Undergraduate Law Review At Auburn University

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OUR MISSION

The Undergraduate Law Review at Auburn University strives to foster intellectual curiosity, critical thinking, and scholarly discourse among Auburn students interested in the field of law. We aim to provide a platform for aspiring law students to engage in legal research and writing while contributing to meaningful scholarship.

We are committed to promoting diversity, equity, and inclusion within our publication, ensuring that a wide range of perspectives and voices are represented. Through our editorial process, we aim to uphold the highest standards of academic integrity and excellence, while also providing valuable opportunities for students to gain practical experience in legal research, writing, and editing.

Furthermore, we seek to serve as a bridge between undergraduate students and the broader legal community, fostering connections and collaborations that enrich both academic and professional development.

In pursuit of these goals, the Undergraduate Law Review at Auburn University is dedicated to publishing high-quality, thought-provoking pieces that advance understanding of the law and its impact on society.

Letter from the Editor

Dear Reader,

I am honored to present you with the third issue of the Undergraduate Law Review at Auburn University. As the Editor-in-Chief, I would like to extend my sincerest thank you for your support as we continue to expand academic opportunities for the undergraduate pre-law community.

Our Law Review focuses on compelling legal issues as well as topics which our pre-law students regularly face in classroom discussions. Students are encouraged to to focus on major issues facing the law and the legal profession of their interest in addition to encouraging a scholarly debate on topics pertaining to current or historical issues. This semester, our review also had the wonderful opportunity to work with Dr. Liberman of Auburn University to kickstart his idea for a legal research fellowship through collaborating with writers from his POLI 2300 course.

I cannot thank enough my managing editor, Grace Crim, and all of our executive and associate editors for diligently working this semester. I would also like to express my appreciation to the faculty and staff who have continued to support our growth, especially to Dr. Liberman who has supported us every step of the way this semester and encouraged us to keep growing. Further, our review would not continue to flourish without the help of our faculty advisor Dr. Steven Brown. Lastly, to our authors, this publication would not be possible without your contributions.

We hope that this publication will spark scholarly discussions and expand the outreach of the knowledge of our community. We aspire to continue to expand our authors and subject matter with each publication. I believe that a continual collaboration between legal writing courses and the review will lead it to become a prospering environment for legal research. It has been an honor serving as the 2024-2025 Editor-in-Chief and I hope to continue to see our platform grow for many years to come.

Sincerely,

Izzy Johnson
Editor-in-Chief
Undergraduate Law Review at Auburn University


LAW REVIEW

Circuit Split Survey: The Constitutionality of the "Felon-in-Possession" Ban

Authored by
Alexia Riley

Since the founding of this country, important personal freedoms and rights of the people have been protected by the Bill of Rights. One of these rights is found in the Second Amendment, which states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[1] Since its ratification in 1791, this right has been one enjoyed by all citizens. In recent years, however, with the increase of gun violence in America, gun control has become a contested issue, and a question that plagues many policy makers' minds as they strive to keep the public safe. One issue that has been brought to the Court's attention increasingly in the past few years is the gun possession rights of convicted felons. The United States Code states, "It shall be unlawful for any person…who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year…."[2] Different circuit courts have explored this idea, yet there have been differing opinions on the issue of what is commonly referred to as the "felon-in-possession" ban. The questions brought before the courts have questioned the constitutionality of this ban, questioning if felons are part of "the people" that enjoy this right. Are they considered part of "the people," or are they not because they are technically not a part of "the people" that can vote or exercise certain rights? A survey of this circuit split regarding this question of constitutionality can help scholars predict how similar cases will be decided and understand the changing state of Second Amendment case law.

In order to fully understand the circuit split regarding the constitutionality of the "felon-in-possession" ban, it is imperative to understand the history and precedent regarding firearm regulations as set out in the Gun Control Act of 1968, *District of Columbia v. Heller*, and *New York State Rifle & Pistol Association, Inc. v. Bruen*.[3] The Gun Control Act of 1968 was one of the first legislative acts to establish any prohibition on possession of firearms in terms of felons. The act made it unlawful for nine categories of people, including felons, to ship, transport, possess, or receive firearms or ammunition in connection with interstate or international commerce. It is important to note, however, that 18 U.S.C. §922, which defines "crime punishable by imprisonment for a term exceeding one year," excludes certain felonies related to business practices and includes certain crimes classified as misdemeanors if they are punishable by imprisonment exceeding two years.[4]

Both *Heller* and *Bruen* outlined tests for determining the constitutionality of firearm regulations. *Bruen* was a landmark case on the constitutionality question, so the tests are categorized as either pre-Bruen or post-Bruen. The *Heller* decision is considered the pre-Bruen precedent, which adopted an individual right interpretation. The Court held that the amendment permits "law-abiding, responsible citizens" to possess arms for a "lawful purpose."[5] *Heller* also presented a two-step test to consider the constitutionality of a firearm regulation. The first step

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[1] U.S. Const. amend. II.
[2] 18 U.S.C §922(g)(1).
[3] *District of Columbia v. Heller*, 554 U.S. 570 (2008); *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2010).
[4] Matthew D. Trout, *Third Circuit Holds That Application of Felon- in-Possession ...,* Congressional Research Service (2 Nov. 2023), crsreports.congress.gov/product/pdf/LSB/LSB11072.
[5] *Heller*, 635.

considered whether a Second Amendment right was in any way implicated, usually by reference to history and sometimes to particular categories of presumptively lawful regulations, as outlined in *Heller*. The second step required a conventional tailoring analysis, where the court evaluated the importance of government interest and the burden on duty that would otherwise be protected by the Second Amendment.[6] While *Heller* provided a test for constitutionality, the majority opinion stated that, "[t]he Court's opinion should not be taken to cast doubt on long-standing prohibitions on the possession of firearms by felons and the mentally ill…."[7] This statement in the majority opinion shows that *Heller* did not bring into question the constitutionality of the felon-in-possession ban, but left unanswered questions about the level of scrutiny that should be applied when determining firearm regulation constitutionality.

Years after the Court's decision in *Heller*, the Supreme Court heard a challenge regarding New York's regulation for its permits for concealed carrying of a firearm. According to the regulations, the applicant for a concealed carry permit needed to demonstrate "proper cause," yet the regulation did not provide a specific statutory definition. The Court decided that the Second Amendment's right to bear arms extended outside just the home and held that the "proper cause" law in New York, and similar regulations in other states, violated the Second Amendment. The Court further stated in the decision that, "Second Amendment claims should not be evaluated by using a conventional weighing of government interests against burdens on the exercise of protected gun-related activity."[8] As a result, *Bruen* rejects the second step of the *Heller* test, but introduces a new two-part framework to determine constitutionality. Instead, the first step in the *Bruen* framework considered whether the plain text of the Second Amendment covers the regulation at issue. The new second step requires that the government prove that the regulation is consistent with the country's history and tradition of regulations. This second step, however, has shown the flaws of the new framework. The Court did not indicate the level of generality required to show that something has tradition in the country. For example, "[t]here may be a history of prohibiting 'dangerous people' from possessing weapons but not a tradition of prohibiting 'felons' per se. (Is there, for instance, a history of prohibiting nonviolent felons, such as tax evaders, from accessing guns?)"[9] While both tests have flaws, these are the framework for determining constitutionality. It is with this framework that cases have been decided leading to the circuit split regarding the felon-in-possession ban.

This circuit split was created in 2023. For the purposes of this survey, the first case chronologically regarding the felon-in-possession ban is *United States v. Jackson*.[10] The United States Court of Appeals for the Eighth Circuit found no violation of the Second Amendment when prohibiting the possession of firearms by felons. Then, just a few months later, the Ninth

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[6] Darrell A. H. Miller, et al. *Bruen's New Standards for Evaluating Second Amendment Claims.* State Firearm Laws After Bruen, RAND Corporation (2022), pp. 4–6. *JSTOR*, http://www.jstor.org/stable/resrep44870.4.
[7] *Heller,* 571.
[8] Darrell A. H. Miller, et al. *Bruen's New Standards for Evaluating Second Amendment Claims.* State Firearm Laws After Bruen, RAND Corporation (2022), pp. 3-4. *JSTOR*, http://www.jstor.org/stable/resrep44870.4.
[9] Darrell A. H. Miller, et al. *Bruen's New Standards for Evaluating Second Amendment Claims.* State Firearm Laws After Bruen, RAND Corporation (2022), pp. 4–6. *JSTOR*, http://www.jstor.org/stable/resrep44870.4.
[10] *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023).

Circuit found a similar ban unconstitutional in *United States v. Duarte*, thus creating a circuit split.[11] After the *Duarte* decision, more cases were decided regarding bans on felons possessing firearms. In addition to the Eighth Circuit, the Sixth, Seventh, and Tenth Circuit Courts also ruled similar bans to be constitutional. In comparison, there is only one other case in addition to the *Duarte* decision in which the Third Circuit ruled a prohibition was unconstitutional: *Range v. Attorney General United States of America*.[12] To fully understand this circuit split, it is crucial to understand the basic facts and reasoning behind the decisions of the circuit courts, who held the bans either constitutional or unconditional.

The number of decisions that rule felon-in-possession bans as constitutional far outweigh the number of decisions that rule them unconstitutional. *Jackson* was the first case in the chronological survey of this circuit split. The Eighth Circuit found that there was no violation of the Second Amendment and relied heavily on the statement in the majority opinion of *Heller* that nothing in that decision "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."[13] Additionally, the *Jackson* decision brought forth an important distinction that both sides of the circuit split use to argue for or against constitutionality: does the felon-in-possession ban apply to violent or nonviolent felons? Jackson had been convicted of possessing a firearm and had two prior felony convictions for selling a controlled substance. He argued that this ban was unconstitutional as applied to him because his previous drug charges were nonviolent and "do not show that he is more dangerous than the typical law-abiding citizen."[14]

Similar to *Jackson*, the Tenth Circuit in *Vincent v. Garland* upheld the constitutionality of Second Amendment regulations and relied on the *Heller* standard.[15] The court determined that circuit precedent after *Heller* remained good law even after the *Bruen* decision. The Court held that the precedent affirmed the constitutional validity of the felon-in-possession charge because *Heller*, "appeared to recognize the constitutionality of longstanding prohibitions on possession of firearms by convicted felons."[16] The *Garland* decision also slightly answers the question posed by *Jackson* of whether the felon-in-possession ban should apply to nonviolent felons, violent felons, or both? The court, in *Garland,* upheld the ban explaining that, "...we have no basis to draw constitutional distinctions based on the type of felony involved."[17] The court stated that the ban on felons' possession of firearms does not draw a distinction on whether the convict committed a violent or nonviolent felony; so long as the convict was convicted of a crime punishable by imprisonment for one year or longer, the felon-in-possession ban applies to them.

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[11] *United States v. Duarte*, 101 F.4th 657 (9th Cir. 2023).
[12] *Range v. Attorney General United States of America*, 69 F.4th 96 (3d Cir. 2023).
[13] *Heller*, 621.
[14] *Jackson*, 501.
[15] *Vincent v. Garland*, 80 F.4th 1197 (10th Cir. 2023).
[16] Dave S. Sidhu *Courts Disagree as to Whether the Federal Felon-In ...*, Congressional Research Service (28 May 2024), crsreports.congress.gov/product/pdf/LSB/LSB11170.
[17] *Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023).

The Seventh Circuit also rejected a constitutional challenge to the Second Amendment in *United States v. Gay*.[18] Gay was convicted of possession of a firearm and ammunition as a felon, and he appealed. The panel, much as the court did in *Garland*, pointed to language in *Heller* in determining that their decision did not alter longstanding prohibitions on the possession of firearms by felons, and therefore, Gay's constitutional rights under the Second Amendment were not violated. The Court also cited *Bruen*, which states the people who possess the rights of the Second Amendment are "law-abiding, responsible citizens," and stated, "Gay does not fit that description. He has been convicted of 22 felonies, including aggravated battery of a peace officer and possessing a weapon while in prison."[19] This decision added to the increasing number of cases that ruled that the felon-in-possession ban was constitutional on its face.

The last case to survey for this circuit split, which found a prohibition on possession of firearms by felons to be constitutional, is *United States v. Williams*.[20] Williams pled guilty to unlawful possession of a firearm as a felon, then submitted a motion to dismiss the indictment while raising the argument that the felon-in-possession ban was unconstitutional on its face and as applied to himself. The court held that the felon-in-possession ban was unconstitutional on its face, citing *Heller's* finding that the Second Amendment is not an unlimited right, and stated that its decision did not place doubt on previous, longstanding prohibitions. Similarly to Gay, Williams failed to demonstrate how he was not a dangerous person as a result of his previous charges, including aggravated robbery and attempted murder. As a result, the court upheld the prohibition as it was applied to Williams himself, "and as applied to dangerous people."[21]

The majority of cases that held the ban constitutional have focused on violent felony convictions. In contrast, the two cases holding a prohibition on possession of firearms by felons to be unconstitutional have focused on nonviolent felony convictions and have cited that as a factor in their reasoning. It is important to understand that for the two cases surveyed below, the courts did not hold the felon-in-possession ban itself as unconstitutional. Instead, the courts found the ban unconstitutional as applied to the specific defendants, which is what caused the circuit split.

The first case in which a circuit court found the ban unconstitutional was *Range v. Attorney General United States of America*.[22] In order to understand why the court held the felon-in-possession ban to be unconstitutional, it is imperative to understand the facts of the case. Bryan Range had a prior conviction from Pennsylvania in 1995 when he pled guilty to one count of making a false statement to obtain food stamps. While the state classified this violation as a misdemeanor, it was punishable by up to five years in prison, which made the felon-in-possession ban applicable to Range. Years later, Range wanted to buy a deer-hunting rifle, but found that he could not. Range brought this problem before a court. The lower court originally ruled that Range was not entitled to the protection of the Second Amendment because

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[18] *United States v. Gay*, 98 F.4th 843 (7th Cir. 2024).
[19] *Gay*, 846-47.
[20] *United States v. Williams*, 113 F.4th 637 (6th Cir. 2024).
[21] *Williams*, 663.
[22] *Range.*

he was an "unvirtuous citizen" and was therefore not one of "the people" to whom the amendment applies.[23] The Third Circuit originally upheld the ban, then re-heard the case en banc after *Bruen* and reversed the district court's decision. According to a Congressional Research Service article discussing *Range*, eleven judges found a violation of the Second Amendment, three judges found no violation, and one judge would have dismissed the case for lack of standing. The majority opinion in *Range* disagreed with the government that the Second Amendment only protected law-abiding, responsible citizens. Instead, the majority argued that "the people" to whom the Amendment refers includes all Americans, rather than just a particular subset. The court stated that if the protections of the Amendment only apply to "law-abiding, responsible citizens," then, "...every American who gets a traffic ticket is no longer among 'the people' protected by the Second Amendment."[24] The court applied the *Bruen* standard, and the majority found that the government failed to show how the felon-in-possession ban, as applied to Range, was analogous to historical firearm prohibitions. In fact, the court said the Gun Control Act of 1968 was too recent to satisfy the *Bruen* standard and said that older precursors of the statute only applied to violent criminals, which Range was not.[25] The court did, indeed, consider founding-era restrictions on felons, including the fact that, "...felons were exposed to far more severe consequences than disarmament," sometimes including death.[26] The court, however, determined that there was no history of lifetime disarmament for people like Range. As a result, the court found the ban unconstitutional as applied to Range, but in a concurrence written by Judge Thomas Ambro, he wrote the felon-in-possession ban remains "presumptively lawful" as, "it fits within our Nation's history and tradition of disarming those persons who legislatures believed would, if armed, pose a threat to the orderly functioning of society."[27]

The second, and only other circuit case that has found the felon-in-possession ban unconstitutional is *United States v. Duarte*.[28] Steven Duarte had five prior, nonviolent criminal convictions under California law. Duarte was convicted of being a felon in possession of a firearm after law enforcement officers watched Duarte toss a handgun out of the window of his car; he was sentenced to 51 months in prison. Duarte appealed, however, and the majority decided that the court was no longer bound by pre-*Bruen* precedent because it did not comply with the *Bruen* analytical approach. The majority ruled that Duarte, an American citizen, was not excluded from enjoying the protection of the Second Amendment as a result of his felony charges because all Americans are among "the people" who possess the Second Amendment rights. The majority also stated that applying such a ban on nonviolent offenders is not consistent with the nation's historical tradition. The majority cited the fact that early laws regarding

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[23]Matthew D. Trout, *Third Circuit Holds That Application of Felon- in-Possession ...,* Congressional Research Service (2 Nov. 2023), crsreports.congress.gov/product/pdf/LSB/LSB11072.
[24] *Range,* 102.
[25]Matthew D. Trout, *Third Circuit Holds That Application of Felon- in-Possession ...,* Congressional Research Service (2 Nov. 2023), crsreports.congress.gov/product/pdf/LSB/LSB11072.
[26] *Range,* 105.
[27] *Range*, 110.
[28] *Duarte*.

disarmament were aimed towards disloyal citizens, insurrectionists, and noncitizens.[29] Further, state proposals of that time would only have disarmed people who were threatening violence or presenting a risk of public injury.[30]

As shown above, there are fewer cases that have found the felon-in-possession ban to be unconstitutional than there are that hold the ban to be constitutional. The cases surveyed above that found the ban to be constitutional reiterate the statement in *Heller* that their decision should not cast doubt on longstanding prohibitions. *Range* and *Duarte*, however, look for a deeper meaning and understanding of the prohibition in order to allow as many citizens as possible access to the protection of their rights under the Second Amendment. These two cases focus on the distinction of violent versus nonviolent felons and argue that the felon-in-possession ban should apply only to violent felons who have a history of violence and could continue that legacy if allowed to own a firearm. This circuit split is only anticipated to grow in the coming years as gun control continues to be a contested topic. This circuit split also provides certain implications for the future and may cause changes in the future.

This circuit split shows the dangers of ambiguity in federal statutes for future courts. As more courts provide differing decisions on this ban, firearm prohibitions, and regulations as a whole, future courts will have a harder time issuing a decision because of the ambiguity of the case law. Additionally, this split calls into question more firearm bans other than the felon-in-possession ban. For example, in *United States v. Rahimi*, the constitutionality of the prohibition of possession of firearms for individuals subject to domestic violence restraining orders was also called into question.[31] The changing state of the Second Amendment case law may cause Congress to review existing firearm regulations and prohibitions. This could look like reviewing or possibly amending certain regulations and prohibitions to apply only to violent felons and allowing people like Range and Duarte, nonviolent offenders, to enjoy the protection of the Second Amendment. Even applying a "dangerousness" based test to determine if a previous offender is likely to use a firearm for public harm could allow for less ambiguity among the regulations and prohibitions. Additionally, this split may cause Congress to consider changes to the National Instant Criminal Background Check System (NICS), to possibly allow for nonviolent offenders to purchase hunting firearms that are far less likely to be used to harm others.

There are many people who are in favor of the felon-in-possession ban and believe that it is constitutional and protects the people. Mainly, supporters of the ban point to the fact that the constitutionality of the statute is well settled because more courts have found the ban constitutional on its face and as applied to specific defendants than have found it unconstitutional. Second, supporters point to the ban's centrality in firearm prohibitions and regulations and argue that doing away with the ban completely, or even altering it, would shake the foundation of the nation's regulatory framework of firearms which would lead to the

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[29] *Duarte*, 679-88.
[30] *Duarte*, 677-78.
[31] *United States v. Rahimi*, 117 F.4th 331 (5th Cir. 2024).

disruption of the entire legal system. [32] Additionally, disarming felons reduces the inflow of dangerous weapons to vulnerable communities, stopping the possibility of would-be criminals. Lastly, a convincing argument in defense of the ban is that by disarming felons, the convicted felons are safer themselves. Convicted felons are a high-risk community for gun suicides, and by disarming them, the risk of suicide is significantly lowered.[33] The majority of supporters of the ban do recognize that the case law surrounding it can be flawed, but that felon disarmament on its own, without the lengthy prison sentences, is vital for public safety.

On the other hand, there are many people that disapprove of the felon-in-possession ban and believe that it is time to rethink the ban. The largest argument against the ban is that its scope is too wide. This argument is found in both the *Range* and *Duarte* opinions, where the court found the ban unconstitutional as applied to the men because they were convicted of non-violent felonies. This argument centers around the desire for violent and nonviolent felonies to be disconnected and the ban applied to them differently. Additionally, as the state and federal list of felonies continues to grow, the range of nonviolent conduct, such as marijuana possession or mail fraud, can potentially disqualify average citizens from possessing firearms.[34] Another argument against the ban and against the courts that ruled the ban as constitutional largely cited only the language in the *Heller* dicta regarding not casting doubt on longstanding prohibitions. The main problem cited with this is regarding a lack of standing where an entire ruling was issued based on one statement that was only stated in dicta of the *Heller* decision. One interesting viewpoint regarding this ban looks deeper than the legality and constitutionality of the ban; instead, it looks at the effect of the ban on the felons. Some argue that the ban hurts an ex-felon's reintegration into society. By barring felons from living in residences where firearms are lawfully kept, it burdens an already exacerbated issue of finding housing after incarceration.[35] Most people who argue against the ban, however, truly argue for reform of the statute, not its erasure.

While it is easy to discuss possible changes to the statue, implementing those changes can prove to be much more difficult. However, the statute can be rewritten to mitigate the harms brought about by it. The statute should be rewritten to impose the ban on a specific subset of violent felons, of which the government gave an enumerated list of obviously violent crimes in the 1938 Federal Firearms Act.[36] Additionally, the statute should be amended to, instead of imposing a lifetime ban, impose a shorter, more reasonable ban on possession of a firearm in relation to the crime committed.[37] This could allow a jury to decide how long the ban is to ensure the convict enjoys their rights protected under the Second and the Sixth Amendments. The statue

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[32] Dru Stevenson, *In Defense of Felon-in-Possession Laws,* 43 Cardozo L. Rev. 1574, 1576 (2022).
[33] Dru Stevenson, *In Defense of Felon-in-Possession Laws,* 43 Cardozo L. Rev. 1574, 1639 (2022).
[34] Zach Sherwood, *Time to Reload: The Harms of Federal Felon-in-Possession Ban in a Post*-Heller *World,* 70 Duke L. Rev. 1430, 1451-1452 (2021).
[35] Zach Sherwood, *Time to Reload: The Harms of Federal Felon-in-Possession Ban in a Post*-Heller *World,* 70 Duke L. Rev. 1430, 1458-1459 (2021).
[36] Zach Sherwood, *Time to Reload: The Harms of Federal Felon-in-Possession Ban in a Post*-Heller *World,* 70 Duke L. Rev. 1430, 1466-1467 (2021).
[37] Zach Sherwood, *Time to Reload: The Harms of Federal Felon-in-Possession Ban in a Post*-Heller *World,* 70 Duke L. Rev. 1430, 1467-1468 (2021).

could also be rewritten to limit where the felon-in-possession ban applies, which could allow convicts to possess a hunting rifle, such as Mr. Range desired. [38]

Overall, this split has brought into question other categorical prohibitions on possession of firearms. As mentioned above, *Rahimi* questioned the constitutionality of gun control as it related to individuals under domestic violence restraining orders.[39] As a result of this felon-in-possession circuit split and the new *Rahimi* decision, gun control policy discussions have shifted to other categorical bans. These categorical bans include drug users and those dishonorably discharged from the military. This split leaves the question of if this version of gun control is constitutional and allows for an open forum to discuss other gun control issues in the future.

The circuit split regarding the felon-in-possession ban is an important split to consider, as its implications for firearm regulations and prohibitions can easily impact the question of gun control that our country is facing as a result of the rise of gun violence. The Court, in *Heller* and *Bruen,* provided tests to determine the constitutionality of firearm regulations and prohibitions, but both tests have flaws that have helped lead to the circuit split. The Sixth, Seventh, Eighth, and Tenth Circuit courts have held the felon-in-possession ban constitutional both on its face and, in certain instances, as applied to the defendant. On the other hand, the Third and Ninth Circuit courts have struck down the ban as unconstitutional as applied to the individual as a result of nonviolent felony convictions. Unless either Congress passes legislation to clarify the ban, or the Supreme Court rules on the constitutionality of the felon-in-possession ban, this circuit split will only continue to grow.

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[38] Zach Sherwood, *Time to Reload: The Harms of Federal Felon-in-Possession Ban in a Post*-Heller *World,* 70 Duke L. Rev. 1430, 1467 (2021).

[39] *United States v. Rahimi*, 117 F.4th 331 (5th Cir. 2024).

Compounding Circumvention: How Telehealth Drug Advertisements Exploit Legal Gaps

Authored by
Sydney Ladine

In the past decade, social media and commercial advertising have expanded their influence on public perception. In light of this, companies marketing compounded drugs have begun to exploit the regulatory loopholes governing commercial speech. Compounded drugs are not subject to FDA approval, meaning they lack the same rigorous testing as other medications, and can be marketed without adhering to the same requirements of standard prescription medications. Without legislation mandating risk disclosure, concerning loopholes are created as patients may not fully understand the side effects associated with compounded drugs due to the absence of standardized safety disclosures. This discrepancy creates a double standard in drug advertising, where compounded medications, despite having the same potential health risks, are subject to a lower standard than their FDA-approved counterparts. These gaps allow companies to bypass the FDA's rigorous review process, promoting unapproved treatments without disclosing any inherent risks.[40]

This issue came to a breaking point by gaining national attention in early 2025 when the Hims & Hers telehealth company aired a Super Bowl advertisement viewed by over 120 million Americans, positioning its compounded weight-loss drug as a cheaper alternative to FDA-approved medications (e.g. Ozempic and Wegovy).[41] After airing, the company received backlash from multiple sources, including public health advocates and government officials, asking: How far can commercial speech protection extend when it potentially damages public safety?[42] The topic was considered by the Supreme Court in 2002 in *Thompson v. Western States Medical Center*. There, the Court held in a 5-4 decision that a complete ban on advertising was

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[40] U.S. Food & Drug Admin., *Human Drug Compounding Laws*, FDA (2024) https://www.fda.gov/drugs/human-drug-compounding/human-drug-compounding-laws

[41] Sydney Reed, *Generation Patient*, GENERATION PATIENT (2025), https://generationpatient.org/blog/2025/2/4/uq23i3mvn7am96q8ljeceqkhlycuem

[42] Durbin, Marshall Draw FDA Attention To Misleading Drug Commercial Set To Run During Super Bowl | U.S. Senator Dick Durbin of Illinois, SENATE.GOV (2025), https://www.durbin.senate.gov/newsroom/press-releases/durbin-marshall-draw-fda-attention-to-misleading-drug-commercial-set-to-run-during-super-bowl.

not narrowly tailored, striking down the previously enforced restriction.[43] However, this ruling did not anticipate the rise of telehealth companies that conflate traditional compounding with mass drug distribution. Telehealth companies are not subject to the strict scrutiny that conventional pharmaceutical companies face.

Presently, the public and other interested parties are arguing for stricter oversight to address the areas of missing legislation.[44] Current FDA regulations on compounded drug advertising are outdated and insufficient, allowing telehealth companies to exploit loopholes. This paper aims to examine the manifestation of such an issue and how the system has handled similar circumstances with legal precedent (e.g. restrictions on marijuana) and consider models from other countries. This paper will also argue that the same advertising requirements applied to FDA-approved drugs should extend to compounded medications, rectifying the current policy issues surrounding drug advertising. Increasing oversight and stricter requirements such as mandating risk disclosure are possible solutions that would promote transparency between compounded drug companies and the public. Implementing these potential changes would prevent consumer deception, bridge unsafe legal gaps, and ensure that public health is prioritized. Ultimately, this paper aims to argue how advertising restrictions based on past precedent can be applied to regulating compounded drug marketing to mitigate public health risks, particularly among vulnerable populations like adolescents.

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[43] *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

[44] In fact, U.S. Senate Democratic Whip Dick Durbin (D-IL) and U.S. Senator Roger Marshall, M.D. (R-KS) issued a bipartisan letter to the FDA expressing their concern over the Hims & Hers ad prior to its airing. In this letter, the Senators argued the need for new legislation to close existing gaps and eliminate existing disparities in pharmaceutical advertising requirements between regulated entities. Durbin, Marshall Draw FDA Attention To Misleading Drug Commercial Set To Run During Super Bowl | U.S. Senator Dick Durbin of Illinois, SENATE.GOV (2025), https://www.durbin.senate.gov/newsroom/press-releases/durbin-marshall-draw-fda-attention-to-misleading-drug-commercial-set-to-run-during-super-bowl.

Prior to the earlier referenced Supreme Court case of *Thompson v. Western States Medical Center*, the FDA required compounded drug advertisements to abide by several restrictions formed in 1997 that required providers, "not [to] advertise or promote the compounding of any particular drug, class of drug, or type of drug."[45] The Central Hudson's Test—used to evaluate commercial speech under intermediate scrutiny—was applied during the case to determine whether the First Amendment was violated.[46] Under this standard, to regulate commercial speech the government must "prove that its interest is substantial" and "that the regulation directly advances that interest and is not more extensive than necessary."[47] Following the Thompson case, which held the FDA restrictions were unconstitutional, compounded drugs could be advertised to the public. While this decision was not necessarily incorrect and was in line with constitutional principles, it did not accurately account for all the possible implications that would be produced.

The first significant controversy regarding compounded drugs arose in 2012 at The New England Compounding Center (NECC). The facility failed to produce a sterile product, resulting in approximately fourteen thousand patients receiving contaminated spinal injections carrying fungal meningitis and more than sixty deaths. [48] Moreover, further examination linked the company to two previously recorded cases of bacterial meningitis stemming back to 2002. The facility had continued to operate partially due to confusion stemming from who had authority

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[45] 21 USC 353a: Pharmacy compounding, House.gov (2024), https://uscode.house.gov/view.xhtml?req=(title:21%20section:353a%20edition:prelim)

[46] The Central Hudson's Test requires that: "that: (1) the speech must concern lawful activity and not be misleading, (2) the government's interest in regulating the speech must be substantial, (3) the regulation must directly advance the government's interest, and (4) it must not be more extensive than necessary." Cannabis Regulation Fact Sheet, Cannabis Advertising and the First Amendment, https://www.networkforphl.org/wp-content/uploads/2024/09/Cannabis-Advertising-and-the-First-Amendment.pdf

[47] Central Hudson Test and Current Doctrine, LII / Legal Information Institute (2017), https://www.law.cornell.edu/constitution-conan/amendment-1/central-hudson-test-and-current-doctrine

[48] The New England Compounding Center and the Meningitis Outbreak of 2012: A Failure to Address Risk to the Public Health Committee Staff Report, (2012), https://www.help.senate.gov/imo/media/doc/11_15_12%20HELP%20Staff%20Report%20on%20Meningitis%20Outbreak.pdf.

over compounding pharmacies. This lack of regulation allowed the company to produce and distribute contaminated drugs on a large scale, revealing major flaws in the regulatory oversight of the company's procedures. This was not the only occurrence of compounding errors. A 2014 report published by the Pew Charitable Trusts found "more than 25 reported compounding errors or potential errors linked to 1,049 adverse events between 2001 and 2013."[49] In light of this finding, in 2013 the Drug Quality and Security Act (DQSA) introduced Section 503B to regulate outsourcing facilities specifically with stricter oversight than previous regulations required.[50] While adding Section 503B created heightened regulation on the production of compounded goods such as requiring that outsourcing facilities "must comply with current good manufacturing practice (CGMP)" and "meet certain other conditions, such as reporting adverse events and providing FDA with certain information,"[51] more regulations specifically pertaining to advertising should be promulgated.

The need for greater regulation of compounded drug advertising regulations reached the public eye when the Hims & Hers ad aired during the 2025 Super Bowl. This ad marketed a compounded weight loss drug similar to Ozempic or Wegovy but failed to disclose the risks and safety information that would typically be required in a pharmaceutical advertisement. This captured the public's and stakeholders' attention as it exposed the regulatory loopholes that currently exist in drug advertising. Current regulations only require that compounded drug advertisements state that they are not FDA approved, which in the case of the Hims & Hers ad

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[49] Pew Charitable Trusts. "U.S. Illnesses and Deaths Associated with Compounded or Repackaged Medications, 2001-Present," (2014), http://www.pewtrusts.org/~/media/Assets/2014/09/CompoundingOutbreaks_ChartSept2014_v3.pdf?la=en.

[50] In response to the Supreme Court case, the Federal Food, Drug, and Cosmetic Act (FDCA) worked to create regulations on compounded drug advertising and distinguish between prescription compounding for individuals and larger outsourcing facilities. Established in 1997, Section 503A of the FDCA governs traditional patient-specific compounding. Section 503A has arguably less oversight compared to Section 503B as they are patient-specific.

[51] Center for Drug Evaluation and Research, *Information for Outsourcing Facilities*, FDA (2020), https://www.fda.gov/drugs/human-drug-compounding/information-outsourcing-facilities.

appeared for only three seconds in small, barely legible grey font at the bottom of the screen. This deceptive advertisement is just one of the ways telehealth companies are circumventing transparency with the public. In addition, a 2024 study conducted by the Yale School of Public Health found that out of the 79 pharmacies surveyed, "Nearly half the sites did not report harmful effects, warnings, precautions, or contraindications, and 40.5 percent claimed efficacy for something not in the label of the FDA-approved drugs."[52] Without further oversight, telehealth companies will continue to exploit the current regulatory loopholes and erode transparency with consumers. The government has previously stated that protecting public health and safety is a priority, both of which can be improved with increased oversight.

By failing to include the risks in advertisements, telehealth companies withhold full disclosure, making it difficult for consumers (particularly younger individuals) to understand the risks associated with these drugs. Unlike their FDA-approved counterparts, compounded drugs are not required to provide full disclosure of possible side effects or even list the risks at all. The increasing amount of compounded drug advertisements has caused stakeholders to become increasingly concerned about inappropriate drug prescribing from patients seeking unnecessary drugs they have seen in advertisements. These concerns hold merit, as a recent study on compounded drugs and DTC advertisements included in the AMA Journal of Ethics found, "physicians tend to comply with patients' requests [...] with 75 of 108 (69 percent) of patient requests for interventions that they considered inappropriate." [53] Studies such as this support the argument that drug advertisements—especially those that do not disclose risks in a balanced

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[52] Jessica M Scully, *New Study Finds Online Advertising for Compounded Diabetes and Weight-Loss Drugs May Mislead Consumers*, Yale School of Medicine (2025), https://medicine.yale.edu/news-article/new-study-finds-online-advertising-for-compounded-diabetes-and-weight-loss-drugs-may-mislead-consumers/.

[53] Bo Wang & Aaron S Kesselheim, *The Role of Direct-to-Consumer Pharmaceutical Advertising in Patient Consumerism*, 15 AMA Journal of Ethics 960 (2010), https://journalofethics.ama-assn.org/article/role-direct-consumer-pharmaceutical-advertising-patient-consumerism/2013-11.

manner, or at all—have led to inappropriate prescribing practices and should therefore be further regulated. Precedent can be drawn from the scrutiny introduced by marijuana advertising laws. For example, in some states where marijuana has been legalized, advertisements that may reach adolescents have been prohibited. Courts have historically upheld these laws because they acknowledge that the States have a compelling interest in restricting the advertising of potentially harmful substances that are visible to minors.

The rationale behind this argument is based on the idea that children are more impressionable and less likely to comprehend potential risks fully. Weight loss medications have already started to see increased usage in adolescents, with a 2024 national Michigan Medicine study finding, "a 594% increase in the monthly number of adolescents and young adults using Wegovy, Ozempic, and other glucagon-like peptide-1 receptor agonists." [54] While weight loss drugs such as Ozempic have been FDA-approved for adults, they have not been approved for children. Unless new legislation is enacted, teens will continue to pursue medications without fully understanding the potential risks. Telehealth companies are now exacerbating these risks by enabling minors to easily access compounded weight-loss drugs, circumventing the important safety regulations required of standard prescription medications. This lack of oversight makes transparency in advertising essential, ensuring that consumers—especially young users—are fully informed before pursuing treatment.

Compared to the regulatory environment of other countries with respect to compounded and Direct-To-Consumer (DTC) drug advertising, the United States is lagging. This is partially due to the emphasis placed on the constitutional right to free speech which is deeply rooted in United States history. When the matter of compounded drug advertising reached the Supreme

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[54] Tessa Roy, *Young People Are Increasingly Using Wegovy and Ozempic | Michigan Medicine*, WWW.MICHIGANMEDICINE.ORG(2024), https://www.michiganmedicine.org/health-lab/young-people-are-increasingly-using-wegovy-and-ozempic.

Court in the Thompson case, Justice Sandra Day O'Connor commented, "If the First Amendment means anything, it means that regulating speech must be a last— not first— resort."[55] Other factors include the significant influence over policy decisions that the pharmaceutical industry wields.[56] In fact, the United States is one of only two countries (alongside New Zealand) that allow DTC and compounded pharmaceutical advertising. [57] In Canada for instance, the advertising of prescription medications is allowed only under strict regulation, and compounded drug advertisements are prohibited altogether. [58] While proponents of DTC and compounded drug advertising argue that stricter regulations would decrease public participation in their own health and would be impractical, countries such as Canada, the European Union, and the United Kingdom have stricter pharmaceutical advertising rules, yet their healthcare systems function without issues related to misleading or unsafe drug marketing. [59] In short, the United States' current policy regarding compounded drug advertising is an outlier when compared to other developed countries. To improve public health and safety, transitioning to a model that promotes stricter oversight and increased transparency should be pursued.

Throughout the years numerous models have been crafted to address and bridge existing gaps in drug advertising legislation. To resolve the current issue while preserving the constitutional right to free speech under the First Amendment, lawmakers should consider drawing from both experts in the field and other countries. As of now, the current model gives

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[55] *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).
[56] Mallory Young & Donald Eckrich, *DIRECT-TO-CONSUMER ADVERTISING IN THE PHARMACEUTICAL INDUSTRY: AN ANALYSIS OF INFORMATION DISPARITIES*, 20 Proceedings of ASBBS 213 (2013), https://asbbs.org/files/ASBBS2013/PDF/Y/Young_Eckrich%28P213-218%29.pdf
[57] cwadmin, *Should the Government Restrict Direct-to-Consumer Prescription Drug Advertising? Six Takeaways on Their Effects. - March 23, 2023 - USC Schaeffer*, USC Schaeffer (2023), https://schaeffer.usc.edu/research/should-the-government-restrict-direct-to-consumer-prescription-drug-advertising-six-takeaways-from-research-on-the-effects-of-prescription-drug-advertising/.
[58] David M Gardner, Barbara Mintzes & Aleck Ostry, *Direct-to-consumer prescription drug advertising in Canada: Permission by default?*, 169 CMAJ: Canadian Medical Association Journal 425 (2003), https://pmc.ncbi.nlm.nih.gov/articles/PMC183296/.
[59] Natasha Parekh & William H. Shrank, *Dangers and Opportunities of Direct-to-Consumer Advertising*, 33 Journal of General Internal Medicine 586 (2018), https://link.springer.com/article/10.1007/s11606-018-4342-9.

the Federal Trade Commission (FTC) regulation over compounded and Over-The-Counter (OTC) drugs with the FDA governing all other medications. The FDA's primary focus has been to reduce disclosure requirements for advertisements, with enforcement efforts between the two groups being limited and often reactive.

One major contributor to the current state is that compounded drugs are not regulated by the FDA. While it would be impractical for the FDA to have oversight over compounded drug prescriptions made for individual users, ensuring the FDA oversees compounding outsourcing facilities that sell to patients nationwide would be a viable option. A paper published by the Stanford Law School urges the FTC and FDA to become more interrelated, with the FTC handling all advertising regulations and the FDA focusing specifically on safety or efficacy claims. [60] A more interconnected framework where the same agency oversaw compounded and name-brand drugs would eliminate any discrepancies in regulation and standardize regulatory measures. This proposition, if implemented, may also prevent confusion over regulatory authority and ensure that all consumers receive accurate, consistent information before pursuing treatment. The transition to this more collaborative model could be enacted through an amendment to the Federal Food, Drug & Cosmetic Act (FDCA) or a Memorandum of Understanding.

Other potential routes of reform include implementing the FDA's "fair balance doctrine", currently only required of FDA-approved drugs, to apply to compounded drugs as well. The fair balance doctrine requires that information be presented so that both the benefits and risks of a medication are conveyed equitably and comprehensively. The FDA explicitly defines this principle as ensuring "the content and presentation of a drug's most important risks must be

[60] Stanford Law School, *Advertising Medicine: Selling the Cure | Stanford Law School*, Stanford Law School (2023), https://law.stanford.edu/publications/advertising-medicine-selling-the-cure/.

reasonably similar to the content and presentation of its benefits."[61] Amending the FDCA to include this doctrine might dissuade advertising deception and promote transparency with consumers. Additionally, this amendment aligns with current FDA concerns, as it acknowledges that compounded drugs pose a higher risk than FDA-approved drugs.[62] Implementing the fair balance doctrine would prevent deceptive advertising practices and exaggerated claims, ensuring that companies comply with uniform standards to the benefit of public health and comprehension.

The *Thompson* case that started this prolonged debate rests on the fundamental assumption that people are capable of making informed decisions about their own best interests—provided they have access to accurate, balanced information. The dissenting opinion in the case also highlighted that "the Court seriously undervalues the importance of the Government's interest in protecting the health and safety of the American public."[63] While there is merit in advertising compounded drugs to the public, ensuring that the public is receiving full transparency so they can make informed decisions cannot be understated. Applying the fair balance doctrine to include the advertisement of compounded drugs would promote the accurate and balanced information on which the Court bases its decision, and support the dissenting opinion that public health and safety should be a priority without impeding free speech. The majority opinion also noted that while the ban on advertising of compounded drugs served governmental interests, it had not been demonstrated that the speech restrictions were not more extensive than necessary to serve such interests. [64] The fair balance doctrine operates on the idea that transparency enhances comprehension. By requiring that drug advertisements disclose risks

[61] Center for Drug Evaluation and Research, *Drug Advertising: A Glossary of Terms*, FDA (2020), https://www.fda.gov/drugs/prescription-drug-advertising/drug-advertising-glossary-terms#fair_balance.
[62] Drug Compounding: FDA Authority and Possible Issues for Congress, (2018), https://www.congress.gov/crs_external_products/R/PDF/R45069/R45069.4.pdf?
[63] *Thompson v. Western States Medical Center,* 535 U.S. 357 (2002).
[64] Id.

and benefits in a balanced manner, the doctrine does not suppress speech or impose requirements more extensive than necessary but instead enhances the quality of information available to consumers.

In light of the evolving landscape of drug advertising and the increasing influence of telehealth companies, it is evident that the existing regulatory gaps in compounded drug marketing pose a significant risk to public health. While there is much to debate as to the matter of compounded drugs and its advertising practices as the industry expands, there is no doubt the laws governing the marketing of compounded drugs must progress with it. Increasing oversight in this space does not equate to a paternalistic government; rather, it is the government's duty to "protect the general welfare" of the citizens of the United States, which has been embedded in the country's foundation since its creation. [65] Implementing measures such as extending the fair balance doctrine to compounded drug advertisements and increasing collaboration between the FDA and FTC will help close regulatory gaps without abridging the right to free speech. Adopting new regulations regarding compounded drug advertisements is not about restricting speech but about implementing necessary safeguards that uphold the government's promise to protect its citizens above all else. As the pharmaceutical landscape continues to evolve, so too must the legal frameworks that govern it—finding a balance between medical innovation, consumer protection, and ethical marketing.

[65] Constitution Annotated, *U.S. Constitution - The Preamble | Resources | Constitution Annotated | Congress.gov | Library of Congress*, CONGRESS.GOV (2019), https://constitution.congress.gov/constitution/preamble/.

Nuclear Regulatory Commission
v.
Texas

Authored by
Bella Suco

Two questions are presented before the Court today. The first is whether the Administrative Orders Review Act (Hobbs Act), which authorizes a "party aggrieved" by an agency's "final order" to petition for review in a court of appeals, allows nonparties to obtain review of a claim asserting that an agency order exceeds the agency's statutory authority. The second is whether the Atomic Energy Act of 1954 and the Nuclear Waste Policy of 1982 permit the Nuclear Regulatory Commission to license private entities to temporarily store spent nuclear fuel away from the nuclear reactor.[23] We hold that the lower court erred in ruling in favor of the State of Texas, as the Nuclear Regulatory Commission did indeed have the authority to issue a license, and that Texas and Fasken do not have standing under the Hobbs Act.

I

What to do with nuclear waste has been a question stumping scientists for decades. Several options have been considered, with no one or the other being considered "perfect." Congress attempted to solve this problem in 1982 by passing the Nuclear Waste Policy, assigning the Department of Energy to identify a suitable location for a long-term underground repository of spent nuclear fuel. In 1987, Congress amended the Act by selecting Yucca Mountain, in southwest Nevada, as the proposed site. However, the facility has never been built. Without the large amount of storage the site would have provided, and with nuclear waste piling up day after day, the Department of Energy and the Nuclear Regulatory Commission ("the Commission") have turned to temporary solutions. Interim Storage Partners, LLC, was granted a license by the Commission to provide temporary, away-from-reactor storage for spent nuclear fuel in a facility in Western Texas.

[1] 28 U.S.C. §§ 2342-2351.
[2] 42 U.S.C. §§ 2011-2021, 2022-2286(i), 2296(a)-2297(h)-13.
[3] 42 U.S.C. §§ 10101-1010

The State of Texas, as well as other interest groups in the area, alleged that the Commission went beyond their statutory authority by conferring the license to a private entity. The Commission responded by claiming the Atomic Energy Act of 1954 and the Nuclear Waste Policy Act of 1982 do indeed give them the authority to do so. The State of Texas, along with the Texas Commission on Environmental Quality, Fasken Land and Minerals, and other similar interest groups, filed suit in the Fifth Circuit Court of Appeals. In 2023, the court granted Texas' petitions for review and denied the Commission's motions to dismiss the suit. The Supreme Court granted certiorari in October 2024.

II

First, we turn to the Hobbs Act. Section 2350 of the Administrative Orders Review Act gives this Court jurisdiction over the final judgment of the proceedings.[4] The Commission argues that neither Texas nor Fasken are "parties aggrieved" as defined in the Act. Texas and Fasken argue that they are. The plain text of the Act is ambiguous and does not set out a strict frame for what it considers to be a party aggrieved.

Luckily, there exists a two-part test to determine whether or not Texas has standing.[5] The first is *party status*, in which "only those who have participated in the proceeding before the Commission have standing to petition for review of its action."[6] Texas' participation in the proceedings was limited to comments on the Commission's environmental impact statement draft, to which Fasken also submitted. Before this, however, Fasken had filed five contentions during the adjudicatory proceedings. Do these comments and contentions meet the requirements of participation? The case law varies. In the same case that outlines our two-step test, the court argued that simply submitting protests to the Commission when asked for met the party status requirement.

[4] 28 U.S.C. § 2350.
[5] *Water Transport Association v. I.C.C.*, 819 F.2d 1189 (D.C. Cir. 1987).
[6] *Id.* at 1191.

requirement.[7] However, that same court, thirty-five years later, ruled that filing petitions and submitting comments does not meet the participation requirement for party status.[8] Another D.C. case held that commenting during proceedings but then being refused when filing a petition for review does not constitute participation for party purposes.[9]

Since we have conflicting precedent on the matter, let us turn to the second hurdle for Texas: *aggrievement*. Texas and Fasken must show that they have suffered an injury that is both caused by the Commission's ruling and would be remedied by a ruling in their favor.[10] Neither one has done so. Texas argues the possibility that the temporary facility, without a permanent replacement built, would become permanent itself. Fasken claims the same, and that transporting nuclear fuel to the facility could be dangerous. Both of these are speculation, and the presumption of injury is not enough to bestow party status.[11] A threat to the environment is not a particular injury suffered by the plaintiff.[12] This Court has ruled, time and time again, the requirement of a concrete injury.[13]

The lower court's opinion notes that the state of Texas had expressed support for nuclear waste storage facilities in the state, and the county now in question even passed a resolution in support of building one there. This outpouring of support from the state is why the Commission began its search for an operator to license the facility to. Now, it seems Texas has changed their tune. The Nuclear Waste Policy Act sets out the guidelines, in accordance with the National Environmental Policy Act which the Commission must follow when preparing to create a nuclear waste site with over 300 metric tons of storage.[14] The National Environmental Policy Act ("EPA") requires the Commission to conduct an environmental review of the area where the proposed

[7] *Id.* at 1192.
[8] *Ohio Nuclear-free Network v. U.S. Nuclear Regulatory Commission*, 53 F.4th 236 (D.C. Cir. 2022).
[9] *Matson Navigation Company, Inc. v. United States Department of Transportation*, 77 F.4th 1151 (D.C. Cir. 2023).
[10] *Water Transport Ass'n* at 1193.
[11] *Id.* at 1195-96.
[12] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
[13] *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).
[14] 42 U.S.C. § 10155.

facility will sit.[15] The Commission did so properly, and closed the adjudicatory proceedings afterwards. Fasken filed a motion to reopen, which the Commission denied, an action they are explicitly allowed to do.[16] The purpose of the EPA environmental review is to prevent the very same injuries that Texas and Fasken are presuming will happen. We cannot assume that the part of the environment Fasken claims will be damaged will in fact be damaged.[17] If the Commission did everything right, and are not in violation of the EPA, like Fasken alleges, Texas and Fasken's comments and contentions are simply not enough to be considered participation.[18] Additionally, their injuries are presumptions, not concrete problems that would be remedied by a court ruling in their favor.[19] For these reasons, this court holds that Texas and Fasken do not have standing pursuant to the Hobbs Act.

III

With Texas and Fasken's lack of standing established, the Court must now answer the second question: whether the Commission's action of licensing a private entity is permitted under the Atomic Energy Act and the Nuclear Waste Policy Act. Texas argues that the Commission exceeded its statutory authority by doing so, while the Commission itself disagrees. This Court has held in the past that the Atomic Energy Act gives the Commission broad authority over the development of nuclear energy.[20] We now adhere to that ruling. The Atomic Energy Act of 1954 gives the federal government the "possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others…"[21] This is broad, but clearly puts the government in control of all nuclear material within the country's borders. In 1974, the Energy Reorganization Act transferred this power from the now-defunct Atomic Energy Commission to the Nuclear Regulatory

[15] 42 U.S.C. § 4321.
[16] 42 U.S.C. § 2239.
[17] *Florida Audubon Society v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996).
[18] *Ohio Nuclear-free Network,* 240.
[19] *Water Transport Ass'n,* 1196
[20] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council Inc.*, 435 U.S. 519, 525 (1978).
[21] 42 U.S.C. § 2013.

Commission.[22] The Nuclear Waste Policy Act, in turn, charges the federal government with the responsibility of providing interim storage of spent nuclear fuel.[23] The Atomic Energy Act also authorizes the Commission to grant licenses for a myriad of uses, the most compelling of which includes "for other such uses as the Commission determines to be appropriate…"[24] This section in particular can be interpreted broadly, and is where the contention between the parties lay. Does temporary storage fall under a use the Commission determines to be appropriate for granting a license? The case law leans affirmative.

Bullcreek v. Nuclear Regulatory Commission, a 2004 case analogous to this one, concerns the reading of Section 10155(h) of the Nuclear Waste Policy Act, and whether it expressly prevents the Commission from licensing temporary, away-from-reactor storage.[25]

> Notwithstanding any other provision of law, nothing in this chapter shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or any other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government….[26]

The court in that case read Section 10155 as not allowing or prohibiting, but rather neutral on the subject. We agree with them. This Court ruled in *Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission* that federalism exists in the regulation of nuclear power: the federal government controls the safety aspect, while the states exercise authority over the need for additional capacity.[27] Texas, Fasken, and the lower court argue that this holding prevents the federal government from having control over storage of spent nuclear fuel. They are wrong in that assumption, however. In that very same case, this Court stated that the Commission, after taking on the Atomic Energy Commission's authority, has "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession,

[22] 42 U.S.C. § 5841.
[23] 42 U.S.C. § 10151.
[24] 42 U.S.C. § 2073.
[25] *Bullcreek v. Nuclear Regulatory Commission*, 359 F.3d 536 (D.C. Cir. 2004).
[26] 42 U.S.C. § 10155(h).
[27] *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983).

and use of nuclear materials."[28] If what they claim is correct, read in accordance with that rule, the Commission can license control over every part of nuclear material, but not temporary storage. It seems contradictory.

In *Virginia Uranium, Inc. v. Warren*, this Court held that the Atomic Energy Act grants the Commission control over "every aspect of the nuclear fuel lifestyle except mining."[29] (emphasis omitted). What benefit is there to assigning this one task in the multitude that are necessary for the production of this nation's nuclear energy to a separate organization than the one controlling everything else? Private entities must secure a license from the Commission before handling nuclear materials.[30] The spent nuclear fuel must be stored somewhere, and the Yucca Mountain Repository is not in any state to accept it. The Nuclear Waste Policy Act states that a facility can be built "for any reason pertaining to the public health and safety."[31] The buildup of spent nuclear fuel is harmful to public health and safety. If this facility is not built in Andrews County, it will have to be built somewhere else, and that state too might challenge the Commission's authority. This does not solve the problem, and we are still left with nowhere to dispose of this radioactive waste. At some point, the national interest must be put above the states'.[32] The Atomic Energy Act grants the Commission the explicit authority to control the storage of spent nuclear fuel - including away-from-reactor storage.[33] This court does not turn a blind eye to the concerns of the people of Texas. However, the Commission, as required, followed the National Environmental Protection Act's guidelines when proposing an action potentially harmful to the environment.[34] Had they found any area of concern, they would not have moved forward with the process, and dismissed the comments and contentions as without merit.

[28] *Id.* at 207.
[29] *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 768 (2019).
[30] *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, 45 F.4th 291 (D.C. Cir. 2022).
[31] 42 U.S.C. § 10142
[32] *People of State of Illinois v. General Electric Company*, 683 F.2d 206, 213 (7th Cir. 1982).
[33] *Id.* at 214-15.
[34] *Oglala Sioux Tribe,* 296.

As the Fifth Circuit opinion notes, the Nuclear Waste Policy Act provides that the federal government is solely responsible for the permanent disposal of radioactive waste.[35] This is why so much time and so many resources were devoted to choosing a large site suitable for disposal: Yucca Mountain. But it's not ready. In the meantime, we must have a temporary solution. If the federal government already has the responsibility of permanent disposal, does it not seem the easiest option that temporary disposal should also fall upon them?

IV

In direct response to the Commission's final impact statement recommending the license be issued to Interim Storage Partners, Texas' legislature passed House Bill 7. This bill, with the exclusion of nuclear facilities already existing, outlawed the construction of a facility for the Commission to store nuclear waste. They argue this preempts the federal government's ability to license the facility. We disagree. A similar Tenth Circuit Case, *Skull Valley Band of Goshute Indians v. Neilson*, dealt with this very same issue. Utah, not wanting a temporary spent nuclear fuel storage facility within their borders, passed a bill outlawing the storage. The court in this case ruled that, citing *Pacific Gas*, the federal law preempted the Utah law.[36] We agree with this decision. The plain text of the Atomic Energy Act and Nuclear Waste Policy Act asserts the federal government's control over the area of nuclear energy. When a state tries to act in contradiction of that area, the federal law will supersede it.[37] The purpose of the Atomic Energy Act and the Nuclear Waste Policy act are to keep the American people safe, by concentrating control of radioactive material into the hands of the federal government.[38]

As the Fifth Circuit Court reads Section 10155(h) as not allowing the licensing of an away-from-reactor storage facility, let's look at the rest of the statute. Section 10155(3) states,

[35] 42 U.S.C. § 10131
[36] *Skull Valley Band of Goshute Indians v. Nielsen*, 376 F.3d 1223 (10th Cir. 2004).
[37] *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218 (1947).
[38] 42 U.S.C. § 10131.

"in selecting methods to provide storage capacity under paragraph (1), the Secretary shall consider the timeliness of the availability of each such method and shall seek to minimize the transportation of spent nuclear fuel, the public health and safety impacts, and the costs of providing such capacity."[39] Not two lines later, it states, "the Secretary shall ensure that storage capacity is made available under paragraph (1) when needed, as determined on the basis of the storage needs specified in contracts entered into under Section 10156(a) of this title, and shall accept upon request any spent nuclear fuel as covered under such contracts."[40] The entire statute here emphasizes at-reactor storage. However, paying close attention to these two lines, it becomes clear that the Commission has the authority to determine what kind of storage is needed at the moment, and to pick whatever contract, facility, etc., that may be based on. The Fifth Circuit opinion admits that the Nuclear Waste Policy provides a comprehensive scheme to address the buildup of spent nuclear fuel. The Nuclear Waste Policy's scheme relies on the responsibility of the federal government to manage the storage of spent nuclear fuel. It is paradoxical to claim that the Policy does not allow for temporary storage by the federal government, citing the same authority that gives that same institution the sole responsibility to perform the comprehensive scheme. We've established using precedent that the federal government maintains broad authority over the area of nuclear energy.[41] We can also plainly see the Nuclear Waste Policy Act gives the Commission the authority to issue licenses to private entities for permanent storage.[42] Why then, is it so contentious that the Commision might be able to do the same, just in a temporary capacity? We disagree with the Fifth Circuit's interpretation of Section 10155(h) barring the authority of the Commission to license temporary storage, and interpret Section 2073(a) as allowing it, under the Commission's broad authority as the entity responsible for nuclear materials.

[39] 42 U.S.C. § 10155(3).
[40] 42 U.S.C. § 10155(5).
[41] *Vermont Yankee Nuclear*, 525.
[42] 42 U.S.C. § 2021.

V

The Nuclear Regulatory Commission is correct in its interpretation of the Atomic Energy Act and the Nuclear Waste Policy Act. While the texts only specifically mention permanent disposal sites, we must view them in the context in which they were written. There was no ability to foresee the stalling of the Yucca Mountain repository, so there was no need to determine a procedure for temporary storage. Now it is a reality, and we must realize that the best people to deal with the problem are the ones who are granted explicit statutory authority to deal with every other problem in the area of nuclear energy.

Despite all of that, none of this statutory interpretation matters if the case before us lacks standing. The Commission is also correct in its assertion that Texas and Fasken do not have party status under the Hobbs Act. The case law rules that for a person or organization to be considered a party, participation must be more than just comments during the proceedings, and motions for review that get denied by the agency.[43] The Commission had every right to deny those motions, as they were found to be lacking in merit. To assert that party status, Texas and Fasken should have been admitted by the Commission as parties to the procedures. As they did not, we must hold that they lack standing for this Court to review their issue.

REVERSED.

Stepping out of character as Justice Sotomayor, I have to agree with the precedent cited above. Congress has very clearly vested broad power and responsibilities in the Nuclear Regulatory Commission through the Atomic Energy Act and the Nuclear Waste Policy Act. Despite the recent overturning of *Chevron*, I believe that courts should defer to an agency when statutes pertaining to their field are unclear or ambiguous. I do believe, however, that Fasken has standing under Hobbs. They tried time and time again to file motions for review, only for them

[43] *Matson Navigation*, 1151.

to get denied. If an agency has the ability to deny a person's attempts to enter the proceedings, no one will ever have standing under Hobbs. There must be a clear opening for gaining that elusive aggrieved party status. I am less certain about Texas. Simply submitting comments does not have a lot of weight when considering the definition of "participation," but I am sure that if they tried the same route as Fasken, they would have been met with a similar fate.

Williams
V.
Reed

Authored by
J. Carter Schatt

In the recent Supreme Court case *Williams v. Reed*, the Court affirmed the inability of state governments to limit their courts' jurisdiction regarding suits brought under 42 U.S.C. § 1983 and, in doing so, established de facto immunity for any person from that class of suits. [66] The Court considered questions of federal law supremacy, the boundaries of a state's authority to establish its own court jurisdiction, and the preemption of § 1983 suits over state law. [67] More broadly, the case reaffirmed the supremacy of federal law over state law and built upon established precedents from several previous § 1983 immunity cases. This paper analyzes that case and its precedents in an attempt to argue the merits of a broader policy that ensures that federal law holds supreme over state law in § 1983 suits, as well as discusses how the Court's decision resolves the issues of de facto immunity under § 1983 yet fails to fully clarify the relationship between state and federal law in a way that satisfies arguments presented in the dissent.

In the wake of the COVID-19 pandemic, Alabamians filed nearly 1.5 million applications with the Department of Labor for assistance between April 2020 and March 2022, compared to 737 applications filed in May 2019, before the onset of COVID-19. Because of this vast increase in applications, the Alabama Department of Labor took a less than prompt amount of time to assess citizens' claims; this created delays throughout the process, including original eligibility decisions, challenges to these decisions, and notifications on these decisions to petitioners. The delay left some petitioners stuck in the process and unable to take advantage of the benefits many turn to in the face of unemployment.

The Alabama State Code requires that, “A determination upon a claim filed pursuant to Section 25-4-90 shall be made promptly ... notice of any such redetermination shall be promptly given to the parties entitled to notice of the original determination…Notice of determination or decision upon a claim shall be promptly given to the claimant and the claimant's last employing unit by delivery thereof or by mailing such notices to their last known addresses."[68] Seeking relief,

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[66] *Williams v. Reed*, 604 U.S. ___, 145 S.Ct. 465 (2025).
[67] 42 U.S.C. § 1983.
[68] Ala. Code § 25-4-95 (2024).

twenty-one claimants filed a suit invoking 42 U.S.C. § 1983, arguing that the delays by the Department in processing their benefit claims violated the Due Process Clause of the Fourteenth Amendment and the Social Security Act of 1935.[69] The Plaintiffs filed against the Alabama Secretary of Labor in his official capacity in the Circuit Court of Montgomery County, Alabama. State law affirms that, "No circuit court shall permit an appeal from a decision allowing or disallowing a claim for benefits unless the decision sought to be reviewed is that of an appeals tribunal or of the board of appeals and unless the person filing such appeal has exhausted his administrative remedies as provided by this chapter."[70] The Secretary argued that, under this statute, the courts lacked jurisdiction because Plaintiffs had failed to exhaust all administrative remedies, as they had not yet completed their reviews, and therefore moved for the case to be dismissed. It is essential to note that the processes Plaintiffs had yet to complete were the same processes for which they were filing a § 1983 suit. Plaintiffs responded by arguing that *Patsy* had broadly outlawed failure to exhaust requirements when it held that, "Exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983."[71]

After hearing arguments from the two sides, the Alabama Supreme Court decided in favor of The Secretary and dismissed the case:

> We agree with Secretary Washington that the plaintiffs failed to validly invoke the circuit court's jurisdiction. All of their claims, in substance, seek relief related to 'the making of determinations with respect to [their] claims for unemployment compensation benefits,' § 25-4-96, yet none of those claims have been administratively exhausted. As a result, the circuit court and this Court have no power to address the merits of those claims. We, therefore, affirm the circuit court's judgment of dismissal.[72]

The dissent argued that Plaintiffs had interpreted the precedent in *Patsy* far too broadly:

> [T]he main opinion nevertheless contends that *Patsy* 'held only that the text of 42 U.S.C. § 1983, a federal statute, lacks an exhaustion requirement' and is, thus, inapplicable here because it 'did not interpret the text of any State law, and certainly

[69] U.S. Const. amend. XIV.
[70] Ala. Code § 25-4-95 (2024).
[71] *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 516 (1982).
[72] *Johnson v. Washington,* 387 So. 3d 138, 144 (Ala. 2023)

> did not hold that State laws requiring administrative exhaustion as a prerequisite to State-court jurisdiction are unconstitutional.'[73]

Plaintiffs filed a Petition for a Writ of Certiorari to the United States Supreme Court. They argued that other state courts with similar cases had interpreted *Patsy* differently than the Alabama Supreme Court had and that the Supreme Court had affirmed its interpretation in *Felder v. Casey*.[74] Plaintiffs argued that the Wisconsin statutes requiring citizens to wait to sue the State under § 1983 were in of themselves exhaustion requirements, and by declaring them illegal, the courts had upheld the precedent set by *Patsy* against exhaustion requirements for federal cases, and it applied to states as well. Upon hearing this petition, the Supreme Court granted certiorari, allowing the case to be heard by the Court; however, the Court narrowed the scope of the question to the specific legality of this particular exhaustion requirement and declined to consider Plaintiff's interpretation of precedent and the legality of exhaustion requirements generally.

The Court ruled, five-to-four, to reverse and remand the Alabama Supreme Court decision. In the decision written by Justice Kavanagh, the Court found that the exhaustion requirement created a catch-22, wherein Plaintiffs would never be able to fulfill the exhaustion requirement and thus could never obtain a judgment. It found that this created de facto immunity for the Alabama Department of Labor from a set of § 1983 suits. In previous decisions, the Court had set a precedent against this, as it had ruled in several cases that §1983 Suits preempted state law attempts to bar them or to extend immunity:

> Federal law is enforceable in state courts …because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land" and charges state courts with a coordinated responsibility to enforce that law according to their regular procedures.[75]

Section 1983 is a federal law and, pursuant to this doctrine, must be followed as a part of state law as well. Section 1983, as it stands, is written in such a way that resists any ability for citizens not to be able to sue under it:

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[73] *Id.* at 147 (Cook, J., dissenting).
[74] *Felder v. Casey*, 487 U.S. 131 (1988).
[75] *Howlett v. Rose,* 496 U.S. 356, 368 (1990).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or another proper proceeding for redress….[76]

While the larger text does include an omission regarding the ability of judges to be sued under Section 1983, it allows for "every person" to be liable, thus denying extensions of immunity from it. This meant that the de facto immunity created was incompatible with federal law and an invalid reason to dismiss the case. In arguing this, the Court cites *Haywood v. Drown, Howlett v. Rose*, and *Felder v. Casey*, all of which were cases in which state laws were used to provide immunity to officials from § 1983 suits. Through these cases, the Court found a clear precedent against rules that provided immunity from § 1983 suits. In this decision, the Court ruled that the Alabama exhaustion clause, in effect, created de facto immunity and was thus illegal, a much more narrow decision than Plaintiffs' original claim that all exhaustion requirements were illegal.

The dissent written by Justice Thomas took issue with what it saw as the Court treading on Alabama's abilities to set and control the jurisdictions of their state courts. He argued that by its decision, the Supreme Court was forcing Alabama to provide a forum to a case in which its courts had previously been relieved of jurisdiction by Ala. Code § 25-4-95. He argued that "The only potential constraint that the Constitution places on a State's jurisdictional discretion is the possibility that a federal statute may preempt state law."[77] He argued that, as § 1983 is written, it does not require states to provide a forum for it, but that it simply explains who can sue and who can be sued. Through this, he finds that because the statute does not expressly require states to structure their jurisdiction in a certain way, it doesn't affect their freedom to do so. They are free not to provide a forum. He argues that by remanding this case back to the state courts, the Supreme Court is actively usurping states' plenary authority to decide which cases they are willing to hear or not hear through decisions surrounding the jurisdiction of their own court systems. He outlines the

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[76] 42 U.S.C. § 1983.
[77] *Williams,*145 S.Ct. at 473 (Thomas, J., dissenting).

limitations that previous Court decisions have imposed on these freedoms and why they do not apply in this case. *Haywood* found that while states maintain broad powers to set their jurisdiction and rules, these rules must be neutral and not embody disagreement with federal policy.[78] Rules in disagreement are ones that "refuse to hear a federal claim solely because it is brought under a federal law," or deprive its courts of jurisdiction over a "'disfavored' federal claim… where doing so would 'undermine federal law.'"[79] Justice Thomas finds that the first issue does not apply as the exhaustion requirement does not discriminate against federal rights, and the second issue does not apply because Alabama's exhaustion requirement is a neutral judicial rule that is not meant to restrict the jurisdiction of the courts away from taking up disfavored federal claims like the New York Statute in *Haywood*. He backs up the neutrality of the rule by pointing out that it was passed in 1939 and has stood for decades without creating an issue. He then contends with the idea that the exhaustion requirement is creating a catch-22 by stating that the exhaustion requirement itself does not prevent or bar §1983 suits against the Department of Labor as Plaintiffs are still able to file them in Federal Court or file them in state court once they have correctly exhausted all available administrative remedies. Based on all of this, he believes that the exhaustion requirement does not create de facto immunity in the way the majority is stating, and, thus, there is no reason to reverse the Alabama Supreme Court decision.

In a final argument, Justice Thomas expresses displeasure with the case being taken up in this manner, arguing that the Court had ignored the original broad-scope defense in favor of an argument that had been ignored if barely mentioned by Plaintiffs who had attempted a facial challenge based on what they saw as a misinterpretation of *Patsy*. He sees this as a mistake made by the petitioners that the Court had fixed: "We should not reward petitioners for their own mistake."[80]

In making this decision, the Court reaffirmed supremacy of Federal law including when it comes to the State's ability to set its court jurisdiction. The decision has also once again emphasized

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[78] *Haywood v. Drown*, 556 U.S. 729 (2009).
[79] *McKnett v. St. Louis & San Francisco R. Co.,* 292 U.S. 230, 233–34 (1934); *Williams,* 145 S.Ct. at 475 (Thomas, J., dissenting) (citing Haywood at 737-39).
[80] *Williams,* 145 S.Ct. at 478 (Thomas, J., dissenting).

the importance of § 1983 suits and the inability of states to exclude them from their jurisdiction if such action would create de facto immunity. The Court has also taken the precedents surrounding *Haywood* forward by deciding that a law does not need to be crafted to extend immunity for it to violate § 1983. The precedents set in this decision will likely be used to oppose any further attempts by states to relieve themselves of § 1983 jurisdiction, as the Court has upheld that under federal law, § 1983 must be followed. The Court's decision, while small in scope, as it only addresses this exhaustion requirement, has helped to strengthen the protections surrounding § 1983 laws and reinforce their importance.

The holding in *Williams* does not propagate any novel idea of law but relies on already established precedent to support its reasoning. In *Felder*, the Court found that a Michigan state law requiring that citizens to file a suit within 120 days of injury for it to be allowed and then give the State another 120 days to grant or disallow the requested relief was illegal:

> Because the notice of claim statute at issue here conflicts in both its purpose and effects with the remedial objectives of § 1983, and because its enforcement in such actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in the state or federal court, we conclude that the state law is preempted when the § 1983 action is brought in a state court.[81]

This is the chronologically first of the three cases cited in the opinion. As it applies to *Williams*, it represents the idea that § 1983 suits must override state laws because if they did not, then the outcomes of Federal and State § 1983 claims would be different, which is at odds with the shared system of jurisprudence. This precedent is also used in the arguments for *Howlett*. In *Howlet*t, a student, Howlett, alleged that his rights had been violated after a search of his car. He attempted to sue the school board under 1983, but the action was dismissed as the school board argued that it was an arm of the State and under the Eleventh Amendment, had immunity from § 1983 suits. The Court took up this issue:

> The District Court of Appeal's refusal to entertain § 1983 actions against state entities such as school boards violates the Supremacy Clause. If that refusal amounts

[81] *Felder v. Casey*, 487 U.S. 131, 138 (1988).

> to the adoption of a substantive rule of decision that state agencies are not subject to liability under § 1983, it directly violates federal law, which makes governmental defendants that are not arms of the State liable for their constitutional violations under § 1983.[82]

When applied to *Williams*, this provides a strong example of the courts dismissing attempts by the states to generate immunity from § 1983 suits for individuals that would otherwise be liable.

Finally, the most recent case the court cited in *Williams* is *Haywood v. Drown*.[83] In this case, a New York statute stripped the state courts of the ability to hear § 1983 petitions from incarcerated citizens, arguing that the suits were, for the most part, frivolous. The Supreme Court would eventually hold that, "Although the absence of discrimination is necessary to our finding a state law neutral, it is not sufficient. A jurisdictional rule cannot be used as a device to undermine federal law, no matter how even handed it may appear."[84] Meaning that, for a state law to be considered neutral, it must be neutral in effect, not merely nondiscriminatory in its language. Together, the created precedents are that a state's refusal to hear § 1983 claims constitutes a violation of the Supremacy Clause. States may not extend immunity from § 1983 suits, and state laws must be effectively neutral to truly qualify as neutral law even if they are written in a way that is not intended to be in violation of federal law. Together, these principles support the Court's majority decision in *Williams* and explain why the de facto immunity created by the Alabama exhaustion requirement was unlawful.

Claflin v. Houseman affirms that, "federal law is as much the law of the several States as are the laws passed by their legislatures . . . and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."[85] As such, it is proper to treat § 1983 as the law of the State of Alabama as much as it is to treat it as the law of the United States. This law states that "every person" shall be held liable. This effectively forecloses expansions of immunity from §

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[82] *Howlett*, 357.
[83] *Haywood.*
[84] *Haywood*, 739.
[85] *Claflin v. Houseman,* 93 U.S. 130, 137 (1876).

1983 suits to anyone who is not a judicial officer or someone acting under a judicial officer's capacity, as this would make it so that not everyone could be held liable.

With the reasoning of the argument laid forth in the opinion shown in these examples, it is notable that the opinion does not see it fit to address several of the dissent's objections to its ruling. These objections are not without merit, and by leaving them unanswered, the Court leaves open the possibility that similar dissent may be used in the future. It is still worth considering that the majority can still reach the same decision to remand and repatriate this case back to the state courts while still addressing the issues put forth by the dissent and, therefore, set a more substantial precedent against these issues in the future that conforms with the objections of Justice Thomas in addition to the opinion of the Court.

In the dissent, Justice Thomas argues that states have the right to shape their own laws and that federal courts may not conscript state courts to provide a forum for issues they have deemed outside their jurisdiction. However, he fails to consider that because Federal and State law form a single jurisprudence, § 1983 and other federal laws, shape state court jurisdiction in the same way as laws passed by the state legislature. Because of this, Alabama state courts must provide a forum for § 1983, not because the federal courts ordain that they must, but because § 1983 forces itself into their jurisdiction as part of their own law, even with the passage of Ala. Code § 25-4-95, which slowed the rate of § 1983 suits and raised the requirements for filing them, did not prevent the State of Alabama from complying with § 1983 as the requirements still allowed every person to be held liable under state law. However, the vast backlog of petitions created as a result of COVID-19 made it impossible for all administrative remedies to be exhausted and, in doing so, created a scenario where not every person could be held liable as it became impossible for the Alabama Department of Labor to be sued under § 1983 for delays in there processes thus creating de facto immunity which is in direct contradiction with the law.

Thomas likewise points out that if there is a catch-22, petitioners may still seek relief in federal courts. However, it is immaterial to the issue of this case. Petitioners being able to find

redress in federal court does nothing to stop the fact that by immunizing the Alabama Department of Labor from § 1983 suits, Alabama is breaking federal law and thus its own laws regarding its courts' jurisdiction. Thomas spends much of his dissent arguing that the federal government cannot force states to provide forums for issues and that state court jurisdictions are only governed by state law but fails to notice that as federal laws, as part of a single federal jurisprudence with state laws, hold just as much sway in determining the jurisdiction of state courts as federal courts. As such, the jurisdiction surrounding these issues is mandated by the laws of the states under this single jurisprudence and not ordered by the federal government in a way that would negate a state's ability to set its own jurisdiction. Because these federal laws apply to state laws, they mandate jurisdiction in the same way as any other state law. Because of this, states are unable to withdraw jurisdiction from these issues, as the federal law granting them jurisdiction will always override their state laws. Consequently, Alabama courts will always have jurisdiction over § 1983 cases and are unable to limit this jurisdiction, as doing so would contravene federal law, which is pre-imminent of their state law.

The Court's decision in *Williams v. Reed* promotes and upholds the supremacy of federal law over state law and enforces the idea that, as such, the federal government has its own part to play in curating the jurisdiction of state courts. Even so, by reaching its current decision, the courts have upheld fundamental relationships between the federal and state governments that form the basis of our republic by reaffirming single jurisprudence of state and federal law and maintaining the supremacy of federal law over state law. This relationship between federal and state is the cornerstone of our nation, and without it, tensions and nullification would run rampant. While Thomas's dissent holds merit and presents strong arguments against the Court's decision, if it sets a precedent, it would weaken the bonds within the federalist system together and establish a precedent that could be used to further erode that very system.

To summarize, because federal law is supreme and forms one system of jurisprudence with state law, and because § 1983 applied as state law sets the jurisdiction of the courts of Alabama to

be unable to exclude anyone from a § 1983 suit, the state exhaustion requirement in extending immunity is illegal and thus it is improper for the courts of Alabama to dismiss this case on lack of jurisdiction. The decision reached by the United States Supreme Court in *Williams v. Reed* is proper, considering the merits and application of the law. While the principles elaborated upon in Thomas's dissent are correct in their precedents regarding a state's ability to set its own jurisdiction, they fail to acknowledge the singular jurisprudence properly created by federal and state law and are thus unconvincing. It is worth noting that the argument for the majority decision focuses more on how, because § 1983 is federal law, it automatically overrides state law because it is naturally superior. This argument can be seen as a more top-down argument for why the catch-22 created by the State of Alabama's exhaustion requirements is illegal and, therefore, more open to criticism by the claims made in the dissent, which negates many of the dissent points. However, the points put forth by the majority decision are still meritorious and uphold previous judicial precedents set by *Haywood v. Drown, Howlett v. Rose, and Felder v. Casey*.

Wrongful Birth vs. Wrongful Life

Authored by
William Bryan and Ryan Lindimore

In both the legal and medical fields, doctors and judges struggle to determine when giving life to a child becomes wrong due to the likelihood of hardships arising from disability. In these cases, plaintiffs typically file either a wrongful life or a wrongful birth suit against the doctor who allowed the birth. Courts usually classify these suits as negligence—more specifically, medical malpractice—arising from a doctor's failure to provide contraceptive measures, sterilization procedures, genetic counseling, pregnancy alerts, communicable diseases, or effective abortions. When a doctor fails in these areas, a child may be born with physical or mental disabilities, or parents may experience emotional distress from an unplanned or medically risky pregnancy. However, the party bringing the suit strongly influences how likely they are to prevail in their claim. Is it right that courts typically rule in favor of parents in wrongful birth cases, but usually reject wrongful life claims brought by the children, which they do not widely accept as legitimate?

First, we must establish the difference between the two. Wrongful birth is a medical malpractice claim that the parents of a child born under these circumstances bring, and it is a widely accepted common law claim. Like all medical malpractice cases, plaintiffs must establish duty, breach, cause, and damages to succeed in a lawsuit. In wrongful birth cases, duty, breach, and cause are all relatively easy to prove. Doctors do have a duty to assist patients in having a planned, healthy pregnancy, and they breach this duty if they neglect to provide complete service. This lack of care can result in an unplanned or unhealthy pregnancy. Damages, however, are a harder issue to establish. In some cases, the child is born healthy, but the parents are either surprised or fearful of the child being born. One case that illustrates clear damages from a doctor's breach of duty is *Turpin v. Sortini*, 31 Cal. 3d 220 (Cal. 1982). In *Turpin*, the

parents were not informed of the likelihood that their child would be born with partial or complete deafness. One of the claims central to determining damages was whether the child had been "deprived of the fundamental right of a child to be born as a whole, functional human being without total deafness." This alludes to the doctor's negligence in failing to inform the parents that their child might not be born a whole, functional human being—especially when testing could have revealed that possibility.

Keel v. Banach, 624 So.2d 1022 (Ala. 1993) presents another example of a wrongful birth case. In this case, the mother and father sued a doctor who performed sonographic examinations but failed to discover fetal abnormalities. The primary issue in this case was not that the doctor was negligent, but whether Alabama recognized "wrongful birth" as a valid cause of action. The Supreme Court of Alabama held that "wrongful birth" was a valid cause of action. The court explained that wrongful birth closely resembles a medical practice case, but noted that there is "little agreement on the issue of damage". Additionally, the Supreme Court ruled that the family could recover emotional distress damages and receive compensation for "extraordinary costs necessary to treat the birth defect and any additional medical or educational costs attributable to the birth defect during the child's minority".

In *Smith v. Saraf*, 148 F.Supp.2d 504 (D.N.J. 2001), the court demonstrates how it views cases involving both wrongful birth and wrongful life claims. In this case, the physician failed to inform the parents about multiple abnormalities detected during an ultrasound. This case highlights the distinctions between wrongful birth and wrongful life claims. The court held that "[a] parent's wrongful birth claim is not derivative of the defective child's wrongful life claim, because the parent's claim is based on "direct injury to [the parent's] own independent rights." (*Saraf*, …). This means that the damages parents recover in wrongful birth cases are fundamentally different from those in wrongful life cases. Courts tend to

recognize damages when parents claim the costs of raising and caring for a child, but they struggle to quantify damages when a child seeks compensation for the hardship of living with an impairment.

While citing a Supreme Court of United States opinion could strengthen the argument, a wrongful death case has never made it to the Supreme Court. It has largely been left to the states to determine whether wrongful birth is a valid cause of action, most recognizing the claim and the idea of the parents receiving some kind of compensation for the negligence of the doctor. However, wrongful life has not seen the same treatment.

Wrongful life is the name given to a cause of action in which a medical professional is sued by a severely disabled person for failing to prevent their birth. It involves a claim made by a child, or by their parents on behalf of the child, that alleges their existence is the result of someone else's wrongful actions or negligence. They believe they should not have been born, or should have been born under different circumstances. Overall, a wrongful life claim asserts that, had it not been for the defendant's actions or negligence, the child would not have been born with a serious illness, disability, or other condition that negatively impacts their quality of life. The plaintiff argues that they have suffered harm by being brought into existence under such circumstances and are seeking compensation for said harm. These cases can be highly complex and contentious, as they raise profound ethical and philosophical questions about the value of life, the nature of harm, and the responsibilities of individuals and institutions. In wrongful birth cases, parents might win because they weren't properly informed about their child's condition. In wrongful life cases, however, it's harder for the child to win because courts find it very difficult to measure the worth of a life, even one that the person deems as "wrongful." This involves grappling with the hypothetical scenario of the child's non-existence.

The majority of states that have considered the issue have refused to adopt a cause of action for wrongful life. Courts have many different reasons for this, one of them being an unwillingness to hold that a plaintiff can recover damages for being alive. The reluctance of these courts is based on the high value which the law and mankind have placed on human life, rather than its absence. They also argue the complaint is that the plaintiff would be better off not having been born. Because we know nothing of death or nothingness, the court cannot possibly know whether this is true. Not all legal systems recognize wrongful life claims, and those that do may have varying standards for establishing liability and determining damages. Additionally, the concept of wrongful life intersects with broader debates about reproductive rights, medical ethics, and the rights of individuals with disabilities. This gets into an even more complex topic about the legal concept of wrongful life on the rights of childbearing women and their offspring. The effect that this concept of common law would have on current abortion laws would be to make it considerably easier to argue for a woman's right to choose an abortion.

There are many examples of wrongful life cases. One very impactful case is that of *Willis vs. Wu*, 362 S.C. 146(S.C. 2004). In this case, Jennie Willis brought a wrongful life action against Dr. Donald S. Wuon on behalf of her son, Thomas Willis. The mother alleges that because the physician failed to adequately and timely diagnose her son’s condition by prenatal testing, she was denied the opportunity to decide whether to terminate the pregnancy during the legal time window. The plaintiff's mother claims the physician's delay led to the failure to find hydrocephalus in the fetus. This congenital defect means the cerebral hemispheres of his brain are missing. Those regions of the brain control thinking, motor functions, voluntary movement and speech, and the ability to interact with others. Still, the state of South Carolina declined to recognize a common law cause of action for wrongful life brought by or on behalf of a child with a congenital defect.

Another case that deals with the issue of wrongful life is *Curlender v. Bio-Science Laboratories*, 106 Cal.App.3d 811 (Cal. Ct. App. 1980). This case involves a child born with Tay-Sachs disease. This rare inherited disease destroys nerve cells in the brain and spinal cord. As a result of Tay-Sachs, the plaintiff Shauna suffers from:

> Susceptibility to other diseases, convulsions, sluggishness, apathy, failure to fix objects with her eyes, inability to take an interest in her surroundings, loss of motor reactions, inability to sit up or hold her head up, loss of weight, muscle atrophy, blindness, pseudobulbar palsy, inability to feed orally, decerebrate rigidity and gross physical deformity.

It was also alleged that Shauna's life expectancy is estimated to be only four years. The complaint also stated allegations that the plaintiff suffered, "Pain, physical and emotional distress, fear, anxiety, despair, loss of enjoyment of life, and frustration." Once again, the state of California declined to recognize a common law cause of action for wrongful life brought by or on behalf of a child with a disability.

This issue between wrongful life and wrongful birth lawsuits is significant. Generally, wrongful birth lawsuits succeed, while wrongful life lawsuits do not. This is a problem because plaintiffs sue for the same reason, except one is brought by parents and the other by the child or on their behalf. This sometimes means the child does not receive damages. One solution for this could be legislative action. Lawmakers could consider enacting legislation to address the specific issues surrounding wrongful life lawsuits. This could involve clarifying legal standards, defining damages, or even prohibiting such lawsuits altogether. Another solution might be having ethical and philosophical conversations. Society could engage in broader discussions about the ethics and morality of wrongful life lawsuits. These discussions could inform legal decisions and public policy leading to improved access to resources.

By providing better support and resources for individuals with disabilities and their families, it would help address some of the underlying issues that lead to wrongful life lawsuits.

Better healthcare, social services, and support networks are a few examples. Overall, many solutions could help wrongful life lawsuits though they require careful legal and ethical consideration.

In conclusion, the distinction between wrongful birth and wrongful life lawsuits raises ethical, legal, and philosophical questions about the value of life, which include the rights of individuals and the responsibilities of medical professionals. While wrongful birth cases brought by parents are often successful, wrongful life cases brought by the affected children face challenges in proving damages and establishing liability. These obstacles highlight the need for further examination and potential legislative action to create fair outcomes for all parties involved. Additionally, societal discussions about reproductive rights, medical ethics, and support for individuals with disabilities can contribute to a better understanding of these issues. Ultimately, addressing wrongful life lawsuits requires a complex approach that considers both legal and ethical dilemmas while prioritizing the rights of all individuals involved.