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For what avail the plough or sail
Or land or life, if freedom fail?
EMERSON

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CONSTITUTIONAL GUN LITIGATION BEYOND THE SECOND AMENDMENT

*JOSEPH BLOCHER & NOAH LEVINE**

INTRODUCTION

Litigation, scholarship, and commentary about gun rights and regulation tend to focus nearly exclusively on the Second Amendment's right to keep and bear arms—a constitutional guarantee that was for all intents and purposes legally inert until the Supreme Court's decision in *District of Columbia v. Heller*.[1] In the twelve years since *Heller*, the Second Amendment has been the subject of substantial litigation[2] and an increasingly broad and deep scholarly conversation, as the questions presented now go beyond the threshold issue of whether the right to keep and bear arms encompasses private purposes like the ownership of arms for self-defense in the home.

This richer debate about the Second Amendment is a welcome development. But it still does not capture the full scope of gun rights and regulation. As a matter of law, let alone public discourse, the right to keep and bear arms is defined not only by the Second Amendment, but also by a wide range of statutory guarantees, including special immunity for manufacturers and sellers of guns,[3] state-level preemption laws,[4] "sanctuary" resolutions,[5] and other sub-constitutional lawmaking.[6] This "right to keep and bear arms

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1. 554 U.S. 570 (2008).

2. Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433 (2018).

3. *See* 15 U.S.C. § 7903(5)(A) (2021) (providing that, except in certain narrow circumstances, no person can sue gun sellers or manufacturers for injuries "resulting from the criminal or unlawful misuse of a [gun] by the person or a third party").

4. *See* Rachel H. Simon, *The Firearm Preemption Phenomenon*, 43 CARDOZO L. REV. (forthcoming 2022).

5. *See generally* Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U.L. REV. 437 (2020) (discussing the legal viability of local governments resisting state gun-control measures they consider unconstitutional).

6. We do not posit a bright line between these rules and "constitutional law"—certainly statutes, ordinances, and even broader cultural and political forces

outside the constitution"[7] has been the focus of increased scholarly attention, not to mention litigation.[8]

But to fully understand the landscape of gun litigation, it is important also to account for *other* constitutional gun rights claims—those that do not derive, at least not directly, from the Second Amendment.[9] In Part I of this short Article, we highlight some of the most prominent of these claims, including those deriving from the Due Process Clause,[10] Takings Clause,[11] and the First Amendment.[12] Our goal is primarily to describe and illustrate, not to evaluate, though it is worth noting that some of these claims appear much stronger than others—and perhaps stronger than some

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have an important role to play in what we collectively regard as "constitutional." *See* Richard A. Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079 (2013). But we can nonetheless recognize something distinct about formal constitutional claims—those that a court might invoke to trump other forms of lawmaking—and those are our focus here.

7. Jacob D. Charles, *Securing Gun Rights by Statute: The Right To Keep and Bear Arms Outside the Constitution*, 110 MICH. L. REV. (forthcoming 2022); Adam Winkler, *Is the Second Amendment Becoming Irrelevant?*, 93 IND. L.J. 253 (2018).

8. The PLCAA, to take just one example, has been the subject of prominent cases attempting to get around the federal limitations on seller liability. *See, e.g.*, Soto v. Bushmaster Firearms Int'l, LLC, 203 A.3d 262, 272 (Conn. 2019) (holding that PLCAA did not bar claim that gun company violated Connecticut's unfair trade practices law when it "knowingly marketed, advertised, and promoted the XM15-E2S for civilians to use to carry out offensive, military style combat missions against their perceived enemies"), *cert. denied sub nom.* Remington Arms Co. v. Soto, 140 S. Ct. 513 (Nov. 12, 2019); Michael C. Dorf, *Mexican Government Lawsuit Against U.S. Gun Makers Tests the Limits of Territoriality*, VERDICT (Sept. 1, 2021), https://verdict.justia.com/2021/09/01/mexican-government-lawsuit-against-u-s-gun-makers-tests-the-limits-ofl-territoriality [https://perma.cc/2EY7-HZM9].

9. In fact, if we were to broaden the lens more to include constitutional claims that incidentally involve guns, then we would be well on our way to a complete constitutional law syllabus. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); United States v. Lopez, 514 U.S. 549 (1995); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); *see also* Jake Charles, *Forging Con Law Through a Gun Regulation Lens*, SECOND THOUGHTS BLOG (June 19, 2019), https://firearmslaw.duke.edu/2019/06/forging-con-law-through-a-gun-regulation-lens/ [https://perma.cc/3ZGX-JBJS].

10. *See infra* Section I.A.

11. *See infra* Section I.B.

12. *See infra* Section I.C. Because they have been discussed in detail elsewhere, we hold aside gun-related Fourth Amendment claims. *See, e.g.,* Caniglia v. Strom, 141 S. Ct. 1596, 1597 (2021) (finding that police's community caretaking responsibilities could not justify warrantless search of home and seizure of petitioner and his firearms); United States v. Robinson, 846 F.3d 694, 699 (4th Cir. 2017) (holding that a police officer's traffic stop of a lawfully armed person is inherently dangerous and thus justifies a *Terry* frisk); Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1 (2015).

courts have credited. Moreover, some constitutional claims sometimes cut *against* the interests of gun owners (for example, by calling into question the constitutionality of "parking lot" laws that require private business owners to permit guns on their property).[13] The paths of argumentation therefore involve tradeoffs and countervailing considerations for gun advocates, courts, and other stakeholders.

In Part II of the Article, we address two broader and more speculative questions. First, how do these constitutional claims interact with traditional Second Amendment arguments? Evaluating that question suggests much about how litigants perceive the relative strength and utility of their rights—for example, whether these litigants might best vindicate their constitutional rights under provisions other than the Second Amendment. And, going forward, the answers will depend greatly on what the Supreme Court decides in the pending case of *New York State Rifle & Pistol Association v. Bruen*,[14] which involves the question of whether the right to keep and bear arms extends outside the home. An affirmative holding could shape the outcome of other constitutional claims, such as whether public carry is expressive conduct or whether Due Process protects a "liberty" in the context of public carry permits.

Second, we ask what this polycentric constitutional understanding of gun rights—that is, an understanding that includes the full scope of potential constitutional rights beyond the Second Amendment—entails for those who support gun regulation as a means to preserve not only their own physical safety, but their freedom to engage in free speech, assembly, worship and other constitutionally salient activities.[15]

I.
CONSTITUTIONAL GUN RIGHTS CLAIMS OUTSIDE THE SECOND AMENDMENT

A. Due Process

As with other constitutional rights whose exercise sometimes depends on state permitting schemes or other discretionary deci-

13. *See infra* notes 72–88 and accompanying text.

14. *See* New York State Rifle & Pistol Ass'n v. Corlett, No. 20-843, 2021 WL 1602643 (U.S. Apr. 26, 2021) (granting certiorari on the question "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment").

15. *See* Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under* Heller, 116 NW. U. L. REV. 139 (2021).

sion-making—free speech, for example[16]—gun rights sometimes intersect with due process. Claims based on due process have been particularly prominent in challenges to state licensing schemes for public carry of firearms, and more recently in challenges to extreme risk protection order laws, also known as "red flag laws."[17] We address each in turn.

1. Concealed Carry Permits

Twenty-five states require citizens to apply for permits before carrying concealed weapons in public.[18] Each of these states has established minimum criteria that applicants must satisfy to receive their permits. For example, applicants in North Carolina must be at least 21 years old,[19] and those in California must have completed a training course.[20] Some citizens who have been denied a license (or had their licenses revoked) have raised Fourteenth Amendment due process claims. The viability of these claims has largely depended on the amount of discretion the state's permitting requirements vest with the issuing authority.

As a threshold matter, challengers invoking the Fourteenth Amendment's Due Process Clause must show that the state has deprived them of liberty or property.[21] In keeping with *Heller*'s indication that concealed carrying is not protected by the Second Amendment[22] (as opposed, perhaps, to open carrying[23]), courts have generally dismissed claims that applicants have a liberty inter-

16. *See, e.g.,* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969) (holding that city council's unbridled power to deny public demonstration permits was an unconstitutional restraint on free speech); Freedman v. Maryland, 380 U.S. 51, 58 (1965) (requiring that Maryland's film censorship review board implement procedural safeguards that mitigate the burden on exhibitors' free speech).

17. *See infra* notes 33–52 and accompanying text.

18. *See Concealed Carry*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry/ (last visited Oct. 7, 2021). The remaining twenty-five states generally allow people to carry concealed weapons in public without a permit. *Id.*

19. N.C. Gen. Stat. Ann. § 14-415.12.

20. Cal. Penal Code § 26150.

21. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569-70 (1972) ("The requirements of procedural due process apply only to the deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property.").

22. District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (stating that the Second Amendment right is not absolute and listing as an example the fact that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues"); *see also* Peruta v. County of San Diego, 824 F.3d 919, 939 (9th Cir. 2016) (en banc) ("We therefore conclude that the Second Amendment right

est in holding a concealed firearms permit.[24] There is no constitutional right to engage in the activity at all, let alone to do so with a state permit.

Litigants have accordingly tended to train their due process arguments on their property rights. And in some cases, courts have found that the denial of a concealed carry permit can indeed constitute a deprivation of property eligible for due process protection. Specifically, challengers have been successful in states where officials have *no discretion* to deny applicants who meet the minimum criteria. Only then does a qualified applicant "have more than a unilateral expectation of [the permit] . . . instead, [the applicant has] a legitimate claim of entitlement to it."[25] The Fourteenth Amendment ensures due process protection over that entitlement.

Of course, that is not to say that these states cannot deny applications, only that they must comply with due process in doing so. That might require the state to allow evidentiary hearings in appeal of non-issuance decisions,[26] offer adequate notice of the reasons for permit revocation,[27] or provide for a reasonably swift appeal.[28]

States which give issuing authorities no discretion in denying applicants are often called "shall issue" states, of which there are currently ten.[29] It is important to note that seven other states use "shall issue" language in their permit application statutes, yet still grant some minimal discretion to state authorities.[30] Even the slightest grant of discretion can eliminate due process coverage for

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to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public.").

23. *See* Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486 (2013).

24. *See, e.g.*, Oquendo v. City of New York, 492 F. Supp. 3d 20, 28 (E.D.N.Y. 2020); White v. Illinois State Police, 482 F. Supp. 3d 752, 771 (N.D. Ill. 2020); Nichols v. Santa Clara, 223 Cal. App. 3d 1236, 1244-45 (1990).

The Supreme Court's pending decision in *Bruen* could alter the trajectory of these claims. If the right to carry a gun in public is recognized as a core Second Amendment right, then challengers might be better able to claim that permit non-issuances and revocations implicate due process.

25. *Roth*, 408 U.S. at 577.

26. *See* DeBruhl v. Mecklenburg Cnty. Sheriff's Off., 815 S.E.2d 1, 7 (N.C. Ct. App. 2018).

27. *See* Caba v. Weaknecht, 64 A.3d 39, 66 (Pa. Commw. Ct. 2013).

28. *See* Kuck v. Danaher, 600 F.3d 159, 167 (2d Cir. 2010).

29. *Concealed Carry*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry/ (last visited Oct. 7, 2021). [perma.cc/9L7T-EWLV]

30. *See id.*

unsuccessful applicants,[31] because it takes away any property interest they might assert.

On a few occasions, permit applicants have also challenged state permit requirements for being unconstitutionally vague. To this point, courts have upheld states' concealed carry permit requirements against these challenges.[32] In short, due process challenges to permit provisions have generally not fared well.

2. "Red Flag" Laws

Nineteen states have adopted laws that allow courts to temporarily restrict individuals who pose an imminent risk of harm from possessing firearms.[33] These extreme risk laws – also called "red flag" laws – enable law enforcement officers or others[34] to petition a court to require gun owners to relinquish their firearms and abstain from acquiring others. Though some argue that extreme risk laws violate the Second Amendment, the more substantive concern is whether these laws comport with the Fourteenth Amendment's due process guarantee.[35]

Some critics assert that extreme risk laws punish individuals based not on conduct but on predictions of their future conduct.[36] Some have likened such laws to the film *Minority Report*, in which a "PreCrime" department arrests people based on mindreading and predictions of their future behavior.[37] Other opponents regard

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31. *See* King v. Wyoming Div. of Crim. Investigation, 89 P.3d 341, 351-52 (Wyo. 2004). Wyoming has since removed such discretion from issuing authorities.

32. *See, e.g.*, Sibley v. Watches, 460 F. Supp. 3d 302, 316-18 (W.D.N.Y. 2020); Kuck v. Danaher, F. Supp. 2d 109, 135-36 (D. Conn. 2011); Bleiler v. Chief, Dover Police Dep't, 927 A.2d 1216, 1225-26 (N.H. 2007). *But cf.* Gowker v.Chicago, 923 F. Supp. 2d 1110, 1116-17 (N.D. Ill. 2012) (holding that a city ordinance was unconstitutionally vague when it treated simple possession of a firearm as "an unlawful use of a weapon that is a firearm").

33. *Extreme Risk Protection Orders*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/ (last visited Sept. 10, 2021)[https://perma.cc/X6QK-YX2Z].

34. *Id.* Twelve states allow household members and law enforcement to petition a court for an extreme risk protection order. Five states restrict petitioners to law enforcement officers. Other states allow mental health professionals, school administrators, medical professionals, coworkers, or others to submit petitions.

35. *See* Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws and Due Process*, 106 VA. L. REV. 1285 (2020).

36. *See, e.g.*, Alan M. Dershowitz, *A Yellow Light for Red-Flag Laws*, WALL ST. J. (Aug. 6, 2019, 6:55 PM), https://www.wsj.com/articles/a-yellow-light-for-red-flag-laws-11565132144?mod=searchresults&page=1&pos=5[https://perma.cc/QME7-DJFE].

37. *See* Blocher and Charles, *supra* note 35, at 1316-17.

these orders as "Kafkaesque. . .stripping Americans of their constitutional rights in secret proceedings where they have no voice."[38]

While the demands of due process are not formulaic, the government must generally provide both notice and a hearing before depriving a person of constitutionally protected liberty or property interests.[39] The challenge is that extreme risk statutes aim to quickly extinguish imminent risks of harm, and there might not always be time for a thorough evidentiary hearing before a temporary gun seizure. And in fact, the Supreme Court has recognized two situations where a post-deprivation hearing still satisfies due process demands: (1) occasions "where a State must act quickly" and (2) those "where it would be impractical to provide predeprivation process."[40]

In *Fuentes v. Shevin*,[41] the Supreme Court created a three-element test to analyze the constitutionality of deprivations conducted before a hearing.[42] First, the deprivation must be "directly necessary to secure an important governmental or general public interest."[43] Second, there must be "a special need for very prompt action."[44] Third, "the person initiating the seizure [must be] a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance."[45] Later, in *Mathews v. Eldridge*,[46] the Court refined its procedural due process jurisprudence with a test balancing three factors: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Gov-

38. *See* Michael Hammond, *Kafkaesque 'Red Flag Laws' Strip Gun Owners of Their Constitutional Rights*, USA TODAY (Apr. 19, 2018, 2:30 PM), https://www.usatoday.com/-story/opinion/2018/04/19/red-flag-laws-strip-gun-rights-violate-constitution-column/52622-1002/[https://perma.cc/T2BZ-AWY7].

39. Henry J. Friendly, "*Some Kind of Hearing*", 123 U. PA. L. REV. 1267 (1975).

40. *See* Gilbert v. Homar, 520 U.S. 924, 930 (1997); *see also* Parratt v. Taylor, 451 U.S. 527, 539 (1981) (stating that "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process"), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986).

41. 407 U.S. 67 (1972).

42. *Id.* at 90–92.

43. *Id.* at 91.

44. *Id.*

45. *Id.*

46. 424 U.S. 319 (1976).

ernment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[47]

Thus far, no court has found that an extreme risk statute violates due process.[48] Under the first *Eldridge* factor, extreme risk orders do impact a substantial private interest in armed self-defense, but only briefly (and often to protect an individual from self-harm).[49] Under the second *Eldridge* factor, the risk of an erroneous deprivation is not clear—it is not even clear how one could measure an erroneous deprivation.[50] Under the final *Eldridge* factor, the governmental and public interests are significant: immediate risk of suicide or homicide represent grave dangers that necessitate swift action.[51] Ultimately, the interest in public safety in emergencies likely overrides the delay of mere weeks for the final hearing.[52] Thus, the difficulty of showing a due process violation under *Eldridge* renders these challenges unlikely candidates for advancing gun rights.

B. Takings

The Fifth Amendment provides that states may claim private property for public use if they pay "just compensation."[53] The archetypal use of eminent domain involves an explicit taking of real property.[54] Regulatory takings (also known as implicit takings) can arise when regulations go "too far," for example, when they deprive property owners of all "reasonable beneficial use" of the property; they, too, require just compensation.[55]

Takings claims have proven to be a somewhat more fruitful avenue for gun rights advocates. The Supreme Court's apparently growing solicitude for property rights, including its recent takings

47. *Id.* at 335.

48. *See, e.g.*, Hope v. State, 133 A.3d 519, 524-25 (Conn. App. Ct. 2016) (rejecting due process challenge); Redington v. State, 992 N.E.2d 823, 830-39 (Ind. Ct. App. 2013) (same); Davis v. Gilchrist Cnty. Sheriff's Off., 280 So. 3d 524, 533 (Fla. Dist. Ct. App. 2019) (same).

49. *See* Blocher & Charles, *supra* note 35, at 1332.

50. *See id.* at 1333.

51. *See id.* at 1334.

52. *See id.*

53. U.S. CONST. amend. V.

54. *See, e.g.,* Berman v. Parker, 348 U.S. 26, 36 (1984) (holding that seizure of a blighted area for city development was a lawful exercise of eminent domain).

55. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 119, 138 (1978) (holding that a denial of a building permit application did not amount to a taking requiring just compensation).

decision in *Cedar Point Nursery v. Hassid*,[56] suggests the possibility of similar claims going forward. But not all of those claims will favor gun rights—some might end up undermining state statutes designed to protect gun possession on others' private property.

1. Magazine and Accessory Restrictions

Some forms of gun regulation focus on the implement itself, for example by prohibiting certain classes of firearms. Such laws have been the subject of regulatory takings challenges, which have occasionally succeeded.

California bans the possession of large capacity magazines (LCMs)—defined as magazines that hold over ten rounds of ammunition—and does not exempt those that are already lawfully owned.[57] Preexisting owners have four options: remove their LCMs from the state, sell them to a licensed dealer, submit them to law enforcement, or modify them to comply with the regulation.[58]

Maryland prohibits the possession of rapid-fire trigger activators (also known as bump stocks) which increase the fire rate of weapons.[59] Though Maryland law allows preexisting owners to maintain possession of their bump stocks so long as they receive authorization from the United States Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the ATF does not currently process applications for these authorizations. Therefore, as in California, Maryland residents must dispossess themselves of their property.[60]

Takings challenges to these two laws have produced very different results. The United States District Court for the Southern District of California in *Duncan v. Bonta* granted summary judgment for the challenger's claim that California's law was a *per se* taking (as well as a violation of the Second Amendment).[61] The appeal is currently pending in the Ninth Circuit, which heard oral argument in July 2021—with many questions from the bench addressing the tak-

56. 141 S. Ct. 2063 (2021) (holding that California's regulation permitting labor organizations to access an agricultural employer's property constituted a taking).

57. CAL. PENAL CODE § 32310(c) (Deering 2016).

58. *Id.* § 32310(d).

59. *See* MD. CODE ANN., CRIM. LAW § 4-305.1(a)(1) (LexisNexis 2019).

60. *See* Marie A. Bauer, Note, *Too Quick on the Trigger: How the Fourth Circuit's Review of Regulatory Takings in* Maryland Shall Issue, Inc. v. Hogan *Failed to Consider the Complexities of Takings Jurisprudence*, 80 MD. L. REV. ONLINE 89, 91–92 (2021).

61. Duncan v. Becerra, 366 F. Supp. 3d 1131, 1185–86 (S.D. Cal. 2019), *aff'd*, 970 F.3d 1133 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021).

ings claim.[62] The Fourth Circuit, on the other hand, held that Maryland's bump stock ban was *not* a taking under the Fifth Amendment.[63]

Subsequent developments in Supreme Court takings jurisprudence may provide a stronger basis for decisions like *Bonta* by widening the scope of *per se* takings to include appropriations of core property rights.[64] In *Cedar Point Nursery v. Hassid*, petitioners challenged a California regulation requiring agricultural employers to allow union organizers onto their farm on a limited, but substantial basis.[65] The Court's prior precedents seemed to distinguish physical occupations which are temporary/limited from those which are permanent; only the latter have typically been characterized as *per se* takings requiring just compensation.[66] Though California's access regulation was limited, the Court in *Cedar Point* found that it was a taking because it "appropriate[d] a right to invade the growers' property. . . ."[67] The decision in *Cedar Point* thus bolstered potential takings challenges to magazine restrictions as appropriations of core property rights, and it may also have implications for so-called "parking lot laws"—as we discuss in more detail below.[68]

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62. Noah Levine, *On* Cedar Point Nursery *and Firearm Regulations*, SECOND THOUGHTS BLOG (July 23, 2021), https://firearmslaw.duke.edu/2021/07/on-cedar-point-nursery-and-firearm-regulations/ [https://perma.cc/A2NV-8LSC].

63. Md. Shall Issue, Inc. v. Hogan, 963 F.3d 356, 367 (4th Cir. 2020); *see also* Ass'n of N.J. Rifle &Pistol Clubs, Inc. v. Attorney Gen. N.J., 910 F.3d 106, 110 (3d Cir. 2018) (holding that New Jersey's LCM ban was not an unconstitutional taking); McCutchen v. United States, 145 Fed. Cl. 42, 53–56 (2019) (holding that ATF's reclassifying bump stocks as machine guns, and thus prohibiting their possession, did not represent a taking).

64. Bauer, *supra* note 6060, at 106–08 (criticizing Fourth Circuit's decision in *Maryland Shall Issue* and advocating use of multi-factor test rather than categorical analysis).

65. 141 S. Ct. 2063, 2069–70 (2021); *see* CAL. CODE REGS. tit. 8, § 20900(e)(1)(A), (3)(A)–(B) (establishing a right of access by union organizers for a maximum of three hours per day, 120 days per year).

66. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83–84 (1980) (holding that a requirement for a shopping center to permit speech and petitioning on company property was not a taking because the center could impose time, place, and manner restrictions).

67. 141 S. Ct. at 2072.

68. *See infra* notes 72–88 and accompanying text. *See also* Ilya Somin, *'Gun-at-Work Laws' Violate the Property Rights of Business Owners*, WASH. POST (April 25, 2022) https://www.washingtonpost.com/outlook/2022/04/25/gun-at-work-second-amendment/ [https://perma.cc/4W34-A6WY] (arguing that such laws constitute takings).

Moving forward, the Court seems likely to limit the scope of what state governments can regulate without payment of just compensation.[69] The challengers in *Bonta* have followed the example of the plaintiffs in *Cedar Point* and argued in supplemental briefs that California's LCM regulation appropriates "the right to possess, which is even more fundamental than the right to exclude."[70] Under current takings jurisprudence, it is currently unclear whether the distinction between real property (as in *Cedar Point*) and chattel (as in *Bonta* or *Maryland Shall Issue*) is significant, but Chief Justice Roberts's majority opinion in *Horne v. Department of Agriculture* seems to support the notion that they should be treated the same: "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."[71]

2. Parking Lot Laws

The revival of strong takings doctrine is welcome news for gun rights advocates seeking to challenge prohibitions on particular classes of arms and accessories, including LCMs. But those same takings principles—and, in particular, the Supreme Court's *Cedar Point* decision—also call into question some laws passed specifically to protect guns and gun owners.

At least twenty-four states have adopted what are sometimes called "parking lot laws" or "take your gun to work" laws.[72] They vary in their particulars, but the purpose and effect of these laws is to make it harder for private entities—often businesses—to exclude guns from their property, for example by requiring that they allow employees to leave guns in their cars during working hours. As the Tenth Circuit put it, such laws "hold employers criminally liable for

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69. This seems especially true given some Justices' disdain for the broad interpretation of the "public use" requirement for takings in Kelo v. City of New London, 545 U.S. 469, 493-523 (2005) (permitting use of eminent domain to transfer property from one private property owner to another). *See* Eychaner v. City of Chicago, 141 S. Ct. 2422, 2423 (2021) (Thomas, J., dissenting in denial of cert.) ("[T]his petition provides us the opportunity to correct the mistake the Court made in *Kelo*.").

70. Rule 28(j) Letter with Supplemental Authorities for Appellees, Virginia Duncan et al. v. Rob Bonta, No. 19-55376 (en banc) (9th Cir. July 12, 2021); *see* 9th Cir. R. 28(j).

71. *See* 576 U.S. 351, 358 (2015).

72. *See* Dru Stevenson, *Workplace Violence, Firearm Prohibitions, and the New Gun Rights*, 55 U.S.F. L. Rev. 179, 189–93 (2021) (describing spread of parking lot laws); J. Blake Patton, Note, *Pro-Gun Property Regulation: How the State of Oklahoma Controls the Property Rights of Employers Through Firearm Legislation*, 64 Okla. L. Rev. 81 (2011).

prohibiting employees from storing firearms in locked vehicles on company property."[73]

In *Ramsey Winch v. Henry*, the Tenth Circuit was faced with a set of constitutional challenges to Oklahoma's parking lot law, which made it illegal for any "person, property owner, tenant, employer, or business entity" to prohibit any person besides a convicted felon from bringing a gun onto "property set aside for any motor vehicle."[74] The court held that the law satisfied due process, was not preempted, was not unconstitutionally vague, and—relevant for our consideration here—that it did not constitute a taking.[75]

The plaintiffs argued that "the Amendments are a physical *per se* taking because they require Plaintiffs to provide an easement for individuals transporting firearms"[76]—a claim strongly analogous to the one advanced in *Cedar Point*.[77] But the Tenth Circuit held that there was no exaction (a kind of taking), because "the Amendments (1) apply to all property owners, not just Plaintiffs, (2) merely limit Plaintiffs [sic] use of their property, and (3) do not require Plaintiffs to deed portions of their property over to the state for public use."[78] Nor was there a *per se* taking, because "[a] *per se* taking in the constitutional sense requires a permanent physical occupation or invasion, not simply a restriction on the use of private property."[79] Instead, the court found that "[a]s in *PruneYard*, Plaintiffs have not suffered an unconstitutional infringement of their property rights, but rather are required by the Amendments to recognize a state-protected right of their employees."[80]

This appears to be precisely the line of reasoning that *Cedar Point* rejects, given its holding that "government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation."[81] California's law, the Court concluded in *Cedar Point*, "appropriates a right to physically invade the growers' property—to literally 'take access,' as the regulation provides. It is therefore a *per se* physical taking under our precedents."[82]

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73. Ramsey Winch Inc. v. Henry, 555 F.3d 1199, 1202 (10th Cir. 2009).
74. 21 Okla. Stat. tit. 21, § 1289.7a; *see Ramsey Winch Inc.*, 555 F.3d at 1202.
75. *Ramsey Winch Inc.*, 555 F.3d at 1209-11.
76. *Id.* at 1209.
77. Cedar Point Nursery v. Hassid, 131 S. Ct. 2063, 2073–75 (9th Cir. 2021).
78. *Ramsey Winch Inc.*, 555 F.2d at 1209.
79. *Id.*
80. *Id.* (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)).
81. *Cedar Point*, 131 S. Ct. at 2074.
82. *Id.* (citation omitted). *See also id.* ("[W]e have held that a physical appropriation is a taking whether it is permanent or temporary."); *id.* at 2075 ("[W]e

If being required to permit labor organizers onto one's land is a *per se* taking, then it is hard to see how the same conclusion would not follow for armed individuals. After *Cedar Point*, then, it would appear that parking lot laws are on much shakier constitutional ground, and a case like *Ramsey Winch* might come out the other way.[83]

Cedar Point, it should be noted, attempts to distinguish its holding from cases like *PruneYard Shopping Center v. Robins* on the basis that the latter involved a mall that was "open to the public, welcoming some 25,000 patrons a day."[84] The Court continued: "Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public."[85] Assuming that such cases are indeed "readily distinguishable," perhaps parking lot laws are defensible insofar as they apply to public parking for business customers and the like. But even then, it would be hard to defend them as applied to employee lots and other "non-public" places not covered by *PruneYard*.

Parking lot laws are not the only ones potentially ripe for takings challenges after *Cedar Point*. Texas, for example, prohibits landlords from barring renters' firearm possession.[86] That, too, would seem to be an extreme imposition on the right to exclude. Harder questions arise with regard to other laws that burden, but do not forbid, exercise of that right. For example, some states have detailed and burdensome signage requirements for businesses wish-

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have recognized that physical invasions constitute takings even if they are intermittent as opposed to continuous."); *id.* at 2080 ("The access regulation grants labor organizations a right to invade the growers' property. It therefore constitutes a *per se* physical taking."); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841-42 (1987) (requiring that California pay just compensation before it could mandate that property owners provide an easement on their beachfront property).

83. *See also* GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1264 (11th Cir. 2012) ("Thus, property law, tort law, and criminal law provide the canvas on which our Founding Fathers drafted the Second Amendment. A clear grasp of this background illustrates that the pre-existing right codified in the Second Amendment does not include protection for a right to carry a firearm in a place of worship against the owner's wishes.").

84. *See Cedar Point*, 131 S. Ct. at 2076–77.

85. *Id.* at 2077.

86. *See* David Tarrant & María Méndez, *What Are The Gun Laws In Texas, And What's Changing Sept. 1?*, The Dallas Morning News, (Aug. 9, 2019), https://www.dallasnews.com/news/2019/08/09/what-are-the-gun-laws-in-texas-and-what-s-changing-sept-1/.

ing to exclude firearms.[87] These effectively make it harder to exercise the core property rights celebrated in *Cedar Point*.[88]

C. First Amendment

The intersection of the First and Second Amendments has been the subject of substantial scholarly and judicial commentary. Much of that commentary has focused on the prospects for useful doctrinal borrowing—importing free speech doctrines to help give shape to the post-*Heller* right to keep and bear arms.[89] More recently, especially in the wake of prominent armed protests, scholars and advocates have focused on the constitutional implications of armed assembly.[90]

Since our focus in this Article is on constitutional claims outside the Second Amendment, we highlight here a subset of cases in which gun owners have argued that public carry of firearms is *itself* a constitutionally protected form of expressive conduct. Courts have been skeptical of these claims.[91]

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87. *See generally* Christine M. Quinn, *Reforming State Laws on How Businesses Can Ban Guns: "No Guns" Signs, Property Rights, and the First Amendment*, 50 U. MICH. J. L. REFORM 955 (2017).

88. For an interesting survey about public preferences on these issues, see Ian Ayres & Spurthi Jonnalagadda, *Guests with Guns: Public Support for "No Carry" Defaults on Private Land*, 48 J.L. MED. & ETHICS 183, 189-90 (2021) (finding that statistically significant majorities would prefer "no carry" defaults with regard to homeowners, employers, and retailers, but default permission in rented properties and parking lots).

89. *See, e.g.*, David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 419 (2014); Nelson Lund, *Second Amendment Standards of Review in a* Heller *World*, 39 FORDHAM URB. L.J. 1617, 1623 (2012) ("Faced with harder cases, and with the fogginess of the Heller opinion, these courts understandably have reached for a framework resembling the familiar 'baggage' picked up by the First Amendment."); Jordan E. Pratt, *A First Amendment-Inspired Approach to* Heller*'s "Schools" and "Government Buildings"*, 92 NEB. L. REV. 537, 542 (2014) ("[T]his Article concludes that lessons from First Amendment doctrine counsel in favor of a narrow interpretation of *Heller*'s schools and government buildings.").

90. *See, e.g.*, Michael C. Dorf, *When Two Rights Make a Wrong: Armed Assembly Under the First and Second Amendments*, 116 NW. U. L. REV. 111 (2021); Eric Tirschwell & Alla Lefkowitz, *Prohibiting Guns at Public Demonstrations: Debunking First and Second Amendment Myths After Charlottesville*, 65 UCLA L. REV. DISC. 172 (2018); Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 223 (2018); Luke Morgan, Note, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175 (2018).

91. For a broad and thoughtful overview, see Danny Li, *The First Amendment Weaponized: When Guns Become Public Discourse,* 30 WM. & MARY BILL RTS. J. (forthcoming 2022) (manuscript at 11-12) (on file with authors).

Most of these First Amendment claims have failed because toting a firearm in public, on its own, is not conduct imbued with the type of particularized message covered by the First Amendment.[92] For example, in *Northrup v. City of Toledo Police Division*, the plaintiff was walking his dog with a handgun holstered at the hip.[93] Police officers, responding to a 911 dispatch, stopped the plaintiff when they saw his gun and observed him making "furtive movements." After confirming he possessed a concealed-carry permit, they released him.[94] The district court granted summary judgment against the plaintiff's First Amendment claim because the plaintiff's holstered firearm, on its own, did not constitute protected expression.[95]

Courts have even been skeptical of First Amendment claims when the plaintiff has a plausible political motive. In *Burgess v. Wallingford*, the plaintiff bore a visibly holstered gun in a pool hall before police officers encountered him.[96] Unlike the plaintiff in *Northrup*, Burgess was wearing a shirt conveying support for the right to bear arms, and he carried Connecticut Citizens Defense League brochures on gun rights.[97] But the court still granted summary judgment against his claim, because "reasonable officers could disagree whether or not there was a great likelihood of plaintiff's [conduct] conveying a message to those who viewed it."[98]

At least one court has suggested that carrying a gun may only constitute protected expression when the actor is "a gun protestor burning a gun [or] a gun supporter waving a gun at an anti-gun control rally."[99] Thus far, however, even this form of expression has been insufficient to garner First Amendment protection. In 2020, gun rights advocacy groups planned an armed protest of pending Virginia gun control measures; in advance of the rally, Virginia Gov-

92. According to *Spence v. Washington*, the First Amendment's free speech clause covers conduct when the actor has an "intent to convey a particularized message," and the message is likely to be understood others. 418 U.S. 405, 410-11 (1974). Most carrying-as-expression claims fail this standard. *See, e.g.,* Baker v. Schwarb, 40 F. Supp. 3d 881, 893 (E.D. Mich. 2014); Deffert v. Moe, 111 F. Supp. 3d 797, 814 (W.D. Mich. 2015); Northrup v. City of Toledo Police Div., 58 F. Supp. 3d 842, 848 (N.D. Ohio 2014); Nordyke v. King, 319 F.3d 1185, 1190 (9th Cir. 2003); Chesney v. City of Jackson, 171 F. Supp. 3d 605, 616–17 (E.D. Mich. 2016).

93. *Northrup*, 58 F. Supp. at 845.

94. *Id.* at 845–46.

95. *Id.* at 847–49 ("Northrup also fails to identify any case in which a court concluded that gun possession alone conveys any message at all.").

96. No. 11-CV-1129, 2013 WL 4494481, at *1 (D. Conn. May 15, 2013).

97. *See id.*

98. *Id.* at 9.

99. Nordyke v. King, 319 F.3d 1185, 1190 (9th Cir. 2003).

ernor Ralph Northam temporarily banned guns on capital grounds.[100] The protestors sought an injunction on the ban and made First Amendment arguments in their complaint: "[T]he act of peaceably and openly carrying firearms. . .is itself a form of protected speech, particularly when the Rally is specifically intended to express opinions to public officials through the symbolic act of bearing arms."[101] The trial court ignored the First Amendment claim and denied the injunction,[102] and the Virginia Supreme Court dismissed the appeal.[103]

Gun owners have also unsuccessfully attempted to invoke the First Amendment's free exercise clause to protect their right to carry in traditionally gun-free places. In *GeorgiaCarry.Org, Inc. v. Georgia*, the plaintiffs argued that a state restriction on firearms in places of worship interfered with their free exercise of religion.[104] The court dismissed the claim because there was no evidence that the law infringed on any "sincerely held religious belief"; personal preferences regarding the ability to act in self-defense did not suffice to establish First Amendment coverage.[105]

The vast majority of guns-as-expression claims have failed, and perhaps they will continue to do so, notwithstanding the current trend of First Amendment expansionism. If such a claim were to succeed, though, it might—like broad takings doctrine—represent a bit of a mixed bag for gun owners. After all, the "expressive" quality of gun carrying will not always be a vindication of constitutional rights; sometimes, it will constitute a tort or even a crime. When the person carrying the gun is the proverbial "law-abiding citizen,"[106] the communication might be coded as positive—a deterrent to would-be wrongdoers. But that is purely contingent on the identity of the parties and their mental states. What about when that "law-abiding citizen" wrongly perceives another person—or the world as

100. Li, *supra* note 0, at 2.

101. Complaint at 7-8, Gun Owners of America, Inc. v. Northam, No. CL20000279-00 (Va. Cir. Ct. Jan. 16, 2020).

102. Gun Owners of America, Inc. v. Northam, No. CL20000279-00, at 2 (Va. Cir. Ct. Jan. 16, 2020).

103. Gun Owners of America, Inc. v. Northam, No. CL20000279-00 (Va. Jan. 17, 2020).

104. GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1249 (11th Cir. 2012). Georgia's statute exempts only licensed individuals who receive prior permission from security or management personnel and comply with all their directions. Noncompliance constitutes a misdemeanor. O.C.G.A. § 16-11-127.

105. *GeorgiaCarry.Org, Inc.*, 687 F.3d at 1255.

106. District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (declaring that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home").

a whole—to be a threat? In that situation, the same message is being communicated—"I can hurt or kill you"—but in a way that the law does *not* protect. Indeed, the armed individual has quite plausibly committed brandishing, menacing, or even assault.[107] Judicial recognition of the expressive quality of gun carrying should raise the stakes in those cases as well.

Consider, too, that some states have passed rules requiring public universities to permit people to carry guns on campus,[108] despite opposition from administrators, faculty, and students.[109] Three professors from the University of Texas brought a challenge to Texas's law, arguing *inter alia* that it infringed academic freedom and free expression.[110] The Fifth Circuit found that there was no harm sufficient to support standing. But if public carry of guns is doctrinally recognized as expression, the professors' claim is far stronger—for if bringing a gun into a classroom can be communicative, then excluding a gun can be as well. Thus, recognizing these expressive interests has the potential to strengthen claims both for and against the ability to carry guns in these spaces.

II.
SOME IMPLICATIONS OF POLYCENTRIC GUN RIGHTS

The litigation story we describe in Part I is still unfolding, and its future course depends in large part on the Supreme Court's disposition of *New York State Rifle & Pistol Association v. Bruen*.[111] In Section II.A, we discuss the incentives that litigants have in bringing alternative—that is, non-Second Amendment—constitutional chal-

107. Joseph Blocher, Samuel W. Buell, Jacob D. Charles, & Darrell A.H. Miller, *Pointing Guns*, 99 Tex. L. Rev. 1173, 1175 (2021). *See also* Kimberly Kessler Ferzan, *Taking Aim at Pointing Guns? Start with Citizen's Arrest, Not Stand Your Ground*, 100 Tex. L. Rev. Online 1, 2 (2021) (arguing *inter alia* that "the shift in cultural norms is moving from citizen defense to citizen offense. It is this cultural norm, and the laws that enable it, that cry for immediate attention.").

108. Shaundra K. Lewis, *Crossfire on Compulsory Campus Carry Laws: When the First and Second Amendments Collide*, 102 Iowa L. Rev. 2109, 2113 (2017).

109. Emily Reimal et al., Urban Inst., Guns on College Campuses: Students' and University Officials' Perceptions of Campus Carry Legislation in Kansas 2 (2019) ("An abundance of research documents the predominantly negative attitudes of students, faculty, and staff toward laws permitting guns on college campuses").

110. Glass v. Paxton, 900 F.3d 233, 237 (5th Cir. 2018).

111. *See* New York State Rifle & Pistol Ass'n v. Corlett, No. 20-843, 2021 WL 1602643 (U.S. Apr. 26, 2021) (granting certiorari on the question "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment").

lenges to gun laws, and how those incentives might change after the Court decides *Bruen*. In Section II.B, we assess the difficulties that this polycentric understanding of gun rights poses for citizens who support gun regulations as a means to protect their own constitutional rights.

A. Litigant Incentives

The frames of constitutional litigation discussed in Part I indicate how gun rights advocates evaluate their litigation options and how those alternative rights frames compare to the Second Amendment itself. The more interesting point is what such litigation frames say about the perceived strength of these claims as compared to straight-up Second Amendment claims. Presumably, litigants emphasize the claims that they think have the best chance of success,[112] which for challengers typically means the claim that will trigger the most stringent form of scrutiny. So, for example, some religion claims that might appear to be about free exercise are cast as free speech (or free association, being a derivative of free speech), in part because of the strong doctrinal protection accorded to free speech claims.[113] Thus, as Zick notes, "starting in the 1980s, in both their general advocacy and litigation of specific cases, religious liberty advocates started to abandon the Free Exercise Clause in favor of the Free Speech Clause."[114] These incentives became even more clear after *Employment Division v. Smith* rendered the Free Exercise Clause a relatively unattractive doctrinal road.[115]

It is not hard to imagine a similar story about gun rights and the Second Amendment. Empirically speaking, the vast majority—more than 90%—of Second Amendment claims have failed in the years since *Heller*.[116] This undoubtedly contributes to the belief, widespread among gun rights advocates, that the right to keep and bear arms is being unfairly under-enforced.[117] Indeed, the notion

112. This is not the *only* conceivable motivation. Some movement litigants, for example, might "win by losing"—parlaying litigation defeats into other forms of support.

113. *E.g.,* Masterpiece Cakeshop Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1721 (2018).

114. TIMOTHY ZICK, THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS 33 (2018).

115. 494 U.S. 872 (1990) (denying heightened scrutiny for free exercise claims involving neutral laws of general applicability).

116. Ruben & Blocher, *supra* note 2, at 1472.

117. For thoughtful arguments in favor of the second class and underenforcement thesis, see David B. Kopel, Data Indicate Second Amendment Underenforcement, 68 DUKE L.J. ONLINE 79 (2018); George A. Mocsary, *A Close Reading of an*

that the Second Amendment is being treated as a "second class right" has become the dominant rhetorical claim of many gun rights advocates.[118] Whether or not that argument is justified—and we are not convinced that it is[119]—it helps explain why so many gun rights claims seek shelter in areas of doctrine that are perceived to be more protective Incidentally, it also helps explain the frequent calls to borrow doctrines from other areas of constitutional law.[120]

This kind of perceived comparative advantage could soon change, however. The Supreme Court is currently considering *New York State Rifle & Pistol Association v. Bruen*,[121] a challenge to New York's "good cause" requirement for public carry permits.[122] The underlying question is whether the right to keep and bear arms extends outside the home. But there is also a lurking methodological question: How should gun regulation be evaluated under the Second Amendment? The federal courts of appeals have overwhelmingly adopted a two-part framework that first asks whether the challenged law falls within the scope of the Amendment at all (*Heller* indicates that certain categories of law—like those pertaining to

Excellent Distant Reading of Heller *in the Courts*, 68 DUKE L.J. ONLINE 41, 43 (2018) (concluding that data show "evidence of judicial defiance" (footnote omitted)).

118. For a conceptual and empirical overview of the "second class" claim and its prevalence in briefs and opinions, see Eric Ruben & Joseph Blocher, *"Second Class" Rhetoric, Ideology, and Doctrinal Change*, 110 GEO. L.J. (forthcoming 2022).

119. Ruben & Blocher, *supra* note 2, at 1475; Adam M. Samaha & Roy Germano, *Is the Second Amendment a Second-Class Right?*, 68 DUKE L.J. ONLINE 57, 59 (2018) (concluding that there are plausible alternative explanations for the data other than the "second-class" argument); Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621 (2019) (arguing that the Second Amendment's treatment compares favorably to that of other constitutional rights at various stages of their development, and that the available evidence does not show judicial hostility, resistance, or political ideology).

120. There is a growing literature on such borrowing and intersection in constitutional doctrine. *See, e.g.*, Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U.L. REV. 1309, 1309-10 (2017) (discussing "cumulative," "hybrid," and "intersecting" rights); Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 674 (2011); Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 460 (2010).

For specific discussion of borrowing in the Second Amendment context, see Jacob D. Charles, *Constructing a Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. REV. 333 (2021).

121. *See* New York State Rifle & Pistol Ass'n v. Corlett, No. 20-843, 2021 WL 1602643 (U.S. Apr. 26, 2021) (granting certiorari on the question "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment").

122. *See* N.Y. Penal Law § 400.00 (2021). Technically these are permits for *concealed* carry, since open carry is generally prohibited in New York.

felons, the mentally ill, "dangerous and unusual weapons," and concealed carrying—do not[123]), and second, if so, whether the law's burdens on protected conduct can be justified in light of the governmental interests served.[124]

Many gun rights advocates argue that this test is under-protective and should be replaced either with strict scrutiny[125] or—more likely—a test that would evaluate gun laws based solely on text, history, and tradition. Under the latter test, a gun regulation's "historical or traditional pedigree is both a necessary and sufficient condition" for its constitutionality.[126] This test is often credited to a dissenting opinion by then-Judge Brett Kavanaugh,[127] and although he took pains to emphasize that it would not rule out gun regulation, and that it is not necessary for all contemporary laws to have exact historical replicas,[128] many believe that it would be more restrictive than the existing two-part framework.[129]

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123. District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008).

124. *See* Gould v. Morgan, 907 F.3d 659, 668 (1st Cir. 2018); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 254 (2d Cir. 2015); United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013); GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194 (5th Cir. 2012); Ezell v. City of Chicago, 651 F.3d 684, 703–04 (7th Cir. 2011); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010).

125. Brief of Plaintiffs-Appellants at 39, Gould v. O'Leary, 907 F.3d 659 (1st Cir. 2018) (No. 17-2202), 2018 WL 1610774 ("Applying anything less than strict scrutiny would relegate the Second Amendment to a 'second-class right.'"); Colloquy, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 455 (2011) (comment of Joyce Lee Malcolm) ("Since fundamental rights are not to be separated into first- and second-class status, the strict scrutiny applied to the First Amendment freedom of the press and freedom of speech should also be applied to Second Amendment rights.").

126. Jake Charles, *The "Text, History, and Tradition" Alternative*, SECOND THOUGHTS BLOG (Dec. 5, 2019), https://sites.law.duke.edu/secondthoughts/2019/12/05/the-text-history-and-tradition-alternative/ [https://perma.cc/55SR-N8NS].

127. Heller v. District of Columbia, 670 F.3d 1244, 1276 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

128. *Id.* at 1275 (Kavanaugh, J., dissenting); *see also* United States v. Skoein, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) ("[A]lthough the Justices have not established that any particular statute is valid, we do take from *Heller* the message that exclusions need not mirror limits that were on the books in 1791.").

129. One of us filed a brief in *Bruen* advocating the two-part framework over the text, history, and tradition alternative—not because the former is more forgiving, but because it is more administrable. *See* Brief of Second Amendment Law Professors as Amici Curiae in Support of Neither Party at 8, New York Rifle & Pistol

If *Bruen* does adopt a more stringent test, then the incentives to try other constitutional arguments would change. And the result could well be not only increased constitutional litigation, but an increased emphasis on the Second Amendment itself, rather than on the Takings Clause or other alternatives.

Substantively, too, a holding that public carry is protected by the Second Amendment will have ripple effects for many of the other forms of constitutional argument discussed here. It seems unlikely that the Court will fully endorse a constitutional right to concealed carry, since the historical evidence clearly does not support it.[130] But if the Court were to do so, then there would be a much stronger claim for a "liberty" interest under due process in the permitting cases discussed above; that is, litigants seeking due process protection from permit denials could more easily satisfy the threshold requirement that their liberty has been deprived.[131]

Or consider what might happen to the expressive conduct claims discussed in Section I.C. If the Court recognizes a broad right to public carry under the Second Amendment, then perhaps there will be less need to argue for the same right being protected as free expression. And yet there might still be some interesting legal space between the two claims. The right to keep and bear arms, for example, does not extend into "sensitive places such as schools and government buildings."[132] Presumably that exception would persist even if public carry were recognized. But the First Amendment does not contain a "sensitive places" exception, so there might still be some benefit to pursuing the free expression claim. For that matter, such parallel tracks of litigation might ultimately encourage convergence between the rationale and even substantive outcomes of "sensitive place" litigation under the Second Amendment and "nonpublic forum"[133] litigation under the First.

We could speculate further on other possible changes, but these examples serve to illustrate and emphasize the possible ripple effects of Second Amendment doctrine on other areas of constitutional law. Scholars have, as we noted earlier, begun to explore those ripple effects with regard to statutory guarantees—not simply

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Ass'n v. Bruen, (No. 20-843), 2021 WL 3144391 (brief of Joseph Blocher, Darrell A.H. Miller, and Eric Ruben).

130. *See* Meltzer, *supra* note 2322, at 1500 (explaining that concealed carry has long been regulated more stringently than open carry).

131. *See supra* note 24 and sources cited therein.

132. *Heller*, 554 U.S. at 626.

133. Cornelius v. NAACP Legal Def. and Educ. Fund, 473 U.S. 788, 796-97 (1985).

deregulation, but pro-rights regulation.[134] The impact on other areas of constitutional law must also be considered.

B. Equality, and Other Rights-holders

Perhaps *Bruen* will herald more Second Amendment cases—both as an absolute matter and as a proportion of constitutional gun litigation. But what about possible growth in other constitutional gun claims? Our discussion has largely set aside, for example, perhaps the most frequent and predictable claims—those deriving from the Fourth Amendment and other criminal procedure rights. We do so not because they are unimportant, but because they are already well-recognized.[135]

A less recognized but potentially growing area of constitutional gun litigation involves claims that echo in equal protection. Here, too, we take our signals somewhat from gun rights rhetoric which, especially in recent years, has emphasized the racist origins of many historical gun laws.[136] The relationship between racism and gun regulation is not new, of course, and historians and scholars have been exploring and illuminating it for decades.[137] But the suggestion that this racist history should call modern gun regulations into constitutional question is increasingly prominent—including in many of the amicus briefs in *Bruen*.[138]

Interestingly, though, this history of racist enforcement tends to be folded into Second Amendment arguments, rather than equal protection claims. In that sense, it cuts in a different direction than the examples we have discussed above—but perhaps it is explicable for the same reason: equal protection claims are perceived to be even weaker than Second Amendment claims, given the current state of doctrine. And indeed, a review of cases in which equal pro-

134. Charles, *supra* note 7.

135. *See supra* note 12 and sources cited therein.

136. *See, e.g.*, Justin Aimonetti & Christian Talley, *Race, Ramos, and the Second Amendment Standard of Review*, 107 VA. L. REV. ONLINE 193, 219 (2021).

137. Among the foundational early work is Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991).

138. *See, e.g.*, Brief of Black Guns Matter et al. as Amici Curiae Supporting Petitioners, New York State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. filed Jul. 20, 2021); Brief of Italo-American Jurist and Attorneys as Amici Curiae Supporting Petitioners, New York State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. filed Jul. 15, 2021).

tection claims *have* been advanced indicates that they face a tough road.[139]

Gun-control-is-racist arguments invoke equality, and—we have suggested—might actually be best understood and evaluated as equal protection arguments. But they are not the only form of equality argument and rhetoric beginning to take root in the gun debate. Supporters of gun regulation, too, have increasingly begun to identify their own interests in constitutional terms. Some invoke the right to life (hence "March for Our Lives") or the right not to be shot.[140] Others point to their own equal rights to peaceably assemble, speak, learn, worship, and vote without fear of armed violence or intimidation by others.[141]

As a matter of litigation, there are some obvious obstacles to making a direct constitutional argument—whether from due process or equal protection—*for* gun regulation. The state action requirement is perhaps the biggest one,[142] though as we have shown above there are a surprising number of direct state actions that *do* arguably violate constitutional rights in the course of furthering some gun owners' interests.[143]

But such direct claims are not the only way for such claims of constitutional equality to be litigated. As one of us has argued in recent work with Reva Siegel, the government has a valid interest in regulating guns not only to keep citizens alive and free from physical harm, but also to protect their equal claims to citizenship and the exercise of constitutional rights free from terror and intimidation.[144] That principle is clear from the common law history of gun regulation and is specifically incorporated in Part III of the *Heller*

139. *See, e.g.*, Drummond v. Twp. of Robinson, 784 F. App'x 82, 83–84 (3d Cir. 2019) (quickly dismissing an equal protection argument against gun-related zoning).

140. Jonathan Lowy & Kelly Sampson, *The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 GEO. J.L. & PUB. POL'Y 187 (2016).

141. Blocher & Siegel, *supra* note 15.

142. See, e.g., DeShaney v. Winnebago Cty. Dep't. of Soc. Services., 489 U.S. 189, 196–97 (1989); Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005).

143. *See supra* notes <*CITE* _Ref82436036">-88 and accompanying text (describing apparent viability of takings claims against bring-your-gun-to-work laws).

144. Blocher & Siegel, *supra* note 15. The argument has begun to appear in briefs. *See, e.g.*, Brief of Survivors of the 101 California Shooting and Giffords Law Center to Prevent Gun Violence as *Amici Curiae* in Support of Appellee and Affirmance at 22, *Rupp v. Becerra*, No. 19-56004 (9th Cir. filed Jun. 2, 2020) (arguing for the constitutionality of California's assault weapons prohibition in part because "[g]overnments also have a significant interest in securing for their communities

opinion. In that respect, it is nothing new. But like the other developments we have tried to emphasize in this short Article, it deserves further attention from lawmakers, judges, advocates, and scholars.

CONCLUSION

Our goals in this Article have been both descriptive and conceptual: To enumerate and illustrate some of the constitutional rights litigation involving guns that is happening outside of the Second Amendment, and to explore the implications of that litigation and what it might mean for our understanding of gun rights and regulation going forward. The latter goal complicates the seeming simplicity of the first. The picture that emerges is about more than rights on one side and government intervention on the other; it is the polycentric, complex interaction of rights and interests that increasingly characterizes US constitutional law.[145] As the Second Amendment matures, both as a matter of law and a focus of scholarship, these are the kinds of challenges that judges and scholars must confront.

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the ability to engage in public and political life without the fear wrought by particularly intimidating weapons—those that are used to intimidate while they kill").

145. Jamal Greene, *Rights as Trumps?*, 132 HARV. L. REV. 28, 34 (2018).

AMERICA'S GUN VIOLENCE EPIDEMIC: A COLOSSAL, BUT CORRECTABLE, SYSTEM FAILURE

JENNIFER KIM & CHRISTA NICOLS

I. INTRODUCTION

On November 3, the United States Supreme Court heard over two hours of oral arguments in *New York State Rifle and Pistol Association v. Bruen*, the most significant Second Amendment case the Court will decide in over a decade. Although the Court was considering the level of gun regulation to be permitted, there was little discussion of the reason why that regulation was necessary. While listening to the debate, it would have been difficult to discern that a gun violence epidemic was raging outside of the courthouse doors, one in which 300 people are shot every day in this country[1] – and nearly 40,000 women, men and children die each year.[2] Little would observers know that the United States' gun violence crisis is an extreme outlier compared to its peer nations, a fact President Biden acknowledged as a national embarrassment.[3]

But just outside the Supreme Court doors, Americans who have experienced the gun violence epidemic firsthand were gathered, sharing the horrors of watching their child die in their arms because someone was upset about a parking space and carrying a loaded firearm,[4] or hiding under the lifeless body of a classmate in the hopes of surviving yet another mass shooting at an American

1. *See e.g.,* Brady United, *Key Statistics*, BRADY, https://www.bradyunited.org/key-statistics (last visited Nov. 16, 2021)[HTTPS://PERMA.CC/QT7W-NPSK]; Associated Press, *316 People Are Shot Every Day in America. Here are 5 Stories*," USA TODAY (Jul. 23, 2021) https://www.usnews.com/news/health-news/articles/2021-07-23/316-people-are-shot-every-day-in-america-here-are-5-stories.

2. U.C. Davis Health, *Facts and Figures*, U.C. DAVIS HEALTH, https://health.ucdavis.edu/what-you-can-do/facts.html (last visited Nov. 16, 2021)[HTTPS://PERMA.CC/67A8-8R2G].

3. Trevor Hunnicutt & Andy Sullivan, *Biden Calls U.S. Gun Deaths a 'National Embarrassment' After Indianapolis Shooting*, REUTERS, Apr. 16, 2021, https://www.reuters.com/world/us/white-house-faces-increased-pressure-act-guns-after-indianapolis-shooting-2021-04-16/.

4. Carolyn Dixon, *Moments That Survive*, EVERYTOWN, https://momentsthatsurvive.org/tribute/carolyn-dixon/ [https://perma.cc/47UY-Z2R7].

high school.[5] The stark contrast between how gun policy is determined, and its deadly real world effects, is representative of America's approach to its gun violence crisis.

The gun violence epidemic in America is the kind of public health crisis Americans generally know how to address. To reduce deaths from motor vehicles and smoking, Americans employed comprehensive approaches that included strong laws that regulated product sales and use, legal accountability, and public safety awareness campaigns. Yet America generally does not address gun violence as it does other public health or safety problems. But it should.

The fact is, America can end its gun violence epidemic. In 2016, public health experts analyzed 130 studies on the relationship between firearm legislation and firearm-related injuries in 10 countries.[6] The study found that firearm restriction laws were associated with fewer deaths. These measures are well known, as every other populous, high-income country implements them to protect its citizens and their right to live without the fear of being shot in everyday life. For example, Australia and Israel require gun owners to register their weapons.[7] In Japan, gun owners must pass written, mental, and drug tests and submit to regular inspection from authorities.[8] Even in countries where firearms are more culturally significant, governments ensure public safety with strict laws. In 2020, following the deadliest mass shooting in Canadian history, the Canadian government passed a ban on assault weapons, which included a buyback program and compulsory strict storage regime.[9] Switzerland, which allows its militia members to store government-issued personal weapons at home, also has an automatic weapons

5. Brett Clarkson, *Parkland Survivor Aalayah Eastmond Tells House How She Hid Under Slain Classmate's Body*, SUN SENTINEL (Feb. 6, 2019), https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-ne-us-house-gun-violence-msd-20190206-story.html [https://perma.cc/D6E3-URWD].

6. Julian Santaella-Tenorio *et al.*, *What Do We Know About the Association Between Firearm Legislation and Firearm-Related Injuries?*, 38 EPIDEMIOLOGIC REV. 140, 140-57 (2016), https://doi.org/10.1093/epirev/mxv012[https://perma.cc/FT9X-8GGQ].

7. German Lopez, *How Gun Control Works in America, Compared With 4 Other Rich Countries*, VOX (Mar. 14, 2018), https://www.vox.com/policy-and-politics/2015/12/4/9850572/gun-control-us-japan-switzerland-uk-canada [https://perma.cc/Y9BC-LSNR].

8. *Id.*

9. Jonathan Masters, *U.S. Gun Policy: Global Comparisons*, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/backgrounder/us-gun-policy-global-comparisons (last updated July 14, 2021, 12:30 PM) [https://perma.cc/232Y-JWVY].

ban for civilians.[10] The rates of gun violence in the United States could be reduced by adopting any one of these laws; but the government refuses to act.

Some insist the breathtaking death toll Americans collectively endure is simply the price of freedom enshrined in the Constitution.[11] This is not true. Despite the likelihood that the laws placing reasonable restrictions on gun possession and use may be litigated extensively in the coming years, beginning with the Court's decision in *Bruen*, the Second Amendment historically has not been much of an impediment to strong gun laws. Even *District of Columbia v. Heller*, the highwater mark for gun rights (so far, anyway), made clear that the Second Amendment was "not unlimited," and allows for a host of reasonable, legislatively authorized restrictions on gun possession.[12]

What is clear now, independent of any discussion of the constitutional limits in regulating gun ownership by individuals, is that inadequate oversight of the gun industry's design, manufacture, and sale of firearms contributes significantly to the high rates of gun injuries and deaths in the United States.[13] There are a range of measures the federal government could take to remedy the shortcomings and allow proper oversight of the gun industry. Such measures would reduce the supply of crime guns flowing into American communities and the foreseeable misuse of legal guns to meaningfully reduce gun violence.

For example, ATF, the only agency tasked with policing the gun industry, is unduly restrained and underfunded, unlike any other federal law enforcement agency in America. As a result, gun dealers known to repeatedly supply guns to illegal traffickers, and to violate federal laws to do so, are often able to maintain their federal firearms licenses without penalty.[14] The gun industry successfully lobbied Congress to restrict access to data that would allow public transparency into the identity of those dealers supplying a disproportionate number of crime guns (Tiahrt Amendments).[15]

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10. *Id.*

11. Ben Kenigsberg, *'The Price of Freedom' Review: Guns Across America*, N.Y. Times (July 7, 2021) https://www.nytimes.com/2021/07/07/movies/the-price-of-freedom-review.html [https://perma.cc/8T7T-RTZY].

12. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

13. Chelsea Parsons, Eugenio Weigend Vargas & Rukmani Bhatia, *The Gun Industry in America: The Overlooked Player in a National Crisis*, Center for American Progress (Aug. 6, 2020) https://www.americanprogress.org/article/gun-industry-america/ [https://perma.cc/A8VX-CBWB].

14. *See infra* at III(B) n. 82.

15. *See infra* at III(A)(2).

Manufacturers have been able to profit from the criminal gun market without consequences because the gun industry is the only industry in America shielded from some civil liability for reckless or negligent business practices (Protection of Lawful Commerce in Arms Act).[16] Guns are also the only consumer product exempt from federal product safety regulation, so life-saving safety features that would be required of any other product are not implemented by many manufacturers.[17] The most dangerous product available to the public is in many ways regulated less than any other product. Each of these problems can be reversed with simple policy changes.

This article argues that America's gun violence epidemic is a product of this system failure. Put another way, our gun crisis is actively facilitated by a confluence of harmful policies that cater more to the business interests of those who manufacture and sell guns than public safety – policies that have nothing to do with protecting any right of Americans to possess guns for lawful use. The result of these policy choices is profit for the gun industry and senseless death for communities across the country.

But these problems are correctable. Our gun violence epidemic can be stopped if America treats gun violence as we do other public health crises. Section II provides an overview of the gun industry's role in fueling gun violence through certain business practices, and Section III highlights the laws and policies in place that allow the gun industry to refuse to change them without consequence. Each law or policy could be easily reversed or amended by Congress, allowing regulation, litigation, and transparency efforts – which were effective in addressing the public health crises caused by tobacco, pollution, and pharmaceuticals – to push the industry to make and sell guns more responsibly.

II.
THE GUN INDUSTRY'S ROLE IN THE GUN VIOLENCE EPIDEMIC

Guns are legal consumer products, but it is widely understood that there is a substantial demand for guns in an illegal secondary market and guns are highly prone to misuse.[18] Once a firearm enters the illegal secondary market, it often changes hands and may

16. *See infra* at III(A)(1).

17. *See infra* at III(C).

18. *See e.g.*, Christopher S. Koper, CRIME GUN RISK FACTORS: BUYER, SELLER, FIREARM, AND TRANSACTION CHARACTERISTICS ASSOCIATED WITH GUN TRAFFICKING AND CRIMINAL GUN USE: REPORT TO THE NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE (2007) available at https://www.ojp.gov/pdffiles1/nij/grants/221074.pdf.

be illegally possessed or misused numerous times before being recovered by law enforcement. As in any industry dealing in sensitive or dangerous products, like chemicals or pharmaceuticals, industry practices need to be designed to minimize the likelihood that their products are foreseeably obtained by illegal or unauthorized actors.[19] The business practices employed by the industry – from the design of the weapon to retail sales practices – will influence the likelihood of that gun being foreseeably misused.

A. Gun Industry Sales and Distribution Facilitate Gun Violence

Negligent, irresponsible, and sometimes illegal behavior by a small percentage of gun dealers contributes significantly to gun violence in the United States, as do the deliberate actions of gun manufacturers and distributors to supply those dealers without reasonable conditions, supervision or monitoring.[20] Illegally trafficked guns used in crime begin as legal firearms and are initially acquired from the legitimate inventory of a Federally Licensed Firearms retail dealer (FFL).[21] According to federal law enforcement, many illegal guns enter the secondary market through theft or unlawful transfers, including straw purchases, and are subsequently acquired by individuals who would otherwise fail a background check or wish to avoid purchasing a firearm in his or her own name.[22] Straw purchases, a purchase where a person misrepresents themself as the actual buyer of a firearm when they intend to give it to another person who has not undergone a background check, are the most frequent type of trafficking channel identified in investiga-

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19. *See e.g.*, Joanna R. Lampe, CONG. RESEARCH SERV., R45948, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 117TH CONGRESS, at 12-16 (2021), https://sgp.fas.org/crs/misc/R45948.pdf [https://perma.cc/BZ28-AB9U]; Linda-Jo Schierow, CONG. RESEARCH SERV., RL31905, THE TOXIC SUBSTANCES CONTROL ACT (TSCA): A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS, at 4-7 (2013), https://sgp.fas.org/crs/misc/RL31905.pdf [https://perma.cc/MZ44-6RWB].

20. Brady, COMBATING CRIME GUNS: A SUPPLY-SIDE APPROACH 6 (2019) https://brady-static.s3.amazonaws.com/SUPPLYSIDEv5.pdf [https://perma.cc/CP8F-ZJGE].

21. *Id.*

22. *See e.g., Don't Lie For the Other Guy: A National Campaign to Prevent the Illegal 'Straw Purchase' of Firearms*, http://www.dontlie.org/ [https://perma.cc/BBR8-R6H3]; U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, ATF SAFETY AND SECURITY INFORMATION FOR FEDERAL FIREARMS LICENSEES, ATF Pub. 3317.2 at 3 (2021) (ATF Safety & Security Report) available at https://www.atf.gov/firearms/docs/guide/safety-and-security-information-federal-firearms-licensees-atf-p-33172/download.

tions carried out by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).[23]

Gun traffickers also obtain firearms through burglary or theft, often from FFLs without adequate physical security or recordkeeping practices. In 2020, FFLs reported 5,961[24] firearms stolen during burglaries. While that number may seem insignificant at first glance, a single gun will likely be possessed by multiple people and/or used in multiple crimes. For example, the Chicago Tribune recently reported that a single gun stolen from a gun shop in Wisconsin was linked to 27 shootings across Chicago[25] before it was recovered by law enforcement.

Accordingly, the business practices of retail FFLs impact the volume of guns diverted to the illegal gun market. ATF has recognized retail FFLs as "the first line in maintaining security and lawful transfers of firearms."[26] While many gun dealers operate responsibly, the minority do not drive and profit from the violence. Based on a 2000 ATF report (the most recently available data), about 90 percent of guns recovered by law enforcement in connection with crime are sold by only five percent of licensed retail dealers, while close to 90 percent of gun dealers sell no guns traced to crime in a given year.[27] Many of the dealers who supply the bulk of crime guns either willfully engage in illegal or corrupt behavior – selling guns that they know will soon be trafficked – or have such lax business practices that their guns are regularly obtained by illegal traffickers.

U.S. gun manufacturers and distributors also bear responsibility, as they have the ability to cut off or regulate the supplies to these dealers, but they choose to continue to supply negligent deal-

23. *See Don't Lie for the Other Guy* http://www.dontlie.org/straw_purchasing.cfm for ATF and industry definition of a straw purchase; U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms, FOLLOWING THE GUN: ENFORCING FEDERAL LAWS AGAINST FIREARMS TRAFFICKERS, PB2001-101651 at xi (2000) available at http://www.nfaoa.org/documents/ATF-%20Following%20the%20Gun,%20Enforcing%20Federal%20Laws%20Against%20Firearms%20Traffickers.pdf.

24. U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, FEDERAL FIREARMS LICENSEE (FFL) THEFT/LOSS REPORT: JAN. 1, 2020 – DEC. 31, 2020, available at https://www.atf.gov/firearms/docs/undefined/federalfirearmslicenseefftheftlossreportjan2020-dec2020508pdf/download.

25. Jeremy Gorner, Annie Sweeney & Rosemary Sobol, *A Gun Was Stolen From a Small Shop in Wisconsin. Officials Have Linked it to 27 Shootings in Chicago*, CHICAGO TRIBUNE (Sep. 25, 2021), https://www.chicagotribune.com/news/criminal-justice/ct-stolen-gun-multiple-crimes-chicago-20210921-aiqhedigtnhrbnikogk26vgdcu-story.html [https://perma.cc/GRR7-DWAE].

26. ATF Safety & Security Report, *supra* n. 18.

27. Brady, *supra* note 20, at 6.

ers despite knowing their role in fueling gun violence. The industry has been explicitly made aware of the link between negligent distribution and sales practices and illegal gun trafficking for decades. In 2001, the Department of Justice called on gun manufacturers to monitor and set reasonable conditions for their distribution systems to prevent supplying criminals.[28] The gun industry refused.[29] That same year, Smith & Wesson entered into a settlement with the United States and several U.S. cities in which it agreed to concrete reforms to its distribution and design of guns to prevent contributing to gun violence.[30] Smith & Wesson later reneged on the agreement after pressure from others in the industry. Similarly, in a high profile 2003 public nuisance lawsuit brought by the NAACP against several major gun manufacturers, the late United States District Court Judge Jack B. Weinstein found as a fact after trial that "each manufacturer should implement readily available reforms," which included "imposing liability insurance standards; limiting gun sales at shows; limiting multiple sales; limiting how the consumer gun transaction can be conducted to insure security; education and training of dealers; and monitoring dealers through visitation and other regular interaction."[31] These findings went unheeded by the gun industry.

B. Lack of Safety Features and Unsafe Storage Facilitate Unauthorized User Access and "Family Fire" Shootings

The misuse of guns by unauthorized users perpetuates a considerable amount of gun violence in the United States. The tragic results of these incidents look different in specific instances – a person steals a gun[32] from the owner's vehicle and fatally shoots a po-

28. U.S. Dep't of Justice, *Archived Executive Summary of Clinton Directive Regarding the National Integrated Firearms Violence Reduction Strategy*, https://www.justice.gov/archive/opd/ExecSum.htm (last visited Nov. 16, 2021) [https://perma.cc/BLG9-ACED].

29. Avi Selk, *A Gunmaker Once Tried to Reform Itself. The NRA Nearly Destroyed it,* WASH. POST (Feb. 27, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/02/27/a-gunmaker-once-tried-to-reform-itself-the-nra-nearly-destroyed-it/ [https://perma.cc/4FV6-GYF9].

30. CLINTON ADMINISTRATION REACHES HISTORIC AGREEMENT WITH SMITH & WESSON, PRESS RELEASE (Mar. 17, 2000), https://clintonwhitehouse3.archives.gov/WH/New/html/20000317_2.html [https://perma.cc/38NF-J7XF] (Smith & Wesson Agreement).

31. N.A.A.C.P. v. AcuSport, Inc., 271 F. Supp. 2d 435, 523 (E.D.N.Y. 2003).

32. Henderson Man Sentenced to Prison for 21 Years Following Shooting of a Raleigh Police Officer , U.S. Dep't of Just. (Oct. 8, 2021), https://www.justice.gov/usao-ednc/pr/henderson-man-sentenced-prison-21-years-following-shooting-raleigh-police-officer-1. [https://perma.cc/6X34-JML3]

lice officer; a child plays with a gun[33] in the home and unintentionally shoots a sibling; or a minor takes a family member's gun[34] to carry out a school shooting.

An estimate integrating twenty years of data from the National Crime Victimization Survey, reports from law enforcement, and surveys of individual gun owners suggests that between 200,000 and 500,000 guns are stolen from private owners each year.[35] The Federal Bureau of Investigation (FBI) released data suggesting around 1.8 million guns were reported stolen by individual gun owners between 2012 and 2017.[36] The data shows that guns stolen from private owners, like those obtained through a straw purchase, are highly likely to be obtained by a prohibited purchaser or diverted to the criminal market. A 2017 report analyzing nearly 150,000 records of stolen weapons from private owners in the United States illustrates that stolen guns frequently flow to criminals.[37] Public health studies confirm this trend.[38] When stolen guns are ultimately recovered, "the person caught with the weapon was a felon, a juvenile, or was otherwise prohibited under federal or state laws from possessing firearms."[39] Guns stolen and diverted to the illegal market are often ultimately recovered in connection with violent crime, sometimes long after the gun was stolen and passed through many unknown possessors. Examples of this are commonly reported across the country:

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33. Associated Press, *Toddler Finds Gun in Sofa, Accidentally Shoots Young Sister*, ABC NEWS (May 22, 2021) https://abcnews.go.com/US/wireStory/toddler-finds-gun-sofa-accidentally-shoots-young-sister-77850855. [https://perma.cc/62UC-9T2T].

34. John Woodrow Cox & Steven Rich, *The Gun's Not in the Closet*, WASH. POST (Aug. 1, 2018) https://www.washingtonpost.com/news/local/wp/2018/08/01/feature/school-shootings-should-parents-be-charged-for-failing-to-lock-up-guns-used-by-their-kids/. [HTTPS://PERMA.CC/CTK8-AUJM]

35. David Hemenway, Deborah Azrael & Matthew Miller, *Whose Guns Are Stolen? The Epidemiology of Gun Theft Victims*, 4 INJ. EPIDEMIOLOGY 11, 1 (2017).

36. Chelsea Parsons & Eugenio Weigend Vargas, *Gun Theft in the United States: A State-by-State Analysis*, CTR. FOR AM. PROGRESS (Mar. 4, 2020) https://www.americanprogress.org/article/gun-theft-united-states-state-state-analysis/ [https://perma.cc/95BP-BJSW].

37. *Id.*

38. Phillip J. Cook, Susan T. Parker & Harold A. Pollack, *Sources of Guns to Dangerous People: What We Learn By Asking Them*, 79 PREVENTATIVE MED. 28, 30 (2015); Daniel W. Webster, et al., *How Delinquent Youths Acquire Guns: Initial Versus Most Recent Gun Acquisition*, 79 J. URBAN HEALTH 60, 66 (2002).

39. Brian Freskos, *Missing Pieces,* THE TRACE (Nov. 20, 2017) https://www.thetrace.org/2017/11/stolen-guns-violent-crime-america/ [https://perma.cc/JC74-WX8S].

- An improperly stored handgun was stolen from a car parked overnight in an affluent subdivision in Jacksonville, Florida. Four months later it was used by a man unconnected with the robbery to shoot just above the bulletproof vest of a police officer, killing him;[40]
- In 2006, a man left an improperly stored firearm in his truck in Atlanta and a thief smashed the window and stole it. It was recovered at a violent crime scene three years later;[41]
- In 2011, three improperly stored firearms were stolen from a vehicle in St. Louis, Missouri. Approximately one year later, one of the guns was used in a robbery and murder;[42]
- In October 2015, a gun was stolen from a car parked in a tourist area of San Francisco and was subsequently used in two murders within a week.[43]

"Family Fire" incidents involving guns in the home also drive a considerable amount of gun injuries and deaths in the United States, particularly among children that do not know how to safely handle a firearm.[44] Analysis of data from the Centers for Disease Control (CDC) shows that between 2014 and 2018, at least 13,000 children under the age of 19 sustained fatal or nonfatal injuries from the unintentional discharge of a firearm.[45] The most common

40. Zachary T. Sampson, *Stolen guns, like one used to kill Tarpon Springs officer, routine at crime scenes*, TAMPA BAY TIMES (Dec. 24, 2014), https://www.tampabay.com/news/publicsafety/crime/gun-police-say-was-used-to-kill-tarpon-springs-officer-stolen-from/2211436/ [https://perma.cc/33AL-2E95].

41. Brian Freskos, Guns *Are Stolen in America Up to Once Every Minute. Owners Who Leave Their Weapons in Cars Make It Easy for Thieves.*, THE TRACE (Sept. 21, 2016), [https://perma.cc/6FTD-ENQL].

42. Freskos, *supra* note 39.

43. Jodi Hernandez & Lisa Fernandez, *Gun Used in Homicides of Canadian Tourist, Tantra Teacher Stolen From Fisherman's Wharf: San Francisco Police*, NBC BAY AREA, https://www.nbcbayarea.com/news/local/gun-used-in-audrey-carey-canadian-tourists-homicide-stolen-from-fishermans-wharf-san-francisco-police/128043 / [https://perma.cc/59KB-8KJA] (Oct. 11, 2015, 8:42 AM).

44. *See* END FAMILY FIRE, https://www.endfamilyfire.org/ (last visited Nov. 16, 2021) [https://perma.cc/HF4R-DBDV].

45. Katherine A. Fowler et al., *Childhood Firearm Injuries in the United States*, PEDIATRICS, July 2017, at 10; *See, e.g.*, Yihyun Jeong, *When a child is shot, everyone feels the pain: Arizona's minors, first responders touched by accidental sMhootings*, AZ CENT., https://www.azcentral.com/story/news/local/arizona/2016/10/14/when-child-shot-everyone-feels-pain-arizonas-minors-first-responders-touched-accidental-shootings/91878562/ [https://perma.cc/P4V3-JT22] *(Mar. 21, 2017, 11:57 AM)* (detailing multiple examples of unintentional shootings involving minors in Arizona, including one where a child was spinning the pistol "like a cowboy" (internal quotation marks omitted)).

circumstance surrounding unintentional firearm deaths of both young and older children was playing with the gun. Recent media reports across the country illustrate how unauthorized access routinely causes harm:

- In June 2021, a three-year-old in Bakersfield, California shot and injured himself with a loaded gun left on the kitchen table;[46]
- In June 2021, a two-year-old unintentionally shot her nine-year-old sibling in Canton, Mississippi with a loaded firearm left under a car seat;[47]
- In August 2021, a toddler in Altamonte Springs, Florida unintentionally shot and killed his mother while handling an unlocked firearm;[48]
- In October 2021, an eight-year-old unintentionally shot an eleven-year-old in Bronzeville, Illinois;[49]
- In January 2021, an eight-year-old unintentionally shot himself in the head with a gun left out in his family apartment in New York City.[50]

Both intentional gun crimes and unintentional shootings are foreseeable harms that can be anticipated when a gun is accessed or acquired by an unauthorized user. Many of the shootings that result are preventable through the implementation of feasible safety features in guns. The gun industry has long known that many gun owners will improperly store their firearms, leaving them vulnerable to theft or unauthorized access and the tragedies that fre-

46. Jason Kotowski, *Bakersfield toddler accidentally shot himself with gun father bought illegally: reports*, KGET (Jun. 22, 2021, 3:36 PM) https://www.kget.com/news/crime-watch/bakersfield-toddler-accidentally-shot-himself-with-gun-father-bought-illegally-reports/ [https://perma.cc/29M9-YY92] (Jun. 22, 2021.

47. Gracyn Gordon, 2-*year-old child finds gun, accidentally shoots sibling in head*, WAPT (Jun. 2, 2021, 6:18 PM) https://www.wapt.com/article/2-year-old-child-shoots-sibling-after-being-left-in-car-finds-gun/36610323 [https://perma.cc/XR85-9YSW] (Jun. 2, 2021, 6:18 PM).

48. Timothy Bella, *Florida Toddler Accidentally Shoots and Kills Mother While She is on a Zoom Work Call, Police Say*, WASH. POST (Aug. 13, 2021, 3:51 PM), https://www.washingtonpost.com/nation/2021/08/13/florida-toddler-mother-shooting-zoom/ [https://perma.cc/LWW3-CJYZ].

49. *Child Accidentally Shoots 11-Year-Old Boy in Bronzeville Sunday*, NBC CHI. (Oct. 17, 2021, 9:42 AM), https://www.nbcchicago.com/news/local/child-accidentally-shoots-11-year-old-boy-in-bronzeville-sunday/2640920/ [https://perma.cc/55YF-ZCPE].

50. *Bronx Boy, 8, Accidentally Shoots Self in Head with Gun: Officials*, NBC N.Y. (Jan. 18, 2021, 6:26 PM), https://www.nbcnewyork.com/news/local/bronx-boy-8-shot-self-in-head-with-gun-rushed-to-hospital/2836594/ [https://perma.cc/EXZ8-BNAN]. OH

quently occur when this is the case. The industry is also well aware of feasible safety features that would reduce or prevent unauthorized access to firearms. A 2003 study found that more than forty percent of unintentional or unauthorized shooting deaths would have been prevented by safety features like integrated locks and personalized gun technology.[51] Integrated safety features will prevent untrained or unauthorized users from unintentionally shooting a gun, while personalized gun technology will make the gun unusable to anyone not authorized by the owner.

This technology has long been available to the gun industry and feasible to implement. Patents for loaded chamber indicators and magazine disconnect safeties that acknowledge the problem of unintentional shootings have existed for over a century.[52] Personalized gun (or "smart gun") technology was developed in rudimentary forms as early as the 1970's, including integrated locks with an authorized user personal identification number (PIN) device or removable key.[53]

As part of the 2000 settlement agreement between Smith & Wesson and the federal government, Smith & Wesson committed to developing and implementing safety devices and research into the development of "smart gun" technology.[54] Smith & Wesson agreed to incorporate internal locking devices within two years; however, the provisions of the agreement were not implemented after industry backlash.[55] Nevertheless, the technology around gun safety has continued to advance. In 2016, in response to a presidential memorandum on promoting smart gun technology, the Department of Homeland Security produced a survey of nearly 200 related patents, many of which employ the use of biometric technology or radio frequency identification (RFID).[56]

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51. Jon S. Vernick et al., *Unintentional and Undetermined Firearm Related Deaths: A Preventable Death Analysis for Three Safety Devices*, 9 INJ. PREVENTION 307, 307–11 (2003).

52. *See* Stephen P. Teret & Patti L. Culross, *Product-Oriented Approaches to Reducing Youth Gun Violence*, 12 FUTURE CHILD. 118, 122–23 (2002).

53. *See* Elisabeth J. Ryan, *Smart Gun Technology and the Potential to Save Lives*, PUB. HEALTH L. WATCH, (Oct. 11, 2017) https://www.publichealthlawwatch.org/blog/2017/10/11/smart-gun-technology-and-the-potential-to-save-lives [https://perma.cc/U2HM-JS2Z].

54. Smith & Wesson Agreement, *supra* note 30.

55. Sekl, *supra* note 29.

56. *R-Tech Smart Gun Technology Patents*, DEP'T HOMELAND SECURITY, https://www.dhs.gov/publication/r-tech-smart-gun-technology-patents [https://perma.cc/5ZE4-TCCT].

Despite the overwhelming evidence of the need for better safety features and the advancement of smart gun technology, manufacturers have done little to minimize the volume of guns accessed or acquired by unauthorized users, instead focusing on maximizing profits through advertising and marketing aimed at generating demand for military-style weapons and high-capacity magazines. These campaigns, referencing militaristic or survivalist themes, are pervasive and target inexperienced gun buyers. In its annual "How to Sell Issue" in 2013, gun-industry trade magazine Shooting Sports Retailer noted that experienced hunters would "likely be put off by the military-esque attitude and marketing" of tactical assault weapons.[57] But the magazine explained that "the tactical coolness factor does, on the other hand, attract a lot of first-time gun buyers . . . Unlike many of the hunting demographic, these potential buyers will likely be interested only in tactical guns, and the military-ish looks and features will be a big selling point with them."[58]

Safer storage practices by gun owners can also prevent many of these shootings. While the National Shooting Sports Foundation (NSSF), the gun industry's trade association, funds a campaign[59] encouraging safe storage, industry actors should also communicate the real risk of guns to potential customers, which studies have repeatedly shown.[60] Instead, gun companies too often exaggerate the self-defense benefits of guns, without mentioning the fact that guns in the home are far more likely to be used to a bad end – an unin-

57. *The Militarized Marketing of Bushmaster Assault Weapons*, VIOLENCE POL'Y CTR. 6 (2018), https://vpc.org/wp-content/uploads/2018/04/Bushmaster2018.pdf [https://perma.cc/RZC8-TCUC].

58. *Id.*

59. *See* Press Release, NSSF, *NSSF, Project ChildSafe Remind Gun Owners to Practice Safe Firearms Storage, Help Save Lives* (Sept. 29, 2017), https://www.nssf.org/articles/nssf-project-childsafe-remind-gun-owners-to-practice-safe-firearms-storage-help-save-lives/ [https://perma.cc/7TRE-7UZD].

60. *See, e.g.*, Aaron J. Kivisto et al., *Firearm Ownership and Domestic Versus Nondomestic Homicide in the U.S.*, 57 AM. J. PREVENTATIVE MED. 311, 311–20 (2019); Linda L. Dahlberg et al., *Guns in the Home and Risk of a Violent Death in the Home: Findings from a National Study*, 160 AM. J. EPIDEMIOLOGY 929, 929–36 (2004); Matthew Miller et al., *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988–1997*, 92 AM. J. PUB. HEALTH 12, 12 (1988).

tentional shooting,[61] domestic abuse and intimidation,[62] suicide,[63] or crimes[64] – than a good one.

The data is clear that personal firearms are often misused or fired unintentionally. The industry knows this fact. The industry also knows that there are effective and feasible alternative designs that could reduce the likelihood that foreseeable misuse occurs and that realistic warnings of the risks of keeping a gun in the home may change consumers' minds about purchasing one and/or the way the consumer chooses to store the gun if they decide to purchase it.

III.
CONGRESS ALLOWS THE INDUSTRY TO CONTRIBUTE TO GUN VIOLENCE THROUGH BAD LAWS AND POLICIES

Instead of effectively regulating the gun industry, Congress has too often done the opposite. At the behest of the gun lobby, Congress has implemented a constellation of laws and policies that shield the industry from the kind of accountability and oversight that applies to other industries, including:

- Congress has failed to place more than minimal mandatory requirements on the way that FFLs conduct business under the Gun Control Act of 1968.[65]
- In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act (PLCAA)[66] to protect the industry from some tort liability that would promote safer business practices without direct regulation.

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61. *See* Judy Schaechter, *Guns in the Home*, AM. ACAD. PEDIATRICS: HEALTHYCHILDREN.ORG (Jun. 2, 2021) https://www.healthychildren.org/English/safety-prevention/at-home/Pages/Handguns-in-the-Home.aspx [https://perma.cc/V6YG-ZDTT].

62. *See* EVERYTOWN FOR GUN SAFETY, GUNS AND VIOLENCE AGAINST WOMEN: AMERICA'S UNIQUELY LETHAL INTIMATE PARTNER VIOLENCE PROBLEM 4 (2019), https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem/ [https://perma.cc/CYA2-VRNX].

63. *See* Beth Duff-Brown, *Handgun Ownership Associated with Much Higher Suicide Risk*, STAN. MED. NEWS CTR. (June 3, 2020), https://med.stanford.edu/news/all-news/2020/06/handgun-ownership-associated-with-much-higher-suicide-risk.html [https://perma.cc/8FLR-HJJR].

64. *See* Press Release, Bureau of Justice Statistics, Firearms Stolen During Household Burglaries and Other Property Crimes, 2005–2010 (Nov. 8, 2012), https://bjs.ojp.gov/press-release/firearms-stolen-during-household-burglaries-and-other-property-crimes-2005-2010 [https://perma.cc/7T9T-KFTQ].

65. *See* 18 U.S.C. §§ 921–25 (1968)

66. 15 U.S.C. §§ 7901–03 (2005)

- Congress included riders to annual appropriations, often referred to as the "Tiahrt Amendments," to prevent ATF from sharing certain information that would give the public transparency into the retail dealers that supply the guns used in crime in communities.[67]
- ATF, the only federal agency tasked with overseeing the gun industry and its compliance with federal law, is systematically undermined and underfunded, making it ineffective at enforcing the laws already in place.
- Congress has excluded guns from consumer products safety requirements. In the aggregate, these moves by Congress allow the gun industry to dodge accountability for their role in the nation's gun violence epidemic.

A. Shielding the Industry from Accountability: The Protection of Lawful Commerce in Arms Act (PLCAA) and The Tiahrt Amendments

1. PLCAA

Historically, U.S. industries that cause harm face comprehensive regulation or exposure to civil liability to mitigate the foreseeable harm caused by their products. These measures have led to reforming dangerous practices. For example, when subjected to civil liability, the auto industry implemented airbags and seatbelts[68] and the tobacco industry modified its advertising practices.[69] Currently, there is ongoing litigation against the pharmaceutical industry for its role in the opioid abuse epidemic.[70] However, the gun industry has often dodged such accountability to date.

The Protection of Lawful Commerce in Arms Act (PLCAA) provides unique protections from civil liability for the gun industry that no other industry enjoys. PLCAA requires courts to dismiss "qualified civil liability action[s]" against gun companies, which both (1) fall within the general definition of this term in 15 U.S.C.

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67. Consolidated Appropriations Act, 2010, Pub. L. No. 111-17, 123 Stat. 3128–29.

68. *See* AMERICAN ASSOCIATION FOR JUSTICE, DRIVEN TO SAFETY: HOW LITIGATION SPURRED AUTO SAFETY INNOVATIONS 5, 8–9 (2010).

69. *See, e.g., Master Settlement Agreement*, TRUTH INITIATIVE, https://truthinitiative.org/who-we-are/our-history/master-settlement-agreement [https://perma.cc/LS3E-N3E8] (last visited Apr. 18, 2022).

70. *Opioid Lawsuits Generate Payouts, Controversy*, AM. BAR ASS'N, https://www.americanbar.org/news/abanews/aba-news-archives/2019/09/opioid-lawsuits-generate-payouts-controversy/ [https://perma.cc/E5UU-UL7W] (last visited Nov. 17, 2021).

§ 7903(5)(A) and (2) do not satisfy any of the enumerated exceptions in § 7903(5)(A)(i-vi). PLCAA defines a qualified civil liability action as:

> [A] civil action or proceeding or an administrative proceeding brought by any person against a manufacturer of seller of a qualified product, or trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, wrestling from the criminal or unlawful misuse of a qualified product by the person or a third party.

15 U.S.C. § 7903(5)(A). The text of the statute excludes six categories of cases from the general definition of prohibited qualified civil liability actions. For instance, PLCAA allows certain claims involving a design or manufacturer defect as well as negligent entrustment and negligence per se claims against gun sellers. §§ 7903(5)(A)(ii), (v) and 7905(B). PLCAA also includes a "predicate exception," which permits lawsuits against gun companies where their violation of a "[s]tate or Federal statute applicable to the sale or market of [firearms]" was "a proximate cause the harm for which relief is sought." § 7905)(A)(iii).

Congress enacted PLCAA out of purported concern that "novel" legal claims could impose sweeping liability on some manufacturers and dealers for criminal shootings. For instance, some lawsuits sought to impose liability on manufacturers of "Saturday Night Specials" for crimes using those guns, simply because those guns posed (in plaintiffs' view) too great a risk of unlawful use. Only one court upheld one of these claims.[71] Under a proper interpretation of the statute, PLCAA bars similar claims that impose absolute liability on gun companies who did nothing wrong but is supposed to allow claims where the misconduct by a gun manufacturer or seller also contributed to that harm are allowed to proceed under despite PLCAA. In fact, in 2005, PLCAA's chief sponsor, Senator Larry Craig, emphasized that PLCAA was "not a gun industry immunity bill because it does not protect firearms [industry actors] from . . . lawsuits based on their own negligence or criminal conduct."[72] Courts adopting the proper, more limited view of PLCAA have held that PLCAA allows liability where gun companies cannot show entitlement to its limited defenses.[73]

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71. Kelley v. R.G. Indus., Inc., 497 A.2d 1143 (Md. 1985), *superseded by statute*, Md. Code Art. 27 § 36-I(h) (1990) (repealed 2002).

72. 151 CONG. REC. S9059 (Jul. 27, 2005).

73. *See, e.g.*, Chiapperini v. Gander Mountain Co., 13 N.Y.S.3d 777 (Sup. Ct. 2014); Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422 (Ind. Ct. App. 2007);

However narrow or broad PLCAA is read, providing special protection to the gun industry is inconsistent with the purpose of the civil justice system. The purpose of the U.S. tort system is to protect the public from market failures and to incentivize industries to adopt adequate safety standards and/or responsible business practices. The tort system functions to prevent injuries from occurring in the first place by holding companies best positioned to anticipate and mitigate foreseeable harm responsible in damages for the harm caused by their conduct.[74] PLCAA, particularly when interpreted broadly, enables the gun industry to evade accountability under this system by profiting off of dangerous business practices that cause harm, and creates a chilling effect on litigation by victims and survivors of gun violence. Without a proper deterrence mechanism, gun industry actors are emboldened to continue putting profits over people.

With full civil accountability, the gun industry would be forced to reform its dangerous practices that supply the criminal gun market. If gun manufacturers and distributors limited their distribution to dealers committed to using safe sales practices, the flow of guns to the criminal market would significantly decrease. This would result in a significant decrease in gun deaths, injuries, and crimes resulting from illegal gun trafficking.

2. Tiahrt Amendments

Public policy generally favors the idea that sunshine is a disinfectant to social problems; information educates the public and policymakers about the extent and causes of issues, and putting a spotlight on bad actors can lead to reform. But these principles are not applied to guns.

Congress and ATF have made it more difficult to deter illegal gun trafficking by keeping hidden from public view critical data – such as which gun companies and dealers supply the criminal market – that would best inform policy measures to reduce the diversion of guns to the illegal market. This information was long available to the public under the Freedom of Information Act, and courts recognized that this transparency did not interfere with legit-

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Williams v. Beemiller, Inc., 952 N.Y.S.2d 333 (App. Div. 2012), *amended by* 962 N.Y.S.2d 834 (App. Div. 2013); Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262 (Conn. 2019).

74. Burgess v. Superior Court, 831 P.2d 1197, 1206 (Cal. 1992) ("[T]he purpose of ordinary tort damages as distinguished from "punitive" damages, is both to compensate and to deter . . . [indeed, o]ne of the purposes of tort law is to deter future harm").

imate law enforcement or privacy concerns. However, in 2003, Congress enacted the first "Tiahrt Amendment," a series of riders to federal appropriations bills that collectively restrict ATF from publicly sharing information from the agency's crime gun trace database.[75] As a result, the public and policymakers no longer know which dealers are selling the most crime guns. Communities have a right to know which federally licensed dealers are responsible for the guns flooding onto their streets, and simple acts of transparency would encourage dealers to adopt safer business practices. Greater information and transparency would enable policy makers to make effective and targeted solutions to address problem sources of crime guns. This would have a significant impact on gun violence. Instead, Congress shields the gun industry from accountability or public scrutiny.

B. Deliberately Undermining ATF

Despite ATF's broad mandate to "protect communities from violent criminals, criminal organizations, and illegal use and trafficking of firearms, among other things,"[76] the agency lacks the necessary authority and resources to adequately and consistently regulate the business practices of FFLs. The gun industry is well-aware of the shortcomings of ATF's enforcement capacity because it has spent most of recent history engineering the agency to fail.[77]

The Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.*, does not sufficiently regulate the business practices of retail gun dealers to prevent illegal gun trafficking. The Act contains no statutory requirement that dealers adhere to specific safe business practices or implement minimum security standards acknowledged by law enforcement to deter the foreseeable diversion of firearms to the illegal market through unlawful transfers or theft. Instead, ATF provides voluntary guidance that can be ignored by negligent dealers.[78] The Act also limits ATF to one routine compliance inspection of an FFL per year, making it less likely that bad actors will be dis-

75. *See* Consolidated Appropriations Act, 2010, 111 Pub. L. 117 (2009).

76. *Who We Are*, U.S. DEP'T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, https://www.atf.gov/about/who-we-are [https://perma.cc/XGF5-XDM7].

77. *See* Glenn Thrush, Danny Hakim & Mike McIntire, *How the A.T.F., Key to Biden's Gun Plan, became an N.R.A. 'Whipping Boy*,' N.Y. TIMES (May 2, 2021), https://www.nytimes.com/2021/05/02/us/politics/atf-nra-guns.html [https://perma.cc/JDP7-GBQ8].

78. *See* dontlie.org and ATF Safety & Security Report, *supra* n. 18.

covered before their sales practices allow a substantial number of firearms to be diverted to the illegal gun market.[79]

Even if the statutory authority were expanded, the agency is underfunded and has long been unable to meet the modest compliance inspection targets it sets for itself.[80] A 2013 report issued by the Department of Justice Office of Inspector General found ATF consistently fails to meet internal targets to inspect each licensee once every three to five years and, alarmingly, did not adequately implement mechanisms to track and prioritize for inspection retail dealers it considers "high risk" to effectively employ the limited resources the agency does have.[81] Additional data released by ATF suggests only 15 percent of retailer dealers were inspected each year between 2010 and 2019, which equates to an inspection once every seven years.[82] Although 2020 posed novel challenges, ATF inspected a mere 5,827 dealers during that fiscal year despite record high gun sales.[83]

Even in rare cases where ATF musters the resources to inspect a licensed retail dealer, licenses are rarely revoked, even when flagrant and repeated violations of federal law are discovered, leaving irresponsible retail dealers free to operate despite the grave risk posed to public safety. An analysis of inspection reports obtained by Brady and independently analyzed by *USA Today* and *The Trace* found that recommendations from ATF field inspectors to take serious remedial action, including recommendations to revoke a federal firearms license from a retailer, are routinely overturned or downgraded to warnings by higher-ups in the agency.[84]

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79. 18 U.S.C. § 923(g)(1)(B)(ii)(I).

80. *Review of ATF's Federal Firearms Licensee Inspection Program*, U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, at 13 (2013), https://oig.justice.gov/reports/2013/e1305.pdf [https://perma.cc/JRJ3-QAX3].

81. *Id.* at 25.

82. Brian Freskos et al., *The ATF Catches Thousands of Lawbreaking Gun Dealers Every Year. It Shuts Down Very Few*, THE TRACE (May 26, 2021), https://www.thetrace.org/2021/05/atf-inspection-report-gun-store-ffl-violation/ [https://perma.cc/3DQZ-B28X].

83. *Fact Sheet – Facts and Figures for Fiscal Year 2020*, U.S. DEP'T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (2021), https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2020 [https://perma.cc/7LX3-3ZVJ].

84. Brian Freskos et al., *After Repeated ATF Warnings, Gun Dealers Can Count on the Agency to Back Off; Sometimes Firearms Flow to Criminals*, USA TODAY (May 26, 2021), https://www.usatoday.com/in-depth/news/investigations/2021/05/26/gun-dealers-let-off-hook-when-atf-inspections-find-violations/7210266002/ [https://perma.cc/E4Q2-GM7T].

Congress also makes it harder for ATF to deter illegal gun trafficking by intentionally slowing down the National Trace Center's (NTC) ability to trace crime guns. Through records kept by retail FFLs pursuant to the Gun Control Act of 1968, ATF is able trace a gun recovered in connection with crime to its first retail sale. Specifically, when law enforcement recovers a gun, they can contact the NTC with the serial number reflected on the firearm. Using that serial number, ATF employees can contact FFLs along the distribution chain and/or reference records in their possession to follow that gun to the last transfer by a licensed dealer to aid law enforcement in identifying leads in criminal investigations.[85]

Despite ATF's mandate to trace crime guns, in 1993, Congress enacted an appropriations bill with riders prohibiting ATF from consolidating or centralizing records, which were made permanent in 2011.[86] This move represents the gun industry's effort to make gun records harder to search and, as a result, ATF's NTC is forced to function using impracticable and outdated data management technology.[87] According to an article by *The Trace*, but for this restriction, the "[NTC] itself, and its 350 employees, likely would be obsolete if the ATF were permitted to create a modern, searchable database."[88] Yet, ATF is forced to dedicate those resources to tracing using outdated systems rather than compliance inspections.

An effective and adequately funded ATF could ensure that gun companies that deliberately or recklessly supply the criminal market are taken out of business, and the chilling effect of strong enforcement would deter other bad actors. This would cut off the source of many crime guns, and significantly reduce gun crimes.

C. Excluding Guns from Consumer Products Safety Standards

The gun industry is the only industry that does not have to adhere to design safety standards and issue a recall on defective products. In 1972, Congress barred the newly formed Consumer Products Safety Commission (CPSC) from regulating firearms, effectively preventing any federal agency from setting safety standards

85. David Friedman, *The ATF's Nonsensical Non-Searchable Gun Databases, Explained*, THE TRACE (Aug. 24, 2016), https://www.thetrace.org/2016/08/atf-non-searchable-databases/ [https://perma.cc/86C2-SH84].

86. *See* Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 103-123, 107 Stat. 1226, 1229 (1993) *and* Consolidated and Further Continuing Appropriations Act, Pub. L. No. 112-55, 125 Stat. 552, 609 (2011).

87. Friedman, *supra* note 85.

88. *Id.*

related to the design and manufacture of firearms.[89] This restriction is wholly unique to firearms. Former President Barack Obama discussed the oddity at a 2016 CNN town hall: "The notion that we would not apply the same basic principles to gun ownership as we do to everything else we own . . . that contradicts what we do to try to create a better life for Americans in every other area of our lives."[90]

These restrictions prevent the CPSC from establishing a system to mandate safety devices, recall defective guns, and track injuries and deaths from unintentional shootings or defective guns. The federal government came down harder on a line of Kinder Eggs that posed a choking hazard[91] than they do on handguns without built-in safety features (368 children were unintentionally shot with a firearm in 2020).[92] As a result, while the CPSC can require that every other product, from BB guns to teddy bears, must be made with the most effective safety features, the gun industry is allowed to sell guns without long-feasible, life-saving safety features. In some instances, guns are over a century behind safety technology.

If guns were regulated like other products, magazine disconnect safeties, internal locks, "smart" guns, loaded chamber indicators and other safety features could become industry standard. As a result, unintentional shooting deaths would greatly decrease, as would the use of stolen guns, and some suicides and other misuses of guns. These reforms would reduce gun deaths and injuries substantially. By excluding firearms from the Consumer Product Safety Act, Congress *has removed any requirement or incentive* for gun manufacturers to implement design features that would make guns safer.

89. Olivia Li, *Cars, Toys, and Aspirin Have to Meet Mandatory Safety Standards. Guns Don't. Here's Why.*, THE TRACE (Jan. 19, 2016), https://www.thetrace.org/2016/01/gun-safety-standards/ [https://perma.cc/4NDN-AN3D].

90. Administration of Barack Obama, Remarks and a Question-and-Answer Session at CNN's "Guns In America" Town Hall Meeting in Fairfax, Virginia (Jan. 7, 2016).

91. Press Release, U.S. Consumer Prod. Safety Comm'n, CPSC Warns of Banned 'Kinder Chocolate Eggs' Containing Toys Which can Pose Choking, Aspiration Hazards to Young Children (Apr. 13, 2006), https://www.cpsc.gov/zhT-CN/node/20527 [https://perma.cc/4N2N-D279].

92. #NOTANACCIDENT INDEX, EVERYTOWN FOR GUN SAFETY, https://everytownresearch.org/maps/notanaccident/ [https://perma.cc/P5FN-SJH3] (last visited Nov. 17, 2021).

IV.
CONCLUSION

The unacceptably high rates of gun deaths in the United States are not inevitable, nor consequences of American culture or the Constitution: they are the result of policy choices. While the scope of the Second Amendment has not been clarified by the Supreme Court to advise which types of laws will comport with the Constitution following the decision in *NYSRPA v. Bruen*, laws regulating individual possession and use are not the only policies driving the gun violence epidemic in the Unites States. There are industry-facing policies that contribute to the rates of gun violence and addressing them will not implicate the scope of the Second Amendment. Congress can act to adequately regulate the gun industry, whose business practices – retail sales practices, distribution system, and design standards – have a direct impact on the violence.

America's gun violence epidemic can be stopped if Congress simply uses the tools employed to address other public health problems, including regulation, litigation, and transparency efforts. For starters, Congress should repeal PLCAA, allowing the threat of civil liability to push industry reform as has been the norm in other industries like automobiles and pharmaceuticals; repeal the Tiahrt Amendments which shield crime gun suppliers from public scrutiny; properly fund ATF and require the agency to target likely crime gun suppliers for inspections and ensure that bad actors are properly sanctioned; and subject firearms to oversight by the CPSC to encourage the adoption of safety features that will make guns less prone to theft or misuse by unauthorized users.

With full civil accountability, comprehensive regulations, and effective legislation, gun deaths and injuries would likely decrease substantially. Public education on the risks of guns and the need for safe storage can be every bit as effective as anti-drunk driving and smoking campaigns, leading to further reductions. And there are other measures that can be implemented, in and out of government, not discussed in this article, that can also address our gun violence epidemic.

Americans are not fated to live and die amidst a gun violence epidemic. Every other comparable nation has avoided or cured such widespread gun tragedies. The United States has effectively addressed other public health and safety problems. The same can be done with guns. We need only the will to do what is best for the lives and safety of Americans.

"SHOW ME YOUR GUN": A WAY FORWARD ON WAITING PERIODS

*FREDRICK E. VARS**

I. INTRODUCTION

On March 16, 2021, a white man walked into an Atlanta-area gun store, legally purchased a handgun, and walked out of the store with it.[1] Within hours, he had used the gun to kill eight people, including six women of Asian descent.[2] What if the shooter had not been allowed to get a gun so quickly? What if he had been required to wait a few days? Would he still have gone on his horrific killing spree?

It may be impossible to enter the mind of the Atlanta shooter to answer these questions, but legislators in several states have introduced so-called "waiting period" bills. Among these is a Georgia bill introduced in direct response to this shooting.[3] The length of periods varies, but they all operate in the same way: a gun buyer is not allowed to take possession of a new gun until a fixed period of time has passed since purchase. The idea is that a "cooling off" period will deter impulsive gun violence—including suicide, which makes up 60% of all gun deaths in the U.S.[4] Research shows that waiting periods save lives.[5]

The affirmative case for waiting periods is strong, but only ten states and the District of Columbia have them,[6] and only one state

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1. Lindsay Whitehurst, *Gun Waiting Periods Rare in U.S. States but More May Be Coming*, ASSOCIATED PRESS (March 21, 2021), https://apnews.com/article/shootings-atlanta-ahmaud-arbery-violence-georgia-d444884e06c90b625b471b98e48bee24 [https://perma.cc/YVD9-MCXE].

2. *Id.*

3. *See id.* (listing Arizona, New York, Pennsylvania and Vermont); Jesse Paul, *Colorado Democrats will Pursue Mandatory Waiting Period for Gun Buyers, Safe-Storage Measure in 2021*, COLO. SUN (Jan. 11, 2021), https://coloradosun.com/2021/01/11/colorado-gun-control-laws-2021-preview/ [https://perma.cc/5C8V-AAT9]; *Gun Bills Fail to Pass Georgia Session, Lawmakers Eye 2022*, WSAV (Apr. 2, 2021) [https://perma.cc/WGD2-2HGU].

4. *Facts and Figures*, U.C. DAVIS HEALTH, https://health.ucdavis.edu/what-you-can-do/facts.html [https://perma.cc/9TL8-GRQ3].

5. *See infra* text accompanying notes 13-17.

6. *See infra* note 22.

has passed a waiting period bill in recent years—Florida, after the Parkland massacre in 2018.[7] This article proposes two potential modifications to waiting period bills that will hopefully tilt the political landscape in their favor. First, I offer two statutory bypass mechanisms for certain gun buyers: one for individuals who can show to law enforcement that they need a gun to protect themselves from an external imminent threat. and the other for individuals who can demonstrate to a judge that they themselves are not dangerous. A prospective gun purchaser who met either standard would be able to take immediate possession of a new gun. Second, and more radically, I propose allowing a person who already has access to a gun to buy another immediately, thus imposing the waiting period only on people buying their first gun. A person who already has access to a gun can use that one rather than wait for another, rendering the waiting period effectively moot for such buyers.

It should be recognized that these modifications could reduce the overall effectiveness of waiting periods. But most of the benefits of waiting periods would remain, and a modified, first-gun waiting period is much better than no waiting period at all. Section II of this article sets forth the case for traditional, across-the-board waiting periods: they are constitutional, effective, and popular. Section III considers the two strongest counter-arguments: delaying gun access in an emergency and inconveniencing gun owners. Rather than ignoring or minimizing these counter-arguments, I suggest ways to address them and hopefully persuade reluctant lawmakers to move forward, adopt waiting periods, and save lives.

II.
ARGUMENTS FOR WAITING PERIODS

Waiting periods are constitutional. California has had a waiting period to purchase firearms continuously since 1923.[8] After the United States Supreme Court in 2008 reversed its precedent and held for the first time that the Second Amendment protects an individual's right to bear arms,[9] two gun owners and two gun-rights organizations challenged California's 10-day waiting period.[10] However, the plaintiffs did not challenge the waiting period as applied to first-time gun purchases.[11] The Ninth Circuit upheld the traditional, across-the-board waiting period on the ground that the

7. FLA. STAT. ANN. § 790.0655 (West 2021).
8. Silvester v. Harris, 843 F.3d 816, 823 (9th Cir. 2016).
9. District of Columbia v. Heller, 554 U.S. 570 (2008).
10. *Silvester*, 843 F.3d at 825.
11. *Id.* at 818 ("It is not a blanket challenge to the waiting period itself.").

waiting period provides "a cooling-off period to deter violence resulting from impulsive purchases of firearms."[12]

Research (including studies conducted after the Ninth Circuit decision) confirms that waiting periods are effective, reducing suicide and homicide. A 2020 study by the independent RAND Corporation found some evidence that waiting periods may decrease total suicide and found even stronger evidence that waiting periods at least reduce firearm suicide.[13] The two key studies cited in the RAND report on suicide used similar methods, but different time periods.[14] As to violent crime, another RAND study included six studies in its analysis.[15] It concluded that waiting periods may decrease both total homicides and firearm homicides.[16] In sum, waiting periods save many lives, with estimates ranging from the hundreds to the thousands each year.[17]

There is strong public support for waiting periods. In a recent public opinion poll, 73% of respondents said that they would sup-

12. *Id.* at 829. The Second Amendment ground may shift depending on how the Supreme Court decides New York State Rifle & Pistol Ass'n v. Corlett, 141 S. Ct. 2566 (2021).

13. Rosanna Smart, *Effects of Waiting Periods on Suicide*, RAND CORP. (last updated Apr. 22, 2020), https://www.rand.org/research/gun-policy/analysis/waiting-periods/suicide.html [https://perma.cc/P44G-A8NF]. Some argue that a person who decides to commit suicide will just find another method if they are denied access to a gun. The term for this is "substitution." It is therefore important to show a reduction in total suicide, not just firearm suicide, to rebut the substitution hypothesis.

14. Griffin Edwards, Erik Nesson, Joshua J. Robinson & Fredrick Vars, *Looking Down the Barrel of a Loaded Gun: The Effect of Mandatory Handgun Purchase Delays on Homicide and Suicide*, 128 ECON. J. 3117 (2018) (1990-2013); Michael Luca, Deepak Malhotra & Christopher Poliquin, *Handgun Waiting Periods Reduce Gun Deaths*, 114 PROC. NAT'L ACAD. SCI. 12162 (2017) (1970-2014).

15. Andrew Morral, *Effects of Waiting Periods on Violent Crime*, RAND CORP. (last updated Apr. 22, 2020), https://www.rand.org/research/gun-policy/analysis/waiting-periods/violent-crime.html [https://perma.cc/UV9W-SXRC].

16. *Id.* There is, however, inconclusive evidence about the effect of waiting periods on mass shootings like the one in Atlanta discussed at the beginning of this article. , Samuel Peterson, *Effects of Waiting Periods on Mass Shootings,* RAND CORP. (last updated Apr. 22, 2020), https://www.rand.org/research/gun-policy/analysis/waiting-periods/mass-shootings.html [https://perma.cc/28LH-875Q]. Mass shootings, however, account for just 0.2% of firearm deaths each year, whereas suicide accounts for 60%. Lacey Wallace, *Mass Shootings Are Rare – Firearm Suicides Are Much More Common, and Kill More Americans*, PBS NATION (Mar. 30, 2021), https://www.pbs.org/newshour/nation/mass-shootings-are-rare-firearm-suicides-are-much-more-common-and-kill-more-americans [https://perma.cc/E2UA-ZXTQ].

17. *See* Edwards et al., *supra* note 14 (hundreds); Luca et al., *supra* note 14 (thousands).

port "establishing waiting periods of three days before a gun can be taken home after it is purchased."[18] A 2019 study found that 85% of non-gun owners and 72% of gun owners support mandatory waiting periods for firearm purchases.[19] Most Americans favor even lengthy waiting periods: in one poll, 75% supported a 30-day waiting period.[20]

Notwithstanding the constitutionality, effectiveness, and popularity of waiting periods, few jurisdictions have them.[21] This is not for lack of trying: waiting period bills have been introduced in several states and in Congress.[22] There are, however, stiff political headwinds, deriving in part from the arguments set forth below.

III.
ARGUMENTS AGAINST WAITING PERIODS AND RESPONSES

With efficacy now established, there are two main arguments against waiting periods. The NRA states these objections as follows: (1) "First-time buyers seeking a firearm for self-defense would be affected by a waiting period that limits their ability to safeguard themselves and their loved ones"; and (2) "Most gun-owners own more than one firearm and a waiting period could not possibly have an effect on those purchasing an additional firearm."[23] Of course, the NRA does not speak for all gun owners, but these are

18. John Bowden, *Two in Two Support Stricter Gun Control Laws: Poll*, THE HILL (Apr. 14, 2021), https://thehill.com/homenews/news/548127-2-in-3-support-stricter-gun-control-laws-poll [https://perma.cc/P2WK-VE8H].

19. Graham Dixon et al., *Public Opinion Perceptions, Private Support, and Public Actions of U.S. Adults Regarding Gun Safety Policy*, 3(12) JAMA NETWORK e2029571, at 5 (Dec. 22, 2020).

20. Lydia Saad, *Americans Widely Support Tighter Regulations on Gun Sales*, G????? (Oct. 17, 2017), https://news.gallup.com/poll/220637/americans-widely-support-tighter-regulations-gun-sales.aspx [https://perma.cc/3XAG-XZUL].

21. *See supra* text accompanying notes 5, 6.

22. *See* John Whittaker, *N.Y. State Senate Passes Gun Bills*, OBSERVER TODAY (June 5, 2021), https://www.observertoday.com/news/local-region/2021/06/ny-state-senate-passes-gun-bills/ [https://perma.cc/4GRQ-HVM9] (reporting that one N.Y. state legislator has tried to pass waiting period bills "eight times since 2012, with all eight proposals expiring in committee"); Whitehurst, *supra* note 1; Press Release, Congressman Raja Krishnamoorthi, House of Representatives, Congressman Raja Krishnamoorthi Announces Reintroduction of the COOL OFF Act to Reduce Gun Violence Through a National Three-Day Waiting Period (Mar. 11, 2021), https://krishnamoorthi.house.gov/media/press-releases/congressman-raja-krishnamoorthi-announces-reintroduction-cool-act-reduce-gun [https://perma.cc/H8AF-H3ZL].

23. *Waiting Periods,* NRA INST. LEG. ACTION (Sept. 2019), https://www.nraila.org/get-the-facts/waiting-periods/ [https://perma.cc/JV2B-ZEUG].

serious arguments that deserve attention, whatever their source. I will discuss and respond to each of these two arguments in turn.

A. Immediate Need for Firearm for Self-Defense

The first argument goes to the fundamental trade-off that a mandatory waiting period presents: do the benefits of reduced suicide and homicide from waiting periods outweigh the costs of delaying gun purchase by those who would not misuse the gun? Self-defense in particular is a very common and perfectly valid reason to want a gun,[24] and sometimes the need for self-defense is urgent. Sponsors of waiting period bills might therefore include a bypass mechanism for emergencies.

One bypass mechanism relies on law enforcement. The Brady Act imposed a federal 5-day waiting period during the 1990s.[25] That waiting period did not apply if the buyer presented a statement from law enforcement that the buyer needed the gun "because of a threat to the life of the transferee or of any member of the household of the transferee."[26] The NRA criticized this bypass mechanism as too narrow in several respects.[27] First, the NRA thought that law enforcement would require proof of a specific communication in order to find a "threat."[28] Next, the NRA argued that a threat of "bodily harm," not just a threat to life as provided for in the statute, should be sufficient to justify immediate gun purchase.[29] Finally, the NRA posited that law enforcement would not admit that anyone in their jurisdiction needs a gun for self-defense because that would constitute an admission that law enforcement would not be up to

24. In a 2019 Gallup poll, 63% of gun owners cited "Personal Safety/Protection" as a reason they own a gun. *Guns*, GALLUP (last visited March 11, 2022), https://news.gallup.com/poll/1645/guns.aspx [https://perma.cc/ZP7M-GUWG]; District of Columbia v. Heller, 554 U.S. 570, 630 (2008) (holding that the Second Amendment protects "the core lawful purpose of self-defense").

25. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102(a)(1)(A)(ii)(I), 107 Stat. 1536, 1537 (1993).

26. 18 U.S.C.A. § 922(s)(1)(B) (West 2015). The full text of the exception is as follows: "the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee." *Id.*

27. Richard E. Gardiner & Stephen P. Halbrook, *NRA and Law Enforcement Opposition to the Brady Act: From Congress to the District Courts*, 10 ST. JOHN'S J. LEGAL COMMENT. 13, 23 (1994).

28. *Id.*

29. *Id.*

the task.[30] These criticisms did not convince lawmakers.[31] Overwhelming public support for the Brady Act overcame all objections.[32]

A co-author and I in another context have proposed a second bypass mechanism that avoids the NRA criticisms altogether: "A person who has registered with the "[STATE] Do-Not-Sell List" may deregister by applying for immediate deregistration to [AN APPROPRIATE STATE COURT] and proving by a preponderance of the evidence that he or she is not likely to act in a manner dangerous to public safety (including danger to self) in a proceeding where any public official or interested party may also present evidence."[33] Under this provision, a would-be gun purchaser does not have to establish a specific threat to life, but rather must convince a neutral judge that they themselves are not dangerous.

To be clear: I do not mean to suggest that any sort of bypass option is required by the Second Amendment—it is not. Nor do I mean to suggest that the Brady Act bypass was inadequate. After all, the studies finding waiting periods to be effective are driven in large part by the Brady Act waiting period, which included only the first exception described above. By offering these two bypass examples, I only mean to suggest that compromise is possible without undermining the effectiveness of a waiting period.

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30. *Id.*

31. Other criticisms raised during hearings on the Brady Act included: (1) concern that law enforcement might act in an arbitrary, capricious, or racist manner, *Brady Handgun Violence Prevention Act: Hearing on H.R. 1025 Before the Subcomm. on Crime & Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong., 496 (1993); (2) the fact that "the average citizen may not even be able to get an appointment to see the chief law enforcement officer," *Brady Handgun Violence Prevention Act: Hearing on H.R. 1025 Before the Subcomm. on Crime & Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong., 496 (1993). *Accord Brady Handgun Violence Prevention Act: Hearing on S. 414 Before the S. Comm.*, 103rd Cong., 167 (1993); (3) "No sanctions exist to require law enforcement officers to destroy personal information about applicants" and the provision did not afford due process, S. Hearing 100-1054, at 132; and, most fundamentally, (4) the decision to buy a gun "ought to be left in the hands of the individual," H.R. Rep. No. 102-47, at 21 (1991). *But see* S. Hearing 100-256, at 81 (1987) ("[The] inconvenience [of a waiting period] is lessened by the fact that the legislation exempts an individual who receives a waiver from a law enforcement agency because his or her life is threatened.").

32. Kevin Merida, *Senate Approves Brady Bill, 63 TO 36*, Wash. Post. (Nov. 21, 1993), https://www.washingtonpost.com/archive/politics/1993/11/21/senate-approves-brady-bill-63-to-36/b242e3dd-2fbd-4459-a59b-416a41b988bb/ [https://perma.cc/7TLZ-K8ER].

33. Ian Ayres & Fredrick E. Vars, Weapon of Choice: Fighting Gun Violence While Respecting Gun Rights 181 (2020).

Having robust bypass options like these may also help lead to compromise on waiting period length. Current waiting periods vary from 72 hours (Illinois) to 14 days (Hawaii).[34] Research suggests that waiting periods of seven or more days prevent more suicides than do shorter waiting periods.[35] Legislators should therefore enact a 7-, 10-, or even 14-day waiting period, coupled with exceptions for emergencies and buyers adjudicated not to be dangerous. The inconvenience for gun owners of a waiting period of a week or more is discussed (and eliminated) in the next subsection.

B. Needless Burden on Gun Owners

The second argument against waiting periods that I will discuss is that waiting periods for people who already own guns are pointless. Gun owners will simply use the gun or guns they already own rather than wait for a new one.[36] As a matter of constitutional law, the Ninth Circuit expressly rejected this argument:

> "[It] assumes that all subsequent purchasers who wish to purchase a weapon for criminal purposes already have an operable weapon suitable to do the job. [This] assumption is not warranted. An individual who already owns a hunting rifle, for example, may want to purchase a larger capacity weapon that will do more damage when fired into a crowd."[37]

Alternatively, and much more likely, the individual who already owns a hunting rifle may be trying to purchase a handgun for a suicide attempt. One recent study found that handguns—-even though more tightly regulated than long guns in the state studied—-were used in 72% of firearm suicides.[38]

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34. *Waiting Periods*, GIFFORDS LAW CTR. (last visited March 11, 2022), https://giffords.org/lawcenter/gun-laws/policy-areas/gun-sales/waiting-periods/, [https://perma.cc/FJ6B-QMU3].

35. Edwards et al., *supra* note 14, at 3133 tbl.4.

36. *See* Silvester v. Becerra, 138 S. Ct. 945, 949 (2018) (Thomas, J., dissenting from denial of certiorari) ("Common sense suggests that subsequent purchasers contemplating violence or self-harm would use the gun they already own, instead of taking all the steps to legally buy a new one in California.").

37. Silvester v. Harris, 843 F.3d 816, 828 (9th Cir. 2016).

38. Paul S. Nestadt et al., *Prevalence of Long Gun Use in Maryland Firearm Suicides*, 7 INJURY EPIDEMIOLOGY 1, 4 (2020), https://injepijournal.biomedcentral.com/track/pdf/10.1186/s40621-019-0230-y.pdf. [https://perma.cc/8HTU-PPB9]. *See also* Thomas J Hanlon, et al., *Type of Firearm Used in Suicides: Findings From Thirteen States in the National Violent Death Reporting System, 2005-2015*, 65 J. ADOLESCENT HEALTH 366, 367 (2019). While these studies show that handguns are used in suicide attempts much more frequently than long guns, the fact that around a quarter of gun suicides involve long guns strongly suggests that a waiting period should include *all* firearms, not just handguns.

It is true that one cannot know for certain which gun purchase will be the fatal one, but slowing down the first gun purchase probably accounts for the bulk of lives saved by a waiting period. Research finds that the risk of firearm suicide peaks immediately after the first acquisition.[39] A person who already owns a handgun does not need another one to make a firearm suicide attempt or to kill someone else. They can simply use the first gun rather than wait for another. Single-victim incidents account for roughly 80% of total gun deaths each year.[40] You don't need two guns to kill one person. This suggests that a waiting period for first gun purchases only would capture most of the benefits of traditional, across-the-board waiting periods, without imposing any burden on current gun owners.

Once again, compromise is possible. Before offering a potential implementation strategy, however, it is important to emphasize that a first-gun-only waiting period is not required by the Second Amendment.[41] And, even though the life-saving effect of waiting periods is likely concentrated on the first gun purchase, across-the-board waiting periods will save even more lives. The reason to consider the first-gun-only approach is to eliminate the burden waiting periods impose on current gun owners and hopefully to overcome political opposition. Where waiting period bills have been introduced and have failed, the perfect should not be the enemy of the good.

The trick to implementing a first-gun-only waiting period is determining reliably whether the prospective buyer already has access to a gun. There is no national registry of gun owners,[42] which presents a problem. But the solution to the problem is simple: require a buyer who wants immediate possession of a new firearm to show the seller an unloaded firearm already in their possession.[43] It

39. David M. Studdert et al., *Handgun Ownership and Suicide in California*, 382 N. ENGL. J. MED. 2220, 2220 (2020).

40. "More than 50 percent (50.6) of all murders for which the UCR Program received supplemental data were single victim/single offender situations." *2019 Crime in the United States*, FED. BUREAU OF INVESTIGATION (last visited March 11, 2022), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/expanded-homicide [https://perma.cc/J9VN-VYDV].

41. Silvester v. Harris, 843 F.3d 816 (9th Cir. 2016).

42. *See* 18 U.S.C. 922(t)(2)(C) (requiring the federal background check system to "destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer").

43. One might provide other avenues to prove gun access, like showing a concealed carry permit.

is too late when a person already has access to a firearm to prevent most of the potential harms of firearms. A "show me your gun"[44] system would be targeted to delay access to that deadliest first firearm, not to delay second, third, and fourth gun purchases.

Handguns are responsible for over 92% of firearm homicides (where firearm type is known) and handguns are the overwhelming choice of victims of firearm suicide.[45] For this reason, under my proposal, a prospective buyer would have to show a handgun in order to purchase another handgun without a delay period. But either a handgun or a long gun (*i.e.* rifle or shotgun) would be sufficient for quick purchase of another long gun. Recall that the possibility of switching toward a more dangerous weapon was an important component of the Ninth Circuit's reasoning upholding California's waiting period as to gun owners.[46]

One argument against the "show me your gun" system is that it will lead to more gun carrying, which could increase unintentional shootings and gun thefts. This is a genuine concern, but needs to be evaluated in context. By definition, guns are already allowed in gun stores, so this proposal does not expand the number of places guns can be carried. A successful gun buyer will necessarily be carrying a gun *out* of the store after a completed purchase. The difference under my proposal is that gun owners who want to take immediate possession will be carrying a gun *into* the store as well. Logically, that would seem to double the risks of accidental discharge and theft. But there are two factors mitigating those risks: (1) the display firearm must be unloaded, so there is only a small chance of an unintentional shooting; and (2) the places where gun theft might occur has not expanded. If there's a thief lurking in the gun store parking lot today, he or she can just wait until the buyer is leaving the store. Thus, the marginal risks associated with the "show me your gun" system are small.

IV.
CONCLUSION

Waiting for the perfect waiting period is a mistake. Too many waiting period bills have died recently, some even before they've

44. *Cf.* AYRES & VARS, *supra* note 33, at 63 (observing in a different context that gun ownership is easy to prove: "just show me your gun").

45. *Crime in the United States 2019*, FBI, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-20 [https://perma.cc/P7SC-JFJN]; Nestadt et al., *supra* note 38 at 1-2; Hanlon et al., *supra* note 38 at 367.

46. *Silvester*, 843 F.3d at 828.

been introduced.[47] Sometimes that may have been the result of fear-mongering and slippery-slope arguments,[48] but opponents also raise genuine concerns. The political question in some states, and perhaps federally, may be whether to ignore these concerns and to continue to fail to enact waiting periods or to instead accommodate these concerns in order to secure passage. The accommodations outlined in this article—-robust bypass provisions and a "show me your gun" exception—-squarely address opponents' primary concerns while retaining most of the life-saving benefits that traditional waiting periods achieve.[49]

47. Nick Reynolds, *Handgun Waiting Period Bill Won't be Introduced in Wyoming Senate*, CASPER STAR-TRIB. (Feb. 12, 2020), https://trib.com/news/state-and-regional/govt-and-politics/handgun-waiting-period-bill-wont-be-introduced-in-wyoming-senate/article_c5473ce4-8e1b-5845-a981-4074b82223b9.html [https://perma.cc/H25V-WG34].

48. *N.H. House Passes Gun Waiting Period Bill*, CONCORD MONITOR (Feb. 19, 2020, 5:05 PM), https://www.concordmonitor.com/House-passes-gun-waiting-period-bill-32799539 [https://perma.cc/3GF6-FMJ7] ("[I]f the bill is enacted, gun control advocates would likely extend the waiting period in the future.").

49. Even with these modifications, it may not be possible to enact waiting periods federally or in every state. Another alternative to combat impulsive gun deaths, currently in effect in three states, is to flip the default: people who want a waiting period could elect to have a waiting period for themselves. AYRES & VARS, *supra* note 33, at pt.1; VA. CODE ANN. §§ 52-50 to -52 (2021); UTAH CODE ANN. § 53-5c-301 (LexisNexis 2021); WASH. REV. CODE. § 9.41.350 (2021). In other words, government can offer an opt-in waiting period (sometimes called a "Voluntary Do-Not-Sell List"), rather than the opt-out waiting period proposed in this article.

THE NEW FALSITY DEBATE: IMPLIED FALSE CERTIFICATION AND SPECIFIC REPRESENTATIONS UNDER THE FALSE CLAIMS ACT

*DOMINIC V. BUDETTI**

INTRODUCTION

On February 29, 2020, officials confirmed the first death in the United States from the novel coronavirus.[1] The next day, officials reported a second death[2] and confirmed the first positive case in New York.[3] Over the months that followed, positive cases and Covid-related deaths rose to astronomical levels, the economy went head-first into a downward spiral, thousands were thrust into unemployment, and small businesses nationwide found themselves on the brink of disaster, if not already beyond that point.[4] In response, Congress created, and the President signed into law, a number of programs aimed at saving lives and rescuing the economy via a mas-

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1. Michael Crowley, Mike Baker, and Nicholas Bogel-Burroughs, *Trump Moves to Calm Fears as First U.S. Death from Coronavirus is Reported*, N.Y. TIMES (Feb. 29, 2020), https://www.nytimes.com/2020/02/29/us/politics/trump-coronavirus.html[https://perma.cc/CFA2-897C].

2. *Second Death from Virus is Reported in the U.S.*, N.Y. TIMES (Mar. 1, 2020), https://www.nytimes.com/2020/03/01/world/coronavirus-news.html [https://perma.cc/5QER-Z795].

3. Joseph Goldstein & Jesse McKinley, *Coronavirus in N.Y.: Manhattan Woman is First Confirmed Case in State*, N.Y. TIMES (Mar. 1, 2020), https://www.nytimes.com/2020/03/01/nyregion/new-york-coronvirus-confirmed.html [https://perma.cc/7482-FQ5W].

4. As of October 21, 2021, more than 731,000 Covid-19 deaths had been reported in the United States alone. Jordan Allen et al., *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (last updated Oct. 21, 2021), https://www.nytimes.com/interactive/2021/us/covid-cases.html [https://perma.cc/DS9E-8XWZ].

sive outlay of taxpayer dollars to businesses and individuals, often subject to numerous conditions.[5]

In the early days of the pandemic and the government's response, commentators and Department of Justice attorneys were well aware of the growing risk of fraud stemming from those stimulus programs.[6] And, in due time, stories of fraud involving misuse of Covid-designated relief began to make headlines.[7] In response, many took up discussions of the role that the False Claims Act (FCA)[8]—the federal government's premier civil anti-fraud tool—could play in stemming those abuses.[9] And they did so with good

5. For example, the Paycheck Protection Program issued over $500 billion in forgivable loans to small businesses over the course of a few months, and HHS distributed billions of dollars to health care providers through the CARES Act's provider relief fund. *See* Ethan P. Davis, Principal Deputy Assistant Attorney General, Dep't of Justice Civil Div., Remarks on the False Claims Act at the U.S. Chamber of Commerce's Institute for Legal Reform (June 26, 2020).

6. *See, e.g.*, Stewart Bishop, *COVID Crimes: White Collar Cases to Expect from the Crisis*, LAW360 (May 11, 2020, 9:02 PM), https://www.law360.com/articles/1271105/covid-crimes-white-collar-cases-to-expect-from-the-crisis [https://perma.cc/H3XH-QTQA]; Neil M. Barofsky, Opinion, *Why We Desperately Need Oversight of the Coronavirus Stimulus Spending*, N.Y. TIMES (Apr. 13, 2020), https://www.nytimes.com/2020/04/13/opinion/coronavirus-stimulus-oversight.html [https://perma.cc/3NLR-4BCX].

7. *See* Christina Morales & Christine Hauser, *Americans Have Lost $145 Million to Coronavirus Fraud*, N.Y. TIMES (Sept. 23, 2020), https://www.nytimes.com/2020/09/23/us/coronavirus-scams-ftc-reports.html [https://perma.cc/46A7-NVSR]; Azi Paybarah, *Another Man Used Covid Relief Money to Buy a Lamborghini, Prosecutors Say*, N.Y. TIMES (Aug. 4, 2020), https://www.nytimes.com/2020/08/04/us/lamborghini-coronavirus-stimulus.html[https://perma.cc/PFC3-3C4X]; Aaron Gregg, *Defense Contractor with Billions in Sales Got Millions in Pandemic Loans Intended for Small Businesses*, WASH. POST (Aug. 3, 2020), https://www.washingtonpost.com/business/2020/08/03/defense-contractor-with-billions-sales-got-millions-pandemic-loans-intended-small-businesses/ [https://perma.cc/ZZN8-HN2R].

8. 31 U.S.C. §§ 3729–33 (2009).

9. *See, e.g.*, Davis, *supra* note 5 (committing to "deploy the False Claims Act against those who commit fraud related to the various COVID-19 stimulus programs"); Holly Drumheller Butler, *How the Gov't is Cracking Down on PPP Fraud*, LAW360 (June 9, 2020, 5:37 PM), https://www.law360.com/articles/1281065/how-the-gov-t-is-cracking-down-on-ppp-fraud[https://perma.cc/R8E8-DGXP] ("[W]histleblowers may bring False Claims Act cases against PPP loan borrowers for making inaccurate certifications or otherwise violating the requirements relating to PPP loans."). January 2021 brought the first of what is sure to be many FCA settlements concerning PPP fraud. *See* Jessica S. Carey et al., *DOJ Announces First False Claims Act Settlement with Borrower and Its CEO for PPP Fraud*, COMPLIANCE & ENFORCEMENT (Jan. 29, 2021), https://wp.nyu.edu/compliance_enforcement/2021/01/29/doj-announces-first-false-claims-act-settlement-with-borrower-and-its-ceo-for-ppp-fraud/ [https://perma.cc/M7RX-FWM2]. For a broader discussion and partial critique of the ways in which the legal system attempted to adapt in the wake of COVID-19, *see* Helen Hershkoff & Arthur R. Miller, *Courts and Civil Justice*

reason: over the past three decades, the FCA has proved an incredibly effective tool for combatting fraud against the government, resulting in more than $2.2 billion in settlements and judgments in fiscal year 2020 alone.[10]

The FCA, at its core, is designed to stem fraud against the government by imposing civil monetary penalties and treble damages upon any person who knowingly presents a false claim to the government for payment.[11] The statute's efficacy has been particularly pronounced when addressing fraud that the government would have difficulty discovering on its own, in no small part because of the statute's *qui tam* provision, which allows for suits by private parties on behalf of the government in exchange for a portion of the recovery.[12] That system effectively operationalizes a network of individuals who are incentivized and better situated to detect and report fraudulent conduct that is, by its nature, "hidden from view and would require public enforcers to pay near-infinite information costs" to uncover.[13] Moreover, developments over the last thirty years in judicial decisions explaining what constitutes a "false or fraudulent" claim—a standard not defined by the statute itself—

in the Time of Covid: Emerging Trends and Questions to Ask, 23 N.Y.U. J. Legis. & Pub. Pol'y (forthcoming 2021).

10. DEPT. JUST., FRAUD STATISTICS: OCTOBER 1, 1986 – SEPTEMBER 30, 2020, https://www.justice.gov/opa/press-release/file/1354316/ [https://perma.cc/E2AW-WKR9]; *see also The False Claims Act*, DEPT. JUST. (last updated Jan. 14, 2021), https://www.justice.gov/civil/false-claims-act [HTTPS://PERMA.CC/2SEL-3KSN].

11. 31 U.S.C. § 3729(a)(1)(A). While the so-called presentment provision found in section 3729(a) of the FCA applies to the quintessential false claim, the Act also includes provisions targeting the use of false records, conspiracy to commit fraud, and other means of defrauding the government. *See id.* §§ 3729(a)(1)(A)–(G).

12. *Id.* § 3730(b). "Qui tam" is short for the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur," meaning he "[w]ho sues on behalf of the king as well as for himself." James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1262 (2013). The device was first utilized in England, *see* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 2:3 (3d ed. 2016), and qui tam statutes, or at least their functional equivalent, "have been in existence . . . in this country ever since the formation of our government." Marvin v. Trout, 199 U.S. 212, 225 (1905). They were present in the American colonies at least as early as 1692, and individual states enacted them as early as 1785. SYLVIA, *supra* note 12, § 2:5. One of the first laws adopted by the First Congress was a qui tam provision, and the early federal government continued to enact qui tam statutes thereafter. *Id.* Under the FCA's current *qui tam* provisions, the relator's share of the recovery depends upon, *inter alia*, whether the government exercised its right to intervene and the relator's contribution. 31 U.S.C. §§ 3730(d)(1), (2).

13. David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1270 n.87 (2012).

have widened the statute's reach and displayed the critical role that the FCA plays in enforcing regulatory standards involving health care, defense, and other major areas of government contracting where such informational disparities tend to arise.

Those judicial developments came to a head in 2016 when the Supreme Court, in *Universal Health Services, Inc. v. United States ex rel. Escobar*, resolved a dispute amongst the circuits about whether a claim for Medicare reimbursement could be considered false—and therefore actionable under the FCA—under what some called the theory of implied false certification.[14] According to that theory, the FCA's falsity requirement may be satisfied when a claim impliedly and falsely certifies compliance with material statutory, regulatory, or contractual requirements notwithstanding any lack of express false assertions or claims. To understand the importance of that theory, imagine a company that contracts with the federal government to supply N95 respirators. And imagine that the contractor provides a shipment of those masks to the government, subsequently submits a claim for payment for "one shipment of N95 respirators," and fails to disclose that the shipped masks were produced in a manner that did not satisfy a Covid-era regulation requiring that all N95 respirators be subject to enhanced quality control measures. Under a traditional theory of falsity, the contractor's claim would not be false because, despite not providing the government with what it intended to pay for—N95 respirators that conform to federal regulatory standards—the contractor did, as a matter of fact, provide the government with a shipment of N95 respirators and made no express assertions about their place of production or compliance with federal regulations. Under a basic theory of implied false certification, however, that same claim would be considered false on the ground that, by seeking payment for "N95 respirators," the claimant implicitly certified that the goods provided were N95 respirators as understood within the context of the contract with the federal government—i.e., that the goods complied with the federal regulations applicable to N95 respirators. Because the respirators were not compliant with those regulations, that implicit certification—and thus the underlying claim—was false and fraudulent.

In *Escobar*, the Court largely sided with the majority of circuits and affirmed the validity of the implied false certification theory in certain contexts.[15] In doing so, however, the Court formulated its

14. 136 S. Ct. 1989 (2016).

15. *See id.* at 1999.

rule in terms that, according to some courts, raised new questions surrounding the reach—rather than the propriety—of implied false certification. The issue at the heart of this new falsity debate is whether and to what extent the claimant must make specific representations about the goods or services provided before the claim will be treated as an implicit certification of compliance with the applicable regulatory, contractual, and statutory provisions. In other words, and to return to the prior example, how should a court treat a claim from a contractor supplying N95 respirators that were not put through enhanced quality control measures if the contractor merely requested payment in reference to a corresponding order number from the government with no additional statements? Is that claim beyond the reach of the FCA given the total lack of representations by the contractor? Or does the submission of the claim itself imply something about either the goods themselves or the contractor's entitlement to payment that, in light of the contractor's noncompliance and failure to disclose that noncompliance, is sufficient to render the claim fraudulent?

What if the contractor requested payment for a "shipment of masks" provided to the government without specifying that these were meant to be "N95 respirators"? Does that lack of specificity shield the contractor from liability despite the fact that they requested payment for inadequately tested medical equipment? Or is the contractor's representation that the claim is for a shipment of masks—when taken in the context of a contract for N95 respirators subject to a federal quality control regulation and combined with the contractor's failure to disclose their noncompliance with that regulation—render the minimal representation sufficiently misleading so as to make the claim as a whole fraudulent? And if something more specific than a "shipment of masks" is required, would a claimant's statement that they are seeking payment for a "shipment of N95 respirators" provide enough of a representation so as to implicitly certify that the masks provided were compliant with the regulations applicable to N95 masks as suggested above, or is an even greater degree of specificity required?

In recent years, a number of district and circuit courts addressing questions of this sort have mistakenly read *Escobar* as endorsing the narrower view of implied false certification—one that limits its reach to situations where the claimant made specific representations about the goods or services provided. As a result, courts have constricted, rather than expanded, the liability of companies that knowingly and falsely imply they are entitled to payment by imposing new limits on a theory of falsity that, before *Escobar*, was viable

in almost every circuit without any such restrictions. And, critically, courts imposing those restrictions have done so at a time when the FCA's *qui tam* provision is crucial for the effective enforcement of federal anti-fraud prerogatives.

This Note argues that the lower court trend of decisions on this issue is inconsistent with the text and purpose of the FCA, Supreme Court decisions interpreting the falsity requirement—including *Escobar*—and the statute's inherent regulatory function. In response to that trend and in light of those inconsistencies, this Note urges courts to treat as false any claim for payment that, when presented, was not accompanied by a disclosure of the claimant's known noncompliance with contractual, regulatory, or statutory provisions.[16] It further argues that this reading of falsity maintains a normative edge over the more restrictive view by fostering the FCA's unique ability to ferret out hard-to-find fraud and thus aiding in the enforcement of critical regulations in the healthcare space and elsewhere.

This Note proceeds in three parts. By way of background, Part I begins by tracing the history of the FCA from its inception during the Civil War, its gradual disuse leading up to, during, and after the Second World War, and its subsequent rise and expansion following a set of amendments beginning in the mid-1980s. In surveying that history, this Note pays special attention to shifts in the FCA's area of use and the ways in which legislative amendments and court decisions have fostered its evolution in those new roles. Part I then situates the FCA within the United States regulatory system and the uniquely prominent role that private litigation plays in that system by framing it as both a primary form of regulatory enforcement and a supplement to public enforcement regimes.

Part II begins by examining the endorsement by some lower courts of the theory of implied false certification in the lead-up to *Escobar*, which expanded the FCA's usefulness in a variety of contexts while also generating controversy and debate among courts and commentators. It then turns to the Supreme Court's decision in *Escobar* itself and the way in which courts have interpreted that decision in the years since. Focusing specifically on the standard for

16. It is important to note that even if a claim is "false or fraudulent," the claimant is not exposed to FCA liability unless the plaintiff can also prove that the regulations with which the claimant failed to comply were material and that they submitted the claim with the requisite degree of scienter. A finding of falsity under the proposed standard would thus not result in liability unless the government considered the violation material to its decision to pay the contractor. This Note does not express any view on how courts ought to apply those other standards.

establishing falsity, this Note argues that—contrary to the leading lower-court interpretations of *Escobar*— neither the language in the opinion nor the background against which the case was decided supports the conclusion that the Court strictly limited the implied false certification theory to those cases where the claimant made specific representations.

Finally, having established that neither *Escobar* nor the text of the statute *requires* pleading and proof of specific representations when alleging falsity, Part III makes the normative case against such a requirement. It argues that the heightened burden created by that rule is contrary to the spirit and purpose of the FCA and would foreclose its use in circumstances where its *qui tam* provision is critical for the detection and prosecution of dangerous regulatory and contractual violations.

I.
FRAUD, WHISTLEBLOWERS, AND THE AMERICAN REGULATORY STATE

The history of the False Claims Act has been well catalogued elsewhere.[17] For these purposes, it is necessary only to cover the aspects of that history that may come to bear on our understanding of falsity. In particular, it is critical to outline the aims of the FCA, the law's place within the broader U.S. regulatory regime, and the way in which amendments over the law's history affect our understanding of each. To this end, this Part begins by tracing the development of the FCA and the significant amendments to it. It then draws on that history as well as insights pertaining to the FCA's structure to situate the law within the broader private enforcement framework prevalent in the U.S. regulatory state. By so doing, this Part highlights a central premise and aim of the FCA's presentment provision: the prosecution of hard-to-detect fraud via *qui tam* suits that—as is true for private regulatory enforcement regimes more generally—capitalize on the informational advantages of private parties and fill gaps left by the functional limitations of public enforcement.

A. The False Claims Act: History and Development

The False Claims Act emerged as a direct response to allegations of rampant fraud in government contracting during the Civil

17. *See, e.g.*, John R. Thomas Jr. et al., *The False Claims Act Past, Present, and Future*, 63 FED. LAW. 64 (2016); SYLVIA, *supra* note 12, § 2:1; JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS (4th ed. 2016).

War, during which time the government's demand for and spending on a host of supplies had skyrocketed.[18] From substituting sand for gunpowder and sugar,[19] providing dying donkeys instead of horses and mules,[20] gluing together rags to pass off as army uniforms and cardboard to pass off as boots,[21] and selling rifles without triggers,[22] opportunistic contractors seemingly seized every opportunity to take advantage of the Union's newfound need for supplies. After holding hearings on the problem in 1862 and 1863, Congress set out "to curb the 'grossest frauds upon the Government.'"[23]

Substantively, the resulting law created liability for "any person . . . who present[s] . . . for payment . . . [a] claim upon or against the Government of the United States [they know] to be false."[24] Those found liable were subject to double damages and a civil fine of $2,000 per violation.[25] And in order to adequately enforce that law, Congress drew upon the *qui tam* procedural device, allowing private citizens to bring suits on behalf of the government in exchange for half of any recovery obtained.[26]

In its early years, the FCA—then called the "Informer's Act" or the "Lincoln Law"[27]—was successful in prompting private citizens to bring suits against contractors on behalf of the United States, and "[t]he Union Army was thus in part funded by payments made by malefactors to satisfy judgments rendered in favor of the United States in proceedings brought by whistleblowers or to settle such

18. *See* Thomas Jr. et al., *supra* note 17, at 65–66.

19. Joan H. Krause, *Reflections on Certification, Interpretation, and the Quest for Fraud That "Counts" Under the False Claims Act*, 5 U. ILL. L. REV. 1811, 1815 (2017); Victor E. Schwartz & Phil Goldberg, *Carrots and Sticks: Placing Rewards as Well as Punishment in Regulatory and Tort Law*, 51 HARV. J. ON LEGIS. 315, 339 (2014).

20. Jennifer M. Pacella, *Bounties for Bad Behavior: Rewarding Culpable Whistleblowers Under the Dodd-Frank Act and Internal Revenue Code*, 17 U. PA. J. BUS. L. 345, 365 (2015).

21. Deborah R. Farringer, *From Guns that Do Not Shoot to Foreign Staplers: Has The Supreme Court's Materiality Standard Under* Escobar *Provided Clarity for the Health Care Industry About Fraud Under the False Claims Act?*, 83 BROOK. L. REV. 1227, 1227 (2018).

22. Paul D. Carrington, *Qui Tam: Is False Claims Law a Model For International Law?*, 2012 U. CHI. LEGAL F. 27, 29 (2012).

23. Farringer, *supra* note 21.

24. Act of Mar. 2, 1863, ch. 67, § 1, 12 Stat. 696 (current version at 31 U.S.C. §§ 3729–33 (2009)).

25. Thomas Jr. et al., *supra* note 17, at 66.

26. *Id.*

27. BOESE, *supra* note 17, at 1–5.

claims."[28] But "[a]fter the Civil War, government spending, and the consequent opportunities for fraud and FCA claims, greatly diminished."[29] So began the first arc of the FCA's history as it shifted from initial enforcement to gradual disuse.[30] And although the New Deal era and World War II brought about a return of heightened government spending, the FCA's role in stemming any consequent fraud was met with far greater skepticism as "[e]nterprising relators began bringing suits based purely on information they obtained from public sources, including indictments, newspaper articles, and congressional investigations."[31] It was commonly believed that these so-called parasitical *qui tam* actions, which frequently arose in the context of defense procurement fraud, "thwart[ed] the spirit of the act" by permitting relators to recover without contributing any meaningful information, while also creating a "race to the courthouse" and "infring[ing] upon the Attorney General's control over criminal and civil fraud actions."[32] Those concerns only heightened after the Supreme Court held in 1943 that nothing in the statute's text or history precluded such suits.[33]

Congress's response was swift: By the end of the year, it had amended the FCA to include a government knowledge defense—precluding *qui tam* actions "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought based on facts known to government agencies or employees"—and slashed the share of recovery available to relators.[34] Those amendments were

28. Carrington, *supra* note 22. *See also* Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, 70 LAW & CONTEMP. PROBS., 109, 123 ("[N]umerous relators came forward to pursue claims against contractors who were proven to have sold the army rifles without triggers, gunpowder diluted with sand, or uniforms that could not endure a single rainfall. . . . It is certain that they did restore some revenue to the Union treasury from those who had raided it.").

29. Thomas Jr. et al., *supra* note 17, at 66.

30. *See* Carrington, *supra* note 22 ("After the Civil War, Lincoln's law fell into disuse. The law was not invoked during the War with Spain, World War I, or, with one exception, World War II.").

31. Thomas Jr. et al., *supra* note 17, at 66.

32. S. Rep. No. 99-345, at 10–11 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5275–76.

33. United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943), *reh'g denied*, 318 U.S. 799 (1943).

34. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608, 609. The Congressional response was nearly harsher: *Hess* had "prompted then Attorney General Francis Biddle to request that Congress repeal the qui tam provisions of the act." S. Rep. No. 99-345, at 11. The House passed repeal legislation, "but the Senate passed an amendment to the House bill providing for the retention of qui tam suits, with restrictions." *Id.*

undeniably successful in stemming "parasitical" suits, but the combination of the government knowledge defense and decreased financial incentive for relators also significantly lowered the average number of *qui tam* suits brought across the board. As a result, "[t]he FCA was largely irrelevant" between the passage of the 1943 amendments and the next set of amendments to the FCA in 1986,[35] notwithstanding the increase in government spending and thus increased opportunities for fraud resulting from both the military buildup during the Korean, Vietnam, and Cold Wars as well as the expansion of government programs during that period.[36]

After numerous investigations into and reports on the rise in fraud,[37] it became clear to legislators that the existing FCA model was failing.[38] In 1985, Department of Defense officials "testified that 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses."[39] The Department of Justice (DOJ) estimated that in 1986, "between 1 percent and 10 percent of the entire federal budget was lost to fraud."[40] Official estimates of government money lost to fraud "range[d] from hundreds of millions of dollars to more than $50 billion per year," and a 1981 GAO report recognized that the estimated loss of between $150 and $200 million in less than three years "[did] not include . . . the cost of undetected fraud which is probably much higher because weak internal controls allow fraud to flourish."[41]

Recognizing these failures, Congress once again amended the FCA in 1986 so as "to make the False Claims Act a more effective

35. Thomas Jr. et al., *supra* note 17, at 66.

36. *Id.* As Congress noted when amending the law in 1986: "In 1984, the Department of Defense conducted 2,311 fraud investigations, up 30 percent from 1982. Similarly, the Department of Health and Human Services ha[d] nearly tripled the number of entitlement program fraud cases referred for prosecution over the past 3 years." S. Rep. No. 99-345, at 3.

37. *See* S. Rep. No. 99-345, at 2-3.

38. Congress itself recognized "that the 1943 amendments and subsequent 'restrictive court interpretations . . . tended to thwart the effectiveness of the statute." Alexander Kristofcak, Note, *FCA v. FDA: The Case Against the Presumption of Immateriality from Agency Action*, 95 N.Y.U. L. Rev. 235, 242 (2020) (brackets and internal quotation marks omitted).

39. S. Rep. No. 99-345, at 2.

40. Thomas Jr. et al., *supra* note 17, at 66. Based on that figure, and "[t]aking into account the spending level in 1985 of nearly $1 trillion, fraud against the Government could [have been] costing taxpayers anywhere from $10 to $100 billion annually." S. Rep. No. 99-345, at 3.

41. S. Rep. No. 99-345, at 3.

weapon against Government fraud."[42] First, Congress made a number of alterations to the public-private enforcement relationship[43] and created protections for whistleblowers, "permitting [them] to sue for relief from retaliatory actions 'by his or her employer . . . .'"[44] Second, Congress softened the limitations of the government knowledge defense, shifting from a full bar to a more limited prohibition on *qui tam* suits. Under the revised Act, the defense applied only to *qui tam* suits based on the public disclosure of allegations or transactions in a government proceeding or investigation, or from the news media, unless the person bringing the action was an original source of that information.[45] Finally, Congress raised the cap on relator recovery, creating a contribution-dependent range between fifteen and twenty-five percent when the government intervenes and twenty-five to thirty percent when the government does not.[46]

In more recent years, Congress has taken further action to ensure that the FCA remains a useful tool in the fight against fraud in government contracting and to undo certain court decisions that Congress believed had misinterpreted the statute and undermined the FCA's purpose.[47] In 2009, Congress passed the Fraud Enforcement and Recovery Act ("FERA"), which eliminated the employer condition for whistleblower retaliation suits, eliminated a judicially created "intent to defraud" requirement, and repealed a statutory "direct presentment" requirement that, in Congress's view, had

42. *Id.* at 4.

43. *See* 31 U.S.C. § 3730(c)(1) (allowing relators to participate in the litigation even after government intervention, subject to certain limitations). Under the prior amendments, "once the action was commenced by the relator, no one could interfere with its prosecution. The act contained no provision for the Government to take over the action" and some courts construed "the relator's interest in the action . . . as a property right which could not be divested by the United States if it attempted to settle the dispute with the defendant." S. Rep. No. 99-345, at 10.

44. 14 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & HELEN HERSHKOFF, FEDERAL PRACTICE AND PROCEDURE § 3653 (quoting 31 U.S.C.A. § 3730(h)).

45. *See* SYLVIA, *supra* note 12, § 2:9. The change was intended to strike the right balance between guarding against parasitic lawsuits and encouraging relators to come forward with valuable information that the government could not otherwise obtain. Thus, "someone bringing a claim on the basis of a newspaper report would be barred, whereas someone coming forward with information they obtained directly—for example, in the course of their employment—could proceed, even if the government had previously become aware of that misconduct." Kristofcak, *supra* note 38, at 243.

46. 31 U.S.C. §§ 3730(d)(1)-(2).

47. *See* SYLVIA, *supra* note 12, § 2:2.

been applied too stringently.[48] In 2010, Congress further amended the FCA with the Patient Protection and Affordable Care Act ("PPACA"),[49] which, *inter alia*, redefined "original source" for the purpose of overcoming the public disclosure bar[50] and specified that claims "includ[ing] items or services resulting from a violation of [the Anti-Kickback Statute] constitute[ ] a false or fraudulent claim" under the FCA.[51]

By all accounts, these series of amendments, and the 1986 amendments in particular, have been successful in revitalizing the FCA as a powerful enforcement mechanism.[52] The percentage of new cases initiated by relators rose from eight to eighty percent in the ten years following the 1986 amendments.[53] The total number of new matters brought under the Act rose from 371 in 1987 to 922 in 2020, and total recoveries under the FCA over that same period amounted to over $64 billion, with yearly recoveries near or above $3 billion from 2010 to 2019.[54]

With the expansion of *qui tam* suits came a broadened role for the FCA in enforcing a large swath of regulatory directives in the United States. While that enhanced regulatory role is apparent in a wide range of areas,[55] it is particularly notable in the healthcare

48. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(b), 123 Stat. 1617, 1624–25 (2009); S. REP. NO. 111–10, at 11 (2009), *as reprinted in* 2009 U.S.C.C.A.N. 430; 31 U.S.C. §§ 3729(a)(1)–(3).

49. Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111–148, 124 Stat. 119 (2010).

50. As amended, an original source is someone who has "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions . . . ." 31 U.S.C. § 3730(e)(4)(B) (2010).

51. 42 U.S.C. § 1320a–7b(g) (2015).

52. *See* David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1915 (2014) ("The [*qui tam*] regime has expanded rapidly since Congress revived the FCA's qui tam provisions in 1986, generating some 3,000 lawsuits and $20 billion in recoveries in the last five years alone . . . .").

53. Kristofcak, *supra* note 38, at 243.

54. DEPT. JUST., FRAUD STATISTICS: OCTOBER 1, 1986 – SEPTEMBER 30, 2020, *https://www.justice.gov/opa/press-release/file/1354316/*[https://perma.cc/E2AW-WKR9]. Total recoveries in 2020 were almost $1 billion lower than in 2019, although many have suggested that the intervening COVID-19 pandemic stymied the rate of settlement and litigation, partially contributing to the fall in recoveries. *See* Jeff Overly & Daniel Wilson, *Raucous 2021 Awaits FCA Litigants After Low-Key Year*, LAW360 (Jan. 22, 2021), https://www.law360.com/articles/1345411 [https://perma.cc/Q78D-Z7NF].

55. *See* Engstrom, *supra* note 52, at 1944–45 ("Qui tam claims now regularly target underpayment of oil and gas royalties owed when defendants extract natural resources from federal lands. They also reach a myriad of other frauds in connection with federally insured education and housing loans, federal research grants,

space.[56] As one commentator has noted, "the statute has evolved into a powerful civil weapon against fraud in the federal health care programs."[57] By way of simple comparison, in fiscal year 1986, there were fifteen new FCA matters concerning "Health and Human Services," amounting to about four percent of FCA claims initiated, investigated, or referred to the federal government in that year.[58] In fiscal year 2020, there were 573 such matters, making up sixty-two percent of the FCA intake that year.[59] The revitalization and reinforcement of the *qui tam* provision appears to have played a significant role in the FCA's prominence in combatting healthcare fraud: 79.5 percent of the new Health and Human Services matters in 2020 were *qui tam*, whereas only twenty percent of the Health and Human Services claims in 1987 were *qui tam*.[60]

In short, after the 1986 amendments, the FCA became an increasingly important tool for combatting not only outright fraud in government contracting, but also substantial regulatory violations in healthcare and other industries. Understanding more precisely how and why the FCA fits within that regulatory scheme is critical to our understanding of the Supreme Court's endorsement in *Escobar* of the theory of implied false certification as a basis for liability and lower courts' responses to that decision.

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and federal funds distributed in connection with Hurricane Katrina relief efforts and the Troubled Asset Relief Program.").

56. *See, e.g.*, Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 281 (2007) ("[A] remarkable body of empirical data demonstrates the expansive role private qui tam relators are playing in enforcing Medicare and Medicaid fraud and abuse laws."); John T. Boese, *When Angry Patients Become Angry Prosecutors: Medical Necessity Determinations, Quality of Care and the Qui Tam Law*, 43 ST. LOUIS U. L.J. 53(1999) (examining the growth of *qui tam* actions brought under the FCA as a mechanism for disgruntled patients to sue managed care organizations for substandard care, underutilization of health care services, and violations of federal regulations).

57. Joan H. Krause, *Holes in the Triple Canopy: What the Fourth Circuit Got Wrong*, 68 S.C. L. REV. 845, 848 (2017). *See also* Engstrom, *supra* note 52, at 1944 ("The 1986 amendments . . . spurred a rich diversity of claim types," the most common of which "assert[ed] fraud in connection with federally funded healthcare services under Medicare, Medicaid, and defense-procurement contracts.").

58. DEPT. JUST., FRAUD STATISTICS: OCTOBER 1, 1986 – SEPTEMBER 30, 2020.

59. Health care claims also made up nearly eighty-five percent of FCA proceeds in 2020. *Id.*

60. *Id.*

B. The FCA as a Regulatory Device

The American administrative state is particularly unique in is its reliance on private enforcement to ensure compliance with its regulatory directives.[61] As one commentator has explained, "the predominant approach to regulation in the United States is ex post rather than ex ante," and the American system "entrusts ex post law enforcement not to a centralized state bureaucracy but rather to a diffuse set of regulators."[62] Chief amongst those regulators are the individuals and classes of litigants who engage in private enforcement via litigation.[63] As detailed below, this reliance on private enforcement is premised in part upon the informational disparities that may stymie public enforcement, as well as the functional limitations imposed on public regulators and general concerns about underenforcement. The FCA, although enacted well before anything resembling the modern administrative state was in existence, builds upon those same premises by creating a "complex public-private hybrid" enforcement scheme[64] to ensure compliance with important contractual and regulatory mandates, particularly in areas of government spending wherein the "'swamp' of fraud opportunities has grown substantially over the life of the post-1986 regime."[65]

1. Informational Asymmetry

Relative to private parties, public enforcers often suffer informational disadvantages that hinder their ability to detect certain fraudulent conduct or regulatory violations.[66] Reliance on private enforcement via litigation addresses those informational disadvantages by empowering those with greater and more cost-effective access to crucial information about the fraud or violation in

61. J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1137 (2012) ("The American regulatory system is unique in that it expressly relies on a diffuse set of regulators, including private parties, rather than on a centralized bureaucracy for the effectuation of its substantive aims."). *See also* Engstrom, *supra* note 52, at 1919–20 ("Across a range of regulatory contexts, private, not public, enforcement now dominates the field.").

62. Glover, *supra* note 61, at 1146.

63. *See id.* at 1146–47, 1154–55 (explaining that private litigants play a leading role as both primary and supplementary regulators).

64. Engstrom, *supra* note 52, at 1976.

65. *Id.* at 1954.

66. *See* Glover, *supra* note 61, at 1154–55.

question.[67] This is particularly true where, as with *qui tam*, the private enforcement scheme empowers and incentivizes insiders with knowledge of the facts giving rise to liability, rather than mere knowledge of the harm's occurrence, to come forward. The FCA fully embodies those basic observations and the consequent intuition, drawn from the history of private regulatory enforcement in the United States, that "enforcement mechanisms should be entrusted and tailored to the needs of the regulator with superior command of information relevant to potential wrongdoing."[68] Indeed, the FCA operates within "the classic whistleblower model in which company insiders surface information about wrongdoing that is prohibitively costly for public regulators to discover or dislodge."[69]

The history surrounding the FCA's enactment further demonstrates that the need to overcome informational disparities that would overwise bar the detection and prosecution of fraud was a driving factor behind the ultimate form that the law took. As one commentator has noted, contractors defrauding the government during the Civil War often "acted with impunity because the scale and complexity of the war effort made identifying the responsible parties and prosecuting frauds too onerous."[70] By incorporating a *qui tam* provision and incentivizing relators with a share of the recovery, Lincoln's Law directly addressed the informational asymmetries that had enabled the fraud in the first instance. Moreover, that Congress responded to the perceived influx of parasitical claims in the 1930s and 1940s by stemming relator's incentives and imposing a government knowledge defense demonstrates the importance of private informational advantages in justifying the FCA's reliance on private litigation. When relators were no longer bringing new information to the table, there was no justification for an expansive private enforcement mechanism.

The legislative history of the 1986 amendments furthers this narrative. At the time, Congress was troubled by a 1981 GAO report

67. *Id.* at 1155. *Cf.* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, at 359, 365 (1984) (noting that information differentials cut in favor of private versus public regulation of injury risk).

68. Glover, *supra* note 61, at 1177–78.

69. Engstrom, *supra* note 52, at 1978.

70. Schwartz & Goldberg, *supra* note 19, at 339–40. *See also* SYLVIA, *supra* note 12, § 1:2 ("Because of the Government's size and the range of programs it funds, the opportunities to defraud the Government are vast. For related reasons, the risk of being caught defrauding the Government historically has remained relatively low.").

finding that "most fraud goes undetected."[71] As Congress recognized in light of that report, "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity."[72] Given the FCA's inability to foster that cooperation after the 1943 amendments[73] and the Congressional committee's belief that "[i]n the face of sophisticated and widespread fraud, . . . only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds," Congress once again sought to increase the information-generating capacity of *qui tam* suits by softening the government knowledge bar, raising incentives for relators, and reinforcing whistleblower protections.[74] That history demonstrates that the FCA's "overriding theme . . . is virtually to deputize an army of insiders to uncover, inform, and pursue those government contractors who knowingly cheat in their agreements with the government," particularly in situations where "[t]he receipt of information from people on the inside is tremendously valuable, as wrongdoing often 'takes place in the shadows and may never be visible to anyone but the immediate actors.'"[75]

2. Functional Limitations in Public Enforcement

Compounding the enforcement dilemmas posed by informational asymmetry is the simple fact that, "for most public regulatory bodies, scarce resources are the rule, not the exception," and those "limited resources . . . are often insufficient to perform the functions with which they are tasked."[76] Private enforcement generally addresses those limitations by "provid[ing] protections against

71. S. Rep. No. 99-345, at 2.

72. *Id.* at 4.

73. *See id.* ("Since the act was last amended in 1943, several restrictive court interpretations of the act have emerged which tend to thwart the effectiveness of the statute.").

74. *Id.* at 2 ("In order to make the statute a more useful tool against fraud in modern times, the Committee believes the statute should be amended . . . to encourage any individual knowing of government fraud to bring that information forward."). The FCA's growing success in the healthcare space also suggests that its qui tam model is particularly effective at addressing informational asymmetry given that, in the "highly regulated structure of the U.S. health care system, with multiple federal health care programs that provide payment and services to individuals in various forms, identifying fraud has become increasingly challenging." Farringer, *supra* note 21, at 1228.

75. Pacella, *supra* note 20, at 366 (quoting Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 689 (2004)).

76. Glover, *supra* note 61, at 1153.

harm based on the initiative of a few," and "provid[ing] a 'back-up' system of redress."[77] Thus, even where a more robust public enforcement mechanism exists, private parties are often a functional necessity for the meaningful enforcement of regulatory directives.[78] Congress, in enacting the 1986 amendments, recognized that the significant problems posed by those functional limitations were equally applicable to public anti-fraud enforcement: "In addition to detection, investigative and litigative problems which permit fraud to go unaddressed, perhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies."[79] And, just as with private enforcement generally, a more expansive *qui tam* regime of the type established by the 1986 and subsequent amendments inherently mitigates those issues in several significant respects.

On the one hand, the FCA's intervention model—in which relators submit claims under seal providing the government with a period of time to decide whether or not to intervene in the case—allows the government to target its resources as necessary without compromising enforcement more generally. Put otherwise, the very nature of the FCA's public-private enforcement regime allows the "resource-constrained and risk-averse" DOJ to "rely upon private enforcers to test the waters in federal court before diving in and spending the agency's reputational capital and resources."[80] As a result, the DOJ (and, indirectly, other regulatory bodies with independent enforcement power) may direct its expertise and resources to those cases where it is most needed without risking underenforcement in those where it is not.

On the other hand, the incentives that drive *qui tam* suits also tend to foster specialization in the form of repeat players and a dedicated relators bar. Although some critics have decried the trend towards specialization as problematic insofar as it encourages

77. *Id.* at 1155.

78. *Id.* at 1160.

79. S. Rep. No. 99-345, at 7. *See also* Thomas Jr. et al., *supra* note 17, at 66 ("The Senate determined that the government was not able to police this fraud effectively, due to federal enforcement agencies' lack of resources."). This same issue appears to have been a leading motivation behind the use of *qui tam* statutes in the American colonies and in the states. SYLVIA, *supra* note 12, § 2:5 ("During the colonial period, regulation was 'cheap in money and men' and the manner of law enforcement was shaped by necessity. Qui tam actions were well-suited to these circumstances because they drew on private sector resources. . . . Qui tam actions [thus] encouraged private enforcement of laws that would otherwise be ineffective because of the lack of government resources.").

80. Engstrom, *supra* note 52, at 1986–87.

a deluge of frivolous and parasitic *qui tam* suits,[81] empirical evidence indicates that those concerns are overblown if not entirely meritless.[82] And, critically, at least some studies suggest that specialization may have the net positive effect of more accurately screening for meritorious cases, generating economies of scale that can minimize enforcement costs, better monitoring the principal-agent relationship between relators and counsel, and producing a closer alignment between private enforcement efforts and public priorities.[83] More generally, there is compelling empirical support for the claim that "more experienced firms bring more successful and larger qui tam cases."[84] Thus, while not entirely without its disadvantages,[85] the specialization prompted by the FCA's *qui tam* system may well result in more effective and efficient litigation than otherwise possible in light of the DOJ's limited enforcement resources.

Along each of the characteristics outlined above, the FCA fits the general model of private enforcement of regulatory actions, and the facts leading up to the 1986 amendments suggest that it was meant to build upon those intuitions about the best means of combating fraud and enforcing regulatory standards in a myriad of contexts. The proliferation of *qui tam* suits and recoveries in the years since strongly suggests that much of the FCA's value stems from its ability to capitalize on those intuitions in order to best reach the most veiled and politically unsavory frauds without drawing an immense sum of taxpayer dollars in an attempt to recover the same.

II
IMPLIED FALSE CERTIFICATION FROM *AB-TECH* TO *ESCOBAR* AND BEYOND

Although the FCA both embodies the spirit of private regulatory enforcement that predominates in the United States and has been, as a matter of fact, an important tool in enforcing a number

81. *See* Engstrom, *supra* note 13, at 1249.

82. *See, e.g.*, Lonny Hoffman, *The Case Against the Lawsuit Abuse Reduction Act of 2011*, 48 HOUS. L. REV. 545, 580 (2011) ("In sum, the claim that the federal courts are inundated with 'frivolous' lawsuits is unsubstantiated by the available empirical evidence."); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 529–30 (1997) (arguing that academic literature attempting to demonstrate frivolous lawsuits tend to use the term without defining it and that, upon further scrutiny, the concept of frivolous lawsuits "is quite slippery.").

83. Engstrom, *supra* note 13, at 1257–59.

84. *Id.* at 1320.

85. *See id.* at 1259–62 (cataloging some of the more nuanced problems posed by specialization amongst relators outside of the traditional frivolous litigation narrative).

of regulatory schemes, it differs from traditional regulatory statutes in a significant way. Many regulatory statutes accord discretion to experts at the agency level to define the precise contours of the regulatory field. The FCA, by contrast, leaves questions about its scope and operation—questions arising largely from definitional gaps in the statute's text—to be sorted out by courts and litigants up and until Congress acts via amendments.[86] Thus, while the FCA bars, amongst other things, the knowing presentment of "false or fraudulent claim[s] for payment" from or "approval" by the government, the statute leaves open what precisely makes a claim for payment or approval sufficiently false or fraudulent so as to trigger liability.[87]

In the vast majority of false presentment claims, courts have relied on two broad conceptions of falsity to resolve that statutory uncertainty.[88] The first, factual falsity, applies to claims that involve "incorrect description[s] of goods or services provided or a request for reimbursement for goods or services never provided."[89] In such cases, the claim is said to be false because its factual basis—the provision of goods or services for which the claimant seeks payment—is itself false. The second, legal falsity, captures claims for which the underlying goods or services were provided but that nonetheless involved "a false representation of compliance with a federal statute or regulation or a prescribed contractual term."[90] Those certifications may be express (express false certification) or implied (implied false certification). Critically, because implied false certification does not depend on any express claim of compliance on the part of the claimant but instead is premised on false certification that are implied by the submission of the claim itself,[91] that

86. Agencies and regulators do have a role to play in the scope of FCA enforcement insofar as they define the regulatory terms themselves, which in turn will often form the basis for assessing both whether a claim was false and whether any such falsity was material. But that link is an indirect one relative to both the relevant agency and the alternative enforcing body—the DOJ—as demonstrated by the proposals to "arm the DOJ . . . with rulemaking authority to define the bounds of FCA liability." Engstrom, *supra* note 52, at 1997–98. For discussion of the democratic implications of agency disinvolvement in "rulemaking" under the FCA, see *id.* at 2002–05.

87. 31 U.S.C. § 3729(a)(1)(A).

88. Though helpful for a more nuanced examination of the falsity standards, it is also worth noting that these categories are, in a sense, artificial and malleable. *See* SYLVIA, *supra* note 12, § 4:34

89. Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001).

90. *Id.* at 696; *see also* SYLVIA, *supra* note 12, § 4:34.

91. *E.g.*, United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295, 305 (3d Cir. 2011). In other words, implied false certification applies when,

particular theory of falsity can reach the most concealed forms of fraud which may otherwise be unassailable for want of a showing of falsity.

In 1994, the Court of Federal Claims first recognized implied false certification as a valid theory of falsity in its oft-cited *Ab-Tech* decision.[92] In that case, a contractor was awarded a construction contract under the Small Business Act 8(a) program, which was designed to assist minority-owned small businesses in the government contracting field. Over the course of their performance, however, the contractor violated a regulation requiring any co-management agreement between a contractor and subcontractor to be approved by the Small Business Association and had submitted requests for progress payments while in violation of that regulation. Although the claims for payment did not overstate the amount that the contractor was owed or misrepresent what progress they had made, the court held that "[t]he payment vouchers represented an implied certification by [the contractor] of its continuing adherence to the requirements for participation in the 8(a) program."[93] By failing to disclose the prohibited arrangement, the contractor "dishonored the terms of its agreement with that agency [and], more importantly, caused the Government to pay out funds in the mistaken belief that it was furthering the aims of the 8(a) program."[94] Consequently, the contractor's claims for payment were false for purposes of FCA liability.

Under this theory of falsity, the government and relators could more easily use the FCA to pursue claims premised on misleading half-truths and, at least under certain constructions of the theory, claims for which omissions alone rendered the claim false.[95] Given the potentially monumental damages that can attach to successful FCA claims, defendants fought to limit its validity and scope, result-

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"through the act of submitting a claim, a payee knowingly and falsely implied that it was entitled to payment." United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1169 (10th Cir. 2010) (citing Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 532–33 (10th Cir. 2000)); *cf. Wilkins*, 659 F.3d at 305) ("[I]mplied false certification liability . . . attaches when a claimant seeks and makes a claim for payment from the Government without disclosing that it violated regulations that affected its eligibility for payment."(internal quotation marks omitted)).

92. Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994).

93. *Id.*

94. *Id.*

95. *See* United States v. SAIC, 626 F.3d 1257, 1266 (D.C. Cir. 2010) (noting that courts can "infer implied certifications from silence" in certain contexts).

ing in circuit splits around both. This Part begins by cataloging those splits and their implications for our understanding of falsity under the FCA. It then turns to the Supreme Court's decision in *Escobar*, which resolved a number of those splits. Finally, it explores the ways in which *Escobar* has been applied by some lower courts to limit the availability of implied false certification based on a misreading of the Court's language and argues against those trends.

A. Early Disputes Around Implied False Certification

After *Ab-Tech*, a number of courts quickly realized that the legal justifications in favor of implied false certification were ample. As the Second Circuit noted in its early and widely cited opinion approving the theory:

> Foundational support for the implied false certification theory may be found in Congress' expressly stated purpose that the Act include at least some kinds of legally false claims and in the Supreme Court's admonition that the Act intends to reach all forms of fraud that might cause financial loss to the government.[96]

Other courts found further support in the legislative history suggesting that Congress intended to create a broad scheme of liability reaching "all fraudulent attempts to cause the Government to pay [out] sums of money or to deliver property or services."[97] And although some courts emphasized the lack of any statutory language speaking to legal, factual, express, or implied falsity,[98] others insisted that "the language and the structure of the FCA support[ed]" implied false certification.[99]

Aside from whether the statute *could* be read to support implied false certification, courts addressing the issue faced a more normative inquiry: whether courts *should* read the FCA to reach claims that are legally false by way of implication absent any statutory language *requiring* such breadth. For the Seventh Circuit—the only court to have strictly disallowed implied false certification[100]—

96. Mikes v. Straus, 274 F.3d 687, 699 (2d Cir. 2001) (first citing S. Rep. No. 99–345, at 9, and then citing United States v. Neifert-White Co., 390 U.S. 228, 232 (1968)).

97. United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295, 306 (3d Cir. 2011) (alteration in original) (quoting S. Rep. No. 99–345, at 9).

98. *See* United States *ex rel.* Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 385–86 (1st Cir. 2011).

99. *Wilkins*, 659 F.3d at 306.

100. United States v. Sanford-Brown, Ltd., 788 F.3d 696, 711–12 (7th Cir. 2015) ("Although a number of other circuits have adopted this so-called doctrine

this question remained front and center. Indeed, the court rejected the theory not on any specific legal ground but because, in its view, "[t]he FCA [was] simply not the proper mechanism for government to enforce violations of [regulatory] conditions of participation . . . ."[101]

Even for courts that adopted implied false certification, concerns about the proper scope of FCA liability could not go unaddressed. But while the Seventh Circuit acted on them by foreclosing the theory altogether, a large number of circuits chose instead to constrict its permissible scope. Many did so by restricting the falsity element itself, insisting, for example, that "implied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid."[102] By narrowing the range of claims potentially subject to implied false certification liability,

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of implied false certification, we decline to join them . . . ."). For courts that allowed the theory, *see e.g.*, *Mikes*, 274 F.3d at 699; *Wilkins*, 659 F.3d at 306; United States v. Triple Canopy, Inc., 775 F.3d 628, 635–37 (4th Cir. 2015); United States *ex rel.* Augustine v. Century Health Servs., 289 F.3d 409, 415 (6th Cir. 2002); Ebeid *ex rel.* United States v. Lungwitz, 616 F.3d 993, 996–98 (9th Cir. 2010); United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1168–69 (10th Cir. 2010); *SAIC*, 626 F.3d at 1266–67; United States *ex rel.* Bryant v. Williams Bldg. Corp., 158 F. Supp. 2d 1001, 1009–10 (D.S.D. 2001). The First Circuit disclaimed all "formal categories of falsity," but in practice the court allowed would-be implied false certification claims to proceed. *See Hutcheson*, 647 F.3d at 386–88, 392. The Fifth Circuit avoided formally adopting or disallowing the theory. *See* United States *ex rel.* Gage v. Davis S.R. Aviation, L.L.C., 623 Fed. Appx. 622, 625 (5th Cir. 2015). The Eleventh Circuit appeared to have accepted the theory early on, *see* McNutt *ex rel.* United States v. Haleyville Med. Supplies, Inc., 423 F.3d 1256, 1259 (11th Cir. 2005), but in 2015 the court declined to "express [an] opinion as to the viability of [the] theory," United States *ex rel.* Osheroff v. Humana Inc., 776 F.3d 805, 808 n.1 (11th Cir. 2015).

101. *Sanford-Brown*, 788 F.3d at 712 (citation omitted).

102. *Mikes*, 274 F.3d at 700; *see also Wilkins*, 659 F.3d at 307 (adopting the *Mikes* formulation); *Augustine*, 289 F.3d at 414 (same); *Hutcheson*, 647 F.3d at 386 (adopting the requirement but rejecting the rule that "implied conditions of payment can only be found in statutes and regulations, and that these sources must expressly state the obligation."); United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1218 (10th Cir. 2008) (looking to the underlying statutes, regulations, or contracts to determine whether payment was conditioned on compliance); United States *ex rel.* Lee v. Fairview Health Sys., No. Civ.02–270 RHK/SRN, 2004 WL 1638252, at *3 (D. Minn. July 22, 2004). Without recognizing the validity of the theory, the Fifth Circuit consistently dismissed "false-certification claims (implied or express) when a contractor's compliance with federal statutes, regulations, or contract provisions was not a 'condition' or 'prerequisite' for payment under a contract." United States *ex rel.* Steury v. Cardinal Health, Inc. (*Steury II*), 735 F.3d 202, 205 (5th Cir. 2013).

courts could better control the theory's proliferation and thereby account for the policy concerns that ultimately motivated the Seventh Circuit to reject the theory outright.

As several courts noted, however, there was no textual basis for the condition of payment requirement,[103] and in at least some contexts, such a narrow application of the theory could arguably run against Congress's intent with respect to the FCA's scope.[104] For courts unwilling to adopt the condition of payment requirement as a result, the solution was to shift the gatekeeping burden from the falsity element to the statute's scienter requirement[105] and the judicially imposed materiality requirement[106]:

> [W]ithout clear limits and careful application, the implied certification theory is prone to abuse by the government and *qui tam* relators who . . . may attempt to turn the violation of minor contractual provisions into an FCA action. In our view, however, instead of adopting a circumscribed view of what it means for a claim to be false or fraudulent, this very real concern can be effectively addressed through strict enforcement of the Act's materiality and scienter requirements.[107]

Doing so, of course, had the similar effect of permitting a narrower band of prospective implied false certification claims than would have otherwise been available, allaying, at least to some degree, the concerns of those who feared its overly expansive use.

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103. *See* United States v. Triple Canopy, Inc., 775 F.3d 628, 637 n.5 (4th Cir. 2015) (quoting *SAIC*, 626 F.3d at 1268); *Hutcheson*, 647 F.3d at 387 ("[T]he text of the FCA does not exhibit an intent to limit liability in this fashion.").

104. *See SAIC*, 626 F.3d at 1268 ("[A]dopting [a condition of payment requirement] would foreclose FCA liability in situations that Congress intended to fall within the Act's scope.").

105. 31 U.S.C. § 3729(a)(1)(A) (applying to any person who "knowingly presents . . . a false or fraudulent claim for payment or approval"). The standard inquiry is whether the defendant had actual knowledge or acted with deliberate ignorance or in reckless disregard of the truth or falsity of the claim; proof of intent to defraud is not required. *Id.* § 3729(b)(1).

106. Unlike other subsections of the FCA, the presentment provision contains no materiality requirement. Nonetheless, some courts had imposed a materiality standard for all presentment claims, *see e.g.*, United States *ex rel.* Loughren v. Unum Grp., 613 F.3d 300, 307 (1st Cir. 2010) ("[T]he FCA is subject to a judicially-imposed requirement that the allegedly false claim or statement be material."), while others adopted it solely for false certification claims, *see e.g.*, *Conner*, 543 F.3d at 1219 n.6, or not at all, *see e.g.*, *Mikes*, 274 F.3d at 697. United Health Servs. Inc. v. United States *ex rel.* Escobar confirmed that presentment claims are subject to a materiality requirement. 136 S. Ct. 1989, 2002 (2016).

107. *SAIC*, 626 F.3d at 1270.

B. The Road to the Supreme Court

In October 2009, seventeen-year-old Yarushka Rivera died of multiple seizures after she stopped taking the medication that she was prescribed while being treated at Arbour Counseling Services ("Arbour"), a satellite mental health facility owned and operated by a subsidiary of Universal Health Services ("UHS").[108] At the time, Arbour participated in MassHealth, a joint state-federal Medicaid program for low-income and disabled Massachusetts residents. Because it received federal funding through that program, Arbour was subject to various federal regulations regarding qualifications, staffing, and supervision.[109] It was only after their daughter's death that Rivera's parents, Carmen Correa and Julio Escobar, learned of the ways in which Arbour had flagrantly violated those regulations while treating Rivera,[110] leading them to initiate a *qui tam* FCA suit against UHS in 2011.[111]

Their claim was not that Arbour had failed to provide certain services that it purported to provide or even that it had necessarily provided those services in an inadequate manner. Rather, the plaintiffs contended that UHS, through Arbour, had "submitted reimbursement claims that made representations about the specific services provided by specific types of professionals, but failed to disclose serious violations of regulations pertaining to staff qualifications and licensing requirements for [those] services."[112] Put otherwise, Arbour allowed Rivera to be treated by unlicensed staff

108. United States *ex rel.* Escobar v. Universal Health Servs., No. 11-11170-DPW, 2014 WL 1271757, at *2–3 (D. Mass. March 26, 2014). Because the plaintiffs—Rivera's parents—did not make any claims on the basis of the quality of care, they made no allegations specifically connecting Rivera's death or final seizure to her treatment at Arbour. *Id.*

109. *See id.* at *2.

110. None of the counselors to which Rivera was assigned were properly licensed, the psychologist that initially diagnosed Rivera was uncertified and had earned a degree from an uncredited internet college, and the nurse practitioner that prescribed her the medication did so without the supervision required by regulation. *Id.* at *5-7. Arbor's only purported supervisor at the time was not, in fact, qualified to provide that supervision, *id.* at *7, and during her time at Arbour, only one of the five professionals that treated Rivera had been licensed to perform that treatment. *Escobar*, 136 S. Ct. at 1997. In total, about 23 unlicensed Arbour employees had counseled patients and prescribed drugs without supervision. *Id.*

111. Rivera's parents also filed complaints with various agencies, resulting in at least two consent decrees and a series of findings related to Arbour's violations of medical care regulations. *Escobar*, 2014 WL 1271757, at *3.

112. *Escobar*, 136 S. Ct. at 1997–98. The specific regulations at issue required satellite facilities to employ certain types of clinicians, meet basic licensing standards, and provide for a certain degree of supervision. *Id.* at 1998.

and without proper supervision while seeking reimbursement in a manner that suggested such licensure and supervisory requirements had been satisfied. As a result, UHS had allegedly "defrauded the program, which would not have reimbursed the claims had it known that it was billed for mental health services that were performed by unlicensed and unsupervised staff."[113]

The district court dismissed the claim on the ground that the regulations were not conditions of payment,[114] but the First Circuit reversed after rejecting the lower court's standard and noting that statutory, regulatory, and contractual requirements could all be conditions of payment either expressly or, as here, by way of implication.[115] When the Supreme Court granted certiorari in December 2015, the case presented a rare opportunity for the high court to finally opine on the disputes surrounding the viability and scope of implied false certification that had been brewing in the circuits.[116]

C. Escobar *& The New Falsity Debate*

As detailed above, the early falsity debate was two-fold, concerning both the general validity of implied false certification and, through the divide along the condition of payment requirement, the permissible scope of that theory. In *Escobar*, the Supreme Court seemingly resolved both issues by upholding implied false certification as a basis for the plaintiff's claim and disavowing the condition of payment requirement in favor of a "demanding" materiality standard that could mitigate over-expansive use of the theory.[117] But in

113. *Id.*

114. *Escobar*, 2014 WL 1271757, at *7.

115. United States *ex rel.* Escobar v. Universal Health Servs. Inc., 780 F.3d 504, 512, 514 n.14 (1st Cir. 2015) (citing United States *ex rel.* Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 385–86 (1st Cir. 2011)).

116. *See Escobar*, 136 S. Ct. at 1998–99 (describing the circuit disagreements on implied false certification).

117. *Id.* at 1995, 2003–04 ("[W]hen evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.").

reaching the first of those two conclusions, the Court was less-than-absolute in its language: "We first hold that, at least in some circumstances, the implied false certification theory can be a basis for liability."[118] Elaborating on its qualified acceptance of the theory, the Court wrote:

> [T]he implied certification theory can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.[119]

Because UHS "submit[ted] claims for payment using payment codes that corresponded to specific counseling services" and "us[ed] National Provider Identification numbers corresponding to specific job titles," they had inaccurately conveyed information about the services provided and qualifications of staff in a manner that clearly constituted misleading half-truths.[120] That being the case, the Court explicitly declined to answer the broader question posed: "whether all claims for payment implicitly represent that the billing party is legally entitled to payment."[121]

Almost immediately, questions emerged around whether plaintiffs were now required to plead and ultimately prove *both* (1) that the request for payment makes specific representations about the goods or services provided, and (2) that the failure to disclose material noncompliance with a statutory, regulatory, or contractual requirement renders the claim an actionable misrepresentation, or if this two-part approach was merely one means of adequately pleading falsity under an implied false certification theory. In effect, the question was again one of scope: Can a claim be impliedly false on the basis of omissions regarding material noncompliance alone, or must there be some specific representation about the goods or services, accompanied by said omissions, rendering that representation a misleading half-truth?[122]

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118. *Id.* at 1995.

119. *Id.* at 2001.

120. *Id.* at 2000.

121. *Id.*

122. *See* SYLVIA, *supra* note 12, § 4:34.50 ("Post-Escobar litigation over the Supreme Court's description of implied certification theory has focused primarily on two issues. The first issue is whether the Court's description of the requirements for a viable type of 'implied certification' claim meant that only claims that met those requirements were viable. The second issue is what types of representations meet the 'specific representations' requirement that the Court described.").

This Part begins with a survey of the ways in which the lower courts have answered that question, noting the clear trend in favor of reading *Escobar* to impose a "specific representations" requirement. Then, through careful parsing of the Court's opinion and the relevant background, it argues that the leading construction runs contrary to the best reading of the decision.

1. Post-*Escobar* Trends

On remand in *Escobar*, the First Circuit had no occasion to consider whether the Supreme Court had introduced a specific representation requirement into the falsity framework. But in a number of cases immediately following the decision, the DOJ engaged in a concerted effort to argue against any such requirement. Their position was relatively straightforward: By employing qualifying language, the Supreme Court "affirmed the implied false certification theory in situations" where such representations were present but "did not suggest that this is the only circumstance when the implied false certification theory applies."[123] At least at the outset, that argument saw success, particularly in Ninth Circuit district courts,[124] and some courts have relied on similar reasoning to continue to reject the specific representations requirement.[125]

Other courts took a slightly different approach by effectively answering the question left open in *Escobar* and holding that all or at least most claims for payment implicitly make sufficient representations so as to satisfy the falsity inquiry, even under a more rigid standard requiring the claimant to have made specific representations. The Fourth Circuit's decisions in *United States v. Triple Canopy, Inc.* are illustrative. A security company that contracted to provide

123. Farringer, *supra* note 21, at 1250–51 (quoting Douglas W. Baruch & Jennifer M. Wollenberg, *FCA Implied Certification Cases—Justice Department's Aggressive Post-Escobar Briefing Signals Its Concern Over the Decision's Potential Impact*, 58 GOV'T CONTRACTOR 375 (2016)).

124. *See, e.g.*, Rose v. Stephens Inst., No. 09 Civ. 05966 (PJH), 2016 WL 5076214, at *5 (N.D. Cal. Sept. 20, 2016); United States *ex rel.* Brown v. Celgene Corp., 226 F. Supp. 3d 1032, 1044–45 (C.D. Cal. 2016).

125. *See, e.g.*, United States *ex rel.* Simpson v. Bayer Corp., 376 F. Supp. 3d 392, 406 (D.N.J. 2019) ("*Escobar* held that such specific misrepresentations were *sufficient* to render a claim false under the implied false certification theory—but declined to address whether they were *necessary*."); United States v. DynCorp Int'l, LLC, 253 F. Supp. 3d 89, 100 (D.D.C. 2017) ("Because the Supreme Court in *Escobar* held that the implied certification theory was satisfied 'at least' under the conditions it described and did 'not resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment,' the D.C. Circuit's broader statement of the implied certification theory remains good law after *Escobar*." (citation omitted)).

qualified security personnel to an airbase in Iraq had requested payment for those services despite knowing that its guards had not satisfied a contractual requirement concerning marksmanship. In a decision predating *Escobar*, the Fourth Circuit held that those claims were false, noting that "the Government pleads a false claim when it alleges that the contractor, with the requisite scienter, made a request for payment under a contract and withheld information about its noncompliance with material contractual requirements."[126] Thus, although the company had not specifically represented anything about the service it provided, the company had knowingly presented false claims when it requested payment.[127]

On remand from vacatur by the Supreme Court in light of *Escobar*, the company disputed falsity on the ground that the Supreme Court had "adopted a much narrower view of falsity than [the Fourth Circuit did in *Triple Canopy I*]," and, specifically, that the government must now "show that a contractor ma[de] specific representations about the goods or services provided . . . ."[128] Because, the company argued, "it merely submitted invoices listing the number of guards and hours worked and these invoices contained no falsities on their face," the falsity standard satisfied by the Medicare billing codes in *Escobar* could not be satisfied here.[129]

The Fourth Circuit, in concluding that the falsity requirement was still satisfied after *Escobar*, did not explicitly reject the specific representations requirement. Rather, the court reasoned that although the claimant had only submitted invoices listing the number of guards provided and hours they worked, the submission was not a bare request for payment but instead a half-truth akin to that in *Escobar* given the contractual framework within which the company was operating, as well as the fact that "anyone reviewing Triple Canopy's invoices would probably—but wrongly—conclude that [Triple Canopy] had complied with core [contract] requirements."[130] Going beyond that analysis, the Fourth Circuit also noted the question left unanswered by the Supreme Court and reaffirmed its pre-*Escobar* position on the matter, writing that "the Gov-

126. United States v. Triple Canopy, Inc. (*Triple Canopy I*), 775 F.3d 628, 636 (4th Cir. 2015) (internal quotation marks omitted).

127. *See id.* at 637.

128. United States v. Triple Canopy, Inc. (*Triple Canopy II*), 857 F.3d 174, 178 (4th Cir. 2017) (internal quotation marks omitted).

129. *Id.*

130. *Id.* (internal quotation marks omitted) (alteration in original) (quoting Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2000 (2016)).

ernment pleads a false claim when it alleges a 'request for payment under a contract' where the contractor 'withheld information about its noncompliance with material contractual requirements.'"[131]

In more recent years, however, courts applying the DOJ or *Triple Canopy* approach have fallen into the clear minority as an increasingly large number of courts have either assumed, without discussion, that *Escobar* imposed a two-part falsity framework[132] or omitted the qualifying language relied on by the DOJ when quoting *Escobar*'s two-part formulation.[133] Moreover, some courts that initially rejected the specific representations requirement have since reversed course. In the Ninth Circuit, for example, a series of decisions have walked back the early success of the DOJ's arguments. In 2017, the Ninth Circuit assumed without analysis that a two-part framework followed from *Escobar*[134] and later that year appeared to affirmatively require specific representations.[135] After a district court certified the question to the Ninth Circuit on appeal based on intra-circuit disputes on the matter,[136] the Ninth Circuit confirmed that the applicable standard requires proof of specific representations.[137] In doing so, however, they expressed significant doubt that any such requirement necessarily followed from *Escobar*:

> Were we analyzing *Escobar* anew, we doubt that the Supreme Court's decision would require us to overrule [our pre-*Escobar* falsity standard]. The Court did not state that its two conditions were the only way to establish liability under an implied

131. *Id.* at 178 n.3 (quoting *Triple Canopy I*, 775 F.3d at 636).

132. *See* SYLVIA, *supra* note 12, § 4:34.50 & n.8 ("Some decisions have cited the requirements described in *Escobar* and found them lacking, without addressing whether those are the only circumstances in which implied certification theory is viable and others do not analyze the issue.").

133. *See, e.g.*, United States v. Spectrum Painting Corp., No 19 Civ. 2096 (AT), 2020 WL 5026815, at *11 (S.D.N.Y. Aug. 25, 2020) ("[I]mplied certification theory can be a basis for liability . . . where two conditions are satisfied . . . .") (quoting *Escobar*, 136 S. Ct. at 2001) (alterations in original)); United States *ex rel.* Jefferson v. Roche Holding AG, 489 F. Supp. 3d 418, 432 (D. Md. 2020) (omitting the phrase "at least where" when quoting the relevant language from *Escobar*); United States *ex rel.* Gelman v. Donovan, No. 12 Civ. 5142 (RJD), 2017 WL 4280543, at *4 (E.D.N.Y. Sept. 25, 2017).

134. *See* United States *ex rel.* Kelly v. Serco, Inc., 846 F.3d 325 (9th Cir. 2017).

135. *See* United States *ex rel.* Campie v. Gilead Scis., Inc., 862 F.3d 890, 901 (9th Cir. 2017) ("The Supreme Court held that although the implied certification theory can be a basis for liability, two conditions must be satisfied.").

136. Rose v. Inst., No. 09-cv-05966-PJH, 2016 WL 6393513, at *3 (N.D. Cal. Oct. 28, 2016) (certifying appeal).

137. United States *ex rel.* Rose v. Stephens Inst., 909 F.3d 1012, 1018 (9th Cir. 2018).

> false certification theory. But our post-*Escobar* cases . . . appear to require *Escobar*'s two conditions nonetheless. . . . We conclude, therefore, that Relators must satisfy *Escobar*'s two conditions to prove falsity, unless and until our court, en banc, interprets *Escobar* differently.[138]

Elsewhere, inconsistency and intra-circuit disputes have emerged.[139] In the Eighth Circuit,[140] D.C. Circuit,[141] and Fifth Circuit,[142] for example, courts have reached conflicting results on whether *Escobar* requires specific representations. Although the majority of district court decisions in the Second Circuit appear to re-

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138. *Id.*

139. *See* United States *ex rel.* Lorona v. Infilaw Corp., No. 3:15-cv-959-J-34PDB, 2019 WL 3778389, at *17 n.25 (M.D. Fla. Aug. 12, 2019) (detailing splits around whether specific representations are necessary after *Escobar*).

140. *Compare* United States *ex rel.* Johnson v. Golden Gate Nat'l Senior Care, LLC, No. 08-1194 (DWF/HB), 2020 WL 1915612, at *7 (D. Minn. Apr. 20, 2020) ("Although Defendants may not have specifically certified supervision minutes, . . . a reasonable jury could conclude that failing to disclose noncompliance with statutory requirements nonetheless makes their representations misleading."), *with* United States *ex rel.* Benaissa v. Trinity Health, No. 4:15-cv-159, 2018 WL 6843624, at *11 (D.N.D. Dec. 31, 2018) (assuming that *Escobar* requires specific representations and omitting the phrase "at least where" when quoting *Escobar*'s statement on falsity).

141. *See* United States *ex rel.* McBride v. Halliburton Co., 848 F.3d 1027, 1031 n.4 (D.C. Cir. 2017) (declining to reach the issue). *Compare* United States v. DynCorp Int'l, LLC, 253 F. Supp. 3d 89, 99 (D.D.C. 2017) (noting that the specific representation requirement "is not the law of the D.C. Circuit"), *and* United States *ex rel.* Landis v. Tailwind Sports Corp., 234 F. Supp. 3d 180, 198 (D.D.C. 2017) (explaining that because *SAIC* remained good law after *Escobar*, specific representations were not required), *with* United States *ex rel.* Hutchins v. DynCorp Int'l, Inc., 342 F. Supp. 3d 32, 42 (D.D.C. 2018) (treating *Escobar*'s falsity framework as mandatory).

142. In a summary opinion, the Fifth Circuit faulted a relator for failing to "provide evidence that would support a finding that the claims included 'specific representations' that were 'misleading half-truths.'" United States *ex rel.* Smith v. Wallace, 723 Fed. Appx. 254, 256 (5th Cir. 2018). Some district courts have since relied on *Smith* for the proposition that *Escobar* requires proof of specific representations. *See, e.g.*, United States *ex rel.* Emerson Park v. Legacy Heart Care, LLC, No. 3:16-CV-0803-S, 2019 WL 4450371, at *5 (N.D. Tex. Sept. 17, 2019); United States *ex rel.* Jamison v. Career Opportunities, Inc., No. 3:16-CV-3248-S, 2020 WL 520590, at *6 (N.D. Tex. Jan. 31, 2020). But at least one court in the circuit has applied the *Triple Canopy* standard instead, noting that *Escobar* left the issue open and that *Smith*'s "passing reference[ ]" to specific representations, "without further explanation," did not resolve the matter. United States *ex rel.* Campbell v. KIC Dev., LLC, No. EP-18-CV-193-KC, 2019 WL 6884485, at *8–9 & n.8–9 (W.D. Tex. Jan. 12, 2019).

quire a showing of specific representations,[143] one judge has taken the opposite approach on the ground that *Escobar* "addressed only one type of [implied false certification] claims—namely, those involving fraudulent half-truths," and thus that pre-*Escobar* Second Circuit case law remained binding "to the extent that it held falsity may arise from the defendant's submission of a claim for payment that does not include a specific representation . . . ."[144]

The Third Circuit's treatment of the matter has failed to produce any greater degree of clarity. The issues began shortly after *Escobar* was decided when the Third Circuit, in dicta, wrote that "implied false certification liability attaches when a claimant 'makes specific representations about the goods or services provided . . . .' "[145] Although the court quoted *Escobar* in that passage, it never assessed the propriety of its conclusion, instead assuming that specific representations were required after *Escobar*. While some district courts in the circuit have recognized the non-precedential nature of the Third Circuit's initial statement and made independent determinations about what *Escobar* requires,[146] others have continued to defer to the Third Circuit's dicta when requiring proof of specific representations.[147]

143. *See, e.g.*, United States *ex rel.* Hussain v. CDM Smith Inc., No. 14-CV-9107 (JPO), 2019 WL 1428360, at *9 (S.D.N.Y. Mar. 29, 2019) (stating that implied false certification framework includes allegation of specific representations); United States *ex rel.* Forcier v. Comput. Sci. Corp., No. 12 Civ. 1750 (DAB), 2017 WL 3616665, at *12 (S.D.N.Y. Aug. 10, 2017) (collecting cases).

144. United States *ex rel.* Wood v. Allergan, Inc., 246 F. Supp. 772, 811 (S.D.N.Y. 2017), *rev'd on other grounds*, 899 F.3d 163 (2d Cir. 2018).

145. United States *ex rel.* Whatley v. Eastwick Coll., 657 Fed. Appx. 89, 94 (3d Cir. 2016) (quoting Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2001 (2016)).

146. United States *ex rel.* Simpson v. Bayer Corp., 376 F. Supp. 3d 392, 408 n.11 (D.N.J. 2019) ("The Third Circuit's mere invocation in [*Eastwick*] of *Escobar*'s language . . . is insufficient for this Court to conclude that the Circuit categorically prohibits FCA liability in the absence of such representations, as the Circuit in that case affirmed dismissal of the complaint on other grounds, and because the panel's disposition of the case was non-precedential."). *See also* United States *ex rel.* Jersey Strong Pediatrics, LLC v. Wanaque Convalescent Ctr., No. 14-6651-SDW-SCM, 2017 WL 4122598, at *3 (D.N.J. Sept. 18, 2017) (permitting implied false certification claims without specific representations); United States *ex rel.* Laporte v. Premiere Educ. Grp., No. 11-3523 (RBK/AMD), 2017 WL 3471163, at *2-3 (D.N.J. Aug. 11, 2017) (same).

147. *See* United States ex rel. Schimelpfenig v. Dr. Reddy's Labs. Ltd., No. 11-4607, 2017 WL 1133956, at *6 (E.D. Pa. Mar. 27, 2017) ("[I]nterpret[ing] the language of [*Eastwick*] to mean the Third Circuit intended to present the *Escobar* standard . . . as being the only one available for proving FCA liability for legally false claims under the implied certification theory."); United States *ex rel.* Lampkin v. Pioneer Educ., LLC, No. 16-1817 (RMB/KMW), 2020 WL 4382275, at *2 (D.N.J.

Although the general trend thus appears to favor a narrower conception of falsity after *Escobar*, that result has emerged inconsistently and with little relationship to the analysis in *Escobar* or the cases upon which it built. This Note argues in favor of the position taken by a minority of the courts—that *Escobar* itself does not impose a specific representation requirement on the implied false certification theory. In making that argument, it aims to engage in the sort of exegesis largely lacking in the decisions that have read the case narrowly.

2. Parsing the FCA and *Escobar*

It is worth reiterating at the outset that the False Claims Act does not define "false or fraudulent" as used in the statute. And, as such, the statute itself does not require specific representations. Nor do the legislative history or leading understandings of "false" or "fraudulent" speak of any such limitation. To the contrary, the 1986 amendments explained that the "most common" form of false claim is one "for goods or services . . . provided in violation of contract terms, specification, statute, or regulation."[148] Such claims, even in the absence of specific representations, can be considered legally false in two equally appropriate respects.

The first is under a contractual theory of entitlement, which begins from the premise that when a claimant submits a claim to the government, they necessarily assert that they have a legal entitlement to be paid. If the claimant makes such an assertion with the knowledge that no such entitlement exists—i.e., with the knowledge that they have failed to comply with a material contractual or regulatory requirement such that the government no longer has an obligation to pay the claimant—that implicit assertion, and therefore the claim, is false. Under that theory, the contractor who supplies the government with N95 respirators without subjecting them to enhanced quality control measures as required by regulation would have submitted a false claim regardless of whether they referenced only an order number, a "shipment of masks," or a "shipment of N95 respirators." Irrespective of the language used, the submission of the claim itself would implicitly represent that the contractor was entitled to payment for that shipment of respirators, and that representation is false so long as the government would be

July 31, 2020) (citing *Eastwick* when requiring specific representations); *In re* Plavix Mktg., Sales Practice & Products Liab. Litig., 332 F. Supp. 3d 927, 939 (D.N.J. 2017) (same).

148. S. Rep. No. 99-345, at 9.

entitled as a matter of contract to deny payment for those goods in light of the nonconformity.

Alternatively, the claim may be false under the so-called half-truths theory of fraudulent misrepresentation, according to which "[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter" is rendered fraudulent.[149] As noted above, the Supreme Court applied this exact theory of common law fraud in *Escobar* to conclude that UHS's claims were fraudulent: the payment codes and ID numbers used in conjunction with the claim for payment were representations made fraudulent by the company's failure to disclose that the services for which payment was sought did not comply with the regulations necessary to seek payment under those programs.[150]

Despite the need to distinguish between "pure omissions" and half-truths in the ordinary case—the former of which are not actionable in the absence of a duty to disclose—[151] nothing prevents the application of the half-truths theory to claims that do not include any representations about the goods or services provided. By definition, such suits will never involve pure omissions because they necessarily encompass a "claim for payment or approval" that the defendant "present[ed], or caused to be presented," to the government.[152] Such claims will include, at the very least, a number of basic representations: who the claimant is, how much money they seek, and under what contract or government program they seek it. Those representations, taken in concert and in the context of a claim for payment, amount to a "statement that contains . . . favorable matters"[153] from the perspective of the claimant—it is information that is necessary for the receipt of funds, either because it represents that goods or services have been provided or because it represents that the claimant is eligible for the receipt of government funds under the relevant program. When, in reality, the claimant's noncompliance with some regulation or contractual term constitutes an "unfavorable matter" for the purpose of receiving payment from the government, the omission of that noncompli-

149. RESTATEMENT (SECOND) OF TORTS § 529 (AM. LAW INST. 1977).

150. *Escobar*, 136 S. Ct. at 2000.

151. *In re* Vivendi, S.A., 838 F.3d 223, 239–40 (2d Cir. 2016).

152. *See* 31 U.S.C. § 3729(a)(1)(A).

153. RESTATEMENT (SECOND) OF TORTS § 529 cmt. a (AM. LAW INST. 1977).

ance makes the statement a false representation.[154] No additional information from the claimant, favorable or otherwise, is necessary to draw that conclusion, and the mere fact that the claimant has not made more specific representations about the goods or services does not render such situations instances of pure omissions.

Yet another return to the N95 example demonstrates this point clearly. When the contractor submits a claim for payment in reference to an order number or a "shipment of masks," they also represent to the government that they are a contractor who provided the government with a good in exchange for a stated sum of money. That assertion, which the contractor makes in order to receive payment from the government, is made materially misleading by the fact that they failed to disclose their noncompliance with the quality control regulation (assuming, *arguendo*, that said regulation would be material in this context).[155] Put otherwise, the contractor would have made a "literally true statement[ ]"—that they provided the goods for which they seek payment—that "create[s] a materially misleading impression"—that those products were subject to the quality control standards required for goods of that sort.[156] And, as a result, the underlying claim for payment would be rendered false under the common law understanding of fraudulent misrepresentations described above.

Regardless of which of the two analytical framings is preferable, there are clear doctrinal bases for treating claims that merely request payment without any specific representations as false in the appropriate contexts. The pre-*Escobar* case law surrounding implied false certification supports that conclusion, as the question of whether or not a claimant had made specific representations was largely irrelevant to the falsity inquiry prior to *Escobar*.[157] Moreover, had the Supreme Court intended to limit implied false certification's applicability to only those circumstances where the claimant made specific representations, it likely would have abrogated the

154. *Id.* ("[A] statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue.").

155. This, of course, assumes that the quality control provision would be considered material. As mentioned above, this Note is not concerned with how materiality is determined.

156. S.E.C. v. Gabelli, 653 F.3d 49, 57 (2d Cir. 2011), *rev'd on other grounds*, Gabelli v. S.E.C., 568 U.S. 442 (2013).

157. *See, e.g.*, United States *ex rel.* Wilkins, v. United Health Grp., 659 F.3d 295, 313 (3d Cir. 2011); Mikes v. Strauss, 274 F.3d 687, 699–700 (2d Cir. 2001); United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163 (10th Cir. 2010); United States v. SAIC, 626 F.3d 1257 (D.C. Cir. 2010).

multitude of earlier circuit court opinions extending the theory's reach beyond that scope. Indeed, the Court did precisely that with respect to decisions that had—wrongly, in the Court's view—introduced a condition of payment requirement to the falsity analysis.[158] Given that the Court made no such abrogation with respect to cases that found falsity even in the absence of specific representations, we should assume that the Court left those opinions intact absent some clear suggestion to the contrary.[159] *Escobar* thus ought not to be read as requiring specific representations unless the Court's language clearly evidences an intent to deviate from the status quo and create such a requirement.

Turning, then, to the language of the case, there are three iterations of the Court's holding on falsity worth considering. In both an introductory paragraph and the first paragraph of its falsity analysis, the Court wrote that implied false certification can be a basis for liability "at least in certain [or some] circumstances."[160] In both places, the Court follows that qualifying language with a statement of what is effectively a misleading half-truths standard: "[L]iability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose . . . noncompliance," such that the "omission renders those representations misleading."[161] The same is true of the third iteration, which differs chiefly in its qualifying language—"the implied certification theory can be a basis for liability, at least where two conditions are satisfied"—and in the fact that it states explicitly the application of a "misleading half-truths" standard.[162]

158. *See* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2001-02 (2016).

159. *See* United States v. DynCorp Int'l, LLC, 253 F. Supp. 3d 89, 100 (D.D.C. 2017) ("[T]he D.C. Circuit's broader statement of the implied certification theory remains good law after *Escobar*."); United States *ex rel.* Simpson v. Bayer Corp., 376 F. Supp. 3d 392, 407 (D.N.J. 2019) (finding that *Escobar* did not abrogate circuit's previous recognition of "FCA liability under the implied false certification theory arising from claims for payment that did not make the kinds of specific representations . . . that were present in *Escobar*."); United States *ex rel.* Wood v. Allergan, 246 F. Supp. 3d 772, 811 (S.D.N.Y. 2017) ("*Mikes* . . . remains good law . . . to the extent that it held that falsity may arise from the defendant's submission of a claim for payment that does not include a specific representation about the goods or services provided, coupled with [material] noncompliance . . . .").

160. *Escobar*, 136 S. Ct. at 1995, 1999.

161. *Id.* at 1995. In the second iteration, the Court writes "representation," rather than "specific representation." *Id.* at 1999.

162. *Id.* at 2001.

All three iterations make clear that falsity is satisfied upon a showing of specific representations about the goods or services provided coupled with omissions that turn those representations into misleading half-truths under an ordinary common law analysis. The only question that remains is the effect of the Court's qualifying language: does the phrase "at least where" operate to constrict the outer bounds of implied false certification or the reach of the Court's opinion?

At first blush, the Court's inclusion of qualifying language itself militates towards the latter view. Had the Court omitted the qualifying phrase entirely and simply held that implied false certification "can be a basis for liability where two conditions are satisfied," the decision would plainly require specific representations. Because the Court instead deliberately qualified its statement, the best reading of that qualifying phrase is one that gives full effect to the Court's choice of words by taking the phrase "at least where" as an indication that the Court was addressing implied false certification only as it applied to the facts before it.[163]

An examination of those facts makes it all the less likely that the Court intended to speak to the whole of implied false certification's validity. It was clear that UHS, in selecting certain billing codes when submitting claims, had made specific representations about the type and quality of services provided. That aspect of the record provided the Court with a ready analogue to the common law backdrop against which it was operating, where misleading half-truths stemming from affirmative statements had long been considered fraudulent. Because the claims at issue fell "squarely within [that] rule,"[164] the Court had no need to turn to or even comment on the legal arguments pertaining to the complete breadth of implied false certification. Indeed, the Court made clear that it was only going as far as was necessary to address the facts before it when it declined to reach the full scope of the relator's construction of falsity, writing that "[w]e need not resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment."[165] Given that restraint, there is little reason to believe

163. *See* SYLVIA, *supra* note 12, § 4:34 ("[B]y qualifying the holding with the phrase 'at least,' the Court did not limit the viability of implied certification to circumstances in which these conditions were met."). In this respect, it is telling that a number of courts have omitted the qualifying language by alteration or selective quoting, *see supra* note 133, suggesting that including it might obfuscate the proposition for which they cite the opinion.

164. *Escobar*, 136 S. Ct. at 2000.

165. *Id.*

that the Court then intended to impose a sweeping condition that would, in effect, preclude the theory that the Court purported not to address. As one court has explained it: "Neither embracing nor rejecting the relators' broad implied false certification theory, the Court held narrowly that, as pled, the defendant's claims for payment rose to the level of misrepresentations sufficient to trigger FCA liability."[166]

The Supreme Court's opinion in *Escobar* is by no means a model of clarity. Indeed, its ambiguities have also sparked debates about the proper standards for materiality and scienter.[167] Read in context, however, the facts of the case and language of the opinion cast considerable doubt upon the view that the Court intended to restrict the scope of implied false certification to the limited and immediate circumstances with which it was concerned. Instead, the phrase "at least where" seems to indicate only that the Court took a fact-bound approach, approving implied false certification as applied to facts akin to those before it while declining to reach the broader issue of whether demands for payment alone, or implicit representations under the *Triple Canopy* formulation, would suffice. To the extent that any ambiguity remains, the Court's decision to address "concerns about fair notice and open-ended liability" through "strict enforcement of the Act's materiality and scienter requirements" rather than "a circumscribed view of what it means for a claim to be false or fraudulent"[168] makes clear that the narrow reading of *Escobar* adopted by the majority of courts to have addressed the issue is contrary to the broader notion of FCA liability adopted by the Court.

III.
THE NORMATIVE CASE AGAINST THE SPECIFIC REPRESENTATIONS REQUIREMENT

The above analysis posits that neither the FCA's text nor the Supreme Court's decision in *Escobar* requires plaintiffs to plead and prove specific representations when alleging falsity under the implied false certification theory. The question remains, however, whether imposing such a requirement is preferable to a rule that permits proof of falsity in its absence. This Note argues that it is not; that even if such a requirement were justifiable within the text of

166. United States *ex rel.* Simpson v. Bayer Corp., 376 F. Supp. 3d 392, 407 (D.N.J. 2019).

167. *See* Sylvia, *supra* note 12, § 4:34.

168. *Escobar*, 136 S. Ct. at 2002 (quoting United States v. SAIC, 626 F.3d 1257, 1270 (D.C. Cir. 2010)).

the statute, the heightened burden it imposes is not justifiable on any normative grounds. In making that argument, this Part begins by assessing the nature of the claims that a specific representation requirement would likely bar. It then considers how barring those claims and imposing a requirement of this sort more generally runs against the spirit and purpose of the FCA and would stymie its efficacy in circumstances where its *qui tam* provision is particularly critical for the detection and prosecution of dangerous regulatory and contractual violations.

A. Consequences of the Specific Representations Requirement

In order to understand the types of claims that the specific representations requirement will likely bar if adopted on a broad scale, it is useful to reiterate what precisely about UHS's claims led the *Escobar* court to find that such representations had been made there. At the core of *Escobar* were Medicare credentialing requirements and the use of National Provider Identification numbers that corresponded with those credentials. When UHS used those codes to seek reimbursement for services rendered, they represented not only that they had provided the corresponding services but also that appropriately certified professionals had provided them. As one court has framed it, the "inclusion of the provider identification numbers meant that the claims effectively stated: 'for these specific services rendered by this kind of licensed professional, X amount is due.'"[169] Because UHS failed to disclose that those services had been provided by unqualified persons, that implied statement amounted to a fraudulent misrepresentation.

This same reasoning has been used to satisfy the specific representations requirement in the context of other claims that included readily recognizable identifying information.[170] When a company seeks reimbursement for a specific drug identified by its official name, for example, courts may take that identification as an implicit representation that the drug for which reimbursement is sought complied with the FDA-approved formula for that drug.[171]

169. United States *ex rel.* Lisitza v. Par Pharm. Cos., 276 F. Supp. 3d 779, 795–96 (N.D. Ill. 2017) (quoting *Escobar*, 136 S. Ct. at 2000).

170. *See, e.g.*, United States *ex rel.* Emerson Park v. Legacy Heart Care, LLC, No. 3:16-CV-0803-S, 2019 WL 4450371 (N.D. Tex. Sept. 17, 2019); United States *ex rel.* Presser v. Acacia Mental Health Clinic, LLC, 836 F.3d 770 (7th Cir. 2016); United States *ex rel.* Tessler v. City of New York, No. 14-CV-6455 (JMF), 2016 WL 7335654 (S.D.N.Y. Dec. 16, 2016).

171. *See* United States *ex rel.* Campie v. Gilead Scis., Inc., 862 F.3d 890, 902–03 (9th Cir. 2017) ("[D]rug names necessarily refer to specific drugs under the FDA's regulatory regime.").

If, however, the drug deviated from that formula in a material fashion and the claimant had knowledge of that fact, their failure to disclose the deviation would constitute an omission rendering the claim false.

But the extent to which the inclusion of that sort of information can mitigate the impact of a specific representations requirement on a broader scale remains uncertain and depends in large part upon two factors. First, beyond claims including Medicare or other systematized billing codes, the availability of implied false certification in a given case will depend upon what the court can and is willing to infer from the information provided with the claim. Where that information is less readily associated with some contractual or regulatory requirement, a court may well find that reliance on that information to satisfy the specific representations requirement is a bridge too far. Second, the plaintiff must be able to link the information provided in the claim sufficiently to the nature of the fraud alleged. Thus, even if a claim included drug names and identification codes that constitute specific representations about the drugs provided, the inclusion of that information cannot serve as a basis for falsity where the alleged fraud rests on, for example, the existence of a scheme to inflate the cost of drugs by filling prescriptions in a greater dosage than originally prescribed.[172] Both limitations are particularly consequential in areas of government contracting that make use of standardized forms. Because those forms will not typically require disclosure of information pertinent to more nuanced fraudulent schemes, it is unlikely that they will provide a basis for an implied false certification theory, even where that information is all that the government requires upon submission of a claim.[173]

Beyond instances where, as in the examples above, uncertainties arise from the courts' potential inability or unwillingness to infer certain assertions from the information provided with the claim, there is an entire category of claims for which the specific representations requirement is particularly prohibitive. These claims—what one might term bare requests for payment—provide no additional

172. *See Lisitza*, 276 F. Supp. 3d at 796–98.

173. *See id.* at 797 ("In this case, the claim forms, by law, are standardized; the federal and state agencies require the same information and certification on their forms. Notably, that information does not include any affirmation or statement that the claimant has complied with all applicable laws and regulations."); United States *ex rel.* Kelly v. Serco, Inc., 846 F.3d 325, 332 (9th Cir. 2017) (finding a lack of specific representations for claims submitted via standard forms that provided "the period of performance, total costs incurred during that period, and [the claimant's] fee applicable to that work.").

information pertaining to the claimant's compliance with relevant regulatory or contractual terms. The most straightforward examples arise in the contracting context, where the claimant may do nothing more than seek payment for performance under the contract while knowingly failing to disclose noncompliance with some material portion of the contract or regulation incorporated therein. The same can be said of claims under entitlement or other government programs, where the claimant seeks either reimbursement for the past provision of services or some other outlay of government funds while making omissions about noncompliance that is material to their eligibility for those funds. In the abstract, these claims may be construed as legally false under the entitlement theory or the half-truths theory as outlined above, and there are thus clear doctrinal bases for treating bare requests for payment as false in the appropriate contexts.

When the specific representations requirement is stringently imposed, however, it prevents the application of those theories to bare requests for payment. On the one hand, it seems to entirely foreclose the entitlement theory, which by definition requires no demonstration of misrepresentation to treat a claim as false. On the other, it significantly narrows the scope of the half-truths theory by effectively precluding courts from assuming that a claim for payment constitutes a sufficient representation within common law conceptions of fraud. Unless a court is willing to equate a payment request with a specific representation as used in *Escobar*,[174] that requirement will effectively bar reliance on the implied false certification theory when it comes to bare requests for payment. The most obvious consequence of the specific representations requirement, then, is to insulate from liability a significant class of fraudulent claims that otherwise would have been treated as false.[175]

B. Spirit, Purpose, and Regulatory Function

Just as early skeptics of the implied false certification theory alleged that it created an overly expansive liability regime, those arguing in favor of a specific representation requirement may suggest that allowing implied certification to operate unbounded per-

174. *See Triple Canopy II*, 857 F.3d 174, 178 (4th Cir. 2017).

175. *See, e.g.*, United States *ex rel.* Lewis v. Cal. Inst. Tech., No. 2:18-cv-05964-CAS(RAOx), 2019 WL 5595046, at *8 (C.D. Cal. Oct. 28, 2019) (noting that while claims lacking specific representations may have been false under the Ninth Circuit's pre-*Escobar* standard, they no longer satisfied the falsity element). For a nonexhaustive collection of pre-*Escobar* cases finding falsity without consideration of specific representations, see *supra* note 157.

mits a greater degree of liability than was contemplated by Congress. That criticism fails to recognize, however, that "both the Supreme Court and Congress have always treated ['false or fraudulent'] as having a broad scope."[176] In a case decided before the 1986 Amendments, the Supreme Court wrote that Congress intended to "reach all types of fraud, without qualification, that might result in financial loss to the Government."[177] When Congress amended the Act nearly twenty years later, they doubled down on that expansive understanding of falsity rather than repudiating or tempering it, both stating that they "strongly endorse[d]" the Court's interpretation and also adding that "[t]he [FCA] is intended to reach all fraudulent attempts to cause the Government to pay ou[t] sums of money or to deliver property or services."[178] Thus, even if the absence of a specific representation requirement results in more FCA liability, there is no reason to believe that a comprehensive liability regime under the FCA is inconsistent with the spirit or purpose of that act, so long as the focus remains on the fraudulent attainment of government funds.[179]

Historical experience with fraud against the government and the FCA more generally supports that basic proposition. In the context of the Civil War, for example, it can hardly be suggested that Congress's animating concerns would not have applied with equal force to bare requests for payment. Regardless of what the contractors had said, Congress was concerned about the sale of guns that did not shoot and boots that degraded in a matter of hours, both of which resulted in an outlay of government funds for something less than what the government had bargained for. If the FCA is principally concerned with the protection of the federal fisc,[180] then there is no policy basis for distinguishing between a bare request for payment for a gun that does not shoot and that same request when accompanied by a specific representation.

The specific representations requirement is equally inconsistent with the FCA's regulatory function. As noted above, that re-

176. SYLVIA, *supra* note 12, § 4:34.

177. United States v. Neifert-White Co., 390 U.S. 228, 232 (1968).

178. S. Rep. No. 99-345, at 9, 19, 1986 U.S.C.C.A.N. 5266, at 5274, 5284.

179. This is particularly noteworthy in light of the fact that the 1986 amendments, which revolutionized the FCA, were explicitly intended to bolster the FCA's scope and strength in response to growing fraud, suggesting that any expansion in liability permitted under those amendments may have "occurred by design." Kristofcak, *supra* note 38, at 260.

180. *See* United States v. Griswold, 24 F. 361, 366 (D. Ore. 1885) ("The statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous . . . .").

quirement is most prohibitive of claims that include the least amount of information pertinent to the character of the goods, services, or compliance with contractual or regulatory provisions. Those claims, however, give rise to the exact sort of informational disparity that the FCA is poised to mitigate via its *qui tam* provision. In the context of a bare request for payment, for example, the cost of detecting fraud, let alone uncovering its specifics, are substantial and would require the government to implement expansive screening functions. The FCA ordinarily circumvents this issue by giving enforcement authority and incentives to insiders with greater access to knowledge about fraud that is, by its nature, hidden, without any additional cost to the government. A significant cost of the specific representation requirement is the foreclosure of that information-generating capacity where it is needed the most.

Moreover, by creating a safe-haven from liability where little-to-no information is provided, the specific representation requirement will have the likely effect of encouraging claimants to make as few disclosures as possible under the relevant contractual or regulatory scheme so as to avoid unnecessarily subjecting themselves to liability under the implied false certification theory.[181] The impact of those developments would reach beyond the inability to detect fraud. In *Escobar*, the Court noted that tying falsity to the presence of a condition of payment, as some courts had previously done, would prompt the government to respond by "designating every legal requirement an express condition of payment."[182] So too here, if the government knows that specific representations are necessary for the prosecution of the most difficult to detect fraudulent claims,[183] it will have every incentive to implement regulatory and contractual schemes that will ensure such representations are consistently presented alongside claims for payment.[184] Thus, by pin-

181. *Cf.* United States *ex rel.* Hutchins v. DynCorp Int'l, Inc., 342 F. Supp. 3d 32, 50–51 (D.D.C. 2018) (noting that the claimant's use of generic billing codes, rather than more specific identifiers, may have been a part of a scheme to "conceal" fraudulent double-billing).

182. 136 S. Ct. 1989, 2002 (2016).

183. *Cf.* United States *ex rel.* Wood v. Allergan, Inc., 246 F. Supp. 3d 772, 816 (S.D.N.Y. 2017) ("[T]he implied certification theory helps to ensure that the Government can still recover for fraud . . . in circumstances where the relevant forms do not require explicit verification that the goods or services are free from illegal influence.").

184. *Compare* United States *ex rel.* Jamison v. Career Opportunities, Inc., No. 3:16-CV-3248-S, 2020 WL 520590, at *6 (N.D. Tex. Jan. 31, 2020) (finding a lack of specific representations where any information generating reports completed by the claimant were not "actually submitted . . . as a part of a claim for payment"), *with* United States *ex rel.* Jefferson v. Roche Holdings AG, No. GLR-14-3665, 2020

ning liability to affirmative disclosure, the specific representation requirement and its likely effect on informational disparities would force the government to impose more expansive certification requirements and additional red tape in a litany of contractual and regulatory spaces.

The specific representations requirement would also undermine the FCA's role in mitigating the effect of financial barriers that hinder effective government enforcement of regulatory and anti-fraud schemes. One of the great efficiencies of the FCA's hybrid model of enforcement is that the combination of its *qui tam* and government intervention provision allows the government to target its resources as necessary without risking underenforcement. If, as a result of the specific representations requirement, the government can no longer trust in the FCA's capacity to capture and attach liability to well-concealed fraudulent claims, they may be forced to expend a greater sum of their limited resources exploring alternative routes of prosecuting conduct which, at the end of the day, results in the unwarranted outlay of taxpayer dollars from the government fisc.

In sum, by grafting a specific representation requirement onto the implied false certification theory, a number of courts have restricted the degree to which the FCA may live up to its central premises and serve the critical regulatory function that is inherent in its public-private enforcement mechanism.

CONCLUSION

During the fifteen-plus-year debate around implied false certification that took place between the decisions in *Ab-Tech* and *Escobar*, courts and commentators raised serious questions about the role that the FCA should play in advancing the government's anti-fraud and regulatory prerogatives. For many, implied false certification was a logical and well-justified extension of the broad conception of falsity embodied by the FCA. For others, permitting liability on the basis of implication alone was beyond the pale. And while the arguments in favor of implied false certification ultimately carried the day when the Supreme Court weighed in, that decision was made

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WL 5759779, at *10 (D. Md. Sept. 28, 2020) (finding specific representations where the contract required the claimant to certify compliance with the applicable Federal Acquisition Regulations). The natural consequence, of course, is that law-abiding contractors, the market, or the taxpayers would be forced to shoulder the increased cost of contracting resulting from the new internal recordkeeping and screening procedures that such reporting regimes would likely prompt.

only after reasonable minds had gone on debating and disagreeing about the issue for years prior.

This Note has catalogued a new falsity debate that has emerged since *Escobar* was decided. And while that debate implicates similar questions about the proper role of the FCA, it has quickly taken on a character quite different from that which proceeded *Escobar*. Rather than relying on arguments that engage in reasoned consideration of the FCA's text, history, and purpose, the new falsity debate is being won with assumptions and ellipses. As an increasingly large number of courts require specific representations as a result of an uncritical reading or outright distortion of *Escobar*'s language, the consequent constriction of the FCA's scope goes largely unjustified. This Note has thus attempted to stake out a position on the propriety of specific representations while also engaging in the sort of discussion that has been painfully absent from judicial treatment of the matter thus far.

SOCIAL MEDIA THREATS AND HOW WE CAN ADDRESS THEM

KEVIN MILLS

In a world where technology develops at an exponential rate, it is becoming increasingly easy to communicate with others. Between social media, messaging services, and various online forums, there is a plethora of ways to communicate with people across the country. While these innovations have made life easier for benevolent actors, they have also allowed those with bad intentions to thrive on the internet. Technology, as it often does, has put our legal system in a dilemma: we want it to be the force for good that we know it can be while limiting the ways in which it can be abused. The consequences of how we resolve the issue of enabling positive uses of technology while tamping down on negative uses are most dire in the criminal context.

It is well-known at this point that the unprecedented attack on the Capitol Building was coordinated across various internet platforms.[1] The insurrectionists discussed these plans in relatively public online settings well before the events of January 6th.[2] And while Facebook, Twitter, and peer platforms are beginning to take more concrete steps towards preventing their services from being used to facilitate violence,[3] they're a day late and a dollar short. Some of our country's most egregious tragedies in the past decade have been contemplated, planned, and set in motion on social media

1. *See, e.g.*, Rebecca Heilweil and Shirin Ghaffary, *How Trump's Internet Built and Broadcast the Capitol Insurrection*, VOX (Jan. 8, 2021), https://www.vox.com/recode/22221285/trump-online-capitol-riot-far-right-parler-twitter-facebook [https://perma.cc/8HT6-B94U]; Ian Talley and Rachael Levy, *Extremists Posted Plans of Capitol Attack Online*, WALL ST. J. (Jan. 7, 2021), https://www.wsj.com/livecoverage/biden-trump-electoral-college-certification-congress/card/x1dwwPqnJM1XfQh5LaUj [https://perma.cc/99UW-46UE]; Ben Collins and Brandy Zadrozny, *Extremists Made Little Secret of Ambitions to 'Occupy' Capitol in Weeks Before Attack*, NBC NEWS (Jan. 8, 2021, 12:36 PM), https://www.nbcnews.com/tech/internet/extremists-made-little-secret-ambitions-occupy-capital-weeks-attack-n1253499 [https://perma.cc/AJ5U-XGS6].

2. Collins and Zadrozny, *supra* note 1.

3. *See* Andrea Chang and Sam Dean, *Social Media Platforms are Cracking Down to Prevent Inauguration Day Violence*, L.A. TIMES (Jan. 18, 2021, 10:58 AM), https://www.latimes.com/business/technology/story/2021-01-18/inauguration-platforms [https://perma.cc/78H9-NHHX].

sites and discussion boards.[4] This raises a key question that we will continue to face through the 21st century: can we ensure the internet is used for good without excessively restricting that use? Put another way, can we have our cake and eat it too?

There is no better illustration of this dilemma than the recent Supreme Court case *Elonis v. United States*.[5] In *Elonis*, the defendant made multiple threatening statements about his ex-wife in Facebook posts. Despite making his vulgar statements in the form of posts of rap lyrics, many readers of the posts took these statements seriously, including the FBI.[6] This led to the defendant being indicted under 18 U.S.C. § 875(c),[7] which prohibits transmitting "in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." The defendant was convicted based on a jury instruction that liability hinged on whether a reasonable person would characterize his statements as threats; the defendant's awareness of the threatening nature of his statements was deemed irrelevant by the District Court. In that court's opinion, the only relevant intent was that the defendant made these statements intentionally.[8]

In an 8-1 opinion, the Supreme Court found it difficult to view this standard as anything other than a negligence standard,[9] which they declined to read into § 875(c). This is because when it comes to federal statutes that omit a specific *mens rea* requirement, the Court follows its longstanding practice of reading into such statutes "only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct."[10] Negligence, it concluded, did not meet that description. Because it felt that negligence as the *mens rea* requirement for this statute would sweep up innocent speech, the Court reversed the defendant's conviction.[11] While the Court went on to say that purpose and knowledge as *mens rea* requirements would clearly not criminalize speech that is otherwise innocent (to clarify, these were not the standards applied to the defendant here) it specifically declined to decide whether recklessness would.[12]

4. *See* Heilweil and Ghaffary, *supra* note 1.
5. Elonis v. United States, 575 U.S. 723 (2015).
6. *Id.*
7. 18 U.S.C. § 875(c) (2020).
8. United States v. Elonis, 897 F. Supp. 2d 335 (E.D. Pa 2012).
9. *Elonis*, 575 U.S. at 738.
10. *Id.* at 745 (quoting Carter v. United States, 530 U.S. 255, 269, (2000)).
11. *Id.* at 737-38.
12. *Id.* at 740.

When faced with a related issue in 2020, the Supreme Court denied certiorari in *Kansas v. Boettger*, a case which would have resolved the question of whether States may *constitutionally* criminalize threats made in reckless disregard of causing fear.[13] While State Supreme Courts have answered this question themselves in different ways,[14] the U.S. Supreme Court has yet to condemn or endorse any particular approach.

As a result, the question remains: does recklessness qualify under *Elonis* as "only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct" when it comes to § 875(c) and similar statutes?[15] Further, does the Constitution even permit the criminalization of threats made in reckless disregard of causing fear? This piece will posit that the answer to both of these questions is yes. This is because a recklessness standard for criminality of threats comports not only with the Supreme Court's decision in *Elonis*, but also *Virginia v. Black*, another notable case in this area, and its progeny.

Part I-A of this paper begins by exploring the development of the definition of a true threat under the Constitution, and where the Supreme Court has drawn the line for when statements will lose their First Amendment protections. Part I-B focuses on what differentiates true threats and constitutionally protected speech. I-C provides an analysis of the Court's decision in *Elonis* following years of varied approaches within the federal courts. Part II-A then picks up where the court left off in *Elonis* and argues that a recklessness standard could be read into federal threat statutes consistent with that decision. Part II- B then answers the question that the Supreme Court declined to address in *Boettger* and demonstrates that a recklessness *mens rea* standard for threats would not violate the First Amendment. Parts II-C and II-D explain how recklessness would work in practice, and why we need it. Ultimately, this paper concludes that a recklessness *mens rea* standard would comport with the First Amendment and *Elonis*, and that if used properly it could be an invaluable tool in stopping those who use the internet for wrongdoing.

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13. Kansas v. Boettger, 140 S. Ct. 1956, 1956 (2020).

14. *Compare* Major v. State, 800 S.E.2d 348, 348 (Ga. 2017) (upholding Georgia's criminalization of threats made in reckless disregard of causing fear), *with* State v. Boettger, 310 Kan. 800, 800-01, 450 P.3d 805, 806 (2019) (striking down Kansas's statute criminalizing threats made in reckless disregard of causing fear).

15. *Elonis*, 575 U.S. at 745 (quoting Carter, 530 U.S. 255, 269).

PART I

A. True Threats Defined

The best starting point in a search for the definition of a true threat is *Watts v. United States*.[16] In that case, a young man attending an antiwar rally told a group of fellow protesters that "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[17] He was indicted and convicted under 18 U.S.C. § 871 for "knowingly and willfully" making a threat to "take the life of, to kidnap, or to inflict bodily harm upon the President of the United States[.]"[18] While the Supreme Court declared this statute constitutional on its face, it acknowledged that "a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind."[19] While the Court did not provide a clear definition of what a true threat is, it did make clear that "political hyperbole" was not a true threat, which is what the defendant in this case engaged in.[20] In coming to this conclusion, the Court found the circumstances of the defendant's statement to be significant: it was made at an emotionally charged protest, it was a conditional statement, and all of the listeners laughed.[21] This case made clear that statutes criminalizing true threats are facially Constitutional. However, such statutes should be handled with care as to not chill innocent speech, even speech that "is often vituperative, abusive, and inexact."[22]

Between the years in which *Watts v. United States* and *Virginia v. Black* were decided, the Supreme Court did not provide any further elaboration on what exactly constitutes a true threat. However, in *R.A.V. v. St. Paul*,[23] the Court did have an opportunity to discuss why threats of violence fall outside of the protection of the First Amendment. Although this case primarily concerned content-based discrimination in threat statutes (in the context of cross burning), the Court offered three reasons why threats of violence are beyond the purview of the First Amendment: "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur[.]"[24]

16. Watts v. United States, 394 U.S. 705 (1969).
17. *Id.* at 706.
18. 18 U.S.C. § 871 (2020).
19. *Watts*, 394 U.S. at 707.
20. *Id.* at 708.
21. *Id.* at 707.
22. *Id.* at 708.
23. R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).
24. *Id.*

Similar to "fighting words," threats of violence are not protected by the First Amendment because such threats "by their very utterance inflict injury" on those who they are directed at.[25] However, it is clear from *Watts* that distinguishing "what is a threat. . .from what is constitutionally protected speech [ ]"[26] is an exercise done out of concern for the speaker's First Amendment rights.

The Supreme Court's further elaboration on what a true threat is under the Constitution came in *Virginia v. Black*.[27] This case, like *R.A.V.*, involved another cross burning. Citing *Watts* as authority, the Court stated that the Constitution permits the prohibition of true threats and defined them as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[28] In addition, the Court articulated that the speaker does not need to intend or be able to carry out the threat, and further, that intimidation is a type of true threat and therefore can be prohibited as well.[29] The statute was upheld as constitutional insofar as it prohibited cross-burning with a specific intent to intimidate.[30] However, the provision of the statute that deemed cross-burning to be *prima facie* evidence of an intent to intimidate was struck down because it blurred the line between constitutionally protected speech and unprotected threatening speech,[31] nullifying the part of the statute that was constitutional. In other words, because the provision automatically classified *any* cross-burning as a true threat, the Court felt that it bypassed the constitutionally required process of separating "what is a threat. . .from what is constitutionally protected speech."[32] However, the statute's criminalization of cross burnings when coupled with a culpable state of mind did *not* violate the Constitution, because it appropriately prohibited true threats without sweeping up potentially innocent speech in the process.

Building off of the Supreme Court's jurisprudence across *Watts*, *R.A.V.*, and *Black*, each Federal Circuit has developed its own test for whether a statement is considered a true threat and is therefore unprotected by the First Amendment. The Second and Fourth

25. *Id.* at 424 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

26. *Watts*, 394 U.S. at 707.

27. Virginia v. Black, 538 U.S. 343 (2003).

28. *Id.* at 359 (citing *Watts*, 394 U.S. at 708; *R.A.V.*, 505 U.S. at 388).

29. *Id.* at 360.

30. *Id.* at 343.

31. *See id.* at 345.

32. *Watts,* 394 U.S. at 707.

Circuits ask "whether an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret [the communication] as a threat of injury."[33] The Sixth Circuit asks "whether in light of the context a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury[.]"[34] The Ninth Circuit defines a true threat as "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted. . .as a serious expression of intent to inflict bodily harm[.]"[35]

While each of these tests uses slightly different language to sort protected innocent speech from unprotected threats, there is a common thread among them: statements (or acts of intimidation, like cross burning) are judged to be true threats by an objective standard for how a reasonable person would interpret the statement in context. Importantly, this inquiry determines whether a statement is a true threat without regard to the defendant's future intentions.[36] That is, a defendant's lack of capability or intention to actualize the threatened conduct does not transform a true threat into constitutionally protected speech. What is criminalized is the act of causing fear, not the possibility that what is feared will become a reality. Thus, these tests do not just protect the speaker's First Amendment rights—they also protect the listener from the fear of violence, regardless of the actual probability thereof.

Usually, courts use tests like the ones above in the context of statutes that have a clear intent requirement. Take for example the FACE Act, which makes civilly and criminally liable anyone who

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any other class of persons from, obtaining or providing reproductive health services[.][37]

The FACE Act has a clear intent requirement. To be liable under the statute, a person must make a true threat with the goal of intimidating or interfering with someone who is obtaining or pro-

33. United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973); United States v. Malik, 16 F.3d 45, 49 (2d Cir. 1994) (quoting Maisonet, 484 F.2d at 1358).

34. United States v. Jeffries, 692 F.3d 473, 477 (6th Cir. 2012).

35. Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1077 (9th Cir. 2002).

36. *See Black*, 538 U.S. at 360.

37. Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (2020).

viding reproductive health services, because they are doing so. If all statutes had a clear intent requirement like the FACE Act, that would be the end of the discussion. Unfortunately, that is not the case. Take for example the statute that the defendant in *Elonis* was indicted under,

§ 875(c): "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."[38] What is the *mens rea* requirement for this statute? That is, aside from the *actus reus* requirement in all criminal prosecutions that the act (here, the communication) was voluntary,[39] what must be the state of mind of the individual as to how they wish or think that the communication will be interpreted? Must the defendant make the communication with the express purpose of causing a fear of violence, or would a lower *mens rea* suffice? Before *Elonis v. United States*, the answer would depend on which court you asked.

B. Interpretations of Black *and the Subjective-Threat Element Circuit Split*

In *United States v. Jeffries*, the Sixth Circuit heard an appeal from a conviction under

§ 875(c).[40] The defendant, a virtuoso like the defendant in *Elonis*, wrote a song entitled "Daughter's Love" about his ongoing domestic troubles, in which he threatened the judge handling his custody proceedings. Lyrics aimed at this judge included "I killed a man downrange in war[,]" "You don't deserve to live in my book[,]" and "I can shoot you. I can kill you."[41] While this ballad was in a different musical genre (country) than the song in *Elonis* (rap), it had the same effect: it caused fear. The defendant was convicted under § 875(c) after a trial and the question on appeal was not whether the defendant's statements were a true threat, but rather whether § 875(c) requires the Government to show that the defendant subjectively intended for these statements to be threats.[42] The defendant's contention was that under *Virginia v. Black*, statutes criminalizing communicative threats are invalid under the First

38. 18 U.S.C. § 875(c) (2020).

39. *See* Martin v. State, 31 Ala. App. 334, 335 (1944) (holding that a defendant could not be prosecuted for public drunkenness when he was involuntarily and forcibly brought to a public place by the police).

40. United States v. Jeffries, 692 F.3d 473 (6th Cir. 2012).

41. *Id.* at 475-77.

42. *Id.* at 478.

Amendment unless they contain a "subjective-threat element."[43] However, the Sixth Circuit rejected this argument, because it understood the Supreme Court's decision in *Black* to hinge on the fact that the statutory provision in question in that case failed to distinguish threats from constitutionally protected speech as required by *Watts*.[44] The Sixth Circuit stated that the reasonable person test it uses[45] for § 875(c) thus does not run afoul of the Supreme Court's overbreadth standard iterated in *Black*, because jurors can consider the circumstances and reasonable connotations of one's statements.[46] This process, the Court asserted, allows for the separation of threats and constitutionally protected speech as required by *Watts* and *Black*.[47] The Court affirmed the defendant's conviction, and upheld § 875(c) as constitutional under the First Amendment. However, unlike the Sixth Circuit and a majority of the Courts of Appeals at that time, the Ninth Circuit would have accepted the defendant's argument.

In *United States v. Bagdasarian*, the Ninth Circuit was faced with a defendant who, like the defendant in *Jeffries*, posted threatening statements online.[48] Not only that, the defendant also sent emails to a friend describing how a particular gun would help create the picture he attached of a smoldering car.[49] The subject of these threats was then President-elect Barack Obama, and so Bagdasarian was indicted under 18 U.S.C. § 879(a)(3) for threatening a major candidate for the office of President.[50] While this was not the first case in which the Ninth Circuit read a subjective intent element into a threat statute, it is germane to this discussion because it concerned an online threat. The court went on to explain that *Virginia v. Black* had affirmed its own dicta in prior cases that intent is what separates speech protected by the First Amendment from unprotected speech.[51] Unlike the Sixth Circuit though, the Ninth Circuit read *Black* as requiring that in order to abide by the First Amendment, an appropriate intent element must be read into threat statutes that otherwise lack one. To the Ninth Circuit, whether any given appli-

43. *Id.* at 479.

44. *Id.* at 480.

45. *Id.* at 477 ("whether in light of the context a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury[.]").

46. *Jeffries,* 692 F.3d at 480.

47. *Id.*

48. United States v. Bagdasarian, 652 F.3d 1113, 1115 (9th Cir. 2011).

49. *Id.* at 1116.

50. 18 U.S.C. § 879(a)(3) (2020).

51. *Bagdasarian*, 652 F.3d at 1118.

cation of a threat statute is constitutional turns on whether in addition to the objective true threat element, there is an intent element that facilitates sorting through protected and unprotected speech.[52]

At the time *Bagdasarian* was decided, the Ninth Circuit's approach was the minority approach among the Courts of Appeals. However, this is a version of the view that the Supreme Court ultimately adopted in *Elonis*.[53] As will be discussed below, though, unlike the 9th Circuit, the *Elonis* Court read an intent requirement into § 875(c) as a matter of statutory interpretation, not on constitutional grounds.[54] Notably, what *Elonis* and *Bagdasarian* both fail to specify is which intent requirements separate protected speech from unprotected speech and which do not.

C. Elonis *and* Boettger

The Supreme Court finally had the opportunity to state what the intent requirement, if any, of § 875(c) is in *Elonis v. United States*.[55] In this case, after his wife of seven years left him, a defendant began posting what he referred to as rap lyrics on Facebook. He consistently included a disclaimer in these posts stating that (although the lyrics clearly referred to his own life) the lyrics depicted fictitious people and scenarios.[56] The lyrics were concerning nonetheless: "I've got enough explosives/To take care of the State Police and the Sheriff's Department[,]" "Enough elementary schools in a ten mile radius/To initiate the most heinous school shooting ever imagined[,]" and finally "Fold up your [protection-from-abuse order] and put it in your pocket/Is it thick enough to stop a bullet?"[57] At trial the Government maintained, and the District Court agreed, that it did not matter what the defendant thought about the threatening nature of these posts at the time he wrote them. Rather, the focus was on whether he intentionally wrote and posted these lyrics, and whether a reasonable person would interpret them as true threats.[58] The defendant was convicted under this standard, and on appeal the Third Circuit affirmed using reasoning similar to that of the Sixth Circuit in *Jeffries*.[59] The Supreme Court reversed, instead

52. *Id.*
53. *See* Elonis v. United States, 575 U.S. 723, 738 (2015).
54. *See id.*
55. *Id.*
56. *Id.* at 727.
57. *Id.* at 729.
58. *Id.* at 732.
59. United States v. Elonis, 730 F.3d 321 (3d Cir. 2013).

arriving at the same conclusion the Ninth Circuit did in *Bagdasarian*—but using vastly different reasoning. Instead of deciding the case on constitutional grounds, the Court inserted a subjective intent requirement as a matter of statutory interpretation.

According to the eight Justice majority, there is indeed a subjective intent requirement within § 875(c); the defendant's state of mind while making the communication regarding how it will be interpreted *does* matter. However, this conclusion rested not on the Constitution, but on longstanding principles of criminal law and statutory interpretation: as the Court explained, "The fact that the statute does not specify any required mental state, however, does not mean that none exists."[60] Substantial precedent on this subject guides the Court to interpret "criminal statutes to include broadly applicable scienter requirements, even where the statute . . . does not contain them."[61] This practice is based on one of the most basic principles of criminal law: "wrongdoing [generally] must be conscious to be criminal."[62] Turning to § 875(c), the Court saw this statute as no different from the ones it had considered in cases like *X-Citement Video* and *Morissette*.[63] The Court then went on to say that the element that separates protected speech (legal innocence) from unprotected threats (wrongful conduct) is knowledge of the "threatening nature of the communication."[64] The Court continued: "[t]he mental state requirement must therefore apply to the fact the communication contains a threat."[65] It follows that a defendant need not be aware that making the communication is criminal, but must be aware of the fact that the communication is threatening in nature.

Since the defendant's conviction was premised on a negligence standard, it did not meet the heightened *mens rea* the Court described. Elonis was found guilty because the jury was told in sum that he could be convicted if he should have known that his statements were threatening, even if he did not in fact know it. Accordingly, the Supreme Court reversed the conviction.[66] The Court also noted that clearly, "the mental state requirement in § 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will

60. *Elonis*, 575 U.S. at 734.
61. *Id.* at 734 (quoting X-Citement Video, 513 U.S. 64, 70 (1994)).
62. *Id.* at 734 (quoting Morissette v. United States, 342 U.S. 246, 252, (1952)).
63. *Id.* at 734.
64. *Id.* at 737.
65. *Elonis*, 575 U.S. at 737.
66. *Id.* at 741.

be viewed as a threat."[67] However, the Court stopped short of addressing whether a finding of recklessness would meet the standard it had just laid out. The Court was comfortable doing so because this question only came up momentarily at oral argument, and neither side had briefed or argued it.[68] Further, the only disagreement among the Courts of Appeals was about the *existence* of a mental state requirement in the statute, not whether recklessness is sufficient.[69] Regardless, the Court did seem to acknowledge that it would perhaps one day face this question.[70]

In 2020, the Court was faced with a somewhat similar question. In *Kansas v. Boettger*, the Court had the opportunity to decide whether the First Amendment prohibits States from criminalizing threats of violence made in reckless disregard of causing fear.[71] However, despite the fact that a number of State Supreme Courts are split on the issue,[72] the Court denied certiorari. As he also did in *Elonis*, Justice Thomas wrote a short opinion expressing his displeasure with the Court's refusal to settle the issue of recklessness as the *mens rea*.[73] He also went further and briefly explained why he felt that the First Amendment does allow States to criminalize threats of violence made in reckless disregard of causing fear.[74] Setting that argument aside, Justice Thomas certainly has a point: State Supreme Courts are split on this issue, and at some point, the Court will have to resolve it. While each State is undoubtedly empowered to criminalize conduct in a variety of ways, the possibility that some States are violating the Constitution in doing so is concerning.

After *Elonis* and *Boettger*, three important questions remain. First, can a recklessness *mens rea* requirement be read into federal threat statutes like § 875(c)? Second, would the Constitution permit that—or similarly—permit the state and federal governments to expressly criminalize threats made in reckless disregard of causing fear? And finally, regardless of the answer to those questions, *should* this all be done? The remainder of this paper will focus on answering all of those questions in the affirmative.

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67. *Id.* at 725.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Boettger*, 140 S. Ct. at 1956 .
72. *Compare* Major v. State, 800 S.E.2d 348, 348 (Ga. 2017) (upholding Georgia's criminalization of threats made in reckless disregard of causing fear), *with* State v. Boettger, 310 Kan. 800, 800-01, 450 P.3d 805, 806 (2019) (striking down Kansas's statute criminalizing threats made in reckless disregard of causing fear).
73. *Boettger*, 140 S. Ct. at 1956 (Thomas, J., dissenting).
74. *Id.* at 1957 (Thomas, J., dissenting).

PART II

A. Why a Recklessness Standard Comports with Elonis

Before discussing whether a recklessness standard for threats should be implemented, it's necessary to determine whether one could be implemented at all. For all the benefits that a recklessness standard could provide, they will mean nothing if the standard contravenes such recent precedent as *Elonis*. However, upon further analysis, it is clear that *Elonis* would permit such a standard.

The *Elonis* court's decision rested on the principle that generally "wrongdoing must be conscious to be criminal."[75] In reversing the defendant's conviction, what was crucial to the Supreme Court was that the District Court had applied what could only be characterized as a negligence standard.[76] As discussed above in Part I-C,[77] the trial court had effectively told the jury that the defendant's state of mind did not matter. The conviction was premised on the idea that even if Elonis was completely unaware of the threatening nature of his statements, he was guilty if a reasonable person would have been aware, establishing a clear negligence standard. Paramount to the Court's decision was that negligence was not "'only that *mens rea* which is necessary to separate' wrongful from innocent conduct."[78] A negligence standard for threats would mean that defendants are unaware of the threatening nature of the communication (the fact making their conduct criminal), which would clearly go against the Court's precedent.

Recklessness, on the other hand, is the perfect benchmark *mens rea* that separates wrongful from innocent conduct. According to the Model Penal Code, a person is reckless when one

> consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[79]

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75. *Elonis*, 575 U.S. at 735 (quoting Morissette v. United States, 342 U.S. 246, 252 (1952)).

76. *Id.* at 738.

77. *See* discussion *supra* Part I-C.

78. *Elonis*, 575 U.S. at 736 (citing Carter v. United States, 530 U.S. 255, 269 (2000)).

79. MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 2007).

Unlike negligence, one's mind is not innocent at the time of the act when one is reckless. Acting recklessly is to be aware of a substantial and unjustifiable risk, and to disregard that risk such that this decision is a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."[80] A recklessness standard, then, would not sweep up innocent conduct as the *Elonis* Court was concerned with because the wrongdoing in question would not be unconscious. By definition, a showing of recklessness requires a demonstration of a *conscious* disregard. Were a defendant shown to be reckless, it follows that the defendant was aware of a "substantial and unjustifiable risk" of the threatening nature of the communication, which is the material fact making the alleged conduct criminal.[81]

It could be argued that still, recklessness does not precisely mean awareness of the material fact making conduct criminal; it only means awareness of a risk of its existence. However, the key feature of recklessness that makes it compatible with *Elonis* is this: when one is reckless, one knows that the material fact *may*—and likely does—exist. Therefore, the material fact making the actor's conduct criminal (here, the threatening nature of a communication) is not entirely unknown to the actor. The person making the alleged threat must know, at minimum, that there exists a high probability that their communication is threatening and consciously disregards that probability, such that the average law-abiding person would not do the same in that situation. This is vastly different from a negligence standard in this context, which would criminalize those who should have known that the communication was or might have been threatening, but in fact had no idea. It should also be noted that not only did the *Elonis* court state that purpose and knowledge were sufficient, but also the Model Penal Code itself states that purpose, knowledge, *and* recklessness all suffice to establish culpability in the absence of an express *mens rea* requirement.[82]

Even more support for the conclusion that the *Elonis* decision would permit a recklessness standard to be read into federal threat statutes comes from Justice Alito's opinion. Justice Alito's analysis "follows the same track as the Court's, as far as it goes."[83] He agreed that the presumption is that criminal statutes require some sort of

80. *Id.*

81. *Id.*

82. MODEL PENAL CODE § 2.02(3) (AM. LAW INST. 2007).

83. *Elonis*, 595 U.S. at 744 (Alito, J., concurring in part and dissenting in part).

mens rea, especially a statute such as this.[84] Further, he felt that "[t]here can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct."[85] Therefore, he thought that recklessness cleared the bar that the majority set in its opinion. Neither the majority nor Justice Alito's opinion, however, provide controlling precedent on the question of whether the Constitution would permit recklessness to be the *mens rea* requirement.

B. Why a Recklessness Standard is Constitutional

As discussed above, the Constitution undoubtedly permits the prohibition of true threats.[86] Their "very utterance inflict[s] injury,"[87] and they are prohibited out of a concern for "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur[.]"[88] However, as the Court famously declared in *Watts*, "[w]hat is a threat must be distinguished from what is constitutionally protected speech."[89] The question then becomes whether a recklessness standard would be able to distinguish the two. As mentioned above and will be discussed below, State Supreme Courts have answered this question differently.[90] The best case to help answer this question is *Virginia v. Black*.

In *Black*, what the Supreme Court saw as unconstitutional was the way in which the statute there bypassed the process of distinguishing threats from constitutionally protected speech.[91] By deeming all cross-burnings to be *prima facie* evidence of an intent to intimidate without an inquiry into *mens rea*, the statute assumed that the act itself demonstrated an intent that otherwise innocent actors may not have,[92] making the statute overbroad. The majority made it clear in this case that threat statutes must be carefully tailored to criminalize only that speech which originates in a blameworthy mind, otherwise they are overbroad and therefore violate the First Amendment. It is clear, then, that a recklessness standard for threat statutes falls squarely within the parameters of the relevant precedent. A negligence standard certainly would not: innocent cross

84. *Id.*
85. *Id.* at 745.
86. *Watts*, 394 U.S.at 708.
87. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
88. R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).
89. *Watts*, 394 U.S. at 707.
90. *Supra* note 14.
91. *See Black*, 538 U.S. at 365–67.
92. This author would like to note that cross burning was a particularly poor context in which to discuss "otherwise innocent actors."

burners (whoever they are) could conceivably be said to have negligently intimidated victims. A recklessness standard, though, would punish only those who consciously disregarded a substantial and unjustifiable risk that their speech would be threatening such that this decision deviates from what a law-abiding person would do.[93] It would criminalize only that speech which originates in a blameworthy mind, and would not cast too wide a net as the statute in *Black* did. The Supreme Court, however, is not the only Court to have considered the constitutionality of threat statutes.

In *Major v. State*,[94] the Georgia Supreme Court upheld as constitutional the State's threat statute which criminalized the making of threats "in reckless disregard of the risk of causing [such] terror . . . or inconvenience[.]"[95] The defendant there had posted on Facebook that he was going to "get the [gun] out and make Columbine look childish."[96] On appeal the defendant's argument was that the statute's intent requirement was overly broad because it compelled juries to look at the mind of the listener and not the speaker in determining whether there was a substantial and unjustifiable risk.[97] In the defendant's view this was overly broad because this process would not protect innocent speakers as required.[98] The Court squarely rejected this argument, maintaining that a recklessness *mens rea* does focus on the speaker of the threat.[99] What the statute criminalizes is not the fact that there was a substantial and unjustifiable risk that the listener would interpret the statement as a threat (an inquiry directed at the listener), rather, what it criminalizes is the conscious disregard, by the defendant, of the risk of the statement being threatening.[100] It does not punish those who are oblivious, it only punishes those who "necessarily grasp[ ] that [they] are not engaged in innocent conduct."[101] The Georgia Supreme Court,

however, arrived at a conclusion very different from the one that the Kansas Supreme Court did in *Boettger*.[102]

93. MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 2007).
94. Major v. State, 800 S.E.2d 348 (Ga. 2017).
95. GA. CODE ANN. § 16-11-37 (2020).
96. *Major*, 800 S.E.2d at 349.
97. *Id.* at 351
98. *Id.*
99. *Id.*
100. *See id.* at 351 - 52.
101. *Id.* at 352 (quoting Elonis v. United States, 135 S. Ct. at 2015 (Alito, J., concurring in part and dissenting in part)).
102. *Compare* Major v. State, 800 S.E.2d 348, 348 (2017) (upholding Georgia's criminalization of threats made in reckless disregard of causing fear), *with* State v.

Like Georgia, Kansas also had a threat statute criminalizing threats made in reckless disregard of causing fear. Unlike the Georgia Supreme Court, though, the Kansas Supreme Court held this statute to be unconstitutional.[103] In doing so, the Court relied heavily on *Black*'s statement that "True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[104] To the Court, relying on Webster's Dictionary, the use of the word "mean" creates an implicit constitutional requirement that the speaker's express purpose was that the communication would be interpreted as a threat.[105] Of course, recklessness is not purpose, and so the Court declared the statute to be unconstitutional.

While the Kansas Supreme Court did note the ambiguity of that sentence,[106] it misinterpreted it. Notably absent from any of the opinions in *Black* is any clarification of that sentence resembling the conclusion of the Kansas Supreme Court.[107] Moreover, *Black* was not a case decided upon whether a particular mental state requirement was violative of the First Amendment. The decision there turned on the fact that there was mental state requirement contained in the Virginia statute; the *prima facie* evidence provision removed that consideration from prosecutions under the statute.[108] That is what made the statute overbroad, not any particular *mens rea* contained within the statute. The support that the Kansas Supreme Court draws from *Black* is, at best, indirect.

What's more, the Kansas Supreme Court simply misreads that crucial sentence in *Black*. The *Black* Court stated that true threats are statements where "the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[109] The word "means" here refers to the requirement that the communication be made voluntarily, not that the speaker's express purpose is for the statement to be interpreted as a threat. All this sentence does in the *Black* opinion is reaffirm the two aspects of the *actus reus* element of

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Boettger, 310 Kan. 800, 800-01, 450 P.3d 805, 806 (2019) (striking down Kansas's statute criminalizing threats made in reckless disregard of causing fear).

103. *Boettger*, 450 P.3d at 806.

104. *Black*, 538 U.S. at 359 (citing *Watts*, 394 U.S. at 708; *R.A.V.*, 505 U.S. at 388) (internal quotation marks omitted).

105. *See Boettger*, 450 P.3d at 814.

106. *Id.*

107. *See Black,* 538 U.S. 343 (2003).

108. *See id.* at 345.

109. *Id.* at 359 (emphasis added).

the crime: first, that the speaker voluntarily make the statement ("means to communicate") and second that the communication be a "serious expression of an intent to commit an act of unlawful violence."[110] Whether a communication is a "serious expression of an intent to commit an unlawful act" is determined by the objective tests that courts have developed. This sentence describes that which the Constitution allows to be prohibited, not the state of mind that must be coupled with it. That is not to say that the *Black* opinion did not discuss states of mind. It did, and the problem that it had with the Virginia statute was that it imputed a state of mind to cross-burners that they did not necessarily have. It is just that this particular sentence speaks only to the objective element in threat prosecutions, while the rest of the decision focuses on the requirement that there be some subjective *mens rea* element paired with it.

Additionally, if the *Black* Court intended to say that a defendant must purposely or knowingly express a serious intent as the Kansas Supreme Court claims, that would seem to contradict the Court's following statement that a defendant "need not actually intend to carry out the threat."[111] If statements are not true threats unless the defendant expressly intends for them to be taken seriously, then the defendant would have to agree that what they are saying is "a serious expression of an intent to commit an act of unlawful violence."[112] Whether the defendant deems their threat to be serious would hinge on whether the defendant actually intended to carry out the threat. This is because to any speaker, whether an alleged threat is "a serious expression of an intent to commit an unlawful act"[113] depends on whether they intended to carry out the threat. When asked if the alleged threat was a serious statement, a hypothetical defendant will either respond "No, I would never do that" or "Yes, I would (or was going to) do that." This would directly contradict the *Black* Court's statement that the "speaker need not actually intend to carry out the threat."[114] What's more, this interpretation of *Black* undermines the very goals of prohibitions of threats as iterated in *R.A.V.*[115] Under the Kansas Supreme Court's

110. *See id.*

111. *Id.* at 360.

112. *Id.* at 359.

113. *Black,* 538 U.S. at 359.

114. *Id.* at 360.

115. *R.A.V.*, 505 U.S. at 388 ("protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur[.]").

reasoning, those who receive threats are left unprotected, and makers of threats are given far too much latitude.

It is clear that under both *Elonis* and *Black*, a recklessness standard can be read or written into threat statutes. While a lower *mens rea* such as negligence would not suffice, recklessness meets both the statutory interpretation and constitutional standards that the Supreme Court has laid out thus far. Even still, this does not answer the question of whether such a standard should be implemented.

C. Why (and how) a Recklessness Standard Should Be Used

While it does appear that recklessness could be the *mens rea* requirement for threat statutes, the question remains: is this a good idea? Why *should* recklessness be the minimum intent requirement for threat statutes, and how would it work in practice? In short, it is because it most effectively balances protection of speakers and hearers of allegedly threatening statements.

Model Penal Code § 2.02(2) lays out hierarchically four different types of culpability with respect to material elements of crimes: purposely, knowingly, recklessly, and negligently.[116] As applied to threat statutes, these different kinds of culpability would apply to the defendant's knowledge of the threatening nature of the communication. Purposely, obviously, would mean that it was the defendant's "conscious object" to make a statement that would be is a threat.[117] Knowingly would mean that a defendant is "practically certain" that the statement will be a threat.[118] Recklessly would mean that the defendant "consciously disregards a substantial and unjustifiable risk" that the statement will be a threat, such that this disregard "involves a gross deviation from the standard of conduct" of a law-abiding person.[119]And finally, negligently would simply mean that the defendant "should be aware of a substantial and unjustifiable risk" that the statement will is a threat, such that this lack of awareness amounts to a "gross deviation from the standard of care" a reasonable person would observe.[120] While each definition slightly varies, there is clearly a common thread among the first three: the defendant is aware, to some degree, of the material element of the crime.

Purposely, knowingly, and recklessly all require that the defendant was aware of the material element in question. For each of

116. MODEL PENAL CODE § 2.02(2) (AM. LAW INST. 2007).
117. *Id.* § 2.02(2)(a)(i).
118. *Id.* § 2.02(2)(b)(ii).
119. *Id.* § 2.02(2)(c).
120. *Id.* § 2.02(2)(d).

these types of culpability, in the context of threats, the speaker is aware of the certainty or substantial likelihood that the statement will be a threat. Negligence on the other hand is defined by a lack of awareness, a lack of awareness that can hardly be said to be appropriate for condemnation when it comes to threats. Recklessness, however, necessarily involves an awareness that the speech will likely be interpreted as threatening. While the question of whether negligence is morally culpable is up for debate as Justice Alito noted in *Elonis*, certainly recklessness is.[121] A defendant who is aware that there is a substantial and unjustifiable risk that a statement will cause fear and makes it anyway can hardly be said to be free of blame. It is also important to note that substantial and unjustifiable is a high bar. Even if there is an extremely substantial risk, if it is justifiable, then the defendant is not reckless.[122] Conversely, if there is an extremely low risk that is unjustifiable nonetheless, the defendant is not reckless.[123] Moreover, there is still the requirement that the defendant's conscious disregard of this risk must be a gross deviation from what a law-abiding person would do. One can imagine a scenario[124] in which a defendant says something and although there is a substantial and unjustifiable risk that it is threatening, a jury nonetheless concludes that the conscious disregard thereof is on par with what a law-abiding person would do in the defendant's situation. This offers ample protection for the speaker.

Additionally, this is not the first time recklessness has been argued for as the *mens rea* in criminal threat prosecutions. In the wake of *Elonis*, many wrote in support for such a standard.[125] These commentators' arguments, though, are a product of their time: because *Elonis* was decided on statutory instead of constitutional grounds,

121. Elonis v. United States, 575 U.S. 723, 745 (Alito, J., concurring in part and dissenting in part).

122. For example, a doctor is not reckless in attempting a very risky surgery if it is a patient's only chance at survival.

123. *See* People v. Hall, 999 P.2d 207, 215-16 (Colo. 2000) ("[A] trier of fact must weigh the likelihood and potential magnitude of harm presented by the conduct . . . .").

124. For example, someone who finds out their child was just killed by a drunk driver may say "I'm gonna kill them" but given the severe emotional distress that person is in, any possible juror would likely see themselves making similar statements about the drunk driver.

125. *See generally* Cameron Fields, *Unraveling a Ball of Confusion: Layers of Criminal Intent, Facebook, Rap, and Uncertainty in* Elonis v. United States, *135 S. Ct. 2001 (2015)*, 36 MISS. C. L. REV. 133 (2017); Stephanie Charlin, *Clicking the "Like" Button for Recklessness: How* Elonis v. United States *Changed True Threats Analysis*, 49 LOY. L.A. L. REV. 705 (2016); Marley Brison, Elonis v. United States*: The Need for a Recklessness Standard in True Threats Jurisprudence*, 78 U. PITT. L. REV. 493 (2017).

these arguments follow Justice Alito's opinion in *Elonis*, which is statutory in nature.[126] None of this reasoning, though, fully takes into account the question of whether using recklessness as the *mens rea* is constitutional. Nor did that seem to be a question worth addressing until State Supreme Courts began answering it in significantly different ways.[127] This paper serves to answer the question that the Supreme Court did not when it denied certiorari in *Boettger*.

It is also important to keep in mind that recklessness is already a widely used standard in criminal prosecutions. Take for example Penal Law § 120.25,[128] the statute for reckless endangerment in New York. Under this statute, one is guilty of reckless endangerment in the first degree when "under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person."[129] The commission staff notes give the example of someone who fires a gun into a crowd without any specific intent to kill or injure but does so with a "depraved kind of mischievousness."[130] Regardless of whether or not someone is injured, that person is guilty of reckless endangerment in the first degree.[131] Just as criminal threat statutes proscribe threats regardless of their realistic probability, this statute criminalizes the mere creation of a grave risk of death. In this way the statute can be seen as a preventative measure—meant to criminalize and deter even that conduct which fails to culminate in injury. A recklessness standard for criminal threat prosecutions would likewise deter communications, regardless of the form they are in, that cause fear in the reasonable person.

While this paper is concerned only with the use of recklessness as a standard for threats in criminal prosecutions,[132] it is worth

126. Fields, *supra* note 125; Charlin, *supra* note 125; Brison, *supra* note 125; Elonis v. United States, 135 S. Ct. 2001, 2014 (2015) (Alito, J., concurring in part and dissenting in part).

127. *Compare* Major v. State, 800 S.E.2d 348, 348 (2017) (upholding Georgia's criminalization of threats made in reckless disregard of causing fear), *with* State v. Boettger, 310 Kan. 800, 800-01, 450 P.3d 805, 806 (2019) (striking down Kansas's statute criminalizing threats made in reckless disregard of causing fear).

128. N.Y. PENAL LAW § 120.25 (2020).

129. *Id.*

130. *Id.*

131. *Id.*

132. This paper does not address the question of whether a civil cause of action based on recklessness would provide adequate relief. Theoretically it would, but in practice a lawsuit would presumably only serve to incense the person who made the threat. For that reason, the victim may be hesitant to sue altogether, and even if not, the situation could further escalate as a result of the lawsuit. While a

mentioning that recklessness is already used in another First Amendment context: libel. In *New York Times Co. v. Sullivan*, the Supreme Court expressed that the Constitution mandates that public officials cannot recover damages for defamation unless the statement was made with actual malice.[133] Actual malice, the Court explained, means that the statement was made with the knowledge that it was false or with a reckless disregard as to whether or not it was false.[134] In the libel context, recklessness works well as a standard, and provides ample protection to defendants. In these situations, the speaker is aware that there is a significant risk that what he or she is saying is not true, but disregards that risk in a way that the law deems to be unacceptable. It is difficult to characterize the speaker who does that as innocent, just as it is difficult to characterize the speaker who recklessly makes a threat as innocent. Regardless, this is a high bar for libel plaintiffs to meet. While mental state requirements are generally lower in the civil as compared to criminal contexts, certainly the fact that recklessness is already used as a standard in another First Amendment area cuts in favor of that standard being used in criminal threat prosecutions.

Another reason that recklessness is an ideal standard for threats is because it is simply easier to prove than purpose or knowledge. In many of the cases discussed above, the thrust of the defendants' arguments was that they did not at the time of speaking intend their statements to be threats. That is, they did not act with purpose or knowledge. Rebutting that assertion, in terms of evidence, is difficult. What would be easier, however, would be to prove that the defendant was aware of a "substantial and unjustifiable" risk that the statement would be threatening and said it nonetheless. A good place to start would be to use the familiar concept that actions (in this case, words and their connotations) often reveal one's thoughts.[135] Depending on what exactly was said, perhaps one can infer what the defendant was aware of at the time of making the statement. This principle is a double-edged sword in that it also protects the defendant: the more benign the statement, the worse the inference that the defendant was aware of a substantial and unjustifiable risk. In addition, the more benign the state-

criminal recklessness standard seems more practical, this question requires far more than a footnote to be properly assessed.

133. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

134. *Id.*

135. *See* People v. Conley, 187 Ill. App. 3d 234 (1989) (inferring intent to cause permanent disability from surrounding circumstances and the defendant's actions).

ment, the lower the likelihood that the factfinder will deem the communication to be a true threat under one of the objective tests, which serve as additional protections for defendants.

One could argue that recklessness is too easy to prove, or is too low of a standard, and that therefore it will sweep up innocent speech. But this argument overlooks a crucial element of any threat prosecution: the statement must be a true threat. This objective element is what helps retain protection for the speaker when recklessness is the *mens rea* requirement. No matter the defendant's state of mind, if the statement is not a true threat, then there has been no threat made. Take for example lyrics from a 2016 rap song that read "Pusha T, Meek Millz, A$AP Rocky, Drake/Big Sean, Jay Electron', Tyler, Mac Miller/I got love for you all, but I'm tryna [sic] murder you[.]"[136] Assume for now that the singer of these lyrics, Kendrick Lamar, was reckless as to how fellow rapper Drake would interpret them. He would still be innocent under any threat statute because these lyrics are not a true threat under any objective test. The word murder is a metaphor for the success that the rapper wishes to attain relative to his peers, and any jury would be able to see that given the surrounding lyrics. The context of these lyrics makes clear that this is mere hyperbole, similar to the defendant's statement in *Watts*. This objective threat element applies in all threat prosecutions and, like recklessness, it is also a high bar. Each Court of Appeals has its own objective test,[137] all of which require the jury to consider the context and circumstances of a given statement. The Constitutional requirement that a statement be a true threat before it is proscribed by law is what would ensure that a recklessness standard does not impinge upon the speaker's First Amendment rights.

D. Why a Recklessness Standard Is Needed

Still, though: is such a standard truly necessary? Is online speech really an appropriate target for criminal statutes? To answer that question, one only needs to recall some of the many tragedies that have occurred in our country in recent years. The "Unite the Right" rally in Charlottesville, the Pittsburgh synagogue shooting, the Charleston church shooting, and most recently the attack on the Capitol Building, all had their roots on one internet platform or another.[138] Further, look again at *Elonis* and *Jeffries*.[139] Both cases

136. BIG SEAN, CONTROL (Def Jam Recordings 2013).

137. *See* United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973); *see supra* notes 33, 34, 35.

138. *See* Heilweil and Ghaffary, *supra* note 1.

involve abusive ex-husbands using Facebook to terrorize their former spouses and anyone who gets in the way.[140] These two cases are only the tip of the iceberg: online harassment is disproportionately aimed at women, and a recklessness *mens rea* for threats has previously been advocated for as a way to address this.[141] Social media platforms can issue statements,[142] ban accounts,[143] and even air commercials calling for internet regulation[144]—but none of this changes the fact that at their core, they are businesses. Their primary interest is profit. We cannot—and should not—count on them to ensure that people aren't using the internet to terrorize others.

The access, speed, and anonymity that the Internet gives to bad actors necessitate an appropriate counterweight. A recklessness standard for criminal threat prosecutions is the perfect preventative measure against those who reveal their potential future crimes via the Internet. Inaction in this area has very real consequences. A recklessness standard for threat prosecutions will by no means be a panacea for violence—but it is a good place to start. At the very minimum, it will deter the most flagrant bad actors from using the internet as a means to their violent ends.

CONCLUSION

Recklessness can and should be the *mens rea* requirement for threat statutes. Such a standard would comport with *Elonis* because it is "only that mens rea necessary"[145] to separate wrongful from innocent conduct. Further, it is constitutional under *Watts* because it distinguishes between protected and unprotected speech, and it is not overbroad and therefore constitutional under *Black* because it distinguishes between those who are aware of their wrongdoing and those who are not. As communicating with each other becomes easier, we need additional safeguards that make abusing that ability

139. Elonis v United States, 575 U.S. 723, 723; Jeffries, 692 F.3d 473.

140. *Id*.

141. *See* Jessica Formichella, *A Reckless Guessing Game: Online Threats Against Women In The Aftermath of* Elonis v. United States, 41 SETON HALL LEGIS. J. 117, 145 (2016).

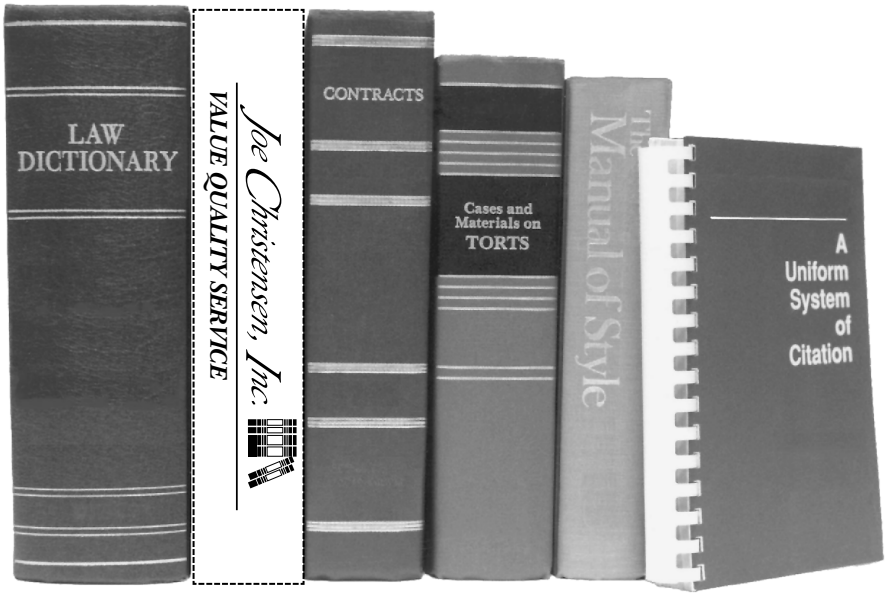
142. *See Permanent Suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021) https://blog.twitter.com/en_us/topics/company/2020/suspension.html [https://perma.cc/MN7J-Q9CJ].

143. Chang and Dean, *supra* note 3.

144. *See Internet Regulations: A (Too) Short History*, Facebook (Mar. 3, 2021), https://www.facebook.com/facebook/videos/154534176489084/ [https://perma.cc/W8KG-LSCE].

145. *Elonis*, 575 U.S. at 735.

more difficult. A recklessness standard for criminal threat prosecutions would do just that.



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