark law.[33] The Lanham Act provides federal causes of action for trademark infringement, trademark dilution, and several other offenses.[34]

A trademark is infringed if there has been a use in commerce of a registered mark in connection with the sale, distribution, or advertising of any goods or services with which the use is likely to cause confusion, mistake, or

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24. *See* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 768-69 (1992); Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 212 (2000).

25. MCCARTHY, *supra* note 13, at § 11:16.

26. *Id.* at § 23:49.

27. *Id.* at § 3.1.

28. *See* Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc., 456 U.S. 844, 849 n.7 (1982).

29. *See* 15 U.S.C. § 1125; *See also* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 28 (2003).

30. MCCARTHY, *supra* note 13, at § 2:2.

31. 15 U.S.C. § 1114.

32. *Id.*; U.S. PATENT & TRADEMARK OFF., https://www.uspto.gov/trademarks/basics/scope-protection [https://perma.cc/J4W6-NXF8] (last visited Jan. 21, 2023).

33. Practical Law Intellectual Property & Technology, Lanham Trademark Act (Lanham Act), Practical Law Glossary Item 8-501-4903., https://us.practicallaw.thomsonreuters.com/8-501-4903 [https://perma.cc/HLF8-TCJY]; The Lanham Trademark Act, 15 U.S.C. §§ 1051-1127 (2020).

34. Practical Law Intellectual Property & Technology, *supra* note 33; 15 U.S.C. §§ 1051-1127.

deception.[35] To prevail on a trademark infringement claim, a plaintiff must establish that it has a valid mark entitled to protection and that the defendant used the same or a similar mark in commerce in connection with the sale or advertising of goods without the consent of the plaintiff in such a way that is likely to cause confusion.[36] Satisfying the requirements of "use" and "in commerce" are straightforward elements of the claim. The standard used to evaluate the last element of whether there has been trademark infringement is referred to as the "likelihood of confusion test."[37] Likelihood of confusion exists when an alleged trademark infringement causes probable confusion in reasonably prudent consumers as to the origin of products or services.[38] It is not sufficient for confusion to be merely "possible," the likelihood of confusion must go beyond mere possibility and be probable.[39] This means that proving actual consumer confusion is not necessary to establish a successful trademark infringement claim.[40]

Courts have considered a multitude of factors to assess whether a consumer is likely to be confused by an alleged infringement.[41] In *AMF v. Sleekcraft Boats*, the Ninth Circuit provided eight factors relevant to finding a likelihood of confusion.[42] The eight *Sleekcraft* factors are: (1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels; (6) type of goods and purchaser care; (7) intent; and (8) likelihood of expansion.[43] Each Circuit uses a variation of the above rules and factors to determine likelihood of confusion.[44] The modern Restatement of Unfair Competition also lists nine foundational factors that are relevant to determining whether the likelihood of confusion exists.[45] The Restatement notes, however, that "no mechanistic formula or list can set forth in advance the variety of elements that comprise the market context from which likelihood of confusion must be determined."[46]

35. 15 U.S.C. § 1114(a); 15 U.S.C. § 1125(a).

36. 15 U.S.C. § 1114 (further explanation of the required elements of use, in commerce, and likelihood of confusion to establish infringement).

37. *See* MCCARTHY, *supra* note 13, at § 23:1; *See also* KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111, 117 (2004).

38. *See* KP Permanent Make-Up, Inc., 543 U.S. at 117.

39. MCCARTHY, *supra* note 13, at § 23:3; Am. Steel Foundries v. Robertson, 269 U.S. 372, 382 (1926); Estee Lauder Inc. v. The Gap, Inc., 108 F.3d 1503, 1510 (2d Cir. 1997).

40. MCCARTHY, *supra* note 13, at § 23:3.

41. *Id.*

42. AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348 (9th Cir. 1979).

43. *Id.* at 348-49.

44. *See* Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961) (Second Circuit uses factored test for likelihood of confusion); *See* Champagne Louis Roederer, S.A. v. Delicato Vineyards, 148 F.3d 1373 (Fed. Cir. 1998) (Federal Circuit application of "DuPont Factors" to test likelihood of confusion); *See also* Application of E.I. DuPont DeNemours & Co., 476 F.2d 1357, 1361 (C.C.P.A. 1973) (listing of the "DuPont Factors"); *See* Interpace Corp. v. Lapp, Inc., 721 F.2d 460, 463 (3d Cir. 1983) (Third Circuit "Lapp Factors" for likelihood of confusion).

45. MCCARTHY, *supra* note 13, at § 23:19, .

46. *Id.*; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 21 cmt. a. (AM. L. INST. 1995).

### *C. Defenses to Trademark Infringement:* Rogers v. Grimaldi

In response to a trademark infringement claim, a defendant may raise a multitude of defenses to combat the assertion.[47] If proven, the defendant prevails, and his mark may continue to exist unchanged in the market. Defendants in trademark infringement claims can assert what have been referred to as "Free Speech" defenses: the First Amendment, parody, and fair use.[48] Each defense, if established, renders the defendant's conduct a non-infringing use of another's mark.[49] The focus of this Note will be the First Amendment defense outlined in the seminal case, *Rogers v. Grimaldi*.

The dispute in *Rogers* concerned the title of a film, however, the test used applies to all works of artistic expression such as paintings, drawings, video games, toys, and greeting cards.[50] In *Rogers*, the famous actor duo Ginger Rogers and Fred Astaire's names were used in the title of a film called "Ginger and Fred."[51] The film tells the story of two Italian cabaret performers who imitated Ginger Rogers and Fred Astaire in their performances.[52] Rogers filed suit on the contention that the title of the film created a false impression of her endorsement of the film and the false impression that she was the subject of the film.[53] The court had to determine whether Rogers could prevent the use of her name in the film title for a movie that had very little relation to her.[54] The court found that the use of Rogers' first name in the film title was an exercise of artistic expression that did not "explicitly mislead" consumers and thus was not prohibited by the Lanham Act under 15 U.S.C § 1125(a).[55] In assessing artistic relevance, courts are not making determinations on the quality of the alleged artistic work, but are instead assessing the relevance of the mark compared to the expressive content of the work.[56] The standard is that the relevance must be above zero.[57] In recent years, the *Rogers* test has gained newfound relevance as NFTs have become a point of contention in trademark infringement suits where parties disagree over whether trademark usages are protected or prohibited under the law.

The test outlined in *Rogers* is a two-step balancing test for when a trademark is used in an expressive work aimed at balancing the rights between free speech under the First Amendment and Trademark Law policy

47. MCCARTHY, *supra* note 13, at §§ 31:43-:44, 31:139, 31:156.50.
48. *Id.* at §§ 31:139; 31:153; 31:156.50.
49. *Id.*
50. *See id.* at § 31:139 (The *Rogers* test applies to all artistic works of expression and does not apply to commercial advertisements or infomercials); *Rogers*, 875 F.2d at 997.
51. *See Rogers*, 875 F.2d at 996-97.
52. *Id.*
53. *Id.*
54. *Id.* at 996.
55. *Id.* at 1005.
56. See E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095, 1100 (9th Cir. 2008).
57. *See id.*

preventing consumer deception and confusion.[58] The decision in *Rogers* was a landmark decision for trademark law and the test the court provided in the case has been adopted and followed by several federal circuits.[59] The two-pronged test states that a trademark used in an alleged expressive work is trademark infringement under the Lanham Act only if the mark; (1) has "no artistic relevance" to the accused work, and (2) use of the mark in the accused work "explicitly misleads" consumers as to the source or content of the work. The court in *Rogers* also stated that "the Lanham Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression."[60] The *Rogers* test provides the infrastructure for courts to balance a defendant's (and the public's) interest in freedom of expression with the interest in the protection of intellectual property rights of trademark owners under the Lanham Act.[61] The existence of a likelihood of confusion must still be demonstrated by the plaintiff alongside proving that at least one of the two factors in the *Rogers* test are met in order to prevail.[62]

### *D. The Inconsistent Application of the* Rogers *Test*

The purpose of the *Rogers* test was to balance the purposes of trademark law, specifically, preventing consumer confusion, with the protections over freedom of expression afforded by the First Amendment.[63] The *Rogers* test has been adopted and used by the Third, Fifth, Sixth, Ninth, and Eleventh Circuits as well as by several federal district courts.[64] Courts have noted, however, that the First Amendment protections cannot provide blank check permission to name and advertise his or her works to "anyone who cries 'artist.'"[65] Thus, a balance must be struck.[66] Different courts have found that different methods do the job of striking the sought-after balance. Some courts have found that the application of the likelihood of confusion test alone strikes an appropriate balance between the rights of trademark

58. The First Amendment of the United States Constitution states, "Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . " US CONST. amend. I; MCCARTHY, *supra* note 13, at § 31:144.50.

59. *See, e.g.*, Parks v. LaFace Recs., 329 F.3d 437, 450 (6th Cir. 2003); Sugar Busters LLC v. Brennan, 177 F.3d 258, 269 (5th Cir. 1999); Mattel, Inc. v. MCA Recs., Inc., 296 F.3d 894, 900 (9th Cir. 2002).

60. *See Rogers*, 875 F.2d at 999.

61. *Id.* at 999-1000.

62. *See* Gordon v. Drape Creative Inc., 909 F.3d 257, 264 (9th Cir. 2018).

63. *See Rogers*, 875 F.2d at 999.

64. *See e.g.*, Seale v. Gramercy Pictures, 949 F. Supp. 331, 339 (3d Cir. 1998); *Sugar Busters LLC*, 177 F.3d at 269; *Parks*, 329 F.3d at 452; *E.S.S. Ent. 2000, Inc.*, 547 F.3d at 1099; Univ. of Ala. Bd. of Trs. v. New Life Art, Inc., 683 F.3d 1266, 1278 (11th Cir. 2012); *Hermes Int'l*, 603 F. Supp. 3d at 277.

65. *See Parks*, 329 F.3d at 447; *See also Yuga Labs, Inc.*, 2022 WL 18024480, at *1.

66. *See Rogers*, 875 F.2d at 999.

owners and First Amendment protections.[67] Alternatively, other courts have opted for the "alternative avenues" analysis and have found that the First Amendment is not violated so long as there are "alternative avenues of communication" available to the artist.[68] Arguments have also been raised as to the applicability of a Right of Publicity Analysis which would build upon precedent set by an alternate test.[69] The *Rogers* test is the most employed because, as was stated by the Court in *Parks*, the other tests do not "accord adequate weight" to First Amendment interests when applied to specific circumstances.[70]

The two prongs of the *Rogers* test—artistic relevance and whether the use of the mark is "explicitly misleading"—provide direction for how to balance the interests of trademark owners and consumers and the interest in protecting freedom of expression.[71] After *Rogers* was decided, the Second Circuit, however, revisited the application of the *Rogers* test and further defined how it should apply to certain works.[72] For example, in *Cliffs Notes*, where the defendant created a parody of the study guide, "Cliffs Notes" titled "Spy Notes," the Second Circuit held that "the *Rogers* balancing approach is generally applicable to Lanham Act claims against works of artistic expression, a category that includes parody."[73] In reaching this decision the court did not apply the "explicitly misleading" prong set forth in *Rogers* and instead applied the likelihood of confusion analysis, balancing the benefits to the public interest in avoiding consumer confusion with the public interest in protecting free expression.[74]

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67. *See Mattel, Inc.*, 296 F.3d at 900; *See also* Lamparello v. Falwell, 420 F.3d 309, 314 (4th Cir. 2005); *See generally* Zangrillo, *supra* note 8; *See generally* David M. Kelly & Lynn M. Jordan, *Twenty Years of Rogers v. Grimaldi: Balancing the Lanham Act with the First Amendment Rights of Creators of Artistic Works*, 99 L. J. OF INT'L TRADEMARK ASS'N 1360, 1362 (2009).

68. *See* Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2d Cir. 1979) (holding that trademark is "in the nature of a property right and as such it need not 'yield to the exercise of First Amendment rights under circumstances where . . . alternative avenues of communication exist" and in the present case there were a number of ways for the defendants to comment on the relevant topic without infringing on the plaintiff's trademark); *See also* Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972) (stating that yielding to the exercise of First Amendment rights where alternative avenues of communication exist would be an infringement of property rights without "significantly enhancing the asserted right of free speech").

69. *See* Zangrillo, *supra* note 8, at 400 (details the *Saderup* case and origin of the transformative use test); *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001) (holding that First Amendment protections did not extend to an artist's use of famous comedy performers' likeness because of the accompanying dangers where there are no "transformative elements").

70. *See Parks*, 329 F.3d at 448-49.

71. *See* Kelly & Jordan, *supra* note 67, at 1384-85.

72. *See* Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., 886 F.2d 490, 495 (2d Cir. 1989) (holding that the public interest in free expression outweighs slight risks of consumer confusion); *See also* Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1379-80 (2d Cir. 1933) (analyzing the "explicitly misleading" prong of the *Rogers* test through use of the *Polaroid* likelihood of confusion factors to determine whether the likelihood of confusion is sufficiently compelling to outweigh First Amendment interests).

73. *See Cliffs Notes, Inc.*, 886 F.2d at 495.

74. *See id.* at 497.

The Ninth Circuit has also confronted the *Rogers* test and expanded the test in its application.[75] On March 23, 2023 the Supreme Court heard oral argument in *Jack Daniel's Properties, Inc. v. VIP Products, LLC*, a case that centers around a chewy dog toy that resembles Jack Daniel's' Old No.7 whiskey bottle.[76] The Ninth Circuit applied the *Rogers* test and held that the dog toy was an expressive work, satisfied the prongs of the test and was therefore not an infringing work.[77] The Supreme Court's decision in *Jack Daniels* was published on June 8, 2023.[78] In a narrow ruling, the Supreme Court held that the *Rogers* test does not apply where the "challenged use of a mark is as a mark" and reversed the Ninth Circuit's judgment.[79] Here, VIP Products' use of Jack Daniel's' mark on a dog toy was held by the Supreme Court not to fall within the goals of trademark law and thus did not receive heightened First Amendment protection.[80] Importantly, in concurrence with the decision, Justice Gorsuch wrote that the Court's decision left much of the *Rogers* test unaddressed and indicated that questions surrounding the test's parameters and applicability might arise again in the future.[81] The Sixth Circuit has applied the test by looking further into the artistic relevance prong and considering the specific use by the defendant of the mark.[82] Prior to a 2013 case, *Eastland Music Group, LLC v. Lionsgate Entertainment, Inc.*, the Seventh Circuit had declined to opine on the applicability of the *Rogers* test for balancing trademark and First Amendment interests.[83] More recently, a

75. *See* New Kids on the Block v. News Am. Pub., Inc., 971 F.2d 302, 304 (9th Cir. 1992) (Two nationally circulating newspapers polled their readers on pop group, New Kids on the Block through a phone number that charged between 50 and 95 cents per minute. The group alleged infringement of their New Kids on the Block trademark, and the district court held that *Rogers* focused on "First Amendment values in the context of artistic expression," which extended to the gathering and dissemination of news. The Ninth Circuit affirmed the decision.). *See also* Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 807 (9th Cir. 2003) (implementing a "cultural significance" requirement onto marks which provides that First Amendment protections will only be afforded to works that include marks that have entered public discourse). *But see E.S.S. Ent. 2000, Inc.*, 547 F.3d at 1099 (removing the cultural significance requirement and instead holding that a work's relevance level must simply "be above zero").

76. *See generally*, VIP Prods. LCC v. Jack Daniel's Props., Inc., 953 F.3d 1170 (9th Cir. 2020).

77. *Id.* at 1175-76.

78. Jack Daniel's Props., Inc., v. VIP Prods. LLC, 599 U.S. 140 (2023).

79. *Id.* at 163.

80. *Id.* at 145.

81. *Id.* at 165.

82. *See Parks*, 329 F.3d at 452 (A producer and rap group used the phrase "move to the back of the bus" in a rap song that may have indicated an association with Rosa Parks, so the *Rogers* test was the most appropriate framework under which "to balance the public interest in avoiding consumer confusion with the public interest in free expression." The court stated that relationship between Rosa Parks and moving to the back of the bus is unmistakable thus the song needed not be about Parks in the strict sense but could be considered to be artistically relevant as a metaphor or symbolically.).

83. *See* Eastland Music Grp., LLC v. Lionsgate Ent., Inc., 707 F.3d 869, 871 (7th Cir. 2013) (The court refused to adopt or reject the Rogers test and instead stated that it is "unnecessary to consider possible constitutional defenses to trademark enforcement . . . because the complaint . . . does not allege that the use of "50/50" as a film title has caused any confusion about the film's source.").

new class of cases has once again reignited the question of the applicability of the *Rogers* test to certain works.[84]

Trademark infringement suits concerning non-fungible tokens are raising novel legal questions about artistic expression in the digital assets space and what protections may be afforded.[85] For context, a non-fungible token (NFT) is a unique, non-interchangeable digital asset that consumers can purchase, trade, and sell to show their ownership over an item on the digital ledger system known as the blockchain.[86] A variety of companies and public figures have filed trademark applications for NFTs of their name or their products including Converse, Jay-Z, and Ticketmaster.[87] The NFT space is ripe with competition, due to its high activity, and can be very lucrative.[88] In such an environment, acquiring trademark rights for an NFT has added importance to ensure that the rights in that NFT are protected by the owner.[89] Some of the rights that NFT owners can protect through trademark are exclusive use, brand credibility, and brand stability.[90] Acquiring trademark rights for an NFT also increases the NFT's value as a brand or as part of a brand.[91]

NFTs also have the capability of infringing upon or diluting existing trademarks.[92] Where alleged infringing uses of another's mark through NFTs have occurred, courts have been asked to apply the *Rogers* test to afford First Amendment protection for an alleged infringing work. For example, in *Hermès v. Rothschild*, plaintiff Hermès is a well-known luxury fashion

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84. *See, e.g.*, *Hermès Int'l*, 603 F. Supp. 3d at 102-03; *Yuga Labs, Inc.*, 2022 WL 18024480, at *1.

85. *See, e.g.*, *Hermès Int'l*, 603 F. Supp. 3d at 102-06; *Yuga Labs, Inc.*, 2022 WL 18024480, at *1.

86. *See generally* Mary Kate Brennan et al., *Demystifying NFTs and intellectual property: trademark and copyright concerns*, REUTERS (June 17, 2022), https://www.reuters.com/legal/legalindustry/demystifying-nfts-intellectual-property-trademark-copyright-concerns-2022-06-17/ [https://perma.cc/5D7N-EED4]; *See What is blockchain technology?*, IBM (Nov. 22, 2022), https://www.ibm.com/topics/what-is-blockchain [https://perma.cc/LHD8-XD49]; *See also* Blockchain Research Institute, *An Intro to Blockchain and NFTs*, BLOCKCHAIN RSCH. INST., https://www.blockchainresearchinstitute.org/an-intro-to-blockchain-and-nfts/. [https://perma.cc/M5GL-QHSS]; Leech, *supra* note 2.

87. U.S. PAT. & TRADEMARK OFF., *TESS SEARCH*, https://tsdr.uspto.gov/#caseNumber=97107367&caseType=SERIAL_NO&searchType=statusSearch [https://perma.cc/6HWP-S235]; U.S. PAT. & TRADEMARK OFFICE, *TESS SEARCH,* https://tsdr.uspto.gov/documentviewer?caseId=sn97118641&docId=APP20211113095707#docIndex=5&page=1 [https://perma.cc/7XHL-6XP5]; U.S. PAT. & TRADEMARK OFF., *TESS SEARCH* https://tsdr.uspto.gov/documentviewer?caseId=sn97089225&docId=APP20211026093031#docIndex=15&page=1 [https://perma.cc/W3DJ-D4L3].

88. *See, generally Spaceageagency*, SPACE AGE, https://spaceage.agency/nft-marketing-guide/ [https://perma.cc/KVX9-DPXY] (last visited Feb. 26, 2024).

89. *See generally* Brennan, *supra* note 86.

90. U.S. Pat. & Trademark Office, *Trademark Scope of Protection*, USPTO.GOV, https://www.uspto.gov/trademarks/basics/scope-protection [https://perma.cc/MF9N-VRZ5] (last visited Jan. 28, 2023).

91. *Id.*

92. *See Hermes Int'l*, 603 F. Supp. 3d at 277-79.

business.[93] One of Hermès' more well-known items is its Birkin handbag, which can be sold for over a hundred thousand dollars.[94] Hermès owns the trademark rights in its name, "Hermès," as well as in "Birkin" and trade dress rights in the Birkin handbag design.[95] Defendant, Mason Rothschild is a "marketing strategist" and "entrepreneur" with ties to the fashion industry.[96] Around December of 2021, Rothschild created a collection of digital images which he titled "MetaBirkins."[97] The MetaBirkins were digital images of blurry, furry, Birkin Handbags which Rothschild used NFTs to sell for prices comparable to physical Hermès Birkin handbags.[98]

Rothschild self-described the MetaBirkins collection as a sort of paying homage to Hermès' most famous handbag that is accompanied by exclusivity, mysterious waitlists, high price tags and extreme scarcity which makes them a "holy grail" item of high value.[99] Rothschild was also quoted in interviews stating that he, "wanted to see as an experiment if [he]…could create that same kind of illusion that [a Birkin] has in real life as a digital commodity."[100] Rothschild sold MetaBirkins on four different NFT platforms and created social media and marketing channels using MetaBirkins as the handle and URL address.[101] Consumers and the press expressed actual confusion on whether MetaBirkins were affiliated with Hermès on the MetaBirkins Instagram page and in magazine articles.[102]

Hermès filed trademark infringement claims against Rothschild for its use of the Birkin trademark.[103] The Court concluded that the *Rogers* test applied, at least in part, to the analysis of Rothschild's use of MetaBirkins as a potential infringement upon Hermès' trademarks because the complaint included sufficient allegations of explicit misleadingness.[104] In applying the *Rogers* test, the court began by considering the artistic relevance prong and stated that the determination would be best left to a jury as it is a mixed question of law and fact.[105] Second, on the "explicitly misleading" prong, the court considered survey results provided by Hermès that assessed net confusion among potential NFT consumers and anecdotal evidence of actual confusion on social media over Rothschild's connection (or lack thereof) to Hermès through the MetaBirkins.[106] In the case, the jury ultimately found that

93. *Id.* at 273.
94. *Id.*
95. *Id.* at 100; 15 U.S.C. § 1127 (Trade dress encompasses features of a product such as packaging or shape that consumers associate with one source. Trade dress serves the same role as trademarks and can also be protected by trademark law.).
96. *Hermès Int'l*, 603 F. Supp. 3d at 101.
97. *Id.* at 100.
98. *Id.* at 101.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Hermes Int'l*, 603 F. Supp. 3d at 102.
103. *Id.* at 103.
104. *Id.*
105. Hermès Int'l v. Rothschild, No. 22-cv-384 (JSR), 2023 U.S. Dist. LEXIS 17669, at *22 (S.D.N.Y. Feb 2, 2023).
106. *Id.* at *25.

the MetaBirkins were an infringement upon Hermès' mark and did not satisfy the requirements of the *Rogers* test.[107]

## III. PROPOSING A MODIFIED *ROGERS* TEST

Building upon the basis of the inconsistent application of the *Rogers* test by the different circuits, a preview of some of the high-level benefits and shortcomings of the *Rogers* test will illustrate the need for a reimagined version of the test that would produce fairer, more uniform results in litigation.

### *A. The Benefits of the* Rogers *Test*

The existence of the *Rogers* test is beneficial for markholders and artists as it strives to balance the interests of all impacted by trademark protections whilst still encouraging creativity. First, the *Rogers* test has been applied to a number of different kinds of works (movie titles, books, songs, etc.) and has thus far shown adaptability.[108] Similarly, in an evolving digital era where social media networks such as TikTok, non-fungible tokens, generative artificial intelligence, and virtual worlds are on the rise, a malleable test that can adjust to new mediums is a necessity.

For example, with NFTs in *Hermès v. Rothschild*, the *Rogers* test proved to be applicable and accounted for the new digital medium under which NFTs are bought, sold, and traded as well as for the considerations of NFTs as artwork despite the variance from artwork as it has been known in the physical world.[109] There is also an inherent benefit in a test weighing considerations from multiple parties, which the *Rogers* test does through its balancing of the public's interest in protecting freedom of expression and markholders' interests in protecting the rights to their intellectual property. The consideration of the rights of trademark owners and the public can ensure a more holistic review of the use of any mark. This is a benefit to all as it prevents a one-sided view that skews to one party and neglects another. The *Rogers* test also provides clearer direction than other approaches such as the "alternative avenues" approach which simply asks the broad question of whether the defendant could have communicated the message through alternative avenues. Configuring a test with elements begins to assess an issue from more than one angle. Although the *Rogers* test has benefits, however, it is not without drawbacks.

107. Hermès Int'l v. Rothschild, F. Supp. 3d, 2023 WL 4145518, at *1-6 (S.D.N.Y. Jun. 23, 2023).

108. *See New Kids on the Block*, 971 F.2d at 304.

109. *See generally Hermès Int'l*, 603 F. Supp. 3d 98.

### B. *The Shortcomings of the* Rogers *Test and its Inconsistent Application*

Given the variance in applications of the *Rogers* test across federal circuits and district courts, there is no clear framework upon which courts and parties can rely to produce consistent results. The first prong of the *Rogers* test, requiring that a mark have at least some "artistic relevance" presents some problems for protecting trademark rights.[110] The threshold for "artistic relevance" is quite low, it must only be above zero.[111] With such a low threshold, creativity is encouraged; however, the requirement would almost always be satisfied, which in effect rests almost all analysis on the second prong of the test. This, ironically, creates an imbalance in the balancing-test. To be clear, this is not to encourage the elimination of the "non-zero" threshold. If the threshold in this prong were to be any higher, it would require courts to make determinations on the artistic level of a work which is not the role of the courts. Instead, adding additional elements to the test would encourage balance where the "non-zero" prong does not achieve it by solely working with the "explicitly misleading" prong.

Additionally, the current *Rogers* test could go further to protect the rights of trademark owners. Because the test in application is imbalanced, the rights of trademark owners are solely within the "explicitly misleading" prong as the First Amendment will almost always prevail on the "artistic relevance" prong. The provision of additional elements will allow for a more balanced analysis of alleged infringements upon marks and provide additional consideration for some of the protections trademark law seeks to preserve such as considerations over consumer deception. The three forthcoming proposed additional elements to the *Rogers* test specifically target the goals of trademark law through combatting bad faith intent to mislead consumers, unfair competition, and advance the public's interest in protecting freedom of expression while ensuring that works that are permissible under *Rogers* are true expressions of art in some form.

### C. *A "New"* Rogers *Test for a New Age*

The three proposed factors to be added to create a reimagined *Rogers* test are: (1) intent of defendant in his/her use of the alleged infringing mark, (2) the likelihood of defendant's expansion into other markets, and (3) whether defendant's use of plaintiff's mark is transformative. By adding three additional factors to the "artistic relevance" and "explicitly misleading" prongs of the *Rogers* test, the considerations of trademark rights, First Amendment protections, and consumers are adequately balanced. Further, keeping the factors principles-based, rather than based on the technology, will accommodate the rapid advances in technology in the future.

The first proposed factor is the consideration of the intent of the defendant in the selection and use of the alleged infringing mark. As the Sixth Circuit considered in *Parks v. LaFace*, where a rap song titled "Rosa Parks"

110. *See Gordon*, 909 F.3d at 266-69.
111. *See Rogers*, 875 F.2d at 999.

by the group, OutKast used the line "move to the back of the bus" and historical civil rights figure Rosa Parks filed suit, André "Dré" Benjamin of OutKast admitted that OutKast's intent was never for the song to be about Rosa Parks and the court considered this as evidence of the lyrics' message.[112] The court concluded in that case that "reasonable persons could conclude that there is no relationship of any kind between Rosa Parks' name and the content of the song…" notwithstanding the consumer's right not to be misled.[113] Considering intent can provide insight into whether a mark was truly an artistic endeavor or if there were other motives such as the capitalization on an already successful brand as was argued by Hermès in *Hermès v. Rothschild*.[114]

Trademark law is concerned with the deception of consumers. Assessing the intent of a defendant in the use of an allegedly infringing mark can assist courts in pinpointing any bad faith or deceptive behavior that would support a finding that the use is not one that should be given special protection even though it is causing some likelihood of confusion. A focus on the intent of a defendant is a focus on what the defendant wished to do with his use of a mark. To use the *Hermès* case as an example, imagine a scenario where Rothschild published his collection of MetaBirkins and included imagery of impoverished people in tattered clothing holding MetaBirkins. And imagine if rather than stating that he *was* in fact attempting to capitalize off of Hermès' brand, Rothschild made clear that he intended to make a social commentary on excessive consumerism in society by juxtaposing a luxury item on someone seemingly lacking the bare necessities of life. If these were the facts of the case, Rothschild's use of Hermès' mark would have been assessed differently under the reimagined *Rogers* test. Society generally supports the right to express oneself and if framed this way, considering intent is important to balancing trademark protection with the First Amendment. Determining intent would have the effect of ensuring the protection of artistic creation rather than allowing for strategic infringing that harms trademark owners and confuses consumers.

To borrow a factor from the likelihood of confusion test as another prong, the *Rogers* test should also consider the defendant's likelihood of expansion into other markets. This consideration would aid courts in determining whether the marks would likely be in competition with each other. For example, as in *Hermès* where virtual 'MetaBirkins' that resembled Birkin handbags created by Hermès were being sold online, granting this activity could have prevented Hermès from expanding into the NFT space with its own NFT creations of its Birkin Bags as they would have been occupied by Rothschild. This places the two parties in direct competition with each other if the NFT consumers are the same consumers interested in purchasing physical Birkin handbags. It can be inferred that the consumers purchasing MetaBirkins may also have had an interest in purchasing authentic Hermès Birkin handbags because Rothschild's MetaBirkins were selling for

112. *See Parks*, 329 F.3d at 453.
113. *Id.*
114. *See Hermès Int'l*, 603 F. Supp. 3d at 103.

comparable prices to Birkin handbags and resembled Hermès' Birkin handbags in design. Hermès also provided evidence of that interest through the submission of a survey.[115] Moreover, in the present day, where technological innovation is occurring at a rapid pace, new mediums and markets are opening for marks to exist and businesses to launch. An element considering the likelihood of expansion into such potential mediums and markets is important to preserve fair competition and ward off monopolies. Generally, not every mark will have a likelihood of expanding or expanding into all markets. Thus, considering the likelihood against a potentially infringing mark leaves some consideration for new entrants in the market which, as a matter of public policy, society supports. Adding an element to consider the relation or potential relation of the marks would further steer courts down the path of achieving fairer decisions.

Lastly, the *Rogers* test should include as a final prong whether the defendant's use of the mark was transformative. The idea of the "transformation" of a work has been discussed in copyright law.[116] In *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, the Supreme Court considered the question of whether an orange silkscreen portrait of the late musical artist, Prince, which originated as a photograph taken by photographer Lynn Goldsmith years prior, constituted a "fair use" of Goldsmith's photograph.[117] The Supreme Court specifically only considered the question of whether the lower court correctly held that the first factor of the fair use analysis—the purpose and character of the use—weighed in Goldsmith's favor.[118] Part of the fair use analysis in copyright law is considering the "purpose and character" of the use.[119] This factor asks whether an allegedly infringing use simply supersedes an original creation or instead has a "further purpose or different character" than the original work by adding something new.[120] The Court stated that this is a matter of degree and the degree of difference has to be weighed against other considerations such as commercialism.[121] A use that has a further purpose or different character is considered to be transformative.[122] The determination that a use is transformative in copyright is part of a factored analysis for fair use that ultimately weighs in favor of a finding of fair use – meaning, non-infringement. If applied to trademark law through a prong of the *Rogers* test, the consideration of transformativeness should function in a similar way in determining whether a use should receive special First Amendment protections so as not to be considered trademark infringement.

To return to the example of *Hermès* with new facts where Rothschild instead portrayed impoverished individuals with MetaBirkins as a social

115. Hermès Int'l v. Rothschild, F. Supp. 3d, 2023 WL 4145518, at *5 (S.D.N.Y. Jun. 23, 2023).

116. *See* Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023).

117. *Id.* at 525.

118. *Id.* at 525.

119. *Id.*

120. *Id.* at 528.

121. *Id.* at 525.

122. *See Warhol*, 598 U.S. 508 at 529.

commentary, with the added imagery, a use that appears this way would be potentially transformative. This inquiry into the transformativeness of a work, in effect, would go one step further than the artistic relevance prong to require something more than above zero for an alleged infringement to be permissible as free expression. The current *Rogers* test does not go far enough to consider consumer confusion as part of the "explicitly misleading" prong because of its varied application across circuits. If a work has been sufficiently transformed, consumers are much less likely to be confused or deceived as to the mark's source, even if the mark references in some capacity the mark of another. In borrowing a concept from copyright law—transformative use—the *Rogers* test would allow courts to be better equipped to consider artistic expression without having to contort to consider the artistic nature of a work beyond the scope of what the court reasonably should. This consideration would also further protect the interests of artists, consumers, and trademark owners alike.

Much of the success of the modernization of society has hinged upon adapting to the advent of new technologies.[123] Technological innovation has provided society with new ways to interact with each other including expressing artwork, communicating, sharing ideas, and protecting our personhood through the invention of the Internet, televisions, cellphones, social media platforms, and more. Many U.S. laws were enacted before the technologies to which they would apply were invented—and the drafters of such laws could not have foreseen the extent to which such laws would eventually come to regulate.[124] This has been seen in many legal areas such as criminal law, privacy law, and government regulation.[125] Even in the *Rogers* test, there has been mobility in what it has applied to. In *Rogers*, the issue was a film title, but the holding has been applied to all expressive works.[126] Recent NFT infringement cases provide another opportunity for the law to be interpreted in a way that is consistent with the goals of not only trademark law, but society.

In turning the *Rogers* test into a five-factored analysis instead of a two-factored analysis, courts would have clearer guidance to follow that more holistically and precisely balances the interests of trademark owners in protecting their marks and being free from unfair competition, the public's interest in free expression, and the interests of consumers in not being deceived or confused by the marks displaying goods and services on the market.

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123. *See generally*, *The Ideas That Inspire Us*, HARV. BUS. REV. (2022), https://hbr.org/2022/11/the-ideas-that-inspire-us [https://perma.cc/L9CE-6G3E].

124. *See, e.g.*, Carpenter v. United States, 585 U.S. 296, 309-16 (2018) (answering the question of how to assess a new phenomenon under the Fourth Amendment and holding that an individual's cell site records can warrant Fourth Amendment protection from an unreasonable search).

125. *See, e.g.*, *Carpenter*, 585 U.S. 296 at 309; Y.G. v. Jewish Hosp. of St. Louis 795 S.W.2d 488, 491 (Mo. Ct. App. 1990); Olmstead v. U.S. 277 U.S. 438, 477-78 (1928).

126. *Rogers*, 875 F.2d at 999.

### *D. The Potential Impact of a Modified* Rogers *Test*

How would the modified *Rogers* test impact interested parties? To start with digital artists and NFT creators, by understanding that the *Rogers* analysis would apply to them in any trademark infringement suit, creators would be incentivized to ensure that their creation does not satisfy the elements of the test so that their mark is free to exist, be marketed, bought and sold in commerce. For example, an NFT creator could exercise due care in selecting a mark and establish a reputation through use in such a way that would provide ample evidence of its artistic nature as an expressive work. Trademark holders would be impacted by the application of the modified *Rogers* test by gaining additional criteria to consider when utilizing marks or expanding marks into new areas. Trademarks are often used in promotional material, on products themselves, or on social media channels. Each of these areas where trademarks are commonly seen can be digitized through web promotional materials, digital images of products online where they may be sold, or otherwise. With the additional elements, the *Rogers* test would be well-equipped to assess works in all spaces in a rapidly evolving digital era.

With a clear test for artists and businesses to understand, the average consumer can develop a strong sense of trust in the authenticity and source of the goods they may purchase or services they may receive. Consumers are what keep businesses moving forward as they buy, sell, and trade products and services on the market. Without consumers, businesses could not progress or persist, and thus a goal of any legislation or decision of the court in this context should, at least in part, consider consumers.

If an allegedly infringing use of another's mark fails to meet the *Rogers* test standards of having artistic relevance and being explicitly misleading, consumers will also suffer alongside the party whose marks are being potentially infringed. In a world with a well-developed *Rogers* test, consumers generally will benefit because some of them will be attracted to the artistic expression allowed in a work. If that kind of expression isn't allowed, then the artistic expression is not available to them. A key goal of trademark law is to prevent consumer deception and confusion.[127] By regulating creations that purport to be artistic under the modified *Rogers* framework, consumers will benefit greatly.

Some argue that the *Rogers* test cannot be stretched to encompass all things that show any remote sense of artistic expression.[128] On June 8, 2023, The Supreme Court published its decision and opinion in a case between the whiskey company, Jack Daniel's and VIP Products, LLC, a company that has produced a parody dog toy that reads "Bad Spaniels."[129] The American Intellectual Property Association submitted in brief, an argument against applying the *Rogers* test to the dog toy because the toy's "humorous message" does not fit the category of being an expressive work to be considered artistic.[130] This argument inadvertently highlights the shortcomings of the

127. *See Inwood Lab'ys Inc.*, 456 U.S. at 849.

128. *Jack Daniel's Props., Inc.*, 599 U.S. at 144.

129. *See generally*, Brief for American Intellectual Property Law Association as Amicus Curiae supporting Petition for Writ of Certiorari at 3, *VIP Prods. LLC*, 953 F.3d 1170.

130. *Id.*

artistic relevance prong of *Rogers*. The threshold to meet the artistic relevance prong of the *Rogers* test is low and need only be above zero.[131] Through the additional prong that would consider if the use of another's mark is transformative, more than "relevance" serves as a qualifying factor in allowing potentially infringing works to exist in the market. Society cherishes the ability of new entrants to come into the market and being able to sell products and offer services. Adding elements to the *Rogers* test would provide for a precise holding in each case that ensures little to no instances of the permission of what could be considered blatant infringements.

Another argument that may be advanced against the *Rogers* test is that it abandons the likelihood of confusion factors. However, this is misleading as some courts reference the likelihood of confusion test as part of the analysis under *Rogers*. Including the intent of the alleged infringer as well as the likelihood of expansion into other markets as additional prongs further remedies the concern around abandonment of the likelihood of confusion test as factors would be a part of the direct analysis on a case-by-case basis for infringement.

Lastly, courts would benefit from a modified *Rogers* test. As it stands, courts differ on whether and how they apply the *Rogers* framework to trademark infringement cases. With a clear five-factor test that considers (1) the defendant's intent in use of the mark, (2) the mark's artistic relevance, (3) whether the use of the mark is transformative, (4) whether the mark is "explicitly misleading", and (5) defendant's likelihood of expansion into other markets, courts would be able to dissect an alleged infringement more precisely in order to achieve fairer results in each case. The five-factor analysis resolves the imbalance posed by the almost always-satisfied "artistic relevance" prong and provides further considerations for the rights of trademark owners who find themselves in litigation over alleged infringements of their marks. Each factor in the modified *Rogers* test is of benefit to almost anyone. Trademark law seeks to protect citizens as does the First Amendment but, in this context, the two can be at odds. By adding additional factors to the *Rogers* test, the balance is easier to achieve between the interests the two seek to protect as the concerns behind free expression and the concerns behind protecting trademark rights are more directly addressed.

## IV. CONCLUSION

In the thirty-five years since *Rogers v. Grimaldi* was decided, courts have faced conflicts with the bounds of the *Rogers* test for balancing the rights protected by trademark law with those guaranteed by the First Amendment of the U.S. Constitution. The circuit split in the approaches used on the test's two prongs further supports the call for adjustments to the test. In thirty-five years, applications of *Rogers* have been challenged and the test itself has been found to apply to many marks and artistic works which were not outlined in

131. *See Rogers*, 875 F.2d at 999.

the original case decision. This speaks to the evolution of law as society evolves. As new technologies are created and consumers continue to seek new forms of media, goods, and services in the digital space, further trademark infringement suits are bound to arise. On the horizon are considerations about generative artificial intelligence text-to-image systems, how trademark infringement can occur and how it should be analyzed in that realm. To address those claims, a universally adopted test is needed to ensure fairer, more consistent results for the next thirty-five years (and beyond) than have been seen in the last thirty-five years. As some circuits have not addressed an application of the *Rogers* test, there could be further discussion on the applicability of the test or a further split amongst the circuits. The current *Rogers* test provides a sturdy foundation upon which to build a well-structured home that would be a complete test for all federal circuits to utilize in trademark infringement litigation for years to come. As society moves in the direction of change, it is time for the *Rogers* test to do the same.

# Living in Private: The Fourth Amendment and Perpetual Electronic Surveillance

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TABLE OF CONTENTS



* J.D., May 2024, The George Washington University Law School. Associate, Federal Communications Law Journal, Volume 76. B.A., 2019, Political Science, Haverford College. I would like to thank the Volume 76 FCLJ Editorial Board as well as Professors Ethan Lucarelli and Renée Lettow Lerner for their guidance during the publication process. I would also like to thank my incredible family for their endless support and love.

# I. INTRODUCTION

The perennial debate over the balance between public safety and personal privacy presents vexing questions about the scope of governmental authority. Should the government be able to watch a person in public forever even if there is no reason to think they are doing anything illegal? What if they decide to monitor the outside of someone's home for months on end, around the clock, hoping to catch them doing something suspicious that will allow officers to apprehend them or search their home?[1]

A central legal question in the 21st Century has been how to understand the Fourth Amendment's protections in the context of the digital age. The Supreme Court and the lower federal courts have frequently grappled with how to apply the Fourth Amendment to modern surveillance technologies, which have given the government capabilities far beyond anything the founding generation could have imagined.[2][3] Such technologies include drones,[4] stationary pole cameras,[5] and artificial intelligence systems that aggregate data collected from street cameras and license plate readers.[6]

The Supreme Court has said that one of the Fourth Amendment's goals is "to place obstacles in the way" of police surveillance that is overly pervasive.[7] Despite this sentiment, the Court has been reticent to create clear rules and standards to govern uses of advanced surveillance technologies.

It is time for the Supreme Court to develop a new test to define when surveillance becomes too widespread, detailed, and targeted such that even limiting deployment to public areas encroaches on an individual's right to privacy. The proposed test would be two-pronged. The first prong of the test should be based around factors the Supreme Court has articulated in previous Fourth Amendment cases where the technology: (1) creates a historic record of information that can be stored and perpetually utilized; (2) gives government agents the ability to monitor persons or areas with superhuman precision; and (3) is prolonged and complete to the point where they are constructively treating the person as the target of a criminal investigation. If law enforcement seeks to use technology that meets the factors of this test, then at minimum a warrant supported by probable cause should be required. The second prong of the test would be that if one of the factors above is lacking, but the technique at issue is so extreme in some respect that it intrudes upon an individual's expectation of privacy in the totality of their movements, then it would similarly require a warrant supported by probable cause.

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1. *See generally* United States v. Moore-Bush, 36 F.4th 320 (1st Cir. 2022).
2. *See* U.S. CONST. amend. IV.
3. *See generally* Riley v. California, 573 U.S. 373 (2014) (ruling that the search incident to arrest of a cellphone was unlawful under the Fourth Amendment).
4. *See generally* Brief for Center on Privacy & Technology at Georgetown Law as Amicus Curiae Supporting Appellant's Petition for Rehearing *En Banc*, Leaders of a Beautiful Struggle, et. al., v. Balt. Police Dep't, 979 F.3d 219 (4th Cir. 2020) (No. 20-1495), 2020 WL 7024181.
5. *See generally Moore-Bush*, 36 F.4th at 320.
6. *See* United States v. Lambert, No. 21-CR-00585 (VEC), 2022 WL 2873225, at *1 (S.D.N.Y. July 21, 2022).
7. *See* United States v. Di Re, 332 U.S. 581, 595 (1948).

This Note examines a current gap in the Supreme Court's Fourth Amendment jurisprudence, which deals with the use of these technologies to track individuals in public areas. Section II will discuss the history of Fourth Amendment jurisprudence, how it has been applied to electronic surveillance, and the live legal issues that form the basis of this Note's analysis. First, in Section II-A the Note will discuss some of the modern technologies that have complicated existing privacy law jurisprudence. Next, Section II-B will delineate the governing test used to determine when government actions violate a person's right to privacy. Section II-C through II-E will discuss the Supreme Court's applications of this test to forms of electronic surveillance. Finally, Section II-F will explore the most recent lower court decisions and the conflicting nature of their rulings pertaining to the lawfulness of various forms of electronic surveillance. Section III will restate the problem presented by advanced forms of surveillance and explain the two-prong test this Note proposes for courts to use in evaluating governmental surveillance techniques. Section IV will restate the conclusions of this Note, highlighting the need for a new privacy test for modern surveillance technologies.

## II. BACKGROUND

### *A. The Evolution of Surveillance Techniques*

Surveillance techniques, as they have advanced, can generally be described as improving two modes of surveillance capability: (1) how much information can be obtained about a target and (2) how many targets can be monitored at once.[8] Surveillance techniques are obviously not developed by legal professionals, and often Fourth Amendment doctrine can be slow to adapt to technological advances utilized by law enforcement.[9]

While there are too many technologies to list individually in this section, the surveillance technologies that have received the most attention from courts, and those with which this Note is concerned, are best described as "enhanced audio-visual surveillance" or "persistent video surveillance." These terms collectively refer to technologies that allow law enforcement to observe persons, hear communications, and monitor locations that they would

8. *See generally* Anne T. McKenna & Clifford S. Fishman, *Wiretapping and Eavesdropping: Surveillance in the Internet Age* § 30:1 (3d ed. 2007) ("Historically, it has made sense to address 'enhanced visual' surveillance and 'other forms of surveillance technology' through focus on specific forms of visual surveillance technology such as artificial illumination, aerial surveillance, image magnification, video surveillance, unmanned aerial vehicles or drones, satellites, and so on."); *see also* Anthony P. Picadio, *Privacy in the Age of Surveillance: Technological Surveillance and the Fourth Amendment,* 90 PA. B.A. Q. 162, 176-79 (2019) (describing forms of surveillance and their application in modern law enforcement entities).

9. *See* McKenna & Fishman, *supra* note 8, § 30.2 (noting that "[t]oday's cyber era . . . poses increasingly complex legal questions that do not fit easily within the Supreme Court's existing Fourth Amendment jurisprudence").

ordinarily not be able to, either because of limited human capabilities or limited law enforcement resources generally.[10]

Another key development in surveillance technology is the ability of security systems to efficiently aggregate and filter data from multiple sources, in order to identify patterns of behavior and alert police to potential investigative targets, such as the many street cameras that populate urban areas or automatic license plate readers.[11] This use of automated systems to uncover suspicious behaviors has been analyzed as a potential Fourth Amendment violation in and of itself.[12] For the purposes of this Note, it is simply relevant in illustrating that the aggregation of surveillance data presents and will continue to cause significant concerns as data collection systems improve in capacity and become more widely distributed.[13]

"Big Data"[14] analytics and Artificial Intelligence (AI)[15] systems, which analyze the information gathered by these tools, have been shown to have concerning applications with respect to social media platforms and law enforcement.[16] Two examples exemplify these emerging issues. The first is a cyber-surveillance tool called Geofeedia, which is an A.I. platform service that uses analytics to track social media posts by location; the tool does this through "a process known as 'geofencing' to draw a virtual barrier around a particular geographic region," and is able to collect and analyze public social media posts within that demarcated area.[17] This tool has been used by law

10. *See id.* (describing forms of surveillance such as "aerial surveillance (planes, UAVs, and satellites) . . . pole cameras, [and] video surveillance of private locations"); *see also* Christopher Slobogin*, Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 216 (2002).

11. *See* Mariana Oliver & Matthew B. Kugler, *Surveying Surveillance: A National Study of Police Department Surveillance Technologies*, 54 ARIZ. ST. L.J. 103, 104 (2022) (describing use of "aggregation of automated license-plate-reader data" to identify rioter from the January 6th insurrection).

12. *See generally* Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL'Y REV. 15 (2016).

13. *See generally* Chris Gelardi, *Inside D.C. Police's Sprawling Network Of Surveillance*, THE INTERCEPT (Jun. 18 2022 6:44 AM), https://theintercept.com/2022/06/18/dc-police-surveillance-network-protests/ [https://perma.cc/H9NG-4U6H].

14. While "Big Data" can be a nebulous term, a good definition is that it "is a generalized, imprecise term that refers to the use of large data sets in data science and predictive analytics." Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. REV. 93, 96 (2014).

15. *See generally What is artificial intelligence (AI)?*, IBM, https://www.ibm.com/topics/artificial-intelligence [https://perma.cc/ZWM2-CWR5] (last visited March 28, 2023).

16. *See* Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1773-76 (2015) (discussing various applications of data analytics programs by law enforcement).

17. Margaret Hu, *Cybersurveillance Intrusions and an Evolving Katz Privacy Test*, 55 AM. CRIM. L. REV. 127, 128-29 (2018). Geofeedia did this by aggregating data from the top social media sites (Facebook, Twitter, Instagram, etc.), identifying individuals who had posted within an area during a selected timeframe.

enforcement, and has sustained public scrutiny and criticism for its use in monitoring domestic protests in the United States.[18]

The second example of a collaboration tool between data analytics technology and law enforcement is "Future Attribute Screening Technology" (FAST). FAST, which has primarily been developed by the Department of Homeland Security (DHS), is another data analytics tool that filters "physiological and behavioral signals with the goal of identifying 'malintent': an individual's predilection for disruptive or violent behavior."[19] FAST was developed post-9/11 to aid law enforcement in identifying security threats by utilizing complex algorithms to identify vital signs (heart rate, eye movements, respiratory quality, etc.) associated with bad intent, deception, and malice.[20] These technologies have not been litigated to any significant extent by the courts, but even if they were, for reasons discussed below, they would likely not be regulated by current Fourth Amendment doctrine. *See infra* § III.A.

A final area that is worthy of note is facial recognition technology. Facial recognition technology allows law enforcement to compile facial images from driver's license records, previous bookings, and social media accounts, and then use computer algorithms to effortlessly compare them to monitor and identify individuals in real time.[21] While it may surprise some readers, facial recognition has existed since the beginning of this century and was first deployed by law enforcement agents in England.[22] As of the writing of this Note there has been no prominent case law discussing the legality of these systems in the criminal context, and action pushing back against them has largely been either through legislation or civil suits.[23] Given the potential for abuse that this catalog of personal information could pose, it is likely to be the subject of litigation in the near future.

### *B. The Fourth Amendment's Protections*

The Fourth Amendment to the United States Constitution provides that searches and seizures by the government generally require a warrant supported by probable cause.[24] If a governmental action is considered a search, it requires a showing of probable cause by law enforcement that a

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18. *See generally* Jonah Engel Bromwich, Daniel Victor & Mike Isaac, *Police Use Surveillance Tool to Scan Social Media, A.C.L.U. Says*, N.Y. TIMES (Oct. 11, 2016), https://www.nytimes.com/2016/10/12/technology/aclu-facebook-twitter-instagram-geofeedia.html?_r=0 [https://perma.cc/M8M8-S85S].

19. *See* Hu, *supra* note 16, at 129.

20. *See id.* at 136; *see also Privacy Impact Assessment For The Future Attribute Screening Technology (Fast) Project,* U.S. DEP'T OF HOMELAND SEC., at 2 (Dec. 15, 2008), https://www.dhs.gov/sites/default/files/publications/privacy_pia_012-s%26t_fast-2008.pdf [https://perma.cc/2SSS-CEAP?type=image].

21. *See* Harvey Gee, *Surveillance State: Fourth Amendment Law, Big Data Policing, and Facial Recognition Technology*, 21 BERKELEY J. AFR.-AM. L. & POL'Y 43, 76-78 (2021).

22. *See* Christopher Benjamin, *Shot Spotter and Faceit: The Tools of Mass Monitoring*, 6 UCLA J.L. & TECH. 2 (2002).

23. *See, e.g.*, Gee, *supra* note 21, at 78-82.

24. *See* U.S. CONST. amend. IV.

crime has been or will be committed and that the search is needed to uncover evidence of that crime.[25] Otherwise the governmental action is unconstitutional and evidence gathered from the unlawful search is generally suppressed.[26] This is the central policy question underlying the debate over the reach of the Fourth Amendment: what government actions are so intrusive to a person's privacy that they require a showing of probable cause to support them?

Until the mid-twentieth century, the Fourth Amendment primarily protected private property against physical trespasses and seizures of a person's effects.[27] The came *Katz v. United States*, where the Supreme Court made a significant shift in Fourth Amendment jurisprudence by holding that it did not simply protect people's property from trespass by government agents, but also protected their personal privacy even when no physical trespass occurred.[28] In his concurrence, Justice Harlan outlined a two-pronged test for determining when the government's actions should be considered a "search" under the Fourth Amendment.[29] Harlan wrote that the fundamental questions for applying Fourth Amendment protection are whether an individual first "exhibited an actual (subjective) expectation of privacy [in a place or thing] and, second, that the expectation be one that society is prepared to recognize as reasonable."[30] Harlan's test, which has come to be known as the "Katz Test" or the "Reasonable Expectation of Privacy Test," has been the dominant method used to determine whether a search has occurred under the Fourth Amendment, and is invariably invoked in cases that involve electronic surveillance.[31]

*Katz* remains the dominant test in the general body of Fourth Amendment jurisprudence, but it has invariably sustained criticism in its long

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25. While it is not relevant to the subject matter of this note, it bears mention that a multitude of exceptions to the warrant requirement have been created by the Supreme Court over time. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 153 (1925) (creating the automobile exception); Nix v. Williams, 467 U.S. 431 (1984) (establishing the inevitable discovery exception for evidence collected from a warrantless search); Brigham City v. Stuart, 547 U.S. 398, 402 (2006) (applying the exigent circumstances exception to justify warrantless entry of a home).

26. *See* United States v. Bershchansky, 788 F.3d 102, 112 (2d Cir. 2015) ("To safeguard Fourth Amendment rights, the Supreme Court created 'an exclusionary rule that, when applicable, forbids the use of improperly obtained evidence at trial.'") (quoting Herring v. United States, 555 U.S. 135, 139 (2009)).

27. *See* Orin S. Kerr, *Katz as Originalism*, 71 DUKE L.J. 1047, 1079 (2022).

28. *See* Katz v. United States, 389 U.S. 347, 353 (1967) (holding that the government's warrantless eavesdropping of the defendant's conversation inside a phone booth constituted a search because he had manifested a subjective expectation of privacy in the conversation he was having in the phone booth).

29. *Id.*

30. *See id.* (internal marks omitted).

31. *See, e.g.*, Margaret Hu, *Cybersurveillance Intrusions and an Evolving Katz Privacy Test*, 55 AM. CRIM. L. REV. 127, pincite (2018) ("For 50 years, *Katz v. United States* has defined the federal courts' approach to evaluating what is a 'reasonable' law enforcement action under the Fourth Amendment."); Florida v. Jardines, 569 U.S. 1, 12 (2013) (Kagan, J., concurring) (noting that while the majority resolved the case under the physical trespass rule, the *Katz* expectations of privacy test could also apply to reach the same result).

history of use.[32] One of the reasons is that defining an expectation of privacy is difficult given the endless variety of factual scenarios for the court to consider.[33] The *Katz* test was based on the idea that where it is reasonable for citizens to *expect* privacy, the Fourth Amendment should protect that privacy.[34] A person sitting inside their home should expect no one is watching them, and therefore, the government may not take steps to observe that individual within their home unless there is probable cause to believe that doing so will uncover a crime.

### *C. The Supreme Court's Electronic Surveillance Cases*

Two Supreme Court cases considering the legality of electronic surveillance prior to *Carpenter* are critical to understanding the difficult questions underlying modern Fourth Amendment jurisprudence. The first of these cases is *United States* v. *Knotts.*[35] In *Knotts*, the Court held that the government's clandestine placement of a radio transmitting beeper in a package the defendant subsequently put inside of his car was not a search.[36] The Court's holding was based in part on the fact that the beeper principally allowed the government to track the defendant on public roads, where there would be no expectation that a person's movements would be private.[37] The Court emphasized the minimal information the radio transmitter could provide and distinguished it from surveillance that could reveal more detailed varieties of information.[38]

The second key case in the Supreme Court's Fourth Amendment jurisprudence on electronic tracking came in *United States* v. *Jones*.[39] In *Jones*, the court confronted the question of whether the attachment of a GPS tracking device to a car is a search under the Fourth Amendment. The D.C. Circuit, which ruled on the case before the Supreme Court granted certiorari, distinguished *Knotts*, finding that the *totality* of Jones' movements was *not*

32. *See Kerr*, *supra* note 27 at 1048 ("Over fifty years later, the *Katz* expectation of privacy test has come under widespread attack. No one likes *Katz*, it seems. Everyone wants to replace it with something else, even if no one agrees on what its replacement should be.").

33. *Compare* Florida v. Riley, 488 U.S. 445, 448-50 (1989) (holding that aerial surveillance of the curtilage of a defendant's home by a helicopter hovering at 400 feet above the ground did violate any reasonable expectation of privacy) *with* Bond v. United States, 529 U.S. 334 (2000) (holding that police squeezing the exterior of a bag to detect drugs did violate the defendant's reasonable expectation of privacy in their belongings).

34. *See Bond*, 529 U.S. at 351 (explaining that "[T]he Fourth Amendment protects people, not places. What a person *knowingly exposes* to the public, even in his own home or office, is not a subject of Fourth Amendment protection.") (emphasis added).

35. United States v. Knotts, 460 U.S. 276 (1983).

36. *See id.* at 285.

37. *See id.* at 281 (holding that a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another").

38. *See id.* at 284 (noting the government made "limited use . . . of the signals from this particular beeper").

39. United States v. Jones, 565 U.S. 400 (2012).

exposed to the public, and thus merited protection under the *Katz* "reasonable expectations of privacy" test.

> [T]he totality of Jones's movements over the course of a month—was not exposed to the public: First, unlike one's movements during a single journey, the whole of one's movements over the course of a month is not actually exposed to the public because the likelihood anyone will observe all those movements is effectively nil. Second, the whole of one's movements is not exposed constructively even though each individual movement is exposed, because that whole reveals more—sometimes a great deal more—than does the sum of its parts . . . Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble . . . Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one's not visiting any of these places over the course of a month. The sequence of a person's movements can reveal still more; a single trip to a gynecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story. A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.[40]

The D.C. Circuit opinion in *Maynard* reflected a nuanced view of the *Katz* test, that the government may not make a "divide and conquer" Fourth Amendment argument by suggesting all its actions taken individually were not a search, so their use of the tracker was lawful; rather, the question the D.C. Circuit asked was whether, taken together, the actions taken by the government harmed a reasonable privacy interest of the defendant.[41] The case was then appealed to the Supreme Court, which took a different route to reach the same result.

In *Jones*, the Supreme Court avoided settling many of these difficult questions. Instead, it simply ruled it was a search to attach a tracker to the defendant's car because that required trespassing on his effects.[42] However, in the concurrences to the opinion five justices espoused or supported some variant of the view that warrantless GPS tracking of a vehicle, even if done without physical trespass upon the vehicle itself, could be considered a search

40. *See* United States v. Maynard, 615 F.3d 544, 558-62 (D.C. Cir. 2010), *aff'd in part sub nom Jones*, 565 U.S. 400 (cleaned up).

41. *Maynard*, 615 F.3d at 561.

42. *See Jones*, 564 U.S. at 404.

under the *Katz* "reasonable expectation of privacy" test.[43] The majority did note that many "thorny problems" could lie ahead with respect to expectations of privacy in electronic records, but decided to resolve the case on a more narrow ground by using the trespass rule.[44] The decision of *Jones* was unanimous, but the concurrences reflected a diverse array of perspectives as to how to think about an individual's privacy in the totality of their movements, and set the stage for further cases wrestling with how to apply the Fourth Amendment to electronic surveillance methods.[45]

### *D. Permutations of* Katz*: The Mosaic Theory and Third-Party Doctrine*

Given the expansive nature of the *Katz* test, many "sub-doctrines" have been suggested for or created by courts to expound upon it; two such doctrines will be discussed here as they are useful in delineating the modern surveillance issues this Note attempts to address: The Third-Party Doctrine the Mosaic Theory.

The first outgrowth of the *Katz* test critical to understanding the caselaw regarding privacy is the Third-Party Doctrine. The Third-Party Doctrine generally holds that records of individuals which are held by third parties are not subject to the warrant requirement.[46] The Third-Party Doctrine was created by the Supreme Court to distinguish information that individuals solely possess and information that individuals give over to third parties (and, thus, over which they have reduced privacy rights). For example, in *Smith v. Maryland*, the Supreme Court held that a law enforcement officer's use of a pen register to record all the numbers dialed from a person's phone was not a search.[47] The Supreme Court, for about forty years, created few substantial limits on the Third-Party Doctrine, until they carved out one notable exception to it in 2018 discussed in the next subsection.

The second sub-doctrine that emerged as a gloss on the *Katz* test came after the Court decided *Jones* and is known as the "Mosaic Theory". The Mosaic Theory was introduced as a theory to explain the rationales behind the concurrences of the justices in *Jones* who were skeptical of warrantless long-term GPS monitoring, irrespective of the placement of the tracker on the car.[48] The exact origins of this theory are unclear, but it is most closely associated

43. *See generally id.* at 413-18 (Sotomayor, J., concurring); *id.* at 419-31 (Alito, J., concurring, joined by Ginsburg, Breyer, and Kagan, JJ.).

44. *See id.* at 412-13.

45. *See, e.g.*, *Jones*, 565 U.S. at 415-16 (Sotomayor, J., concurring) (noting that the Fourth Amendment may be implicated when police utilize "a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations").

46. *See* Smith v. Maryland*,* 442 U.S. 735, 743-44 (1979) (holding that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties").

47. *See id.*; *see also* United States v. Miller, 425 U.S. 435 (1976) (holding there was no reasonable expectation of privacy in financial records held by a bank).

48. *See* Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012).

with Professor Orin Kerr.[49] The Mosaic Theory's central claim is that courts can, and should, analyze a "collective sequence" of government actions to ascertain whether the Fourth Amendment has been violated.[50] The subsequent axiom of the Mosaic Theory is that if through prolonged surveillance law enforcement allows the government a kind of information about an individual that could only be gleaned from constant monitoring, that may implicate a person's Fourth Amendment interests.[51]

There are a few problems with the Mosaic Theory. First, the proposition it stands for is not particularly remarkable. Putting together individual pieces of information that, when combined, reveal an individual is engaged in a criminal enterprise, constitutes the essence of investigatory work; thus, an expansive view of the Mosaic Theory could render completely normal police practices unconstitutional.[52] Second, the Mosaic Theory does not explain how widely the scope of the analysis should sweep. That is, how many government actions need to be analyzed together, and are there any ways to distinguish one action from others conducted during the same period? Finally, the Mosaic Theory is devoid of any particularized or objective factors that can be effectively administered by courts. Therefore, it is not an established or sufficient alternative to the *Katz* test, or for the test this Note proposes for advanced surveillance technologies. However, it is important to note as a background principle for the proposition that government actions can and sometimes should be analyzed collectively rather than individually.

### *E. The Supreme Court's New Understanding in* Carpenter

The most recent Supreme Court case that grappled with the issue of warrantless searches of electronically maintained records was similar to *Jones* in that it raised more questions than it answered. In 2018, the Supreme Court decided *Carpenter* v. *United States*, in which it held that Cell-Site Location Information (CSLI), was protected against warrantless searches by the government.[53] *Carpenter* represented a seismic shift in the Court's understanding of how to apply the protections of the Fourth Amendment in the digital age. The relevant facts were that the government, while investigating a series of thefts, obtained court orders under the Stored Communications Act for the CSLI of the suspect's cell phones.[54] The government argued that CSLI is not controlled or maintained by the user of

49. *See id.* at 313.
50. *See id.* at 320-21.
51. *See id.* at 326-27.
52. *See id.* at 328-29.
53. 585 U.S. 296, 316-17 (2018).
54. *See id.* at 296. CSLI refers to time-stamped records a cellphone generates when it connects to radio towers. A cellphone generates this information automatically, and the records can be used in many instances to track the movements of an individual. In *Carpenter*, the government obtained almost thirteen thousand data points cataloging the suspect's movements over one hundred and twenty-seven days.

the cellphone and is, therefore, a third-party record (held by the service provider) in which the user has no reasonable expectation of privacy.[55]

The Court described the ubiquitous nature and extent of information kept on cellphones and concluded that the warrantless collection of CSLI was a violation of the Fourth Amendment.[56] Chief Justice Roberts, writing for a five-justice majority, described the "detailed, encyclopedic, and effortlessly compiled" nature of CSLI data, which was key to their analysis that the government's use of this data was concerning.[57] The majority found the CSLI data was entitled Fourth Amendment protections, in part because it gives law enforcement the ability to track any individual who owns or even possesses a cellphone without the need to "know in advance whether they want to follow a particular individual."[58] The majority concluded with a flourish:

> We decline to grant the state unrestricted access to a wireless carrier's database of physical location information. In light of the *deeply revealing nature of CSLI*, its depth, breadth, and comprehensive reach, and the *inescapable and automatic nature of its collection*, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The Government's acquisition of the cell-site records here was a search under that Amendment.[59]

The decision was fractious and generated several separate dissents that raised many issues regarding the Supreme Court's Fourth Amendment jurisprudence and its applicability to the realm of electronic surveillance.[60] These issues will be discussed in depth in Section III.

### *F. Post*-Carpenter *Lower Courts*

In the four years since *Carpenter* was decided, lower courts have generally limited the application of its reasoning to CSLI, declining to extend Fourth Amendment protection to other types of electronic data.[61] However, in that time a number of lower courts have wrestled with how to understand

55. *See id.* at 313-14 (describing the government's argument that "the third-party doctrine governs this case . . . [because CSLI should be categorized as] 'business records' created and maintained by the wireless carriers").

56. *See id.* at 300-02; *Cf. Riley*, 573 U.S. at 393-94 (noting the "quantitative and . . . qualitative" differences between cellphones and other items a person possesses).

57. *See Carpenter*, 585 U.S. at 312.

58. *See id*.

59. *Carpenter*, 585 U.S. at 320 (emphasis added).

60. Justice Gorsuch in a lengthy dissent called the *Katz* test a way for the Supreme Court "to protect privacy in some ethereal way dependent on judicial intuitions." *See id.* at 392 (Gorsuch, J., dissenting). Justice Gorsuch dissented from the reasoning, not the result, opting to propose a textualist view of the Fourth Amendment whereby CSLI could be protected as a bailment. *See* Kerr, *Katz as Originalism*, *supra*, note 27 at 1089-92.

61. *See, e.g.*, United States v. Brown, 627 F. Supp. 3d 206 (E.D.N.Y. 2022) (denying a motion to suppress vehicle GPS data, in part because the privacy interests at play in the case are not the same as they were in *Carpenter*).

*Carpenter* and whether to extend it to factual contexts outside of CSLI. These will be examined in turn, as each of them makes important points about how this case has been extended or limited.

### 1. Remote GPS Tracking of Vehicles: *United States v. Diggs*

In 2019, less than a year after *Carpenter* was decided, a federal district court in Illinois held it was a search under the Fourth Amendment to access the historical GPS data of a car the defendant did not own.[62] The court held specifically that under the *Katz* test framework, the defendant had a reasonable expectation of privacy in his movements in the car, even though it was not an item he owned.[63] The court also explicitly invoked *Carpenter* to dismiss the government's argument that the third-party doctrine precluded the defendant from having standing to challenge the use of the data from his wife's car.[64] The government did suggest that the fact the GPS data captured the defendant's wife's movements as well as the defendant's reduced his privacy interest in it, but the district court considered that argument to be forfeited.[65] As of this writing, no circuit court has adopted the reasoning of *Diggs* to establish a rule that warrantless collection of GPS data from a car not owned by a defendant violates the Fourth Amendment. However, it has had some resonance outside the Seventh Circuit and prompted some courts to discuss its application.[66]

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62. *See* United States v. Diggs, 385 F. Supp. 3d 648, 650-53 (N.D. Ill. 2019) (noting that the car at issue was registered to Diggs' wife and holding it was a violation of his rights to track with GPS data).

63. *See id.* at 651 ("[The defendant] had a reasonable expectation of privacy in his movements, as chronicled by a month's worth of GPS data tracking the vehicle he was driving.").

64. *See id.* at 653-54 (reasoning that "*Carpenter* defeats the government's third-party argument here . . . Applying the third-party doctrine to the GPS data here would require essentially the same extension of the doctrine that the [Supreme] Court rejected in *Carpenter* . . . Accordingly, *Carpenter* compels the conclusion that, given the privacy concerns implicated by the 'detailed and comprehensive record of [Diggs's] movements' captured by the Lexus's GPS tracker, 'the fact that the [police] obtained the information from a third party does not overcome [Diggs's] claim to Fourth Amendment protection.'") (internal citations omitted).

65. *See id.* at 652.

66. *See* United States v. Jackson, No. 2:21-CR-331-MHT-SMD, 2022 WL 1498191 (M.D. Ala. Mar. 15, 2022), *report and recommendation adopted,* No. 2:21CR331-MHT, 2022 WL 1491670, at *4-5 (M.D. Ala. May 11, 2022) (distinguishing *Diggs* in part by noting that the case at issue "presents a very different set of facts leading to a different result . . . The police did not aggregate historical GPS data to tell a detailed story about Jackson's movements over a period of time to link him to the rash of dollar store robberies [like in *Diggs*]. Rather, they used essentially real-time data to find a wanted car. This is a critical distinction that fundamentally distinguishes this case from Jones and Diggs."); *see also* United States v. Currie, No. 8:20-CR-00262-PWG, 2022 WL 195504, at *5-8 (D. Md. Jan. 21, 2022) (reasoning that like in *Diggs*, ownership of an item (in *Currie*, a cellphone) is not dispositive in determining whether an individual can assert a reasonable expectation of privacy over it).

### 2. Pole Cameras: *Tuggle*, *Moore-Bush*, and *Hay*

In 2021, the Seventh Circuit in *United States v. Tuggle* decided that law enforcement officers' use of stationary pole cameras on public utility poles was not a search under the Fourth Amendment.[67] Law enforcement, during the course of investigating a drug conspiracy, warrantlessly used three pole cameras to monitor the outside area of the defendant's house.[68] The court found the duration (eighteen months) concerning, but still declined to extend *Carpenter* to pole cameras.[69] This aspect of *Tuggle* shows how the *Katz* reasonable expectation of privacy test allows courts ways to let endless amounts of surveillance in places not guaranteed *per se* Fourth Amendment protection, such as the visible exterior of the home.[70]

In the Summer of 2022, the First Circuit considered whether prolonged surveillance of public areas was permissible.[71] In *United States v. Moore-Bush*, the First Circuit, sitting *en banc*, split evenly on the question of whether the government's use of a stationary pole camera, which was aimed at the front of the Defendant's house for over eight months, was a search under the Fourth Amendment.[72] That case demonstrates the continuing debate among the lower courts of how expansively to read the Supreme Court's ruling in *Carpenter* and whether they possess the institutional competence to adjudicate critical questions regarding personal privacy and the deployment of advanced digital surveillance technologies.

The Tenth Circuit considered a similar issue in *United States v. Hay*.[73] The opinion began by bluntly saying "[d]oes the Fourth Amendment permit the government to surveil a home for months on end without a warrant? This case requires us to decide."[74] *Hay* involved the investigation of a veteran's disability status; As part of their investigation, agents "installed a pole camera on a school rooftop across the street from Mr. Hay's house. The camera was remote-controlled and activated by motion, and it recorded near constant footage of Mr. Hay's house as visible from across the street. All told, the camera captured 15 hours of footage per day for 68 days."[75] Mr. Hay was

67. *See* United States v. Tuggle, 4 F.4th 505 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1107 (2022).

68. *See id.* at 511 ("The government installed three cameras on public property that viewed Tuggle's home. Agents mounted two cameras on a pole in an alley next to his residence and a third on a pole one block south of the other two cameras. The first two cameras viewed the front of Tuggle's home and an adjoining parking area. The third camera also viewed the outside of his home but primarily captured a shed owned by Tuggle's coconspirator and codefendant.").

69. *See id.* at 526-27.

70. *See id.* at 514 (Reasoning that surveilling the exterior of the defendant's home with pole cameras is not a search because "Tuggle knowingly exposed the areas captured by the three cameras. Namely, the outside of his house and his driveway were plainly visible to the public. He therefore did not have an expectation of privacy that society would be willing to accept as reasonable in what happened in front of his home.").

71. *See generally* United States v. Moore-Bush, 36 F.4th 320 (1st Cir. 2022).

72. *See Moore-Bush*, 36 F.4th at 321-60, 361-72.

73. 95 F.4th 1304 (10th Cir. 2024).

74. *Id.* at 1308.

75. *Id.*

convicted of ten counts of stealing government property in violation of 18 U.S.C. § 641 and six counts of wire fraud in violation of 18 U.S.C. § 1343.

Hay challenged the conviction in part on Fourth Amendment grounds, claiming that like the defendant in Carpenter, he had a reasonable expectation of privacy in the totality of his movements coming and going from his home. Hay argued on appeal that the government was able to "paint[] an intimate portrait of [his] personal life," including "when he entered and exited his home; who visited him and his family," and "what [he] did on his own front porch."[76] The 10th Circuit rejected this argument, noting that "No circuit court has concluded that extended video surveillance of a house is a search under *Carpenter*."[77] It did not matter that the length of monitoring was that long, or that the porch, which would be considered the curtilage of the home, was monitored. *Hay* represents the last word on this subject, and encapsulates the view of the lower federal courts that *Carpenter* is a narrow decision and its holding sweeps no more broadly than its facts.

### 3. Surveillance from the Sky: *LOABS v. Baltimore*

In 2021, the Fourth Circuit considered the constitutionality of an aerial surveillance program that was used by the Baltimore Police Department.[78] The program, known as the Aerial Investigation Research (AIR) program, was described by the Fourth Circuit as follows:

> The AIR program uses aerial photography to track movements related to serious crimes. Multiple planes fly distinct orbits above Baltimore, equipped with PSS's camera technology...The cameras capture roughly 32 square miles per image per second. The planes fly at least 40 hours a week, obtaining an estimated twelve hours of coverage of around 90% of the city each day, weather permitting. The PSA limits collection to daylight hours and limits the photographic resolution to one pixel per person or vehicle, though neither restriction is required by the technology. In other words, any single AIR image—captured once per second—includes around 32 square miles of Baltimore and can be magnified to a point where people and cars are individually visible, but only as blurred dots or blobs.[79]

76. *Id.* at 1316.

77. *See id*. (collecting authority); United States v. Dennis, 41 F.4th 732, 741 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 2616 (2023) ("Surveillance of areas open to view of the public without any invasion of the property itself is not alone a violation.").

78. *See* Leaders for a Beautiful Struggle v. Balt. Police Dep't, 2 F.4th 330, 330-35 (4th Cir. 2021).

79. *See id.* at 334.

While it was only utilized during certain days of the week, the AIR program gave the police extraordinary surveillance powers.[80] Community advocates challenged the law, and were joined by an assortment of amici in arguing there were serious privacy concerns present with the warrantless use of this technology.[81] The Fourth Circuit, sitting *en banc*, concluded the case was moot based upon a series of factual developments, but a majority ruled that the use of the AIR program was a search, and its warrantless use violated the Fourth Amendment.[82]

#### 4. Commonality of Issues and the Need for a New Standard

Like *Carpenter*, all of these lower court cases represent difficult situations because they expose how many extremely serious surveillance techniques can fall through the cracks of the Supreme Court's Fourth Amendment Jurisprudence. This Note does not argue that surveillance techniques of the kind described above may not be used, or even that they should all necessarily require a warrant. However, given the disparity of outcomes in these cases, the broader social milieu concerning privacy and the expansive reach of technology in modern life, there is a need for new legal rules to apply to disputes over governmental surveillance.

## III. ANALYSIS

### *A. Problems Protecting Privacy*

Looking at the current state of the law in its totality, existing Fourth Amendment doctrine has failed to adequately protect the privacy of individuals from many advanced forms of surveillance. The simple fact is that a vast amount of warrantless surveillance is currently occurring with minimal and unclear legal rules. The lower courts' attempts to apply existing caselaw to modern surveillance techniques have been at best uneven.[83] This Note does not call for a wholesale repeal of the *Katz* expectation of privacy test. As *Jones* shows, multiple legal standards can and should co-exist to safeguard core constitutional rights such as the Fourth Amendment.[84] Instead, this Note

80. *See* Scott A. Havener, *Leaders of A Beautiful Struggle v. Baltimore Police Department: The Fourth Amendment Continues Its Struggle to Make Sense of the Twenty-First Century*, 68 LOY. L. REV. 159, 163-64 (2021) ("During the daytime . . . three PSS aircraft would continuously circle Baltimore at altitudes between 3,000 and 12,000 feet. For no less than forty hours a week, each plane would take one photograph per second at a resolution of one pixel per 1.45 square feet, roughly representing a person as a single pixel. AIR was used to track vehicles' movements too, which were typically depicted as fifteen to twenty pixels. The combined imagery provided coverage of over ninety percent of the city.").

81. *See Leaders of a Beautiful Struggle*, 2 F.4th at 335.

82. *See* Havener, *supra*, note 75 at 163-67.

83. *See supra*, notes 67-78.

84. *See Jones*, 565 U.S. at 409 ("[T]he Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.") (emphasis in original).

argues that a new analytical framework should be developed to determine the reasonableness of modern surveillance techniques that currently pervade domestic law enforcement in the United States.

A new test is needed for three reasons. First, the *Katz* test's framework is unworkable in the context of modern surveillance tools. It is not reasonable to expect judges to consistently determine what the objective expectations of privacy amongst citizens are in regard to the types of activities discussed above, such as the totality of their movements as captured through GPS, the prolonged surveillance of their person or the exterior of their homes, or the measurement of their bodily signals or facial data.

Second, the *Katz* test is too susceptible to judicial interpretation and, as has been described, leads to inconsistent results.[85] The reason for this is that the *Katz* test is not an empirical test that answers the question of what the actual expectations of privacy are.[86] Rather, it is a normative test that judges use to answer the question of what societal expectations *should* be.[87] While this may be a formulation some would prefer, it gives enormous discretion to the judiciary without any accompanying doctrinal safeguards or limiting principles. Thus, there needs to be a test grounded in a set of relatively objective factors that, when met, should require the government to demonstrate probable cause.

Finally, the current regime is arguably too permissive towards mass surveillance techniques and contravenes the spirit of the Fourth Amendment by not protecting citizens from "permeating police surveillance."[88] There are a multitude of technologies in use today by the government that afford them immense surveillance capabilities and would likely go unchecked under current Fourth Amendment doctrine.[89] While a doctrinal test may come under some of the same criticisms leveled at the Mosaic Theory, it would standardize the case law in this area and allow courts more particularized criteria to assess surveillance techniques. At least one member of the current Supreme Court has put forth the somewhat out-of-the-box idea of treating electronic data generated by a person as a bailment (non-ownership transfer of possession) whereby they would retain ownership rights and associated privacy protections.[90] While this may come to pass in some form, that view garnered no support in *Carpenter*, and is unlikely to become ensconced in binding precedent on the lower courts anytime soon.

The Mosaic Theory, while useful to delineate the gap that permits long-term surveillance of individuals in public areas, is fairly unhelpful in providing courts an interpretive roadmap for those dissatisfied with *Katz* and

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85. *See Carpenter*, 585 U.S. at 391 (Gorsuch, J., dissenting) (opining that the contours of the *Katz* "expectation of privacy test" are "left to the judicial imagination."); *see also* Hu, *supra* note 31.

86. *See Carpenter*, 585 U.S. at 391-95 (discussing ways of viewing the *Katz* test).

87. *See id.*

88. *See Di Re*, 332 U.S. at 595.

89. *See* Benjamin Goodman*, Shotspotter-the New Tool to Degrade What Is Left of the Fourth Amendment*, 54 UIC L. REV. 797, 824-28 (2021) (describing Seventh Circuit case in which the court found it reasonable for police to conduct a *Terry* stop based upon information they obtained from "Shotspotter," an automatic gunshot detection system).

90. *See Carpenter*, 585 U.S. at 396-405 (Gorsuch, J., dissenting).

its application to new technologies that "once seemed like science fiction."[91] Some recent scholarship has suggested the Supreme Court's *Carpenter* decision, adopting some tenets of the Mosaic Theory, has now provided a new set of questions for the lower courts, but that it largely restates the questions of the *Katz* test and does not add any new considerations to guide courts in assessing surveillance techniques.[92]

The question becomes how to move forward from our current landscape of porous Fourth Amendment law. There is a clear and present tension in the law that mandates the Supreme Court to provide some measure of clarity and consistency to the case law. When one examines the concurrences of *Jones*, the Court's opinion in *Carpenter*, and the post-*Carpenter* decisions, it becomes clear that there is widespread disagreement amongst courts and judges on how to handle the issue of warrantless surveillance.[93] *Carpenter* was anomalous in that the Supreme Court confronted a conflict in its own case law and chose to create a narrow exception to the third-party doctrine based on the unique nature of CSLI. The majority in *Carpenter* disclaimed any pretense that it provides a clear roadmap or test for the range of privacy issues presented by warrantless uses of other forms of technology.[94] It is far from certain that if the current Supreme Court justices confronted a case like *Carpenter,* the result would be the same, but in deference to the principle of *stare decisis* for the purpose of this Note it is assumed that the holding will remain.

The Supreme Court should act to remedy this gap in Fourth Amendment law, because they are the final arbiters of what the Constitution's protections mean.[95] Action from Congress, while it may be preferable to judicial rules given that Congress is democratically accountable, is unlikely to happen in this area given the complexity of these issues and the lack of appetite to impose regulations on the government's investigatory powers. Because of that, this Note argues for a test the Supreme Court should impose on the lower courts to assess Fourth Amendment interests for situations where the government uses advanced surveillance technology to either monitor people in public areas or conduct prolonged surveillance of a person without a warrant based upon probable cause. The Supreme Court should recognize

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91. Taylor H. Wilson, Jr., *The Mosaic Theory's Two Steps: Surveying Carpenter in the Lower Courts*, 99 TEX. L. REV. ONLINE 155, 159 (2021) (quoting David Gray & Danielle Keats Citron, *A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy*, 14 N.C. J.L. & TECH. 381, 386 (2013)).

92. *See generally id*. (discussing the application of the *Katz* test to electronic surveillance technologies).

93. This statement is evident from a nothing more than a glance at the fractured votes behind the cases discussed in this Note. While the result of *Jones* was unanimous, multiple concurrences were generated that diverged from the majority's rationale significantly; the Supreme Court's decision in *Carpenter* was 5-4; the Seventh Circuit was divided in *Tuggle*; the Fourth Circuit *en banc* was divided in *Leaders of a Beautiful Struggle*; the First Circuit, in poetic fashion, evenly split down the middle in *Moore-Bush*, with three judges writing the government's actions constituted a search under the Fourth Amendment, and three writing they did not.

94. *See Carpenter*, 585 U.S. at 298.

95. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) (explaining that "the federal judiciary is supreme in the exposition of the law of the Constitution").

that "[t]here comes a point where we should not be ignorant as judges of what we know to be true as citizens."[96] This Note submits that point has been reached, and that the *status quo* is not acceptable.

### *B. A New Test for a New Era*

This Note proposes a two-prong test. The first prong involves an analysis based on the following three questions. Each of these inquiries is formulated to be as objectively determinable as possible and has been used in some form or fashion by the Court in its prior electronic surveillance cases. First, do the surveillance techniques of the government reveal information in real time, or does it also store and "mine" information about a person that predated the government's investigation? Second, do the techniques give the government superhuman capabilities to surveil an individual or multiple individuals with precision far beyond what could be achieved through human capabilities like stakeouts and other "real-time" surveillance? Finally, is the length of the monitoring by the surveillance technique such that it should not be reasonably used against a person unless there is probable cause to believe there was a crime? If any one of the elements above is not satisfied, then the court would move to the second prong of the test. The second prong is whether the surveillance at issue is so extreme and gathers information of such a sensitive nature that it has in effect intruded on an individual's expectation of privacy in the totality of their movements, and therefore, cannot be allowed without a warrant.

#### 1. Retrospective v. Prospective Nature of the Information Collected

The first element of the proposed test asks an easily verifiable question: do the surveillance techniques employed by the government allow them to retrieve information about a person's movements from a time before the investigation of that individual began? If so, then the action merits intense scrutiny, as this gives law enforcement the option to "travel back in time" to chronicle the activities of any person they would like to investigate.[97] If the techniques are being used in real-time and are solely for the purpose of monitoring individuals already identified as suspects, then this element would not be implicated, and those methods could be analyzed under the traditional *Katz* framework to determine whether they require a warrant.

This element has informed the Supreme Court's analysis in prior cases dealing with electronic surveillance techniques.[98] In *Jones*, for example, the

96. *Cf.* United States v. Zubaydah, 142 S. Ct. 959, 985 (2022) (Gorsuch, J., dissenting).

97. *See Carpenter*, 598 U.S. at 311 ("Moreover, the *retrospective quality* of the data here gives police access to a category of information otherwise unknowable . . . With access to CSLI, the Government can now travel back in time to retrace a person's whereabouts.") (emphasis added).

98. *See Jones*, 565 U.S. at 415-16 (Sotomayor, J., concurring) (discussing the concerns over GPS records by noting that "the government can store such records and efficiently mine them for information years into the future") (internal citations omitted).

concurrences of Justices Alito and Sotomayor were not only concerned with the GPS monitoring of the defendant's car after a tracker was placed on it, but also with the potential of law enforcement remotely accessing a car's GPS data. Their concerns stemmed from the fact the GPS data would give the government a recorded account of everywhere that car and the individual driving it had been.[99]

It is certainly true that there are other categories of information that may give the government retrospective details about a person without implicating constitutionally protected privacy interests. To name a few, utility records,[100] pen registers,[101] and even bank records[102] can be retrieved without the government showing probable cause of a crime. However, the retrospective nature of information obtained about an individual only speaks to one aspect of the material the government is seeking. For example, a person's tax forms are not valuable solely because they provide past information about someone, but because they provide previously compiled financial disclosures from a person. Therefore, this element's use in assessing electronic surveillance is concerned with the scope of the government's intrusion. That is, whether the police have access to data about an individual that existed before they formed the suspicion to investigate them.

The importance of whether technology can reveal a tranche of historical data is expressly discussed in *Carpenter*, in subsequent Fourth Amendment cases by the lower courts, and is critical to the analysis of these issues.[103] In other cases like *Tuggle* or *Moore-Bush*, the government set up the surveillance themselves and all the data received from them was for the purpose of the investigation. Therefore, in those cases, this factor could well be absent, or analyzed differently. But for the dragnet approach of the AIR program in *Leaders of a Beautiful Struggle*, or in future cases involving facial recognition technology, it would be objectively determinable whether the technology at issue was warrantlessly deployed on the public generally and utilized later to

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99. *See id.*; *see also id.* at 428-30 (Alito, J., concurring) (discussing the potential of long-term tracking of cellphones and other electronic devices).

100. *See* Aparna Bhattacharya, *The Impact of Carpenter v. United States on Digital Age Technologies*, 29 S. CAL. INTERDISC. L.J. 489, 498 (2020) ("Utility records traditionally received Fourth Amendment treatment similar to bank records and telephone records in that courts have found that customers do not have a reasonable expectation of privacy in such records.").

101. *See generally Smith*, 442 U.S. 735; *see also* Stephen A. Saltzburg et al., AMERICAN CRIMINAL PROCEDURE: INVESTIGATIVE - CASES AND COMMENTARY 82 (12th ed. 2022) (describing that currently under the Electronic Communications Privacy Act, 18 U.S.C. § 3121 et seq., the government does have to obtain a court order for pen registers, but the showing required is lower than probable cause).

102. *See Miller*, 425 U.S. at 442 (noting "[t]he lack of any legitimate expectation of privacy concerning the information kept in bank records").

103. *See Carpenter*, 585 U.S. at 311 (noting that over time CSLI from a cellphone can "provide[] an all-encompassing record of the holder's whereabouts," and that the "deep repository of historical location information" of CSLI opens "an intimate window into a person's life"); *see also id.* at 342 (emphasizing that unlike the situation in *Jones* "police need not even know in advance whether they want to follow a particular individual, or when" if they are using CSLI); *Leaders of a Beautiful Struggle*, 2 F.4th at 341, 344-45 (discussing how the government with relatively minimal effort could use the AIR program to compile a detailed picture of a person's habitual comings and goings around town).

gather information about a person from before they were suspected of committing a crime.

### 2. Extent of the Government Monitoring

The second factor of the proposed test would examine the extent of what the technology allows the government to uncover, and whether the technology used provides them with superhuman capabilities (capabilities that allow them to see, hear, and record more information than could reasonably be gathered using officers and targeted surveillance).[104] This factor was arguably a driver of the decision in *Leaders of a Beautiful Struggle*, where the AIR program gave law enforcement an enormously powerful tool to aid in their investigatory duties.[105] The Fourth Circuit drew a distinction between the AIR program and "short-term surveillance" of having humans watching a suspect by noting that the type of prolonged and precise surveillance at issue did not exist "[p]rior to the digital age."[106]

The Seventh Circuit's ruling in *Tuggle* illustrates the importance of this factor, and how a reasonable application of it in isolation can lead to the opposite conclusion from *Leaders of a Beautiful Struggle*. In *Tuggle*, the police had installed and used three cameras to monitor an outside area of the defendant's home, in an effort to uncover evidence of drug trafficking.[107] In its ruling, the court first emphasized that this was not a search because the area surveilled was knowingly exposed to the public.[108] The limited geographic and technological nature of the surveillance was a key factor in the court's decision. That is, the court said the "isolated use of pole cameras" that only captured information that would be available to any passerby on a public road by the defendant's house made the search permissible.[109] Of course, there was the issue of the *prolonged use* of these cameras, which will be discussed with the third factor *infra*.

The Seventh Circuit in *Tuggle* provided an incisive delineation of how the current regime of Fourth Amendment law in the long run will come to permit more and more surveillance by the government. The author of the opinion, Judge Flaum, began by describing in practical terms the issues that courts will be asked to confront by the ever-expanding presence of cameras and other electronic recording devices.[110] The court also recognized the fact

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104. In reality, many techniques that the government has substantial reliance interests in such as cars and binoculars would not be included in the definition of "superhuman capabilities." The term "superhuman capabilities" is best defined as those capabilities that could only be accomplished with electronic devices that exponentially improve human capabilities of detecting, collecting, and storing information.

105. *See Leaders of a Beautiful Struggle*, 2 F.4th at 341 (explaining that "the AIR program *'tracks every movement'* of every person outside in Baltimore") (emphasis added).

106. *Id.* (quoting *Carpenter*, 585 U.S. at 310).

107. *See Tuggle*, 4 F.4th at 510.

108. *See id.* at 514.

109. *See id.* at 516-17.

110. *See id.* at 509 (describing "a future with a constellation of ubiquitous public and private cameras accessible to the government that catalog the movements and activities of all Americans").

that current Fourth Amendment doctrine is "circular[]" in the sense that as technology becomes more advanced and its use more widespread, the government will more likely evade the warrant requirement if it moves with deliberation in utilizing those technologies.[111]

In *Leaders of a Beautiful Struggle*, there is a more straightforward application of this factor. The AIR program gave the government superhuman capabilities to observe the activities of almost any citizen of Baltimore who was walking outside during its use.[112] The Fourth Circuit took pains to stretch the holding of *Carpenter* to say that the AIR program was in essence a constitutional violation of the same caliber as warrantless CSLI collection in *Carpenter*.[113] In reality, what the court was remarking upon was the fact that the AIR program was unique in that it allowed the government the ability to accomplish something they could never hope to achieve with beat cops patrolling: a photographic record of anyone within miles of the city area surveilled, eyes in the sky to catch what evades the limits of human resources.

The observations made by the judges in these cases are illustrative of the concerns this Note outlines regarding mass surveillance technologies, and why corrective action is needed. Once again, this is not to say that by using the proposed test the outcome of these cases would be different. However, it would provide a methodology to resolve complex surveillance cases that courts could consistently use and develop common law around. Moreover, it would be based on a relatively objective set of criteria that would clarify what is undoubtedly an unkempt area of law. This improvement in both efficiency and consistency would be a positive development regardless of one's opinion on how much latitude the government should have in conducting criminal investigations.

### 3. The Length of the Surveillance Period

The last factor of the first prong is the duration of the surveillance itself. This is perhaps the most subjective factor of the three described, seeing as the duration can be context-specific depending on when the clock starts, and the nature of the crime being investigated. However, as discussed, even simple categories of data like GPS tracking of a car have prompted concern when it is conducted for such a long period as to constitute the operational equivalent of targeting a person.[114] Justice Alito in particular remarked on the duration of surveillance in *Jones*, and while no bright line rules exist delineating how

111. *See id.* at 510 ("The upshot: the *Katz* test as currently interpreted may eventually afford the government ever-wider latitude over the most sophisticated, intrusive, and all-knowing technologies with lessening constitutional constraints.").

112. *See Leaders of a Beautiful Struggle*, 2 F.4th at 334.

113. *See id.* at 341 ("More like the CSLI in *Carpenter* and GPS-data in *Jones* than the radio-beeper in *Knotts*, the AIR program tracks every movement of every person outside in Baltimore.") (internal quotations omitted).

114. *See Jones*, 565 U.S. at 415-17 (Sotomayor, J., concurring) (suggesting citizens do not expect "that their movements will be recorded and aggregated in a manner that enables the government to ascertain" their habitual travels).

long is too long, his opinion stresses that "the line was surely crossed before the 4-week mark."[115]

While in *Tuggle* the Seventh Circuit adopted a literal interpretation of the Supreme Court's ruling in *Kyllo* that advanced technology cannot be considered a search if it's in "general public use," it did wrestle with the issue of length of observation.[116] However, the court decided that eighteen months of surveillance did not require a warrant based on probable cause, and rejected the Mosaic Theory as a basis for concluding the duration allowed the government to "piece together" the defendant's movements.[117]

The First Circuit's *en banc* opinion in *Moore-Bush* provides a clear assessment of how the length of time can matter for analyzing government action under the Fourth Amendment. The three-judge concurrence ruling that the monitoring was a search, which was written by Judge Barron, dismissed the notion that line-drawing with respect to the duration of surveillance was a fool's errand.[118] The Barron concurrence expressly relied on *Carpenter* to analogize the recording of every movement the defendant made in the surveilled front area of their house to the recording of the whole of a person's movements as captured through CSLI.[119] The concurrence in that case went on to argue that because it would be ludicrous to think the government would devote the resources to surveil a house continuously unless they were a criminal target of immense significance, the same rationale the Court recognized in *Jones* should apply, and the totality of the defendant's movements outside of their home should be given Fourth Amendment Protection.[120]

The Tenth Circuit's recent decision in *Hay*, even though it rejected the defendant's argument that the government's use of a pole camera to monitor his home was a search, recognized the importance of the duration of the monitoring to its analysis of the Fourth Amendment issue.[121] The court in that case simply said that although "the surveillance took place over an extended

115. *See id.* at 430 (internal citation omitted).

116. *See Tuggle*, 4 F. 4th at 517 (noting that "[t]he more challenging question is . . . the prolonged and uninterrupted use of . . . the pole] cameras").

117. *See id.* at 520 (noting that the Supreme Court has not required lower courts to adopt the mosaic theory).

118. *See Moore-Bush*, 36 F.4th at 357 ("[B]y relying expressly on the concurring opinions in Jones -- a case involving lengthy electronic tracking -- to conclude that there is a "reasonable expectation of privacy in the whole of [one's] movements" in public, *Carpenter was necessarily rejecting the notion that temporal line-drawing in that clearly related context is not possible.*") (emphasis added).

119. *See id.* at 333 ( "[T]he Court concluded in *Carpenter*, it was reasonable for a person to expect that no such tracking was occurring as he moved about in public over a lengthy period and thus to expect that those public movements were, taken as a whole, private in consequence of the practical anonymity with respect to the whole of them that follows from the reality that virtually no one has a feasible means of piercing it.").

120. *See id.* at 334.

121. *See Hay*, 95 F. 4th at 1315 (noting that the Supreme Court in *Carpenter* "distinguished pursuing a suspect for a brief stretch, which fell within a societal expectation of privacy, from secretly monitoring and cataloguing every single movement of an individual's car for a very long period, which fell outside of it.") (internal citations omitted).

period of time," the area being monitored was public, and under current federal law no Fourth Amendment protection could be extended to it.[122]

#### 4. Whether the Information Collected in Effect Intrudes Upon a Reasonable Expectation of Privacy the Person Would Have in a Place or Thing

It may well be the case that there will be surveillance techniques that pass muster under this test because they do not satisfy all the factors of the test above. Nevertheless, a literal application of the factors described above would not end the inquiry in every circumstance. The Supreme Court, in light of its emphasis on respecting the history and tradition of constitutional protections, has expressed support for the notion that advances in technological capabilities should not come at the cost of freedom from governmental overreach that inspired the adoption of the Fourth Amendment.[123] Even if one of the three elements from the first prong is missing, the surveillance technique would still need to satisfy the second prong of the test.

Therefore, even if a technology deployed by the government is not used to mine historical information about a person, does not give law enforcement superhuman capabilities, and is only used for a short amount of time, citizens should have a residual rule to rely on to object when their information is collected. This is the second prong of the test proposed by this Note: when a surveillance technology uncovers such a revealing category of information, either by individual collection or aggregation of that data, it has infringed on a person's expectation of privacy, and should require probable cause.

The second prong of the test is informed in large part by the analysis that was done by the Supreme Court in *Carpenter*. While it was true the result of *Carpenter* was effectively an exception to the Third-Party Doctrine, and the government's arguments were more consistent with what the Court decided in the past, there was a self-evident logic to the majority's reasoning. Namely, because of the "deeply revealing" nature of CSLI, there needed to be a baseline level of Fourth Amendment protection imposed to prevent an Orwellian reality of ubiquitous surveillance from occurring.[124]

There may well be criticism of this prong as being the *Katz* test by another name, or that it effectively swallows the multifactor test proposed. In response to this, the burden required for this prong from the objecting party will be fundamentally different than what their showing would be for the *Katz* test. A party seeking to invoke the second prong will have to show that the information collected by the government in its totality is of such a sensitive nature that no reasonable person would knowingly expose it. This is different than the *Katz* test because it allows for courts to engage in a different inquiry:

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122. *Id.* at 316.

123. *See Jones*, 565 U.S. at 406-07 ("At bottom, we must 'assur[e] preservation of that degree of privacy against government *that existed when the Fourth Amendment was adopted.*'") (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001) (emphasis added)).

124. *See Carpenter*, 585 U.S. at 320.

the question will not be whether the information in its constituent units is produced or maintained in such a way that the person cannot reasonably expect privacy over it, which is effectively what is asked under the *Katz* test. Rather, a court applying the second prong will ask whether the information when aggregated is of such a quality that the government has effectively learned information that would not be collected unless it is needed to investigate a crime. In effect, this would alter the objecting party's burden by asking them to show that the information is so private that it would only be collected if there was probable cause to believe the person had committed a crime and was under investigation. While making this type of showing would be difficult for an objecting party to demonstrate, it would effectively help prevent the government from maintaining stores of data on people not suspected of crimes, which could help preempt many issues related to facial recognition technology, metadata, and other forms of electronically stored information.

This prong would reset the balance of interests and make the inquiries by courts more straightforward. Such a balance would be an improvement over the assortment of rules and exceptions that make up the current and dizzying state of Fourth Amendment law. Therefore, the test proposed by this Note should be considered, as it would work towards clearing up an area of law that needs reform.

## IV. CONCLUSION

The Fourth Amendment exists to ensure American citizens maintain a baseline amount of privacy in their person and effects by restricting the government's ability to conduct searches and seizures of property, whether digital or not. We are living through an age where law enforcement is continually gaining an expansive technological capability to collect, analyze, and utilize electronic data to investigate, solve, and prosecute crime. This will only accelerate with the continued advancement of artificial intelligence systems that can both collect vast amounts of data with ease, and automatically perform analytical tasks using that data. While these advancements have yielded positive results in achieving public safety objectives, there have been serious costs to the privacy of American citizens.

What the right balance between these objectives is depends on policy many factors, but the Supreme Court and lower courts need to ensure that there is a baseline level of Fourth Amendment protection against new methods of surveillance. Adopting the test proposed in this Note is not a panacea to resolving the complex legal, practical, and philosophical problems posed by electronic surveillance. However, it is a step in the right direction by seeking to provide rules that aim to balance the considerable authority the government wields with the freedom from unreasonable searches and seizures guaranteed in the Constitution.

# Communications Law: Annual Review

## Staff of the Federal Communications Law Journal

TABLE OF CONTENTS

# Lindke v. Freed

**Kendra Mills**

37 F.4TH 1199 (6TH CIR. 2022)

In *Lindke v. Freed*, the Sixth Circuit affirmed the District Court for the Eastern District of Michigan's judgment in favor of the appellee because the mere inclusion of his title of "City Manager" on Facebook did not signify that his Facebook activity was state action.[1] Therefore, his activity did not contravene the federal rights of the appellant.[2] The court recognized the "state-official test" as the appropriate framework through which to evaluate the social media activity of public servants, which requires that such activity be either an "actual or apparent duty" of public office or else be dependent upon "the authority of [public] office."[3]

## I. BACKGROUND

Prior to his appointment as City Manager in Port Huron, Michigan, James Freed joined Facebook to connect with his social circle.[4] His profile was initially a private account, accessible only to those with whom he mutually agreed to connect, but he eventually accrued so many connections that he converted his profile to a "public figure" page, which allowed an unlimited number of followers.[5] After his appointment, he updated his Facebook page to include, along with other personal information, his title of "City Manager, Chief Administrative Officer for the citizens of Port Huron, MI."[6] The contact details of the page (website, email, and physical address) were that of Port Huron's city hall and administration.[7]

Freed posted a variety of content to his page, drawn from both his private and professional life.[8] In 2020, he posted about policies he initiated for Port Huron in the wake of the COVID-19 pandemic.[9] A Port Huron citizen, Kevin Lindke, was critical of Freed's policies and expressed his displeasure in the comments on Freed's Facebook posts.[10] In response, Freed deleted Lindke's comments and eventually blocked Lindke from viewing and interacting with his page.[11] Frustrated that he could no longer access Freed's

1. Lindke v. Freed, 37 F.4th 1199, 1207 (6th Cir. 2022), *vacated*, 144 S. Ct. 756 (2024).
2. *See id*. at 1202.
3. *Id*. at 1203 (quoting Waters v. City of Morristown, 242 F.3d 353, 359-60 (6th Cir. 2001)).
4. *See id*. at 1201.
5. *Id*.
6. *Id*.
7. *Lindke*, 37 F.4th at 1201.
8. *See id*.
9. *Id*.
10. *Id*.
11. *Id*. at 1202.

page to express his views, Lindke sued Freed in federal court under 42 U.S.C. § 1983, which provides a cause of action when federal rights are violated by someone acting "under color of any statute, ordinance, regulation, custom, or usage, of any State."[12] Lindke alleged that Freed "violated his First Amendment rights by deleting his comments and blocking him from the page."[13] The District Court for the Eastern District of Michigan granted summary judgment to Freed. Lindke appealed to the United States Court of Appeals for the Sixth Circuit.[14]

## II. ANALYSIS

On appeal, the Sixth Circuit affirmed the district court's judgment in favor of Freed, rejecting Lindke's argument that Freed acted "under color of any statute, ordinance, regulation, custom, or usage, of any State" when he deleted Lindke's comments and blocked him from the page.[15] Courts have interpreted the language of 42 U.S.C. § 1983 to mean that a defendant must be acting in a state capacity for liability to attach to his actions.[16] This state action requirement is dependent upon whether a defendant's actions are "fairly attributable to the State."[17] A state official's actions are not state action when they are within "the ambit of [his] personal, private pursuits."[18] The Sixth Circuit, acknowledging that case law is a little "murky" with regard to the division between official and personal acts, sought to "realign how state officials' actions fit into the current framework," in the context of "the ever-changing world of social media."[19]

### *A. The "State-Official Test" Framework*

The Supreme Court has set out three tests by which to evaluate state action: the public function test, the state-compulsion test, and the nexus test.[20] However, these tests are intended to assess whether a private party has engaged in state action, not to distinguish between a public servant's official and personal activities. Consequently, drawing upon their own precedent, the Sixth Circuit applied the "state-official test."[21] This test directs the court to inquire whether a state official is "'performing an actual or apparent duty of his office,' or if he could not have behaved as he did 'without the authority of his office.'"[22] It draws upon Supreme Court guidance pertaining to public officials, which allows that a "public employee acts under the color of state law while acting in his official capacity or while exercising his responsibilities

12. *Id.*; 42 U.S.C. § 1983.
13. *Lindke*, 37 F.4th at 1202; U.S. CONST. amend. I.
14. *Lindke*, 37 F.4th at 1202.
15. *Id.*; 42 U.S.C. § 1983.
16. *Lindke*, 37 F.4th at 1202 (quoting West v. Atkins, 487 U.S. 42, 48 (1988)).
17. *Id.* (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).
18. *Id.* (quoting Stengel v. Belcher, 522 F.2d 438, 441 (6th Cir. 1975)).
19. *Id.*
20. *Id.* (citing *Lugar*, 457 U.S. at 939).
21. *Id.*
22. *Lindke*, 37 F.4th at 1203 (quoting *Waters*, 242 F.3d at 359).

pursuant to state law."[23] In addition, the state-official test may be thought of as an alternate version of the Supreme Court's nexus test, which asks whether a defendant's activity "may be fairly treated as that of the State itself."[24] In answering these questions, courts must evaluate whether a defendant's action is "'entwined with governmental policies' or subject to the government's 'management or control.'"[25] The state-official test applies these same sub-questions to the activity of a public servant.[26]

### *B. State Action in the Age of Social Media*

In the context of social media, the Sixth Circuit decided that pages and accounts must be assessed as a whole, rather than by singular posts, because too narrow a focus would belie the larger context necessary to answer the test's questions.[27] A public official's social media activity must be subject to the same state action test, and ask whether such activity is "part of an officeholder's 'actual or apparent dut[ies],'" or "depends on his state authority."[28] An example of social media activity that would meet this test is that of an official who is mandated by law to maintain a social media account: "a page can constitute state action if the law itself provides for it."[29] In this case, the fact of the social media account and all related activity would be an "actual duty."[30] The Sixth Circuit also stated that the use of state resources to run an account would suggest that the usage of such an account would amount to performing a duty.[31] In addition, the court determined that, by their very nature, accounts associated with *offices* rather than people could not be used in the same manner "without the authority of the office."[32] These accounts include those which are passed on to successive office holders. In addition, the management of a social media account by staff members represents a type of social media activity that would not occur without public authority.[33] It is only when a public official operates an account, such as in the examples described above, "pursuant to his actual or apparent duties or using his state authority" that his action is "fairly attributable to the state."[34] Absent some element of state action, 42 U.S.C. § 1983 is inapplicable.[35]

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23. *Id.* (citing *West*, 487 U.S. at 50).
24. *Id*. (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)).
25. *Id*. (quoting Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001)).
26. *Id*.
27. *Id*.
28. *Id.* at 1203 (quoting *Waters*, 242 F.3d at 359); *Id*. at 1204.
29. *Lindke*, 37 F.4th at 1203.
30. *Id*. at 1204.
31. *Id*.
32. *Id*. (quoting *Waters*, 242 F.3d at 359).
33. *Id*.
34. *Id*. (citing *Waters*, 242 F.3d at 359; *Lugar*, 457 U.S. at 939).
35. *Lindke*, 37 F.4th at 1202.

### C. *Applying the "State Official Test"*

The court determined that Freed's Facebook posts were not state action because they neither represented his duties nor did they depend upon his state authority.[36] Freed was not required by law to maintain his Facebook account, and there were no records demonstrating that he used public funds to operate his account.[37] Despite Lindke's contention that, according to Freed's own words, "regular communication . . . is essential to good government" and was therefore implicitly representative of state action, the court rejected this premise on the basis of its breadth.[38]

Addressing the second prong of the state action evaluation, as to whether Freed's activity depended upon his authority, the court found that because the page did not belong to the office of the City Manager and was not maintained by Freed's employees, his posts did not qualify as state action.[39]

### D. *Disposing of Alternative Tests*

The court declined to apply the broad standard proposed by Lindke, wherein state action would be found where "the presentation of the account is connected with the official's position," although this standard was accepted by other circuits.[40] In particular, the court distinguished the instant case from *Knight First Amendment Institute v. Trump*, a Second Circuit case relied upon by the appellant, wherein not only did President Trump's Twitter account include the "trappings of an official, state-run account," it was also subject to "substantial and pervasive government . . . control."[41] In this way the court found that even if it were to accept the appellant's alternative standard, there were not sufficient facts to prove state action.[42]

The court also evaluated whether the instant case could be analogized to the framework of factors used to assess whether police officers have engaged in state action.[43] Disagreeing with the appellant, the court determined that in the case of police officers, it was the fact of their appearance—their badges and uniforms—that granted authority, not the reverse.[44] In contrast, Freed was not endowed with his authority by virtue of his Facebook page.[45] Instead, the court returned the focus to official duties and state authority, with the object of providing a clear framework for both public servants and lower courts in the Sixth Circuit.[46]

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36. *Id.*
37. *Id*. at 1205.
38. *Id*. (citing Appellant's Brief, No. 21-2977, 2021 WL 6197754, at *29 (6th Cir. Dec. 8, 2021)).
39. *Id*.
40. *Id*. (quoting Appellant's Brief, 2021 WL 6197754, at *35).
41. *Lindke*, 37 F.4th at 1206 (quoting Knight First Amend. Inst. v. Trump, 928 F.3d 226, 235 (2d Cir. 2019)).
42. *Id*.
43. *Id*.
44. *Id*.
45. *Id*. at 1207.
46. *Id*. at 1206-07.

## III. CONCLUSION

For the preceding reasons, the Sixth Circuit affirmed the district court's summary judgment, holding that James Freed, City Manager of Port Huron, Michigan, did not engage in state action when he posted on his Facebook page, because his social media activity was not "part of his actual or apparent duties," nor was it "dependent on the authority of his office" and therefore did not fall within the bounds of 42 U.S.C. § 1983.[47]

47. *Lindke*, 37 F.4th at 1203-04, 1207 (quoting *Waters*, 242 F.3d at 359); On March 15, 2024, the Supreme Court vacated and remanded this case to the Sixth Circuit, issuing a new test by which to determine whether a state official who blocks someone from commenting on their social media page has engaged in state action. The Court held that the state action doctrine requires that a social media user must demonstrate that the state official "(1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media." *Lindke v. Freed*, 144 S. Ct. 756, 762 (2024).

# Missouri v. Biden

**Arjun Singh**

83 F.4TH 350 (5TH CIR. 2023)

*Missouri v. Biden* involved plaintiffs who alleged injuries by Defendants in the censorship and moderation of their expressions on social media platforms regarding, *inter alia*, the COVID-19 pandemic and the 2020 United States Presidential Election. The District Court for the Western District of Louisiana issued an injunction broadly prohibiting government officers from communicating with social media companies regarding concerns about content on their platforms, which the Fifth Circuit significantly narrowed.[1] The Supreme Court granted certiorari to hear the case on three questions regarding: (1) Article III standing, (2) the state action doctrine, and (3) the breadth of the preliminary injunction.[2]

## I. BACKGROUND

Plaintiffs Dr. Jayanta Bhattacharya and Dr. Martin Kulldorff, both medical research professionals, co-authored the "Great Barrington Declaration" on October 4, 2020, which professed criticism of government authorities for imposing restrictions on personal conduct during the COVID-19 pandemic.[3] They alleged that the declaration itself was "deboosted" on social media platforms such as Google, Reddit, Facebook, and others, whereby users searching for the document were directed to content in opposition and that URLs to the document were removed.[4] Plaintiffs also alleged that videos of them discussing the declaration were removed and that they were denied access to personal accounts.[5]

Plaintiff Jill Hines, an advocate for consumer and human rights in Louisiana, engaged in advocacy during the COVID-19 pandemic, demanding that government-issued mandates requiring children to wear face masks be rescinded.[6] Hines alleged that such advocacy expressed on social media platforms was removed by Facebook.[7] Similarly, plaintiff Dr. Aaron Kheriaty, a psychiatrist, who engaged in advocacy against government-issued

1. Missouri v. Biden, 83 F.4th 350, 362 (5th Cir. 2023) [hereinafter *Biden II*], *cert. granted sub nom.*, Murthy v. Missouri, 144 S. Ct. 7 (2023).
2. Murthy v. Missouri, 144 S. Ct. 7 (2023).
3. *See* Missouri v. Biden, No. 3:22-CV-01213, 2023 WL 4335270, at *4 (W.D. La. July 4, 2023) [hereinafter *Biden I*].
4. Declaration of Dr. Jayanta Bhattacharya at 5, *Biden I*, No. 3:22-CV-01213 (W.D. La. June 14, 2022), ECF No. 10-3; *Biden II*, 83 F.4th at 367.
5. *See Biden II*, 83 F.4th at 366-67.
6. *See Biden I*, 2023 WL 4335270, at *3.
7. *See id*.

restrictions on personal movement (termed "lockdowns") and vaccination mandates during the pandemic, alleged that such advocacy was limited in its reach on social media platforms X (formerly Twitter) and YouTube.[8]

Plaintiff Jim Hoft, who operates a news website known as "The Gateway Pundit" located in St. Louis, Missouri, published several content items on social media that were critical of defendant Dr. Anthony Fauci, election laws in Virginia regarding the 2020 presidential election, as well as a video alleging irregularities in said election.[9] Hoft alleged that such content on social media platforms was restricted, as was his access to the accounts used to publish them.[10]

State plaintiffs, Missouri and Louisiana, asserted an interest in ensuring the free transmission of information within their jurisdiction and that their citizens are informed of public policy decisions and may exercise their constitutional rights.[11] They alleged that the actions of social media companies harmed their citizens by precluding them from exercising such rights, which grants them the right to sue *parens patriae*.[12]

The defendants include Dr. Anthony Fauci, President Joe Biden, U.S. Surgeon General Vivek Murthy, multiple White House officials, and various executive departments and agencies.[13] Defendants are alleged to have "coerced" social media companies to "censor disfavored speech and speakers," and coordinated with them to remove such content posted by the plaintiffs and third parties.[14] This coercion took the form of communications between officials and company executives and public statements compelling obedience with efforts to reduce "misinformation" and "disinformation," particularly regarding the efficacy of vaccinations against COVID-19.[15] One such measure, plaintiffs contend, was the vow to revisit social media companies' immunity from suit under Section 230 of the Communications Decency Act (CDA).[16]

The state plaintiffs initially filed their complaint in the U.S. District Court for the Western District of Louisiana on May 5, 2022.[17] The plaintiffs later sought a preliminary injunction on the defendants' contacting social media companies regarding objections to content.[18] Defendants then filed a motion to dismiss.[19] The complaint was amended three times, enabling

8. *See id.*
9. *See id.* at *3-4.
10. *See id.*
11. *See id*.
12. *See* Third Amended Complaint at 137, *Biden I*, No. 3:22-CV-01213 (W.D. La. May 5, 2023), ECF No. 268.
13. *See Biden I*, 2023 WL 4335270, at *5-37.
14. *Id.* at *2, *4, *5.
15. *Id.* at *6-14.
16. *See id.* at *4.
17. *See* Complaint, *Biden I*, No. 3:22-CV-01213, 2022 WL 1431257 (W.D. La. May 5, 2022), ECF No. 1.
18. *See* Motion for Preliminary Injunction, *Biden I*, No. 3:22-CV-01213 (W.D. La. June 14, 2022), ECF No. 10.
19. *See* Memorandum in Support of Defendants' Motion to Dismiss, *Biden I*, No. 3:22-CV-01213 (W.D. La. July 12, 2022), ECF No. 35-1.

individual plaintiffs to join the suit.[20] The district court denied the defendants' motion to dismiss in part, dismissing claims for relief against President Biden and replacing him with U.S. Surgeon General Vivek Murthy as lead defendant.[21] On July 4, 2023, the district court granted the plaintiffs' proposed injunction.[22]

Defendants appealed the injunction to the U.S. Court of Appeals for the Fifth Circuit.[23] The Fifth Circuit significantly narrowed the injunction covering only certain plaintiffs and reversed all provisions except a bar on coercing companies to remove content by intimating possible punishment.[24] The injunction was affirmed on rehearing and Defendants moved the Supreme Court to stay the injunction. On October 20, 2023, the Court granted the stay and issued a writ of certiorari.[25]

## II. ANALYSIS

### *A. Do respondents have Article III standing to sue?*

The government challenged the standing under Article III of the U.S. Constitution of both the individual plaintiffs and state plaintiffs in the case.[26] Both Defendant-Petitioners and Plaintiff-Respondents based their claims of standing upon the Article III standing requirements first set out in *Lujan v. Defenders of Wildlife*, which establishes factors to assess standing. The first factor requires "a concrete and particularized injury in fact" that is "traceable to the actions of the defendant[s]," which is the second factor. The injury must be "likely to be redressed" by relief granted by a "favorable judicial decision," the third factor.[27] The states, additionally, asserted *parens patriae* standing.[28]

The Fifth Circuit ruled on the standing claims in favor of the plaintiffs. On the first factor, it ruled that the "chilling" effect on future speech by the content moderation decisions established a continuous injury-in-fact.[29] On the second factor, the Fifth Circuit relied on a theory of traceability articulated by the Court in *Department of Commerce v. New York* in 2019, that a likely predictable reaction by a third party to a defendant's conduct is sufficient to establish a causal link between plaintiffs' injuries and the defendant.[30] In this

20. *See* Third Amended Complaint at 137, *Biden I*, No. 3:22-CV-01213 (W.D. La. May 5, 2023), ECF No. 268.
21. *See Biden I*, No. 3:22-CV-01213, 2022 WL 2825846 (W.D. La. July 12, 2022).
22. *See Biden I*, 2023 WL 4335270, at *73.
23. *See Biden II*, 83 F.4th at 362.
24. *See id.* at 399.
25. *See Murthy*, 144 S. Ct. 7.
26. *See* Brief for the Petitioners at 16-22, *Murthy*, 144 S. Ct. 7 (2023) (No. 23-411).
27. *Id.* at 16 (citing Carney v. Adams, 141 S. Ct. 493, 498 (2020) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992))); Brief of Respondents at 18, *Murthy*, 144 S. Ct. 7 (2023) (No. 23-411).
28. Third Amended Complaint, *Biden I*, No. 3:22-CV-01213 (W.D. La. May 5, 2023), ECF No. 268.
29. *Biden II*, 83 F.4th at 368.
30. *See id.* at 370-71 (citing Dep't of Com. v. New York, 139 S. Ct. 2551, 2561 (2019)).

case, it ruled that the government's continued advocacy for social media companies to restrict certain speech would likely constitute such a predictable reaction, with only "likelihood" being required to be established as opposed to certainty.[31] On the third factor, the Fifth Circuit concluded that an injunction precluding contact between the government and companies on the issue of content moderation decisions would likely redress the injuries identified.[32]

### *B. Did the government's conduct transform content restrictions into state action?*

The plaintiff-respondents in the case have contended that the federal government's alleged coercion of social media companies to restrict content transformed such restrictions into state action that violated their First Amendment rights.[33] Plaintiffs relied on several precedents to suggest that state action had occurred following an exercise of the state's "coercive power," where the state provides significant encouragement, and where the state and the private actor are "joint participants" in said conduct.[34] Plaintiffs also claimed that companies' legal immunity under Section 230 of the CDA merged with these factors to create a "compelling case for state action" and, thus, a likelihood of success on the merits.[35]

The Fifth Circuit addressed the question of state action using the "close nexus test" specified in *Blum v. Yaretsky*, whereby a private party is "significantly encouraged" or coerced "to such a degree that its 'choice'—which if made by the government would be unconstitutional—'must in law be deemed to be that of the State.'"[36] To determine what constitutes "significant encouragement," the Fifth Circuit relied on *Blum* and its own precedent to infer that the state must exercise active and meaningful control over the challenged private action, which may involve "entanglement in a party's independent decision-making," a direct involvement in the decision's execution, extensive oversight.[37] Applying these principles to the defendants in this case, the Fifth Circuit found that the White House, Surgeon General's Office, Federal Bureau of Investigation, Centers for Disease Control and Prevention, and the Cybersecurity and Infrastructure Security Agency significantly encouraged the companies' conduct by virtue of their "consistent and consequential interaction with the platforms" and their "[compliance] with the officials' requests."[38] The court ruled that, over time, the tenor of such requests changed to a point of the platforms capitulating to "state-sponsored pressure."[39]

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31. *Id.* at 371 ("[P]redictability does not require certainty, only likelihood.").
32. *See id.* at 372, 375.
33. *See* Plaintiffs' Memorandum in Support of Preliminary Injunction at 43, *Biden I*, No. 3:22-CV-01213, 2022 WL 3444621 (W.D. La. June 14, 2022), ECF No. 15.
34. *Id.* 43-44.
35. *Id.* at 42, 50.
36. *Biden II*, 83 F.4th at 373-74 (quoting 457 U.S. 991, 1004 (1982)).
37. *Id.* at 375 (citing *Blum*, 457 U.S. at 1004.).
38. *Id.* at 387.
39. *Id.*

Regarding coercion, the Fifth Circuit employed a four-factor test used by the Second Circuit in a recent case, *National Rifle Association v. Vullo*, to establish whether the government's conduct could be "reasonably construed as intimating a threat."[40] Regarding the first factor, which looks at "word choice and tone," the Fifth Circuit examined the record to determine that the officials' communiques were "on-the-whole intimidating" and involved "inflammatory, and hyper-critical phraseology," that amounted to them being "phrased virtually as orders."[41] On the second factor, regarding how the companies perceived government communications, the Fifth Circuit reviewed the record to conclude that the platforms were influenced to remove content specifically identified by government officials.[42] The Fifth Circuit noted that "when they asked for the platforms to be more aggressive, 'interven[e]' more often, take quicker actions, and modify their 'internal policies,' the platforms did."[43] Regarding the third factor of a state entity's coercive authority over the companies, the Fifth Circuit, in considering whether a "reasonable person would be threatened" by the government's statements, concluded that they would.[44] The final factor, concerning a reference to adverse consequences, was established by references to the record where officials threatened that the platforms would be "held accountable" with "fundamental reforms," such as a rescinding of immunity.[45] The court concluded that the communications were state action and violated the First Amendment.[46]

### *C. Are the terms and breadth of the injunction improper?*

The defendant-appellants in the case asked the Supreme Court to consider whether the injunction's terms, as well as its breadth, were proper. The district court's injunction, as modified by the Fifth Circuit, enjoined several defendants from demanding the removal of content involving First Amendment-protected speech.[47] The defendants argued that the injunction was "impermissibly overbroad" in its directives to government agencies and did not "state its terms specifically," thus arguing that the injunction was violative of Federal Rule of Civil Procedure 65.[48]

In this respect, the Fifth Circuit agreed with the defendants, noting that the injunction was overbroad in that it prohibited the government from engaging in legal conduct.[49] The Fifth Circuit found that the injunction's provisions that barred "urging, encouraging, pressuring, or inducing" social media companies to restrict conduct was not unconstitutional, unless it

40. *Id.* at 379-80 (citing Kennedy v. Warren, 66 F.4th 1199, 1211-12 (9th Cir. 2023)); *see also* Nat'l Rifle Ass'n of Am. v. Vullo, 49 F.4th 700 (2d Cir. 2022).
41. *Id.* at 383.
42. *See Biden II*, 83 F.4th at 384.
43. *Id.* at 383-85.
44. *Id.*
45. *Id.* at 385.
46. *See id.* at 392.
47. *See id.*
48. *Biden I*, 2023 WL 4335270, at *69.
49. *See Biden II*, 83 F.4th at 394.

satisfied the "close nexus test" described, here, in Section II-B.[50] Regarding vagueness, it observed that, for an official,"[t]here would be no way for a federal official to know exactly when his or her actions cross the line" into impermissible conduct.[51] The court also noted that the injunction's provisions barring government contact with several private non-parties might have impermissibly implicated these group's First Amendment rights.[52] Hence, the Fifth Circuit vacated all but one prohibition of the injunction.

The remaining prohibition, identified as "provision six," is modified *suo motu* by the Fifth Circuit to avoid encompassing any First Amendment protected speech by the defendants.[53] Relying, once again, on the provisions of the "close nexus test," the Fifth Circuit's new language for the injunction barred the state defendants from actions that "coerce or significantly encourage social-media companies to remove, delete, suppress, or reduce, including through altering their algorithms, posted social-media content containing protected free speech."[54] It specified "guiding inquiries" for the defendants to determine whether their conduct runs afoul of the modified injunction, which are the standards of reasonableness in the interpretation of a threat as well as active and meaningful control by the state over platforms' content decisions.[55]

## III. CONCLUSION

For these reasons, *inter alia*, the Fifth Circuit modified the preliminary injunction. The Court's grant of certiorari attracted a dissent from Justice Alito, joined by Justices Thomas and Gorsuch. They argued that the defendants did not make a "clear showing of irreparable harm" as required for a stay.[56] Oral arguments in the case took place on March 18, 2024.[57]

50. *Id.* at 374, 395.
51. *See id.* at 395.
52. *See id.* at 396-97.
53. *Id.*
54. *Id.*
55. *Biden II*, 83 F.4th at 397.
56. *Murthy*, 144 S. Ct. at 8 (Alito, J., dissenting).
57. *See* Docket for No. 23-411, SUP. CT. OF THE U.S., https://www.supremecourt.gov/docket/docketfiles/html/public/23-411.html [https://perma.cc/U8MG-STXQ] (last visited Mar. 18, 2024)

# NetChoice, L.L.C. v. Paxton

**Luke Posniewski**

49 F.4TH 439 (5TH CIR. 2022)

In *NetChoice, L.L.C.*[1] *v. Paxton*, the Fifth Circuit heard First Amendment claims of trade associations representing companies affected by Texas House Bill 20, which regulates the ability of online platforms to censor the viewpoints of their users.[2] The court reversed the Western District of Texas's preliminary injunction and held that the statute does not violate the First Amendment.[3] Under First Amendment doctrine, the court held the statute does not chill the speech of online platforms, it regulates the conduct of online platforms rather than their speech in light of 47 U.S.C. § 230, and assuming the statute did regulate their speech, the regulations survive the intermediate scrutiny test applied to content-neutral rules.[4] Additionally, the court concluded that common carrier doctrine further empowered the Texas legislature to prevent online platforms from discriminating against the viewpoints of Texas users.[5] This case created a split with the Eleventh Circuit's decision in *NetChoice, LLC v. Attorney General of Florida* which invalidated a similar Florida statute on First Amendment grounds.[6] The United States Supreme Court heard both cases on February 26, 2024.[7]

## I. BACKGROUND

On September 9, 2021, Texas Governor Greg Abbott signed House Bill 20 into law.[8] The provisions of House Bill 20 apply to social media platforms with more than fifty million monthly users in the United States.[9] The trade associations NetChoice and the Computer & Communications Industry

1. While the petitioner's name is "NetChoice, LLC," this brief will use the official title of this case "NetChoice, L.L.C. v. Paxton."
2. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 445-47 (5th Cir. 2022), *cert. granted*, 144 S. Ct. 477 (2023) (No. 22-555).
3. *Id*. at 447-48.
4. *Id*.
5. *Id*. at 448.
6. *NetChoice L.L.C.*, 49 F.4th at 490; NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022).
7. *NetChoice, LLC v. Paxton*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/netchoice-llc-v-paxton/ (last visited Apr. 9, 2024) [https://perma.cc/JK55-HMNZ].
8. *History for HB 20*, TEX. LEGISLATURE ONLINE, https://capitol.texas.gov/BillLookup/History.aspx?LegSess=872&Bill=HB20 (last visited Apr. 9, 2024) [https://perma.cc/MSQ2-QDGN].
9. TEX. BUS. & COM. CODE ANN. § 120.002(b) (2023); *see also* TEX. BUS. & COM. CODE ANN. § 120.001(1) (2023) (defining "social media platform" as "an Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images").

Association (CCIA) sued the Attorney General of Texas arguing that House Bill 20 was an unconstitutional violation of the First Amendment with a focus on two provisions of the law: Section 2 and Section 7.[10] Section 2 requires social media platforms to disclose how they moderate content, publish a biannual transparency report, and create a system of notice and appeal when the platform removes user-submitted content.[11] Section 7 prohibits a social media platform from censoring "a user, a user's expression, or a user's ability to receive the expression of another person based on . . ." viewpoint or geographic location in Texas.[12]

On December 1, 2021, the district court held for the plaintiffs and issued a preliminary injunction against House Bill 20 finding that both Section 2 and Section 7 of the law were facially unconstitutional, that the law discriminates based on content and speaker since it permits some censorship and only applies to large social media platforms, and that the law fails the heightened scrutiny required by the First Amendment.[13] The defendant appealed to the Fifth Circuit and moved for a stay of the preliminary injunction, which the Fifth Circuit granted and the Supreme Court vacated.[14]

## II. ANALYSIS

On appeal, the Fifth Circuit reversed the district court's preliminary injunction, rejecting the appellee's contention that Section 2 (platform disclosure requirements) and Section 7 (prohibition of censorship by platforms) of House Bill 20 unconstitutionally chill their speech.[15]

### *A. Constitutionality of the Prohibition on Platform Censorship of User Viewpoints*

The court began with Section 7 and considered judicial doctrine regarding facial challenges to statutes, First Amendment doctrine, and common carrier doctrine.[16]

#### 1. Pre-Enforcement Facial Challenges and Application of First Amendment Overbreadth Doctrine

The court began by noting the online platforms argued that it must invalidate House Bill 20 entirely before any instance of its enforcement under

10. *NetChoice L.L.C.*, 49 F.4th at 445-46.
11. *Id*. at 446.
12. *Id*. at 445-46 (citing TEX. CIV. PRAC. & REM. CODE ANN § 143A.002(a) (2023); *see also id.* at 446 (citing TEX. CIV. PRAC. & REM. CODE ANN § 143A.001(1) (2023) (defining "censor" as "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or other- wise discriminate against expression")).
13. *NetChoice L.L.C.*, 49 F.4th at 447.
14. *Id*.
15. *Id*.; *Id*. at 485.
16. *Id*. at 447-48.

the First Amendment overbreadth doctrine.[17] Before applying the doctrine, the court recognized that judicial disfavor to pre-enforcement facial challenges such as this one must meet an "extraordinarily high legal standard" for three reasons.[18] First, the court looked to the Founders to conclude that there was no intention to allow Article III judges to void legislation, as they expressly rejected this mechanism upon consideration.[19] Additionally, Article III limits the judicial power to decide "Cases" and "Controversies" which prohibits courts from "anticipat[ing] a question of constitutional law in advance of the necessity of deciding it."[20] Finally, the court considered the risk of facial challenges to a state statute in the federalist system, as it creates an avenue for unelected judges to invalidate the decisions of an elected legislature.[21] With these considerations, the court concludes that a pre-enforcement facial challenge to legislation must show that there is no situation where the law in question would be valid, and they found the online platforms made no attempt to argue this circumstance.[22]

The court turned to the platforms' argument regarding Section 7 of House Bill 20 under the overbreadth doctrine, which is the other valid facial challenge to a law like House Bill 20.[23] Courts apply this doctrine to invalidate a law only "where there is a substantial risk that the challenged law will chill protected speech or association" in the First Amendment context.[24] Crucially for the court's analysis, the overbreadth doctrine "'attenuates' as the regulated expression as the regulated expression moves from 'pure speech towards conduct."[25]

These considerations led the court to reject the online platforms' overbreadth argument with respect to Section 7 (the prohibition on platform censorship of user viewpoints) on three grounds.[26] First, the court holds that platform censorship addressed in Section 7 constitutes conduct rather than the "pure speech" at which the doctrine is aimed to protect.[27] Then the court looked to the context of the overbreadth doctrine, which seeks to address the constitutional rights of third parties whose speech is likely to be chilled because they must avoid the "burden" and risk of litigation due to an overbroad law.[28] The court illustrated this point with individual citizens who refrain from expression due to criminal sanctions imposed by an overbroad law as the exemplary third party the doctrine is intended to protect.[29] In stark contrast to the example, NetChoice and CCIA represent all the parties

17. *Id.* at 448.
18. *Id*. at 449.
19. *NetChoice L.L.C.*, 49 F.4th at 448.
20. *Id*. at 449 (quoting Liverpool, N.Y.C. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)).
21. *Id.*
22. *Id*.
23. *Id*. at 450.
24. *Id*.
25. *NetChoice L.L.C.*, 49 F.4th at 450 (quoting L.A. Police Dep't v. United Reporting Pub. Corp., 528 U.S. 32, 40 (1999)).
26. *Id.*
27. *Id*. at 451.
28. *Id*.
29. *Id.*

regulated under Section 7, all the parties have the resources to litigate an enforcement action under Section 7, and Section 7 only provides for declaratory and injunctive relief rather than criminal sanctions or even damages.[30] Finally, the court cited the Supreme Court's requirement to avoid speculation about hypothetical cases under the overbreadth doctrine and assessed the facial requirements of the statute to find that House Bill 20 allows the censorship of "unlawful expression" and speech that "incites criminal activity or consists of specific threats."[31]

### 2. Analysis of the Merits of the Platforms' First Amendment Claim

The platforms also claimed that Section 7 regulations prohibiting censorship violated their First Amendment rights which they exercise through content moderation.[32] First Amendment doctrine prohibits regulations that force a host to express something or "interfer[e] with the host's own message."[33] Thus, in its analysis of applicable precedent, the court found that a party that hosts speech can make a First Amendment challenge to a law when it compels the host to speak or restricts the host's own speech.[34]

In its application of precedent on compelled speech, the court distinguished the Section 7 regulations from the unconstitutional right-of-reply statute at issue in *Miami Herald*, where a newspaper publishing critical commentary about a public figure was required to provide space in its paper for that party to publish a reply.[35] In *Miami Herald*, the Supreme Court found the right-of-reply statute unconstitutional because newspapers exercise discretion in affirmatively choosing to publish material, so they are essentially *speaking* to the value of the speech that they publish.[36] As a result, a regulation requiring a newspaper to publish certain information effectively forces them to speak.[37] In contrast, the court here concluded online social media platforms do not exercise the same form of discretion in moderating content.[38] Rather, the court characterized social media platforms as receivers of user information with no editorial discretion outside filtering "obscene and spam-related content," which fails to meet the same level of "substantive, discretionary review akin to newspaper editors."[39]

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30. *Id*.
31. *NetChoice L.L.C.*, 49 F.4th at 451 (quoting TEX. CIV. PRAC. & REM. CODE ANN § 143A.006(a) (2023)).
32. *Id*. at 455.
33. *Id*.
34. *Id*. at 455-59 (citing Mia. Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256 (1974); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 15 (1986); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 576 (1995); Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 60 (2006)).
35. *Mia. Herald Pub. Co.*, 418 U.S. at 258.
36. *NetChoice LLC*, 49 F.4th at 459 (citing *Mia. Herald Pub. Co.*, 418 U.S. at 258).
37. *Id*.
38. *Id.* at 459-60.
39. *Id*. at 459; *see also id*. at n. 8.

The court rejected the platforms' counterargument that forced hosting of speech could infringe on their ability to express their own message since someone could equate the hosting of certain speech with an expression of support for its message.[40] First, they reasoned that the Supreme Court rejected this premise in its precedent except where the host is "intimately connected" with the speech.[41] Analogizing this distinction to the case at hand, the court held social media platforms lack the requisite connection that would cause a party to attribute speech on their platform to the company itself because they permit any user to post on virtually any topic as long as the user agrees to their "boilerplate terms of service."[42]

On the second leg of its analysis, the court found Section 7 does not restrict social media platforms from speaking.[43] First, it reasoned platforms do not have limited space to express their speech like the newspaper in *Miami Herald* or the newsletter in *PG&E* where regulatory requirements on what had to be included harmed the parties to speak as they would in their own forums.[44] Second, platforms have the ability to distance themselves from any speech they host unlike parade organizers or any other speech host who is "intimately connected" with the speech they are hosting.[45] Finally, Section 7 lacks a content-based trigger on social media platform's speech unlike *Miami Herald* where the law required newspapers to publish a response if they ran a negative piece on a political candidate.[46]

The court also addressed the platforms' argument that Section 7 infringes on their First Amendment right to editorial discretion.[47] First, they rejected the notion that editorial discretion is a free-standing category of protected expression under the First Amendment, as editorial discretion served as a consideration about the "presence or absence of protected speech" in precedent as opposed to protected expression itself.[48] Furthermore, they concluded that, even if editorial discretion is a protected right, the platforms fail to exercise it because they disclaim the legal responsibility for content that traditionally adheres to editorial discretion and they fail to perform the pre-publication "selection and presentation" that editorial discretion entails.[49]

### 3. Application of 47 U.S.C. § 230

The court also considered the history of 47 U.S.C. § 230 to conclude that platforms' censorship of users cannot be considered their protected

40. *Id.* at 460.
41. *Id*. at 461-62 (distinguishing the speech in *Pruneyard* and *Rumsfeld* not inherently associated with the owner of the forum and the inherent connection between a parade organizer and the messages expressed in the parade in *Hurley*).
42. *NetChoice L.L.C.*, 49 F.4th at 461-62.
43. *Id.* at 462.
44. *Id.* (citing *Mia. Herald Pub. Co.*, 418 U.S. at 256; *Pac. Gas & Elec. Co.*, 475 U.S. at 24)).
45. *Id.* (citing *Hurley*, 515 U.S. at 576).
46. *Id.* at 462-63 (citing *Mia. Herald Pub. Co.*, 418 U.S. at 244).
47. *Id.* at 463.
48. *NetChoice, L.L.C.*, 49 F.4th at 463.
49. *Id*. At 464-65 (citing Associated Press v. NLRB, 301 U.S. 103, 127 (1937); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998)).

speech.[50] This statute creates broad immunity for most online platforms by expressly stating that they are not treated as the "publisher or speaker" of information provided by another party unless they contribute to the "creation or development" of the content.[51] While recognizing that Congress cannot legislate the definition of what does or does not constitute protected speech, the court reasoned that Congressional fact-finding deserves deference and such deference was particularly warranted in this analysis because online platforms regularly rely on Congress' policy behind § 230 and defend its reasoning.[52] While § 230(c)(2) does allow online platforms to retain immunity even if they remove "objectionable" content, the court interpreted this provision to mean that platforms are still "not like publishers *even when they engage in censorship*."[53]

### 4. Constitutional Applicability of Common Carrier Doctrine to Online Social Media Platforms

The court invoked common carrier doctrine to hold that Section 7 permissibly creates nondiscrimination requirements for online social media platforms that are consistent with First Amendment protections.[54] This doctrine allows states to create such obligations "on communication and transportation providers that hold themselves out to serve all members of the public without individualized bargaining."[55] In its analysis of the history of common carrier doctrine, the court found two major factors when previous courts have decided whether to impose common carrier requirements on new technologies. First, they looked at whether the "carrier [held] itself out to serve any member of the public without individualized bargaining."[56] Second, courts considered whether the company was "affected by the public interest" which applies if its "service played a central economic and social role in society."[57] The court affirmed precedent that has found common carrier nondiscrimination regulations compatible with individual constitutional protections, as past courts repeatedly upheld such regulation except for cases decided under now-rejected principles.[58]

On the first factor, the court held that online social media platforms fit the category of communications firms because they "held themselves out to serve the public without individualized bargaining" since they only require users to agree to standard terms of service.[59] The platforms argued they did

50. *Id.* at 466.
51. *Id*. (quoting 47 U.S.C. § 230 (2018)).
52. *Id.* at 466-67.
53. *Id*. at 468.
54. *NetChoice L.L.C.*, 49 F.4th at 469.
55. *Id*.
56. *Id*. at 471 (citing JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 495 (9th ed. 1878)).
57. *Id.*
58. *Id*. at 473 (noting the Supreme Court upheld common carrier nondiscrimination obligations except for cases marked by the now-rejected principles of *Lochner v. New York*, 198 U.S. 45 (1905) and the racism of *Plessy v. Ferguson*, 163 U.S. 537 (1896)).
59. *Id.* at 474.

not serve the public equally because they only served those who agreed to their terms of service and they were not generally open to the public because they discriminate against certain users and forms of expression through their content moderation.[60] However, the court concluded that a state can still properly impose common carrier obligations on a communications firm that requires consent to terms and conditions when it offers the same terms to all potential users.[61] Moreover, the court rejected the platforms' second point on the grounds that states have regulated businesses as common carriers even though the businesses have a right to exclude certain customers.[62]

The court then applied the second prong to find that "Texas reasonably determined that the Platforms are 'affected with the public interest.'"[63] Citing recent decisions, the court determined that social media platforms have become a central hub of social and political activity.[64] In addition, it concluded the unique ability of large online platforms to disseminate information and the fact that many of these platforms earn most of their revenue through advertising show that the platforms have become a key part of the economy thus justifying the Texas legislature's decision to regulate them as common carriers.[65] The platforms contended that common carriage regulations are disfavored unless the government contributed to a carrier's monopoly, but the court found previous case law did not require a conferred monopoly and determined that the previously addressed § 230 protections provided by Congress constituted sufficient government report to justify the Texas legislature's common carrier regulations.[66] Finally, the court rejected the platforms' counterarguments that carriage is different from the processing of data and that nondiscrimination obligations of House Bill 20 go beyond the scope of common carrier doctrine and will interfere with how they process the communications.[67] In its reasoning, the court found these arguments based on the premises that common carrier requirements cannot apply to a more complex communication technology like social media, and disagreed finding that these obligations may be drafted to fit the medium they seek to regulate as the doctrine has previously evolved to apply to new technologies and should continue doing so.[68]

60. *NetChoice L.L.C.*, 49 F.4th at 474.

61. *Id*. (citing Semon v. Royal Indem. Co., 279 F.2d 737, 739 (5th Cir. 1960)).

62. *Id.* (citing 47 U.S.C. § 223 (granting telephone companies the privilege to filter obscene or harassing expression while otherwise regulated as common carriers); Williams v. Trans World Airlines, 509 F.2d 942, 948 (2d Cir. 1975) (allowing transportation providers to refuse service to disorderly passengers while otherwise imposing common carrier nondiscrimination regulations)).

63. *Id.* at 475.

64. *Id*. (citing Packingham v. North Carolina, 582 U.S. 98, 107 (2017); Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1178-79 (9th Cir. 2022)).

65. *Id.* at 475-76.

66. *NetChoice L.L.C.*, 49 F.4th at 476-77.

67. *Id*. at 478.

68. *Id*. at 478-79.

### 5. Application of Intermediate Scrutiny to Section 7

The court continued its analysis with an assumption that Section 7 does affect the First Amendment rights of platforms to conclude that the regulation still survives the intermediate scrutiny applied to content-neutral regulations on speech.[69] In its analysis, the court found Section 7 a content-neutral regulation because it does not depend on the "what" the platform purports to express through its censorship.[70] The platforms contended that Section 7 is a content-based regulation because it specifies certain types of online platforms (i.e. social media), specifies the platforms that are regulated by a certain size, permits certain types of censorship but not others, and targets the largest social platforms due to specific disagreement with their style of censorship.[71] In its, dismissal of these arguments the court noted that precedent shows that regulation of a specific medium does not raise concerns of content-based regulation and Section 7's allowance for censorship covers expression unprotected by the First Amendment, which suggests it's unrelated to the underlying expression.[72] Furthermore, the court concluded the major thrust of the law's platform size scope served the interest of broadening expression since Section 7 aimed to foster the diversity of ideas on these large platforms.[73] Finally, the court held there was insufficient evidence or precedent to suggest the Texas legislature targeted specific platforms.[74]

Since the court considered Section 7 content-neutral, it applied the intermediate scrutiny test where a regulation is permissible if it "advances important government interests unrelated to the suppression of free speech and does not burden more speech than necessary to further those interests."[75] The court looked to the Texas legislature's findings to determine that the regulation advanced the important government interest of "protecting free exchange of ideas and information" and confirmed this as a substantial government interest from Supreme Court precedent labeling this as a "government purpose of the highest order."[76] Then, it ruled that the regulation does not burden more speech than necessary citing the platforms' inadequate alternatives of suggesting the government could create its own platform, but with the large platforms' unique prominence and value of their network effects on the dissemination of viewpoints, the court held that there was no realistic less-restrictive alternative.[77]

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69. *Id.* at 480.
70. *Id*.
71. *Id*. at 480-82.
72. *NetChoice L.L.C.*, 49 F.4th at 480-81 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 660 (1994) [hereinafter *Turner I*]; R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992)).
73. *Id.* at 482.
74. *Id.*
75. *Id*. (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997)).
76. *Id.* (citing *Turner I*, 512 U.S. at 663).
77. *Id.* at 483-84.

### *B. Analysis of Pre-enforcement Facial Relief Against Section 2 of House Bill 20*

The Fifth Circuit took up the platform's second contention that they are entitled to relief from the disclosure requirements in Section 2.[78] The court held these requirements were not unduly burdensome under Supreme Court precedent set out in *Zauderer*, where the court held that states can require disclosure of "purely factual and uncontroversial information."[79] The court concluded that the regulation met this requirement because its forms regulations imposed minimal burden by requiring tasks that many of these platforms already perform, and the burdens preferred by the platforms constituted speculation that would be better adjudicated on a case-by-case basis when they actually occurred.[80]

78. *NetChoice L.L.C.*, 49 F.4th at 485.
79. *Id.* (citing Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985)).
80. *Id.* at 485-87.

# Garnier v. O'Connor-Ratcliff

**Vaishali Nambiar**

41 F.4TH 1158 (9TH CIR. 2022)

In *Garnier v. O'Connor-Ratcliff*, the Ninth Circuit addressed the question of whether two school board members violated their constituents' First Amendment rights by blocking them from their social media pages.[1] The Ninth Circuit rejected all of the Board members' arguments on appeal and ultimately affirmed the district court's decision, holding that blocking the constituents did, in fact, violate the First Amendment.[2] This case was argued before the U.S. Supreme Court on October 31, 2023, and on March 15, 2024, the Supreme Court published a per curiam order vacating and remanding the case back to the Ninth Circuit.[3]

## I. BACKGROUND

In November 2014, Michelle O'Connor-Ratcliff and T.J. Zane (Trustees) created public social media pages to promote their campaigns for positions on the Poway Unified School District (PUSD) Board of Trustees.[4] They each created a Facebook page, and O'Connor-Ratcliff would later also go on to create a Twitter page in 2016.[5] After winning seats on the Board, the Trustees continued to operate their public pages for various purposes related to their position as Board members.[6] The public was able to engage with the Trustee's posts and pages through emoticon reactions and comments.[7] Christopher and Kimberly Garnier were two parents of children in the District, and in 2015, the Garniers began to repeatedly post lengthy comments on the Trustees' social media posts critiquing the PUSD Board.[8] The Trustees began deleting and hiding the Garniers' comments and, eventually, went on to block the Garniers entirely in October 2017.[9] Subsequently, the Trustees also began using a "word filter" feature to filter out any comments on their page that included specific words.[10] Since the Trustees added several

1. Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1167 (9th Cir. 2022), *cert. granted*, 143 S.Ct. 1779 (Apr. 24, 2023) (No. 22-324).
2. *Id.*
3. O'Connor-Ratcliff v. Garnier, No. 22-324, 2024 WL 1120878 (2024) (per curiam) *vacating and remanding*, *Garnier*, 41 F.4th 1158 (9th Cir. 2022).
4. *Garnier*, 41 F.4th at 1163.
5. *Id.*
6. *Id.* at 1164.
7. *Id.*
8. *Id.* at 1165-66.
9. *Id.* at 1166.
10. *Garnier*, 41 F.4th at 1166.

commonly used English words to their filtration system, this effectively eliminated all comments on their public pages.[11]

Shortly after being blocked, the Garniers filed suit under § 1983 seeking damages, declaratory relief, and injunctive relief, claiming the Trustees violated their First Amendment rights by removing them from the social media pages—which constituted public fora.[12] The district court found that the Trustees acted under color of state law in blocking the Garniers, and the social media pages were designated public fora, so a trial was required to determine disputed factual issues about whether the blocking was a content-neutral restriction of the repetitive comments.[13] After a two-day bench trial, the district court granted judgment for the Garniers, finding that the Trustees' indefinite blocking of the Garniers was not a narrowly tailored restriction and taxed costs in favor of the Garniers.[14] The Trustees appealed, challenging the judgment and the decision to award costs, and the Garniers cross-appealed, asserting the district court erred by granting qualified immunity to the Trustees for the damages claims.[15]

## II. ANALYSIS

### *A. Trustees' Arguments*

The Trustees put forward four arguments on appeal. First, the Trustees contended that the case was moot because the implementation of word filters effectively blocked comments from all users, and therefore this closed any public fora that may have previously existed.[16] Next, they maintained that blocking the Garniers did not constitute state action under § 1983.[17] Third, they argued that the decision to block the Garniers constituted a narrowly tailored time, place, and manner restriction.[18] Finally, the Trustees asserted that the district court erred by denying, without prejudice, their motion to retax costs.[19] The court rejected each of these arguments and framed their analysis accordingly.

#### 1. Mootness

The court rejected the Trustees' argument that their use of the word filter feature deemed this case moot on three grounds.[20] First, the court pointed to the fact that the word filter feature was only utilized on the Trustees' Facebook page—so Christopher Garnier's claim against O'Connor-

11. *Id.*
12. *Id.* at 1166-67; 42 U.S.C. § 1983.
13. *Garnier*, 41 F.4th at 1167.
14. *Id.*
15. *Id.*
16. *Id.*.
17. *Id.* at 1168-69.
18. *Id.*at 1177-78.
19. *Garnier*, 41 F.4th at 1184..
20. *See id.* at 1167-69.

Ratcliff's Twitter page would still survive.[21] Next, the court identified that the word filter feature only implicated a user's ability to comment, not their ability to register emoticon reactions (e.g., likes, hearts).[22] As a result, a live controversy still existed because the Garniers were deprived of providing non-verbal feedback other users were capable of providing.[23] Finally, and "independently dispositive," was the fact that the Trustees *voluntarily* made use of the world filtering system.[24] The court noted that a defendant's voluntary cessation of an activity does not moot a case unless the defendant can meet the heavy burden of showing they would not revert to their prior behavior. [25] Ultimately, the court concluded that the Trustees had not adequately proven they would continue using the word filter and close off all verbal comments from the general public - so this case was not moot.[26]

### 2. State Action

To determine whether the Trustees were acting under the color of state law, the court applied the "nexus test," which looks for whether there is a "close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself."[27] The court analogized the facts of this case to other state action cases involving off-duty state officers and concluded that since the nexus test was applied in those instances, it would also be appropriate in this context.[28]

To guide its application of the nexus test, the court utilized a set of factors discussed in a previous case, *Naffe v. Frey*.[29] The first *Naffe* factor is whether "the employee purports to act under the color of law."[30] Here, the court found that the Trustees satisfied this factor by prominently displaying themselves as government officials on their social media pages and primarily posting content about official Board activities to engage with the public.[31] The second factor is whether the defendant's actions in the performance of their duties "had the purpose and effect of influencing the behavior of others."[32] On this point, the court determined that the Trustees' behavior had the purpose and effect of influencing constituents because they presented their social media pages as official outlets of information from the Board.[33] Each Trustee had hundreds of followers and actively solicited public feedback—

21. *Id.* at 1168.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Garnier*, 41 F.4th at 1168.
26. *Id.*
27. *Id.* at 1169 (quoting Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001)).
28. *See id.* at 1174-77 (noting that the Second, Fourth, and Eighth Circuits have aligned with this reasoning in deciding state action issues in cases involving similar facts, while the Sixth Circuit has rejected analogizing government social media cases to cases involving off-duty law enforcement).
29. *Id.*
30. *Id* (quoting Naffe v. Frey, 789 F.3d 1030, 1037 (9th Cir. 2015)).
31. *Garnier*, 41 F.4th at 1171.
32. *Id.* at 1170 (quoting *Naffe*, 789 F.3d at 1037).
33. *Id.* at 1171.

none of which would be possible without their governmental status.[34] Finally, the last *Naffe* factor asks whether the harm inflicted on the plaintiff was meaningfully related to the defendant's "governmental status or performance of their duties."[35] The court determined that the Trustees' maintenance of their social media platforms as though they were an official organ for Board duties satisfied this element, as it was linked to blocking the Garniers.[36] Since all three factors were satisfied, the court concluded that the Trustees "unequivocally cloaked their social media accounts with the authority of the state," thus constituting state action under § 1983.[37]

### 3. First Amendment Analysis

In conducting a forum analysis, the court found that the Trustees' social media pages constituted a designated public forum prior to the establishment of word filters.[38] While the Trustees asserted that they intended their social media pages to serve as a one-way channel of communication to constituents, the court rejected this because the pages were open to the public to comment on and did not contain unambiguous and definite etiquette rules, as required for limited public fora.[39] However, the court noted that after the addition of word filters, the characteristics of the Trustees' pages changed, such that it became a limited public forum.[40] Additionally, since O'Connor-Ratcliff's Twitter page never utilized word filters, the court treated it as a designated public forum.[41]

The court decided it did not need to resolve the question of whether blocking the Garniers was viewpoint-discriminatory because blocking the Garniers violated the First Amendment, even when blocking was framed as a content-neutral time, place, and manner restriction.[42] In designated public fora, time, place, and manner restrictions are acceptable only if they are narrowly tailored to serve a legitimate government interest and if alternative channels for communication of the information exist.[43] First, the court found that there was no evidence the Garniers' comments actually disturbed the Trustees' pages by creating "visual clutter" or prevented other users from engaging in discussion.[44] Therefore, the court concluded that there was no significant government interest to justify the blocking.[45] Moreover, the court noted that even if the Garniers' comments were found to have interfered with a significant government interest, the act of blocking them was not narrowly tailored because the Garniers were entirely prevented from leaving comments

34. *Id.*
35. *Id.* at 1170 (quoting *Naffe*, 789 F.3d at 1037).
36. *Id.* at 1172.
37. *Garnier*, 41 F.4th at 1173 (quoting Howerton v. Gabica, 708 F.2d 380, 384-85 (9th Cir. 1983)).
38. *Id.* at 1178-79.
39. *Id.* at 1178.
40. *Id.* at 1179.
41. *Id.*
42. *Id.* at 1180.
43. *Garnier*, 41 F.4th at 1180.
44. *Id.* at 1181-82.
45. *Id.* at 1182.

and from even viewing the Twitter page.[46] The court noted that this burdened substantially more speech than necessary when the Trustees could have used alternate methods like deleting only repetitive comments and establishing clear rules of etiquette on their pages.[47]

Moreover, the court found that it was not reasonable for the Trustees to continue blocking the Garniers after they installed word filters, in light of the purpose of the limited public forum.[48] Determining reasonableness requires courts to determine "whether the limitation is consistent with preserving the property for the purpose to which it is dedicated."[49] Here, the Trustees' implementation of word filters was driven by their interest in limiting public comments on their pages.[50] However, after using word filters, continuing to block the Garniers effectively served no purpose.[51] The only remaining impact was that the Garniers would not be able to participate in providing non-verbal emoticon reactions to posts, but the Trustees never asserted an interest in limiting emoticon reactions on their pages.[52] Therefore, the court concluded the continued blocking of the Garniers was unreasonable.[53]

#### 4. Costs

With respect to the Trustees' claim that the district court erred by denying, without prejudice, their motion to retax costs, the court stated it lacked the appropriate jurisdiction to address this question.[54] The district court had clearly intended to revisit the question following the appeal, and so this did not constitute a "final decision" that the Ninth Circuit would be able to hear.[55]

### *B. Garniers' Cross-Appeal*

The Garniers cross-appealed, contending the district court erred by granting the Trustees qualified immunity as to the Garniers' damage claim.[56] The district court granted qualified immunity on the basis that at the time the Trustees blocked the Garniers, there was no established First Amendment right to post comments on a public official's social media page.[57] The court agreed with this logic, noting the lack of controlling authority or consensus of

46. *Id.*
47. *Id.*
48. *Id.* at 1182-83.
49. *Garnier*, 41 F.4th at 1183 (quoting DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 967 (9th Cir. 1999)).
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 1184.
55. *Garnier*, 41 F.4th at 1184-85.
56. *Id.* at 1183.
57. *Id.*

cases clearly establishing such a right in the fall of 2017 when the Trustees blocked the Garniers.[58]

## III. CONCLUSION

For the foregoing reasons, the Ninth Circuit affirmed the district court's judgment that the Trustees violated the First Amendment by restricting the Garniers' expression on their social media pages.[59] O'Connor-Ratcliff petitioned the Supreme Court of the United States for a writ of certiorari, and this was granted in April 2023.[60] The Supreme Court heard the case on October 31, 2023.[61] On March 15, 2024, the Court issued a per curiam order vacating and remanding the case to the Ninth Circuit for further proceedings consistent with the reasoning the Court articulated in *Linkde v. Freed*—another state action case that also dealt with the use of social media by public officials.[62]

58. *Id.* at 1183-84.
59. *Id.* at 1185.
60. *Id.*, *cert. granted*, 143 S.Ct. 1779 (Apr. 24, 2023) (No. 22-324).
61. O'Connor-Ratcliff v. Garnier, No. 22-324, 2024 WL 1120878 (U.S. 2024) (per curiam) *vacating and remanding Garnier*, 41 F.4th 1158.
62. *Id.*