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INDEPENDENCE INSTITUTE V. WILLIAMS: THE TENTH CIRCUIT'S PROPER RULING OF COLORADO'S DISCLOSURE LAW AND INCREASED FLEXIBILITY IN STATE DISCLOSURE LAW

Christopher Kulesza & Clifford Fisher†

ABSTRACT:

The Citizens United v. FEC *decision generated immense doubt about the future of state campaign finance regulation. Since the* Citizens United v. FEC *decision, opponents of campaign finance reform are becoming increasingly successful in challenging state regulations. Among campaign finance regulations, disclosure requirements have traditionally found the most support among the courts. Even though disclosure requirements were upheld in* Citizens United v. FEC*, they have been placed under pressure by federal district and appeals courts. Indeed, the Eighth Circuit has used* Citizens United v. FEC *to strike down state disclosure requirements. It does not appear, however, that these decisions are a part of a broader trend. This Article reviews* Independence Institute v. Williams*, where state disclosure requirements were strongly upheld by the Tenth Circuit under the review standards set in* Citizens United v. FEC*. The Tenth Circuit reiterated the strong support* Citizens United v. FEC *gave to disclosure requirements under the exacting scrutiny test, which has been a source of ambiguity in other disclosure decisions. Further, the court signaled that states have leeway in their ability to set campaign finance disclosure laws that match the cost of campaigning in their state.*

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I. INTRODUCTION

States have regulated campaign contributions to remove corruption from the political process since the late 1800s.[1] These regulations took the form of campaign contribution limits, expenditure limits, public financing, and disclosure.[2] Of course, public financing, expenditure limits, and campaign contribution limits attempt to directly remove money in politics by statutorily barring donations.[3] On the other hand, disclosure laws "require electoral actors (candidates, political committees, political parties, and others) to report campaign funds, both raised and spent, to a government agency."[4] Ultimately, disclosure requirements attempt to provide information to voters about the relationship between donors and political campaigns rather than specifically barring the flow of money to candidates.

In part, because disclosure requirements do not directly stop contributions and other campaign related activity, they have enjoyed a unique place among the four campaign finance regulations.[5] Unlike various forms of campaign contribution limits,[6] public financing,[7] and expenditure limits,[8] disclosure requirements have been routinely upheld by the United States Supreme Court.[9] Indeed, in the highly-debated *Citizens United v. FEC*,[10] disclosure requirements were provided strong support in the majority opinion, even though the case put all other forms of campaign finance regulations in an exceptionally precarious position.[11] Because of this, disclosure requirements

1. BENJAMIN T. BRICKNER & NAOMI MUELLER, CLEAN ELECTIONS: PUBLIC FINANCING IN SIX STATES INCLUDING NEW JERSEYS PILOT PROJECTS (2016), http://www.eagleton.rutgers.edu/research/newjersey/documents/CE-PublicFinancinginSixStates09-08.pdf.

2. Christopher F. Kulesza, Michael G. Miller & Christopher Witko, *State Responses to U.S. Supreme Court Campaign Finance Decisions*, 47 PUBLIUS 467 (2017).

3. *See* RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, THE (NON-)EFFECTS OF CAMPAIGN FINANCE SPENDING BANS ON MACRO POLITICAL OUTCOMES: EVIDENCE FROM THE STATES (2014), http://people.umass.edu/schaffne/laraja_schaffner_spendingbans.pdf (discussing the effects of these mechanisms, specifically spending bans).

4. Jessica Levinson, *Full Disclosure: The Next Frontier in Campaign Finance Law*, 93 DENV. L. REV. 431, 433 (2016).

5. *See* Buckley v. Valeo, 424 U.S. 1 (1976) ("Unlike the over-all limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities. But we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.").

6. McCutcheon v. FEC, 134 S. Ct. 1434, 1462 (2014); Randall v. Sorrell, 548 U.S. 230, 247 (2006).

7. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011).

8. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 454, 476-81 (2007).

9. Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265 (2000).

10. 558 U.S. 310 (2010).

11. *See* Citizens United v. FEC, 558 U.S. 310, 365-66 (2010) ("The Court has explained that disclosure is a less restrictive alternative to more comprehensive regula-

have oftentimes been considered the most defensible among campaign finance regulations.

In recent decades, tides were turning against disclosure regulations quite quickly in federal district and appellate courts.[12] Most recently, the number of challenges to state disclosure requirements dramatically increased.[13] Federal courts increasingly met state disclosure requirements with skepticism.[14] Disclosure requirements in *Galassini v. Town of Fountain Hills*[15] and *South Carolina Citizens for Life v. Krawcheck*[16] were struck down largely due to the overbreadth in how the term "political committee" was defined.[17] Of these, *Iowa Right to Life Committee, Inc. v. Tooker*[18] and *Minnesota Citizens Concerned for Life, Inc. v. Swanson*[19] are of most interest to this analysis. In these cases, both state disclosure requirements were struck down, even while *Citizens United* provided strong support to these regulations.[20] These cases left unanswered the question of whether *Citizens United* could be used to strike down disclosure requirements in future decisions.

Recent cases at the federal district and appellate levels signal that the courts are still struggling with how to properly apply *Citizens United* to disclosure requirements.[21] Indeed, *Citizens United* may continue to be troublesome for state disclosure law in future cases. Scholars have been exceptionally concerned[22] about the decisions in *Tooker* and *Swanson*.[23] The fallout from both cases, however, may be

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tions of speech."); *see also* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 262 (1986) (rejecting *Citizens United*'s contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy).

12. Michael S. Kang, *Campaign Disclosure in Direct Democracy*, 97 MINN. L. REV. 1700 (2013).

13. *See* CAMPAIGN LEGAL CTR. DATABASE, http://www.campaignlegalcenter.org (last visited Mar. 18, 2018).

14. *See, e.g.*, Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576 (8th Cir. 2015); Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864 (8th Cir. 2012); Galassini v. Town of Fountain Hills, No. CV-11-02097-PHX-JAT, 2014 U.S. Dist. LEXIS 168772 (D. Ariz. 2014); S.C. Citizens for Life v. Krawcheck, 759 F. Supp. 2d 708 (D.S.C. 2010).

15. No. CV-11-02097-PHX-JAT, 2014 U.S. Dist. LEXIS 168772 (D. Ariz. 2014).

16. 759 F. Supp. 2d 708 (D.S.C. 2010).

17. *See Galassini*, 2014 U.S. Dist. LEXIS 168772, at *17; *see also* S.C. Citizens for Life v. Kenneth C. Krawcheck et. al., 759 F. Supp. 2d 708 (D.S.C. 2010).

18. 717 F.3d 576 (8th Cir. 2013).

19. 741 F. Supp. 2d 1115, 1122-23 (D. Minn. 2010).

20. *See* Asher R. Ball, Note, Minnesota Citizens Concerned for Life, Inc. v. Swanson *and Disclosure Burdens: Does Getting Corporations to Talk Suppress Their Speech*, 91 NEB. L. REV. 706, 732 (2013); *see also* David J. Sund, Iowa Right to Life Committee, Inc. v. Tooker*: The Eighth Circuit Ignores* Citizens United *by Striking Down an Iowa Campaign Finance Disclosure Requirement*, 48 CREIGHTON L. REV. 659 (2015).

21. Sund, *supra* note 20.

22. *Id.*; Ball, *supra* note 20.

23. *Swanson*, 741 F. Supp. 2d at 1122-23.

quite limited if the current trend continues. Indeed, both cases were decided by the United States Court of Appeals for the Eighth Circuit and do not seem to be a part of a larger nationwide trend. Even though federal courts beyond the Eighth Circuit have ruled state disclosure requirements are unconstitutional, other courts, such as the court in *Independence Institute v. Williams*,[24] are upholding the requirements under the reasoning of *Citizens United*.[25]

This Article will discuss the challenge to Colorado's disclosure regulation in *Williams* in four parts. First, this Article will provide a brief history of state campaign finance disclosure law.[26] Second, this Article will discuss the central legal standards that have been used by courts to analyze state campaign finance disclosure law.[27] Third, this Article will provide the facts of *Williams*.[28] Fourth, this Article will provide an analysis on how the court properly applied precedent on campaign finance regulation and how it may allow states to broaden their disclosure requirements.[29]

II. A BRIEF HISTORY OF STATE CAMPAIGN DISCLOSURE LAW

Disclosure requirements in the states predate federal regulations.[30] In 1890, New York was the first state to enact disclosure requirements.[31] This initial law required candidates to itemize their campaign expenditures, but not their campaign contributions.[32] Colorado and Michigan both passed very similar laws in 1891.[33] Unfortunately for state reformers, these laws were largely unenforceable and plagued with significant loopholes.[34] Further, these statutes lacked severe punishments for those who did not properly report their campaign expenditures.[35]

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24. 812 F.3d 787 (10th Cir. 2016).

25. *See Citizens United*, 558 U.S. at 371 (finding the disclosure requirements constitutional); *see also* Indep. Inst. v. Williams, 812 F.3d 787 (10th Cir. 2016).

26. *See infra* notes 30-62 and accompanying text.

27. *See infra* notes 63-93 and accompanying text.

28. *See infra* notes 94-107 accompanying text.

29. *See infra* notes 108-160 accompanying text.

30. *See infra* notes 32 and 49 and accompanying text.

31. BENJAMIN T. BRICKNER, IN DIRTY DEALS? AN ENCYCLOPEDIA OF LOBBYING, POLITICAL INFLUENCE, AND CORRUPTION 179-201 (3d ed. 2014).

32. PERRY BELMONT, RETURN TO SECRET PARTY FUNDS: VALUE OF REED COMMITTEE 128 (1st ed. 1927).

33. PETER H. ARGERSINGER, STRUCTURE, PROCESS, AND PARTY 64 (1st ed. 1992).

34. Comment, *Editors Loophole Legislation-State Campaign Finance Laws*, 115 U. PA. L. REV. 983 (1967).

35. BELMONT, *supra* note 32, at 26.

By the turn of the twentieth century, eighteen states enacted disclosure requirements, but three statutes were quickly repealed.[36] The first enforceable state campaign finance disclosure law was the California Purity of Election Act of 1893.[37] In contrast to the Michigan, Colorado, and New York statutes, the California act severely punished those who did not comply with the law.[38]

However, the California law was not long lived. California state officials attempted to enforce the act across both primary and general elections. The statute was challenged in the California Supreme Court in 1896 because it did not apply to primary elections, an argument that would be used against federal laws in future court cases.[39] In response, the legislature passed the Purity of Primary Elections Law in 1897. However, the law was constitutionally flawed. The law required individuals to take an oath that their vote in the primary would directly translate to support in the upcoming general election.[40] The statute was immediately challenged in *Spier v. Baker*,[41] and the California Supreme Court nullified the law soon after.[42]

In 1907, the California state legislature repealed the Purity of Elections Act of 1893 and replaced it with a significantly weaker law. Although the new statute still required expenses to be reported after an election, it no longer provided stiff punishments for candidates who violated the law. The new statute lacked the original public office forfeiture requirement and made failure to report campaign contributions a misdemeanor.[43] For the next forty years, the law was further amended to include primary elections and to bar any candidate from receiving a certificate of nomination until he or she disclosed campaign expenses. The law was still not effective, however, after the amendments were enacted. By the 1950s, only one individual had been prosecuted for election code violations.[44]

Campaign finance reform was relatively delayed at the federal level. Serious federal efforts to regulate campaign finance began nearly twenty years after the first statutes were adopted in the states, coinciding with the advent of the Progressive Era. Unlike the states,

36. ROBERT E. MUTCH, BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM 17 (2014).

37. Bruce A. Thompson, *Campaign Contributions and Expenditures in California*, 41 CAL. L. REV. 303 (1953).

38. *Id.* at 303-04.

39. *Id*.

40. *Id.*

41. 120 Cal. 370 (1898).

42. Leonard M. Friedman, *Reflections Upon the Law of Political Parties*, 44 CAL. L. REV. 65 (1956).

43. *Id*.

44. Bruce A. Thompson, *Campaign Contributions and Expenditures in California*, 41 CAL. L. REV. 300 (1953).

the federal government began first experimenting with campaign contribution limits, not disclosure requirements. The 1904 presidential election cycle generated controversy when it was revealed that President Theodore Roosevelt accepted campaign contributions from corporations.[45] Facing significant criticism, President Theodore Roosevelt called for prohibitions against union and corporate contributions in 1905.[46] Congress responded by passing the Tillman Act,[47] which was signed by President Roosevelt in 1907. Like state campaign finance regulations, the Tillman Act was nearly impossible to enforce.[48] The Tillman Act, however, was the first major step to regulate campaign contributions at the federal level.

The Federal Corrupt Practices Act[49] ("FCPA") introduced federal disclosure requirements for United States House of Representatives campaigns three years later.[50] The original legislation was rife with loopholes and weaknesses.[51] The FCPA required political parties to disclose their campaign spending, not individual candidates. Further, only single-state parties and candidate committees were subject to the disclosure requirements. United States Senate campaigns were added a year later in 1911 to make way for the Seventeenth Amendment. Most controversially, the amendments also placed expenditure limits on House and Senate campaigns at $5000 and $10,000, respectively.[52]

The FCPA directly produced three landmark United States Supreme Court decisions that arguably set the stage for all future challenges to campaign finance regulations. Only one of these, however, dealt with disclosure requirements. *Newberry v. United States*[53] was the first Court challenge to the FCPA. The case centered around the 1918 Michigan Republican Senate primary race between automotive industrialist Henry Ford and Truman H. Newberry.[54] Newberry defeated Ford in the Senate primary, leading Ford to take the Democratic nomination instead to remain in the general election.[55]

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45. Scott John Hammond, Robert North Roberts, Valerie A. Sulfaro, Campaigning for President in America, 1788–2016 36 (2016).

46. *Fifth Annual Message*, Am. Presidency Project, http://www.presidency.ucsb.edu/ws/index.php?pid=29546 (last visited Mar. 17, 2018).

47. 34 Stat. 823 (1906).

48. Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 Yale L. & Pol'y Rev. 279, 280 (1991).

49. 36 Stat. 822 (1910).

50. Richard Briffault, *Two Challenges for Campaign Finance Disclosure After* Citizens United *and* Doe v. Reed, 19 Wm. & Mary Bill Rts. J. 983 (2010).

51. Larry J. Sabato & Howard R. Ernst, Encyclopedia of American Political Parties and Elections 146, 147 (2d ed. 2007).

52. *Id*.

53. 256 U.S. 232 (1921).

54. Raymond J. La Raja, Small Change: Money, Political Parties and Campaign Finance Reform 53 (2008).

55. *Id*.

Newman, however, spent approximately $180,000 in outreach on the primary race, most originating from his personal income. This far exceeded the limits imposed by federal statute, leading to a criminal conviction against Newberry in federal district court.[56]

The Court ruled in *Newberry* that the Federal Constitution did not give Congress the authority to regulate primary elections and party nominating conventions.[57] Thus, the spending limits placed in the FCPA could not be imposed on federal candidates. This Court decision did not have any direct effect on state campaign finance regulations, as states had yet to implement similar spending limits, but arguably set the stage for future constitutional questions on expenditures and state campaign finance law which will be discussed below.

Following the Court ruling, Congress attempted to strengthen the FCPA to include multistate parties and campaign committees in 1925.[58] The FCPA put in place quarterly reporting requirements. The amendments largely failed to eliminate most problems that plagued the original statute. For example, total campaign contributions were not regulated and no penalties were included for violating the law. Congress also failed to identify an agency to enforce the regulations. Instead, enforcement of the regulations was left to Congress, creating perfect conditions for conflicts of interests. Campaigns could also set up multiple campaign committees to avoid the $100 disclosure floor.[59]

Most central to this analysis, *Burroughs v. United States*[60] presented a Court challenge to the FCPA's disclosure requirements. Ada L. Burroughs and James L. Cannon acted as treasurer and chair of an anti-Catholic and Prohibitionist Political Action Committee, respectively, during the 1928 presidential election.[61] Both refused to disclose contributions made to the committee in violation of the FCPA, leading to eleven indictments against them. On each appeal, the courts found that the FCPA was constitutional and that the indict-

56. *Id*.

57. The Supreme Court has explained that the power to control party primaries for designating candidates for the Senate is not within the grant of power "to regulate the manner of holding elections" (U.S. CONST., Art. I, § 4)—neither within the fair intendment of the words used nor the meaning ascribed to them by the framer of the Constitution; it is not necessary in order to effectuate the power expressly granted (U.S. CONST. Art. I, § 8, cl. 18), and its exercise would interfere with purely domestic affairs of the states and infringe upon liberties reserved to the people. Newberry v. United States, 256 U.S. 232 (1921).

58. BROOKINGS INST. PRESS, *Money and Politics: A History of Federal Campaign Finance Law and "Soft Money," in* CAMPAIGN FINANCE REFORM: A SOURCEBOOK 29 (Trevor Potter, et al. eds., 1997).

59. *Id*.

60. 290 U.S. 534 (1934).

61. MUTCH, *supra* note 36, at 93.

ments were justified. Most importantly, the Court upheld disclosure requirements, arguably cementing them as a cornerstone for campaign finance law reformers.[62]

A. Watergate Reform

State endeavors to regulate campaign finances were largely nonexistent from the 1930s to the 1960s, barring a few isolated cases. The numerous challenges to campaign finance regulations in state court may have engendered significant reluctance among the state legislatures from enacting any meaningful changes.[63] This trajectory changed when Congress passed the first federal public finance program in 1966. Sponsored by Senator Russell Long, the program provided a $1.00 checkoff for individuals on their tax forms. The program was quickly repealed a year later, never being used in an election.[64]

The effort to rein in campaign contributions and expenditures was revitalized with the passage of Federal Election Campaign Act[65] ("FECA").[66] The first and most impactful challenge to FECA was a lawsuit brought by Senators James Buckley and Eugene McCarthy, supported by organizations including the American Civil Liberties Union and the American Conservative Union.[67] In *Buckley v. Valeo*,[68] the petitioners argued that the provisions of the amended FECA placed undue restrictions on First Amendment speech protections, including campaign contribution limits, disclosure requirements, and expenditure limits.[69]

The *Buckley* ruling was mixed for campaign finance reformers. Multiple provisions of the 1974 amendments were declared unconstitutional by the United States Supreme Court in a per curiam, seven-to-two decision. Most notably, the Court was exceptionally troubled by the how sweeping and restrictive FECA's expenditure limits were,

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62. Burroughs v. United States, 290 U.S. 534, 547-48 (1934). The Supreme Court noted:

> The power of Congress to protect the election of President and Vice-President from corruption being clear, the choice of means is primarily for the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.

Burroughs, 290 U.S. at 547-48.

63. Brickner, *supra* note 31, at 196.

64. *The FEC and the Federal Campaign Finance Law*, FEC, http://classic.fec.gov/pages/brochures/fecfeca.shtml (last visited Mar. 17, 2017).

65. Pub. L. No. 92-225, 86 Stat. 3 (1971).

66. Federal Election Campaign Act, 52 U.S.C. § 301 (1971).

67. La Raja, *supra* note 54, at 77.

68. 424 U.S. 1 (1976).

69. Buckley v. Valeo, 424 U.S. 1, 11 (1976).

stating that "[t]he provision, for example, would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement 'relative to a clearly identified candidate' in a major metropolitan newspaper."[70] The Court further wrote that expenditure limits violated constitutional protections that allow "candidates, citizens, and associations to engage in protected political expression."[71] The Court also decided that the appointment procedure for the Federal Elections Commission violated the separation of powers principle for giving selection authority to congressional leadership rather than the President.[72]

Even though expenditure limits were ruled unconstitutional, *Buckley* provided state governments with a legal justification to maintain limits on direct contributions. The Court determined that FECA's $1000 limits were "closely drawn," stating that "[FECA's] $1,000 contribution limitation focuses precisely on the problem of large campaign contributions."[73] The Court further found that "the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling."[74] In doing so, the Court set a $1000 contribution level as being an appropriate limit for exercising First Amendment rights.[75] The new federal public finance program was also left relatively untouched by the Court's decision, giving constitutional support to programs that require candidates to surrender their ability to raise funds privately in exchange for taxpayer funded subsidies.

The Court was significantly more supportive of disclosure requirements, arguably cementing them as the least legally challenged campaign finance regulation for decades. As noted, disclosure requirements, unlike public finance laws and contribution limits, do not stop speech from happening. Under disclosure requirements alone, funds can still be transferred from the donor to the campaign. By simply requiring candidates to report their campaign contributions, the Court ruled that such reports "deter actual corruption and avoid the appearance of corruption by exposing large contributions

70. *Buckley*, 424 U.S. at 40.

71. *Id*. at 59.

72. The Supreme Court wrote that "the appointment of Ambassadors and Judges of the Supreme Court was confided to the Senate, and that the authority to appoint—not merely nominate, but to actually appoint—all other officers was reposed in the President." *Id*. at 130.

73. *Id*. at 28.

74. *Id*. at 29.

75. The Supreme Court also stated that "[a]s the Court of Appeals observed, if it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Id.* at 30.

and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election."[76]

As campaign disclosure was declared constitutional by federal courts, disclosure regulations were significantly strengthened by state governments. In contrast to the early disclosure laws, state governments actively attempted to find ways to better enforce their statutes. Arguably, the most important reform to disclosure requirements in the states during the 1970s was a ban on large cash donations.[77] Banning major cash donations gave the state governments an exceptionally powerful tool to track donations to candidates, finally giving officials the means necessary to enforce disclosure requirements. Indeed, during the 1974 election, there was very little evidence that a significant amount of money went undisclosed following the ban.[78]

B. Modern Reform

The precedent that the United States Supreme Court relied upon through the 1990s and 2000s was still relatively supportive of state campaign finance regulation. Arguably, *Citizens United v. FEC*[79] marked the biggest change in the trajectory of the future of state campaign finance regulation.[80] The conservative group Citizens United wished to air and advertise a negative film against Hillary Clinton titled *Hillary: The Movie* within thirty days of the 2008 Democratic primary. Showing the ad was in direct violation of the McCain-Feingold Bipartisan Campaign Reform Act of 2002[81] ("BCRA"), which banned any electioneering communications that were aired thirty days before a primary and sixty days before a general election.

In *Citizens United*, the Court unraveled decades of court precedent regarding independent expenditures made directly from treasuries. Federal limits on independent expenditures from unions and corporations were declared unconstitutional. The decision in *Citizens United* partially overruled *Austin v. Michigan Chamber of Commerce*,[82] which upheld the Michigan ban on corporations from using treasury funds from political activity. *Citizens United* also completely

76. *Id*. at 67.

77. Adoption of the cash donation ban was not universal. For example, Texas still allowed candidates to collect significant contributions through cash. *See* David Broder, *Epilogue*, *in* Campaign Money: Reform and Reality in the States 311 (1976).

78. *Id.*

79. 558 U.S. 310 (2010).

80. Citizens United v. FEC, 558 U.S. 310, 366 (2010).

81. Pub. L. No. 107-155, 116 Stat. 81 (2002).

82. 494 U.S. 652 (1990).

overturned *McConnell v. FEC*,[83] which allowed the federal government to regulate "electioneering communications."

The Court once again provided support for disclosure requirements in *Citizens United*.[84] *Burroughs v. United States*[85] began a trend of favorable decisions followed by *Citizens United*. Writing the opinion of the Court, Justice Kennedy stated that "disclosure is a less restrictive alternative to more comprehensive regulations of speech."[86] The Court also noted that disclosure requirements could provide exceptionally vital information to voters, serving as a tool that could be used to increase democratic accountability.

It should be noted that *Citizens United* did not have a direct impact on state disclosure requirements. The precedent set in *Citizens United*, however, has been used extensively to challenge state campaign finance regulations. For example, in both *Iowa Right to Life Committee, Inc. v. Tooker*,[87] and *Minnesota Citizens Concerned for Life, Inc. v. Swanson*,[88] the courts struck down disclosure requirements tied to independent expenditures made by individuals and groups. Once these individuals and groups reached a certain threshold, ongoing independent expenditure reports had to be filed with the state. The Court had previously upheld very similar requirements, arguably pointing to the misapplication of *Citizens United*.[89] As will be discussed below, however, the reporting requirements in Colorado could hardly be considered slow. Instead, both states required rather rapid reporting once a contribution or expenditure was made to a candidate or political committee.

C. Constitutionality of Disclosure Law: Strict Scrutiny and Exacting Scrutiny

Previous scholarly work on disclosure requirements has discussed two standards by which campaign finance laws are tested in courts: exacting scrutiny and strict scrutiny.[90] It is vital to briefly discuss these two concepts to fully understand how the courts have ruled on disclosure requirements. Strict scrutiny is commonly known to be the most stringent judicial standard applied by the courts. Strict scrutiny is applied when there is a fundamental constitutional right being in-

83. 540 U.S. 93 (2003).
84. Katherine Shaw, *Taking Disclosure Seriously*, Yale L. & Pol'y Rev. Inter Alia (Apr. 3, 2016), https://ylpr.yale.edu/inter_alia/taking-disclosure-seriously.
85. 290 U.S. 534 (1934).
86. *Citizens United*, 558 U.S. at 366.
87. 717 F.3d 576 (8th Cir. 2013).
88. 692 F.3d 864 (8th Cir. 2012).
89. Sund, *supra* note 20.
90. Kevin Bandy, Justice v. Hosemann*: The Fifth Circuit's Devaluation of State Ballot Initiatives and Political Participation*, 84 U. Cin. L. Rev. 475 (2016).

fringed by government action. To pass strict scrutiny, a statute must be narrowly tailored to further a compelling government interest. Very few campaign finance laws have been upheld when the strict scrutiny test is applied. On the other end of judicial scrutiny standards is the rational basis test. Under this test, a law is constitutional when no fundamental rights are at question. For a law to pass this test, it must simply be rationally related to some government interest.

The courts have traditionally used something less than strict scrutiny, but more than the rational basis test, when considering the constitutionality of disclosure requirements, referred to as exacting scrutiny.[91] Exacting scrutiny attempts to balance the burdens that disclosure laws can place on free speech while giving states the ability to design policies that keep the public informed about campaign contributions and expenditures.[92] This test has been much easier for state governments to meet under constitutional challenge. Like strict scrutiny, however, the government must have more than "mere showing of some legitimate governmental interest."[93] That is, the government's interest must be sufficiently important for the law to be constitutional.

III. FACTS AND RULING OF INDEPENDENCE INSTITUTE V. WILLIAMS

Founded in 1985, the Independence Institute is a nonpartisan think tank that operates out of Denver, Colorado. The Independence Institute brought a challenge to Colorado's disclosure requirement in 2014. The Institute hoped to air an advertisement sixty days before the 2014 gubernatorial election that was critical of the State's inability to audit its new health insurance change. The advertisement mentioned incumbent Colorado Governor Hickennlooper, who was running for reelection at the time, by asking voters to contact his office to support legislation that would start an audit.

The Colorado Constitution requires "any person who spends at least $1000 per year on 'electioneering communications' to disclose the name, address, and occupation of any person who donates $250 or more for such communications."[94] "Electioneering communications" are defined as:

> any communication broadcasted by television or radio . . . that: (1) unambiguously refers to any candidate; and (2) is

91. *See* Levinson, *supra* note 4.

92. Zachary R. Clark, *Constitutional Limits on State Campaign Finance Disclosure Laws: What's the Purpose of the Major Purpose Test?*, 2015 U. CHI. LEGAL F. 527 (2016).

93. Bandy, *supra* at 90.

94. COLO. CONST. art. XXVIII, § 6, cl. 1.

> broadcasted, printed, mailed, delivered, or distributed within thirty days before a primary election or sixty days before a general election; and (3) is broadcasted to . . . an audience that includes members of the electorate for such public office.[95]

Concluding that the advertisement would be considered an "electioneering communication," the Independence Institute sought a preliminary injunction against the disclosure requirement fearing that they would infringe on their members' First Amendment rights to free association.

The Independence Institute agreed in its argument that disclosure requirements could be used to regulate speech that was campaign related. Further, it did not challenge the law because the statute was too ambitious or vague. Rather, the Independence Institute contended that the advertisement had little to do with the actual election, even though incumbent Governor Hickenlooper was mentioned by name. Instead, the Independence Institute challenged the law on the grounds that the advertisement was simply presenting a public policy idea. Specifically, that "genuine issue advocacy," even that mentions a candidate, is shielded by the First Amendment from disclosure requirements.[96] For that reason, the Independence Institute argued that disclosure laws could not constitutionally be applied to its advertisement.

The United States District Court for the District of Colorado[97] found that the disclosure requirements survived the "exact scrutiny" test, and thus were not unconstitutional.[98] Through the "exact scrutiny" test, the court properly ruled that "it has long been held that reporting and disclosure requirements are subject to a different standard of scrutiny than restrictions on one's ability to speak."[99] Fur-

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95. COLO. CONST. art. XXVIII, § 2, cl. 7.

96. Indep. Inst. v. Williams, 812 F.3d 787, 792 (10th Cir. 2016).

97. The case was originally filed as Indep. Inst. v. Gessler, 71 F. Supp. 3d 1194 (D. Colo. 2012), in the district court. Scott Gessler was the Colorado Secretary of State until 2015. He was replaced by Wayne Williams.

98. District Judge R. Brooke Jackson wrote very strongly that:

> To begin, and just to be clear, this case is not about preventing the Independence Institute from speaking on the issues of the day. It is not about prohibiting the Institute from broadcasting its advertisement. The Institute is free to broadcast its advertisement so long as it complies with the reporting and disclosure requirements of Article XXVIII. Moreover, the Institute could have broadcast the ad without any reporting or disclosure requirements more than 60 days before the November 4, 2014 election. It can likewise broadcast the ad without any reporting or disclosure requirements after the election. In fact, it could broadcast the advertisement today without the reporting or disclosure requirements if it did not refer unambiguously to a candidate presently running for office.

Gessler, 71 F. Supp. 3d at 1198.

99. *Id.*

ther, the district court found that "the distinction between issue speech and express advocacy has no place in the context of disclosure requirements."[100] The case was later appealed to the United States Court of Appeals for the Tenth Circuit.

The Independence Institute was unsuccessful in its appeal. The court of appeals also ruled in favor of the Colorado disclosure requirements for two primary reasons. First, the Tenth Circuit found that the disclosure requirements were significantly tailored to reach some form of speech. Indeed, the court agreed that the United States Supreme Court allowed for some forms of disclosure requirements even if the speech did not directly relate to an election. *Citizens United v. FEC*[101] directly formed the basis of this reasoning. The Tenth Circuit cited *Citizens United* where the Court stated that "the distinction between issue speech and express advocacy has no place in the context of disclosure requirements."[102] The Colorado law was exceptionally similar to the disclosure provisions of the BCRA.[103] Like the requirements in *Citizens United*, disclosure requirements can encompass some forms of advocacy speech if they are "cabined within the bounds of exacting scrutiny."[104] Since the Court ruled that there was no distinction between advocacy and campaign advertisements, the Colorado disclosure requirements were constitutional as they pertained to the Independence Institute's ad.[105]

Secondly, because the Colorado disclosure requirements were so similar to those upheld in *Citizens United*, the court reasoned that they were sufficiently tailored to meet exacting scrutiny. The court found that the trigger provision was the only difference between the Colorado and BCRA disclosure.[106] The Colorado disclosure regulation required those who annually spend $1000 or more to disclose donors of $250 or more. In contrast, federal regulations require reporting for those who annually spend an aggregate of $10,000 or more to disclose donors of $1000 or more. The court reasoned that state disclosure regulations would naturally have a lower threshold as state elections are typically less expensive to run than federal elections. Thus, the disclosure requirements were tailored to meet the public's informational interest. Even though disclosure requirements chill potential donors,

100. *Id*. at 1201.

101. 558 U.S. 310 (2010).

102. *Williams*, 812 F.3d at 794.

103. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

104. *Williams*, 812 F.3d at 792.

105. *Id*. at 796.

106. *Id*. at 797-98.

they are far less restrictive than other forms of campaign finance regulations.[107]

IV. ARGUMENT

A. The Tenth Circuit Correctly Applied the Exacting Scrutiny Standard to Colorado's Disclosure Law

It should be no surprise that disclosure requirements were upheld by the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit. As noted, disclosure requirements have been consistently upheld by the United States Supreme Court, including the seminal *Buckley v. Valeo*[108] and *Citizens United* v. *FEC*[109] cases. Indeed, the Tenth Circuit has been quite diligent in using the exacting scrutiny standard for disclosure, including the *Sampson v. Buescher*[110] case. Fundamental to these decisions is the agreement by the courts that information is a vital part of the democratic process. The Court has recognized that disclosure requirements provide invaluable information to voters about the sources of campaign contributions and spending. Each ruling recognized the fact that disclosure requirements provide an increased level of accountability to the democratic process. Because of this, disclosure has traditionally been the most upheld campaign finance regulation.

The district courts and courts of appeal have not been able to find consistency in applying the appropriate legal standards on disclosure requirements, even though they have enjoyed a long history of protection by the United States Supreme Court.[111] In many ways, the Court has not provided much guidance to the lower courts in how to apply this standard, even though it was first established under *Buckley*. This has led to highly contradictory decisions in federal and state courts alike, creating some uncertainty among state policymakers as to how far to craft their disclosure requirements.[112] Indeed, the courts of appeal have made wildly different opinions on how to apply the major purpose test versus the exacting scrutiny standard to disclosure requirements.[113]

The way the Tenth Circuit properly distinguished between the previous precedent on campaign finance regulations and their relation to the exacting "scrutiny standard" was quite commendable. Deviat-

107. *Id*. at 798.
108. 424 U.S. 1 (1976).
109. 558 U.S. 310 (2010).
110. 625 F.3d 1261 (10th Cir. 2010).
111. Benjamin N. Levin, *Missouri Campaign Reporting Requirements in the Shade of Citizens United*, 81 Mo. L. Rev. 1195, 1195-1214 (2016).
112. Levinson, *supra* note 4.
113. Clark, *supra* note 92.

ing from previous decisions such as *Iowa Right to Life Committee, Inc. v. Tooker*,[114] the Tenth Circuit was careful to differentiate the several types of campaign finance laws and their relation to *Buckley* and *Citizens United*, leading to a decision that is far more in line with Court precedent. Writing the opinion of the court, Judge Tymkovich separated disclosure requirements, campaign contribution limits, and expenditure limits, pointing to the fact that they fall under different rules.[115] Citing *Randall v. Sorrell*[116] and *Buckley*, the Tenth Circuit acknowledged that both forms of campaign finance regulation "impinge on protected associational freedoms."[117] Campaign contribution limits may only provide a "marginal" impact on an individual's right to free speech. So long as they meet the closely drawn standard, campaign contribution limits are constitutional. Expenditure limits are not simply an impediment to speech. Rather, expenditure limits are a direct mechanism to reduce the amount of political communication that can be made by a campaign. Thus, any expenditure limit must be scrutinized under the strict scrutiny standard. Up until now, there has not been an expenditure limit that has passed constitutional muster, even limits that were voluntary, such as New Hampshire.[118]

On the other hand, the Court found in *Buckley* that disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign related activities."[119] The Tenth Circuit emphasized that, under *Citizens United*, disclosure requirements only require the government to meet the exacting scrutiny, "which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest."[120]

Of course, it is important to note the similarities between the state and federal laws. Since the disclosure requirements utilized by Colorado were carefully tailored to match those upheld under *Citizens United*, the Independence Institute did not have nearly enough justification to argue against the statute. In this sense, nothing beyond a ruling in favor of the Colorado statute should have been acceptable. Had the Tenth Circuit failed to conform to prior precedent, it would have been unduly constrained in its ability to craft new disclosure requirements.

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114. 717 F.3d 576 (8th Cir. 2013).

115. Indep. Inst. v. Williams, 812 F.3d 787, 791-92 (10th Cir. 2016).

116. 548 U.S. 230 (2006).

117. *Williams*, 812 F.3d at 791.

118. Kennedy v. Gardner, Civ. No. 98-608-M, 1999 U.S. Dist. LEXIS 23480, at *16 (D.N.H. Sept. 30, 1999).

119. Buckley v. Valeo, 424 U.S. 1, 64 (1976).

120. *Williams*, 812 F.3d at 792.

B. Separating Types of Regulated Speech and Disclosure Requirements

To avoid precedent on campaign disclosure requirements, the Independence Institute attempted to carve out "genuine issue advocacy" from other forms of campaign communication, arguing that it was shielded by the First Amendment. Rather, even though the advertisement mentioned the candidate's name, the Independence Institute argued that any advertisement dealing specifically with these issues could not be regulated by disclosure requirements.[121]

That argument is a stretch, contradicting precedent that *Buckley v. Valeo*[122] began. First, there is very little to suggest that forms of speech beyond express advocacy cannot be regulated. *Buckley* was specific in only declaring express advocacy as constitutional.[123] As the Tenth Circuit noted, campaign disclosure law has evolved with time along with the Court's understanding of how the First Amendment applies to forms of speech beyond express advocacy. Instead, the *Buckley* decision was primarily a product of the statute rather than an attempt at making any constitutional distinction between both forms of speech. Under *Citizens United v. FEC*,[124] the Court found that the distinction between these forms of speech do not apply with regard to the constitutionality of disclosure requirements. Rather, disclosure requirements can extend beyond express advocacy. Thus, the Tenth Circuit correctly sided in favor of the statute, stating that the Court's previous logic did not make such a distinction between "genuine issue advocacy" and other forms of speech.

It is apparent that the Independence Institute's advertisement was intended to shift the public attitude about Governor Hickenlooper before the election. The decision by the Tenth Circuit may be quite intuitive considering how precedent made it clear that speech beyond candidate advocacy can be regulated under *Citizens United*. The Tenth Circuit, realizing that the campaign advertisement was obviously intended for the election, went a step further in reiterating that the difficulty in drawing a line between campaign speech and non-campaign speech was exactly why the Supreme Court did not distinguish between the two.[125] This decision further provides states flexibility to bring to light campaign contributors that may attempt to influence an election through independent expenditures.

121. Indep. Inst. v. Williams, 812 F.3d 787, 791-92 (10th Cir. 2016).
122. 424 U.S. 1 (1976).
123. Buckley v. Valeo, 424 U.S. 1, 47-48 (1976).
124. 558 U.S. 310 (2010).
125. *Williams*, 812 F.3d at 796.

C. The Tenth Circuit Properly Considered the Cost of Campaigning at the State Level

Of course, the impact of these decisions extends beyond the proper application of the exacting scrutiny standard. States have attempted to stretch disclosure requirements knowing that expenditure requirements, public finance laws, and campaign contribution limits could be challenged on constitutional grounds. Thus, disclosure requirements bear a strong burden in ensuring fair elections, more than ever before. Because of this, disclosure requirements have significantly evolved over the past two decades expanding to cover electronic reporting, independent expenditures, electioneering communications, and small group campaigning activities.[126] In some instances, such as the challenge in *South Carolina Citizens for Life, Inc. v. Krawcheck*,[127] states have not been as successful in defending these more comprehensive disclosure requirements in federal courts as these laws expand.[128] The *Independence Institute v. Williams*[129] decision is particularly noteworthy for how far the legislatures can craft disclosure requirements to regulate campaign activity to meet the needs of their respective states while still failing under the exacting scrutiny standard.

The most compelling challenge to Colorado's disclosure requirements were the differences in monetary limits built into the trigger provisions. As noted, the Colorado disclosure trigger provision was only set at $1000 compared to the $10,000 level upheld in the *Buckley v. Valeo*[130] decision, setting a much lower limit on the regulation of speech. The courts have grappled with the question of what level of money is appropriate in other unrelated cases, particularly with cam-

126. Schmeida R. McNeal, et al., *E-Disclosure Laws and Electronic Campaign Finance Reform: Lessons From the Diffusion of E-Government Policies in the States*, Gov't Info. Q., https://www.researchgate.net/publication/220526960_Reflecting_on_E-Government_Research (last visited Oct. 30, 2017).

127. 301 F. App'x 218 (4th Cir. 2008).

128. The court in South Carolina Citizens for Life, Inc. v. Krawcheck stated:

> Like the regulations in the above cited cases, the South Carolina Ethics Act imposes numerous burdens on entities that qualify as committees under S.C.Code Ann. § 8-13-1300(6) without reference to the entity's major purpose. As previously stated, the Ethics Act imposes approximately fifteen burdens of varying degree. These burdens include requirements that each committee file recurring certified campaign reports; maintain records of contributions, contributors, and expenditures; comply with various bank account requirements; reject anonymous and cash contributions; and disclose information about contributions and expenditures. . . This Court concludes that the committee provisions of the South Carolina Ethics Act at issue simply sweep too far. The committee definition set forth at S.C.Code Ann. § 8-13-1300(6) is in direct conflict with the Fourth Circuit's decision in Leake, and therefore requires invalidation by this Court.

S.C. Citizens for Life, Inc. v. Krawcheck, 759 F. Supp. 2d 708, 718-20 (D.S.C. 2010).

129. 812 F.3d 787 (10th Cir. 2016).

130. 424 U.S. 1 (1976).

paign contribution limits. States that tested this level have been challenged in court with varying success.

Missouri's campaign contribution limits were upheld by the *Nixon v. Shrink*[131] United States Supreme Court decision. Missouri set a campaign contribution level of $1075. The petitioners argued that this campaign contribution limit was unconstitutionally low. Rather, the $1000 limit upheld under *Buckley* was only constitutional so long as the limits were increased to inflationary pressures. Writing for the Court, Justice Souter wrote that "this assumption is a fundamental misunderstanding of what we held."[132] Instead, the Court asked in *Buckley* if "the limits were so low as to impede the ability of candidates to 'amas[s] the resources necessary for effective advocacy.'"[133] The *Buckley* decision upheld a $1000 federal campaign contribution limit. The *Buckley* Court stated, however, that this $1000 limit was not a constitutional minimum for which the states could set their statutes.[134]

Other states have not been as successful arguing for lower campaign contribution limits. For example, Vermont's campaign contribution limits were challenged in the *Randall v. Sorrell*[135] United States Supreme Court decision. The Vermont campaign contribution limits were the most restrictive in the country in 2005 at $200 for the State House, $300 for the Senate, and $400 for all statewide elections. These totals included any campaign contribution made in-kind and were not indexed for inflation. This campaign finance law also imposed expenditure limits on all state campaigns.[136]

During oral arguments, Justice Antonin Scalia openly questioned if Vermont legislators could be bought at such a low level of campaign support. William Sorrell, arguing for the State of Vermont, stated that "in over 65 hearings before our legislature and then through a 10-day trial, we established that as the trial court said, the threat of corruption in Vermont is far from illusory," to which Justice Scalia asked "[t]o the extent that Vermont legislators can be bought off by $51?" (Justice Scalia was said to be indexing the campaign contribution limit to 1972 prices when FECA was enacted).[137] William Sorrell replied that Vermont's gubernatorial elections have the second lowest expenditures in the nation and exceptionally cheap media markets

131. 528 U.S. 377 (2000).
132. Nixon v. Shrink, 28 U.S. 377, 396 (2000).
133. Buckley v. Valeo, 424 U.S. 1, 21 (1976).
134. *Buckley*, 424 U.S. at 21.
135. 548 U.S. 230 (2006).
136. Randall v. Sorrell, 548 U.S. 230, 237 (2006).
137. Transcript of Oral Argument at 28, Randall v. Sorrell, 530 U.S. 230 (2006) (No. 04-1528).

around Burlington.[138] Thus, Sorrell implied that Vermont candidates could effectively run a campaign under these strict campaign contribution limits.

The Court was not convinced that the low cost of campaigns, nor the motivation to combat corruption, were sufficient to uphold Vermont's campaign contribution and expenditure limits. In a six-to-three decision, the Court ruled that the Vermont campaign contribution and expenditure limits were unconstitutional and failed to meet the "closely drawn" standard since they were "sufficiently low as to generate suspicion that they are not closely drawn."[139] The United States Supreme Court admitted that the courts typically do not wish to set specific limits for states. As ruled in *McConnell v. FEC*,[140] the Court found that the "legislature is better equipped to make such empirical judgments, as legislators have 'particular expertise' in matters related to the costs and nature of running for office."[141]

State legislatures' ability to regulate campaign finance law requirements can only go so far. Writing the opinion of the Court, Justice Breyer wrote that a lower bound does exist when setting campaign finance laws, consistent with the *Buckley* decision. Further, Justice Breyer stated that "[a]t some point the constitutional risks to the democratic electoral process become too great."[142] Eventually, low limits would impose a significant burden on candidates hoping to mount an effective campaign.

These cases are only relevant to campaign disclosure requirements insomuch as they reinforce the importance of courts to consider the cost of conducting state elections. In most ways, it is improper to directly compare court decisions on campaign contribution limits and disclosure requirements through the subtle intricacies of these cases. As noted earlier, the courts have consistently ruled that campaign contribution limits impact speech in a much more direct manner than disclosure requirements.

With this being said, campaign contribution limits and disclosure requirements are oftentimes grouped together in federal court decisions as constitutional ways to remove corruption in elections. Indeed, the *Buckley* Court ruled that campaign contribution limits, "along with the disclosure provisions, constitute the [FECA's] primary weapons against the reality or appearance of improper influence stemming

138. Transcript of Oral Argument, *supra* note 137, at 31.
139. Randall, 548 U.S. at 249.
140. 540 U.S. 93 (2003).
141. McConnell v. FEC, 540 U.S. 93, 137 (2003).
142. *McConnell*, 540 U.S. at 136.

from the dependence of candidates on large campaign contributions."[143]

Both campaign contribution limits and disclosure requirements use specific monetary levels set at an amount the legislature believes is proper to conduct a campaign in its state. In most cases, this falls well below what it would cost to run a state legislative campaign. Thus, it is vital that the courts fully understand the cost differences associated with running a state compared to a federal campaign. If they fail to do so, state legislators will find it nearly impossible to regulate state elections effectively. The Tenth Circuit decision found that "smaller elections can be influenced by less expensive communications."[144] In this manner, the *Williams* decision was an exceptionally supportive decision for policymakers seeking to set disclosure requirements that will have a real impact on state elections. Indeed, per data from the National Institute on Money in State Politics, the average campaign contribution to state legislative candidates in 2014 was $507.41.[145] Ninety percent of all campaign contributions were below $1000. Without the recognition of the courts of these relatively low totals, most state campaign contributions and expenditures would never be made available to the public.

This is not to say, however, that disclosure requirements cannot be detrimental to speech. States should act with free rein in setting their disclosure requirement levels. Disclosure requirements that are set at an exceptionally low level or that are vague can hinder private individuals' ability to advocate for a policy position. For example, Arizona's disclosure requirements were struck down in federal district court in *Galassini v. Town of Fountain Hills*[146] for placing exceptional burdens on small groups and individuals to express their First Amendment rights by requiring them to first register as a political action committee.[147] States should still be cautious when determining the trigger provisions for their campaign disclosure laws.

D. Lack of Appeal to the United States Supreme Court

Following the decision, Independence Institute President John Caldra stated that the case would be appealed to the United States

143. *Buckley*, 424 U.S. at 59.

144. *Williams*, 812 F.3d at 797.

145. Nat'l Inst. on Money in State Politics, www.followthemoney.org (last visited Jan. 20, 2018).

146. No. CV-11-02097-PHX-JAT, 2013 U.S. Dist. LEXIS 142122 (D. Ariz. 2013).

147. Galassini v. Town of Fountain Hills, No. CV-11-02097-PHX-JAT, 2013 U.S. Dist. LEXIS 142122, at *59 (D. Ariz. 2013).

Supreme Court.[148] Interestingly, *Independence Institute v. Williams*[149] was never appealed. Instead, the Independence Institute opted to appeal another case, *Independence Institute v. FEC*,[150] under a suit it brought to federal courts concurrently with *Williams*, which challenged federal disclosure law requirements under BCRA.[151] The two cases have many parallels beyond the circumstance of being argued before federal courts at the same time. The legal arguments used against disclosure requirements in *Independence Institute v. FEC* decision closely mimic those in *Williams.* This led to only one of the cases being appealed to the United States Supreme Court. Likewise, the findings of the Tenth Circuit and district courts were highly similar. As discussed below, *Williams* was directly cited in the lower court three-judge panel decision for *Independence Institute v. FEC*.

Like *Williams*, the Independence Institute wanted to run an ad in Colorado for the 2014 election. In this case, the ad was in support of the Justice Safety Valve Act ("JSVA") and told constituents to call Senators Udall and Bennet to back the legislation. Senator Mark Udall was formally running for reelection, and thus the communication would have fallen under federal disclosure requirements. The Independence Institute declined to run the ad believing that it would be regulated under BCRA.[152]

The Independence Institute argued that the large-donor disclosure law violated its First Amendment rights in two ways. First, nearly identical to *Williams*, the Independence Institute argued that the advertisement is "general issue advocacy," and thus it is constitutionally exempt from disclosure.[153] Second, since the Independence Institute is a nonprofit organization and cannot engage in political activity, advertisements of a legislative matter also constitutionally exempt the ad from disclosure law.[154]

The panel provided a very strong decision in favor of the large-donor BCRA disclosure requirements. In a highly similar manner to the Tenth Circuit decision in *Williams*, the three-judge panel found no difference between the two forms of speech. It reiterated the fact that the United States Supreme Court rejected the argument that the First Amendment requires Congress to regulate "issue advocacy" from "ex-

148. John Frank, *Colorado Campaign Disclosure Law Upheld by Federal Appeals Court*, DENVER POST (Feb. 5, 2016, 4:32 PM), http://blogs.denverpost.com/thespot/2016/02/05/federal-appeals-court-upholds-colorados-campaign-disclosure-law/124936/.

149. 812 F.3d 787 (10th Cir. 2016).

150. 816 F.3d 113 (D.D.C. 2014).

151. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

152. Indep. Inst. v. Williams, 812 F.3d 787, 791 (10th Cir. 2016).

153. *Williams*, 812 F.3d at 796.

154. *Id*.

press advocacy."[155] The court wrote, "First, the Supreme Court and every court of appeals to consider the question have largely, if not completely, closed the door to the Institute's argument that the constitutionality of a disclosure provision turns on the context of the advocacy accompanying an explicit reference to an electoral candidate."[156]

Second, the court found the "genuine" issue advocacy exception constitutionally 'unworkable.'" Simply, the Independence Institute did not offer any sort of rule or guideline on how advocacy directly mentioning electoral candidates would be constitutionally judged or how the FEC could neutrally enforce it. The trial court directly referenced *Williams*, stating that it was even questionable that the advertisement could not be construed as a candidate-centered message.[157]

Finally, the three-judge panel also ruled that the large-donor disclosure requirement was fully constitutional under the "exacting scrutiny" test, properly applying Court precedent in its decision. The three-judge panel found that the United States Supreme Court already ruled that the large-donor disclosure requirement under BCRA "advances substantial and important government interest." Quoting *McConnell v. FEC*,[158] the three-judge panel emphasized that disclosure requirements provide "the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." Also, the disclosure requirement is "tailored to substantially advance those interests" since they did not stop anyone from speaking or present a ceiling on campaign related activities.

The decision of the three-judge panel was appealed to the United States Supreme Court. The Court, however, simply upheld the decision without further comment.[159] The ruling by the United States Supreme Court to uphold the lower court's decision in *Independence Institute v. FEC* without comment cannot be overemphasized. As discussed, the Court has not shied away from controversial rulings on campaign finance law in recent years. It appears that the Court is quite adamant about the constitutionality of both state and federal disclosure requirements, in stark contrast to the concern of many following the *Citizens United v. FEC*[160] decision.

The lack of an appeal for *Williams* is also critical. Obviously, without an appeal, the decision stands intact. While it does not carry the same weight as a United States Supreme Court decision, the

155. *Id*. at 793-94.
156. Indep. Inst. v. FEC, 216 F. Supp. 3d 176, 187 (D.D.C. 2016).
157. *Indep. Inst.*, 216 F. Supp. 3d at 189.
158. 540 U.S. 93 (2003).
159. Indep. Inst. v. FEC, 137 S. Ct. 1204 (2017) (mem.).
160. 558 U.S. 310 (2010).

Tenth Circuit decision could provide leeway to state governments experimenting with varying forms of disclosure requirements, especially since the decision was directly cited in the three-judge panel decision that was upheld by the Court. With this, policymakers should feel more comfortable in designing disclosure regulations that match the nuances of campaigning in their own state.

V. CONCLUSION

Following *Independence Institute v Williams*,[161] we might see a shift among courts in their efforts to properly apply the exacting scrutiny standard to disclosure requirements. Overall, the trajectory of decisions regarding disclosure requirements tended to be quite poor for campaign finance reformers. The number of successful challenges to state disclosure requirements increased during the past two decades. There are notable signs in *Williams* that the courts may be more willing to defend disclosure requirements in the future, particularly with the staunch support provided by the *Independence Institute v. FEC*[162] United States Supreme Court decision.

Of course, two of the most recent and controversial decisions that led to incorrect interpretations of the exacting scrutiny standard both came from the United States Court of Appeals for the Eighth Circuit, immediately suggesting that these rulings might be limited. Unsurprisingly, the *Iowa Right to Life Committee, Inc. v. Tooker*[163] decision borrowed heavily from the *Minnesota Citizens Concerned for Life, Inc. v. Swanson*[164] ruling.[165] Both cases draw from the same underlying Court precedent on campaign disclosure requirements. Courts of appeal and district courts draw from each other's decisions. Indeed, the exacting scrutiny standard test in *Williams* was recently cited in the *Calzone v. Hagan*[166] decision. This case, combined with *Independence Institute v. FEC*, may provide some clarity on how to properly apply the exacting scrutiny standard.

In the short time that has passed, the *Williams* decision has been quite durable. The Colorado disclosure requirements were once again upheld by the United States Court of Appeals for the Tenth Circuit in both the *Vogt v. City of Hays*[167] and the *Coalition for Secular Govern-*

161. 812 F.3d 787 (10th Cir. 2016).
162. 816 F.3d 113 (D.D.C. 2014).
163. 717 F.3d 576 (8th Cir. 2013).
164. 692 F.3d 864 (8th Cir. 2012).
165. *See generally* Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576 (8th Cir. 2013) (citing Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864 (8th Cir. 2012), throughout the case's rationale).
166. No. 2:16-cv-04278-NKL, 2017 U.S. Dist. LEXIS 29937 (W.D. Mo. 2017).
167. 844 F. 3d 1235 (10th Cir. 2017).

ment v. Williams[168] decisions. In its decisions, the court reaffirmed its application of the exacting scrutiny standard used in *Independence Institute v. Williams*.

The *Independence Institute v. Williams* decision may also provide much needed coverage to state governments as they craft campaign finance laws. The number of policy options at the disposal of state governments continues to shrink as federal and state courts strike down campaign contribution limits, public financing, and expenditure requirements; disclosure is the final regulation for policymakers and reformers to implement without the risk of significant constitutional challenge. Recognizing that state campaigns are less expensive than federal campaigns, legislatures are provided leeway with crafting disclosure requirements that meet the needs of their citizens.

168. 815 F. 3d 1267 (10th Cir. 2016).

LIMITED LIABILITY COMPANIES AND VOLUNTARY CREDITORS: REEXAMINING THE ABOLISHMENT OF VEIL PIERCING

DANIEL BUCHHOLZ†

I. INTRODUCTION

Piercing a company's veil of limited liability remains one of the most litigated issues in corporate law and one of the most hotly debated topics among business-law scholars.[1] Nonetheless, despite the numerous cases involving veil piercing, courts have hardly defined the

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1. *See, e.g.*, Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991) ("Piercing the corporate veil is the most litigated issue in corporate law . . . .").

doctrine in a coherent or consistent manner.[2] Further, this confusion is only enhanced when courts attempt to pierce the veil of a limited liability company ("LLC").

The confusion surrounding LLC veil piercing stems from numerous factors, including some courts' seemingly blind application of corporate standards,[3] and worse, some courts' misunderstanding that the corporation and the LLC are not the same entity.[4] Indeed, the LLC is a different entity than the corporation in both structure and purpose. Most notably, the LLC is primarily a creature of contract, thereby making it a highly customizable business entity. Further, the contractual nature of the LLC is also ideal for voluntary creditors because, by default, many LLC statutes, such as the Delaware Limited Liability Company Act ("DLLCA"), provide voluntary creditors with numerous contractual avenues to ensure repayment. Moreover, there are other important doctrinal differences between the corporation and the LLC, such as those involving fiduciary duties. Nonetheless, courts ignore many of the LLC's special features in veil-piercing cases.

This Article argues that courts and legislatures should prevent voluntary creditors from piercing the LLC veil. LLC statutes—including, most notably, the DLLCA—encourage freedom of contract, yet allowing voluntary creditors to pierce an LLC's veil allows them to bargain for protection ex post. Moreover, the differences between the corporation's and the LLC's doctrines, structures, and purposes further support repeal. Section II of this Article provides the necessary background on veil piercing and LLC law. Next, Section III argues that LLC veil piercing for voluntary creditors is contradictory to both LLC statutes, such as the DLLCA, and LLC law in general. Section III also points out the important differences between the corporation and the LLC that should not be ignored by courts and legislatures. Finally, Section IV argues the difference in treatment for involuntary creditors is warranted and calls for courts to stop piercing the LLC veil for voluntary creditors.

2. *See, e.g.*, ROBERT CLARK, CORPORATE LAW 72 (1986) ("[T]he courts usually forgo any sustained attempt at a remedial theory or even a coherent exposition of the basis of liability, although descriptive summaries are occasionally attempted.").

3. *See infra* note 94 and accompanying text.

4. *See infra* note 93 and accompanying text.

II. THE ENIGMA OF VEIL PIERCING AND THE LIMITED LIABILITY COMPANY

A. Limited Liability and Its Exception

Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.[5]

—Judge Benjamin Cardozo

Entity separateness is a longstanding "bedrock principle"[6] in business law.[7] As a separate entity from its owners, an entity (such as the corporation or the LLC) has its own "legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs."[8] Accordingly, an owner's liability is limited to the amount of its investment in the enterprise.[9] In other words, barring exceptional circumstances, the firm's creditors cannot recover any unpaid business debts from the owners themselves.[10] As a result, entity separateness encourages entrepreneurial activity by founders, risk-taking by management, and investment by passive investors.[11] Not surprisingly, entity separateness—and its resulting limited liability—is the "the primary benefit" of the corporation and the LLC.[12] Better stated, a firm's "most precious characteristic" is the "privilege of limited liability."[13] In short, limited liability is "sacrosanct."[14]

Nonetheless, like any privilege granted by the law, there is a risk of abuse or unfairness. Accordingly, there is an equally fundamental principle in business law that carves out an exception to limited liabil-

5. Berkey v. Third Ave. Ry., 155 N.E. 58, 61 (N.Y. 1926).

6. United States v. Bestfoods, 524 U.S. 51, 52 (1998).

7. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 642-44 (1819); 1 William Blackstone, Commentaries on the Laws of England 455 (1979) ("[I]t has been found necessary . . . to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality. These artificial persons are called bodies politic, bodies corporate, . . . or corporations . . . .").

8. Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001).

9. *See, e.g.*, Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp., 483 F.2d 1098, 1102 (5th Cir. 1973).

10. *See, e.g.*, United States v. Jon-T Chems., Inc., 768 F.2d 686, 690 (5th Cir. 1985) ("Creditors of the corporation have recourse only against the corporation itself, not against its parent company or shareholders."); *see also* Revised Uniform Limited Liability Company Act § 304(a) (Unif. Law Comm'n 2006) (noting owners of an LLC are not liable for the debts and obligations incurred or torts committed by the LLC).

11. *See* Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 93-97 (1985).

12. Timothy P. Glynn, *Beyond "Unlimiting" Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 Vand. L. Rev. 329, 337 (2004).

13. William W. Cook, The Principles of Corporation Law 19 (1925).

14. *In re* BH S & B Holdings LLC, 420 B.R. 112, 133 (Bankr. S.D.N.Y. 2009).

ity.[15] Under the equitable[16] doctrine of "piercing the veil," a court may disregard a firm's limited liability shield and hold the owners personally liable for the obligations of the firm.[17] Piercing the veil is a logical and predictable complement to limited liability: who else would creditors seek payment from when a firm stops paying the bills?[18]

Veil piercing has become more popular in recent years, and despite courts' contentions that veil piercing is a "difficult task,"[19] nearly fifty percent of veil-piercing claims are successful.[20] Notwithstanding the numerous veil-piercing cases, courts have failed to identify a universal standard to apply.[21] The confusion stemming from veil piercing is, undoubtedly, "the existence of incoherent and inconsistent multifactored tests."[22]

Nonetheless, as a starting point, courts generally pierce the veil if two requirements are met: first, there must be a unity of interest between the entity and its owner(s); and second, there must be a wrongful or fraudulent act by the owner(s), such that allowing the lack of separateness between the entity and its owner(s) to continue would promote fraud or injustice.[23] Further, some courts also require a sufficient nexus between the abuse of the limited liability form and the alleged misconduct. That is, the owner's wrongful conduct must be tied to the manipulation of the limited liability form to make veil piercing justifiable on grounds of equity.[24]

To assist in their analyses, courts somewhat haphazardly apply numerous factors to determine if each requirement is met.[25] Despite the myriad of factors enumerated by courts, the most persuasive factors for piercing the veil include injustice or unfairness, misrepresen-

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15. *See Bestfoods*, 524 U.S. at 62-63.

16. *But see infra* notes 33-37 and accompanying text.

17. *See generally* STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 1.1 (2017) (explaining the doctrine's basic principles).

18. *See* Jonathan Macey & Joshua Mitts, *Finding Order in The Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 105 (2014) ("Whenever a corporation is unable fully to meet its creditors' demands for payment, . . . the company's shareholders generally are the most attractive target.").

19. *See, e.g.*, LaSalle Nat'l Bank v. Perelman, 82 F. Supp. 2d 279, 295 (D. Del. 2000).

20. *See* Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 107-09 (2010).

21. *See, e.g.*, Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 507 (2001) (noting the doctrinal standards of veil piercing are "often characterized by ambiguity, unpredictability, and even a seeming degree of randomness").

22. Macey & Mitts, *supra* note 18, at 106.

23. *See, e.g.*, Kinney Shoe Corp. v. Polan, 939 F.2d 209, 211 (4th Cir. 1991); FREDERICK J. POWELL, PARENT AND SUBSIDIARY CORPORATIONS: LIABILITY OF A PARENT CORPORATION FOR THE OBLIGATIONS OF ITS SUBSIDIARY § 3, at 4-6 (1931).

24. *See, e.g.*, Doberstein v. G-P Indus., Inc., No. 9995-VCP, 2015 WL 6606484, at *4 (Del. Ch. Oct. 30, 2015).

25. *See, e.g.*, Laya v. Erin Homes, Inc., 352 S.E.2d 93, 98-99 (W. Va. 1986) (listing nineteen factors courts utilize in veil-piercing cases).

tation or fraud, domination by a single owner, commingling of assets, and undercapitalization.[26] It should be noted, however, that these factors are often applied inconsistently.[27]

It is also worth noting some of the practical realities of veil piercing. First, courts will only pierce the veil of closely held entities because ownership in publicly held entities is too widely dispersed, which prevents adequate control of the firm to justify veil piercing.[28] Second, veil piercing is more common when the entity is owned by individual shareholders or members rather than parent companies.[29] Third, involuntary creditors are more successful than voluntary creditors in piercing the veil.[30] Fourth, while the procedural components of veil-piercing claims are often misunderstood,[31] "[i]nsolvency is a natural complement to veil-piercing," as it would make little sense to seek recovery from a firm's owners when the firm can satisfy the amount owed to its creditors.[32] Fifth and finally, despite the fact that courts[33] and commentators[34] contend veil piercing is an equitable remedy, the doctrine does not appear to be rooted within concerns of inequitable bargains.[35] Indeed, courts do not appear to sufficiently analyze the

26. *See* Oh, *supra* note 20, at 133 tbl.12, 134.

27. *Compare* Riggins v. Dixie Shoring Co., 592 So. 2d 1282, 1283 (La. 1992) (Dennis, J., concurring) (listing the failure to pay dividends as a factor for piercing the veil), *with* Soroof Trading Dev. Co. v. GE Fuel Cell Sys. LLC, 842 F. Supp. 2d 502, 521 (S.D.N.Y. 2012) (listing the payment of dividends as a factor for piercing the veil).

28. Oh, *supra* note 20, at 110, 110 tbl.3.

29. *Id.* at 110 tbl.4.

30. *Id.* at 141 tbl.14.

31. *See* Sam F. Halabi, *Veil-Piercing's Procedure*, 67 RUTGERS U. L. Rev. 1001, 1016 (2015) ("The reality is that veil-piercing claims run the gamut from freestanding causes of action . . . to affirmative defenses to, indeed, equitable remedies enforced at the end of litigation.").

32. Oh, *supra* note 20, at 132.

33. States such as Alabama, Massachusetts, and New York treat veil piercing as an equitable remedy. *See Ex parte* Thorn, 788 So. 2d 140, 143 (Ala. 2000); Heimlich v. Friedfertig, No. 07-P-817, 2008 WL 4500221, at *1 (Mass. App. Ct. Oct. 9, 2008); Morris v. N.Y. Dep't of Taxation & Fin., 623 N.E.2d 1157, 1160 (N.Y. 1993).

34. *See, e.g.*, Peter B. Oh, *Veil-Piercing Unbound*, 93 B.U. L. REV. 89, 90 (2013) ("Veil-piercing is an equitable remedy."); Thompson, *supra* note 1, at 1068.

35. *See* Oh, *supra* note 20, at 128 (noting there is "no appreciable difference in veil-piercing when a bargain involves only organizations, versus an organization with an individual"); *see also* Stephen M. Bainbridge, *Abolishing LLC Veil Piercing*, 2005 U. ILL. L. REV. 77, 79 n.14 (2005).

sophistication[36] of the contracting parties in veil-piercing claims brought by voluntary creditors.[37]

Not surprisingly, the inconsistent and sporadic application of veil piercing has prompted some commentators to seek reform and even abolishment of the doctrine.[38] Others, however, have sought a simpler approach by attempting to clarify the doctrine. Specifically, commentators have argued the first prong of the veil-piercing analysis (i.e., lack of separateness) is merely a proxy for the actual reason courts pierce the veil.[39] In fact, despite veil piercing's purported confusion, commentators have established that courts will pierce the veil in predictable circumstances, such as to achieve the goals of a specific regulatory scheme, to avoid fraud or misrepresentation by owners attempting to obtain credit, or to promote bankruptcy values (i.e., resolving insolvency problems as efficiently as possible).[40]

Avoidance of fraud or misrepresentation by owners is the most compelling justification identified, as fraud and misrepresentation are the most frequently cited rationales by courts for piercing the veil.[41] Like most veil-piercing claims, this justification is classified based on the type of creditor. For voluntary creditors, courts may pierce the veil when there is evidence of misleading statements or representations that do not rise to the level of common law fraud.[42] For involuntary creditors, courts may pierce the veil to discourage inadequate oversight or negligent mismanagement of a firm.[43]

Additionally, piercing the veil to further a regulatory or statutory scheme is another compelling justification, as veil-piercing claims couched in violations of environmental statutes[44] and employee bene-

36. *See, e.g.*, *Doberstein*, 2015 WL 6606484, at *2, *5, *5 n.24 (noting the assistance the plaintiff received from her interior designer during a remodeling project qualified the plaintiff as sophisticated for purposes of veil piercing and equitable fraud). *But see* Advanced Tel. Sys., Inc. v. Com-Net Prof'l Mobile Radio, LLC, 846 A.2d 1264, 1282 (Pa. Super. Ct. 2004).

37. Oh, *supra* note 20, at 129 tbl.10 (noting that veil-piercing contract claims are nearly equally successful between organizations and between individuals and organizations).

38. *See generally* Bainbridge, *supra* note 21 (calling for the total abolishment of the veil-piercing doctrine and discussing other reform attempts).

39. Macey & Mitts, *supra* note 18, at 102.

40. *Id.* at 113.

41. *See* Oh, *supra* note 20, at 133 tbl.12, 134.

42. Macey & Mitts, *supra* note 18, at 124-27.

43. *See id.* at 127-28.

44. *See generally* Lucia Ann Silecchia, *Pinning the Blame & Piercing the Veil in the Mists of Metaphor: The Supreme Court's New Standards for the CERCLA Liability of Parent Companies and a Proposal for Legislative Reform*, 67 FORDHAM L. REV. 115 *passim* (1998); *see also* Cindy A. Schipani, *Taking It Personally: Shareholder Liability for Corporate Environmental Hazards*, 27 J. CORP. L. 29 *passim* (2001).

fits/Social Security statutes[45] have a higher rate of success than veil-piercing claims that do not allege a statutory violation.[46] Moreover, refusal to uphold a firm's limited liability protections if doing so would directly undermine a statutory scheme that renders the firm's conduct illegal[47] is consistent with the other business law principles.[48]

B. The Limited Liability Company

For Shakespeare, it may have been the play, but for a Delaware limited liability company, the contract's the thing.[49]

—Chancellor William Chandler

The combination of the LLC's increasing popularity[50] for closely held businesses and the practical reality that courts will only pierce the veil of firms with few owners makes the issue of veil piercing in the LLC arena particularly important.[51] The LLC's unique characteristics are what make it different from the corporation. However, the LLC also imports fundamental aspects of corporate law, such as fiduciary duties and veil piercing (although to varying degrees).

1. LLC Basics

The LLC is a hybrid of the corporation and the partnership.[52] It provides limited liability for its members and managers (like the cor-

45. *See, e.g.*, Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1220 (2d Cir. 1987) ("Neither the separate corporate status of the three corporations nor the general principle of limited shareholder liability afford protection where exacting obeisance to the corporate form is inconsistent with ERISA's remedial purposes.").

46. *See* Oh, *supra* note 20, at 132.

47. *See* Carter-Jones Lumber Co. v. LTV Steel Co., 237 F.3d 745, 749 (6th Cir. 2001) ("Can it be that the shareholder is immunized from personal liability if he causes the corporation to commit an illegal act, no matter the degree of his control over the corporation with regard to the illegal act, no matter the harm to third parties, and no matter the other equities? Neither [the Sixth Circuit] nor the Ohio courts hold that such immunity exists.").

48. *See* Schenley Distillers Corp. v. United States, 326 U.S. 432, 437 (1946) ("One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public.").

49. R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC, No. 3803-CC, 2008 WL 3846318, at *1 (Del. Ch. Aug. 19, 2008).

50. *See* Del. Div. of Corps., 2015 Annual Report 2 (2015), https://corp.delaware.gov/Corporations_2015%20Annual%20Report.pdf (reporting in 2015 that 71.7% of new businesses formed in Delaware were LLCs, while only 21.4% and 6% were corporations and limited liability partnerships, respectively).

51. David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?*, 51 Okla. L. Rev. 427, 429 (1998).

52. *See, e.g.*, Robinson v. Glynn, 349 F.3d 166, 174 (4th Cir. 2003); Cohen, *supra* note 51, at 452.

poration), freedom to structure its internal governance by agreement (like the partnership), and entity status (like both the corporation and the partnership).[53] Further, while partnership law predominantly governs the LLC's internal governance,[54] the LLC is "ideal for those wanting to craft a highly specialized and customized vehicle, specifying the duties and benefits among owners and managers."[55]

The LLC's internal governance flexibility is by design. Indeed, in Delaware, "[i]t is the policy of [the DLLCA] to give the maximum effect to the principle of freedom of contract and to the enforceability of [LLC] agreements."[56] For example, of the many contractual freedoms provided by the DLLCA,[57] none evidence the LLC's flexibility more than section 18-1101(c), which allows management's fiduciary duties to be completely eliminated.[58] Moreover, an LLC's operating agreement[59] is not only malleable but very powerful too, as it is the firm's principle governing document.[60] Consequently, this flexibility has made the LLC the entity of choice for many closely held businesses.[61] And while the LLC has other notable characteristics, such as its

53. *See, e.g.*, SHAWN J. BAYERN, CLOSELY HELD ORGANIZATIONS 244 (2014) (discussing the essential characteristics of LLCs and their similarities to corporations and partnerships).

54. *See* WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 68 (2012) ("[I]nternal relations among owners and investors in the LLC . . . is, for the most part, governed by general or limited partnership law.").

55. Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L.J. 221, 222 (2009).

56. DEL. CODE ANN. tit. 6, § 18-1101(b) (2017).

57. *See infra* Section III.A.

58. *See* DEL. CODE ANN. tit. 6, § 18-1101(c).

59. The terms "operating agreement" and "LLC agreement" are used interchangeably throughout this Article. *Id.* § 18-101(7).

60. *See, e.g.*, REVISED UNIFORM LIMITED LIABILITY COMPANY ACT § 110(a) (UNIF. LAW COMM'N 2006) (giving the operating agreement primacy over the statute as to an LLC's activities, the relations among its members, and the duties and rights over its managers); *see also* Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 290 (Del. 1999) ("[The LLC] permits members to engage in private ordering with substantial freedom of contract to govern their relationship, provided they do not contravene any mandatory provisions of the [DLLCA]."); Fisk Ventures, LLC v. Segal, No. 3017-CC, 2008 WL 1961156, at *1 (Del. Ch. May 7, 2008) ("Contractual language defines the scope, structure, and personality of [LLCs]."); F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLC'S: LAW AND PRACTICE § 5.3 (3d ed. 2017) ("[S]tatutes and courts defer to contracts of the LLC.").

61. *See, e.g.*, O'NEAL & THOMPSON, *supra* note 60, § 5.2 ("Overall the LLC statutes draw on both partnership antecedents and corporate law antecedents for an entity that has been mostly used by closely held businesses.").

check-the-box tax treatment, those features are not relevant for purposes of this Article.[62]

2. LLC Fiduciary Duties

While partnership and contract law mainly govern the LLC's internal affairs, corporate law still plays a significant role. Specifically, like corporate officers and directors,[63] managers of an LLC owe the traditional fiduciary duties of care and loyalty to the firm's members.[64] In light of the LLC's broad contractual customization, it should not come as a surprise, however, that some LLC statutes—particularly, the DLLCA—authorize fiduciary duties to be modified or eliminated in the operating agreement.[65] Nonetheless, a summary of these duties is warranted for purposes of this Article and because waiving fiduciary duties in LLCs is easier said than done.[66]

First, the duty of care requires those making business decisions be adequately informed.[67] This means the duty of care is not focused on the substance of the decision but on the decision-making process itself.[68] Therefore, absent "gross negligence" by management in the decision-making process, a firm's owners cannot sue management merely because a decision turned out poorly.[69] If the plaintiff believes management did, in fact, act grossly negligent when making a business decision, the plaintiff must overcome the business judgment rule, which presumes management's fiduciary duties are met when making

62. For a discussion of the LLC's other characteristics, as well as its origin and history, *see* William J. Carney, *Limited Liability Companies: Origins and Antecedents*, 66 U. COLO. L. REV. 855 (1995).

63. *See, e.g.*, Guth v. Loft, 5 A.2d 503, 510 (Del. 1939).

64. *See, e.g.*, *In re* Atlas Energy Res., LLC, No. 4589-VCN, 2010 Del. Ch. LEXIS 216, at *20-24 (Del. Ch. Oct. 28, 2010); *see also* Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160, 170 (Del. 2002) ("[A] general partner owes the traditional fiduciary duties of loyalty and care to the limited partnership and its partners."); Daniel Buchholz, *Eliminating Fiduciary Duties in Delaware LLCs: A Process Focused Approach to the Analysis of Waiver Provisions*, 16 FLA. ST. U. BUS. REV. 153, 157-59 (2017).

65. *See* DEL. CODE ANN. tit. 6, § 18-1101(c).

66. *See, e.g.*, Auriga Capital Corp. v. Gatz Props., LLC, 40 A.3d 839, 843 (Del. Ch. 2012), *aff'd*, 59 A.3d 1206 (Del. 2012).

67. *See In re* Walt Disney Co. Deriv. Litig., 907 A.2d 693, 749 (Del. Ch. 2005); Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 10 (2005).

68. *See, e.g.*, JAMES D. COX & THOMAS L. HAZEN, BUSINESS ORGANIZATIONS LAW 200 (2016).

69. *See* Brehm v. Eisner, 746 A.2d 244, 259 (Del. 2000); Smith v. Van Gorkom, 488 A.2d 858, 881 (Del. 1985); Trenwick Am. Litig. Tr. v. Ernst & Young L.L.P., 906 A.2d 168, 173 (Del. Ch. 2006) ("What Delaware law does not do is to impose retroactive fiduciary obligations on directors simply because their chosen business strategy did not pan out.").

business decisions.[70] The business judgment rule is designed to prevent a court from imposing itself on a firm's business and affairs;[71] consequently, "[o]vercoming the presumptions of the business judgment rule on the merits is a near-Herculean task."[72]

Second, the duty of loyalty requires that management place the firm's best interest over any interest management possesses that is not shared by the firm or its owners.[73] Unlike the duty of care, the duty of loyalty is focused on management's motives and purposes for a transaction rather than the decision-making process.[74] The duty of loyalty is not limited to cases involving conflicted transactions, but also includes cases where management fails to act in good faith.[75] The duty to act in good faith is breached when management acts fraudulently or fails to disclose all material information when seeking owner action.[76] Additionally, management breaches its duty to act in good faith by, not surprisingly, acting in bad faith, which includes either: (a) "fiduciary conduct motivated by an actual intent to do harm"[77] (i.e., subjective bad faith); (b) "conscious disregard of one's responsibilities"[78] (i.e., intentional dereliction of duty); or (c) a know-

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70. *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); ALLEN ET AL., *supra* note 54, at 231.

71. *See* Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1279 (Del. 1989). The business judgment rule is a two-part doctrine:

> The rule operates as both a procedural guide for litigants and a substantive rule of law. As a rule of evidence, it creates a "presumption that in making a business decision, the directors of a corporation acted on an informed basis [i.e., with due care], in good faith and in the honest belief that the action taken was in the best interest of the company." The presumption initially attaches to a director-approved transaction within a board's conferred or apparent authority in the absence of any evidence of "fraud, bad faith, or self-dealing in the usual sense of personal profit or betterment."

Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 64 (Del. 1989) (citations omitted).

72. *In re* Tower Air, Inc., 416 F.3d 229, 238 (3d Cir. 2005).

73. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993).

74. COX & HAZEN, *supra* note 68, at 221.

75. *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) ("[A]lthough good faith may be described colloquially as part of a 'triad' of fiduciary duties that includes the duties of care and loyalty, the obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty.").

76. *See* Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998); *see also* Jackson Nat. Life Ins. Co. v. Kennedy, 741 A.2d 377, 388-89 (Del. Ch. 1999) ("The duty of disclosure is merely a specific application of the more general fiduciary duty of loyalty that applies only in the setting of a transaction or other corporate event that is being presented to the stockholders for action.").

77. In re *Walt Disney Co.*, 906 A.2d at 64.

78. *Id.* Management has certain oversight duties (or "*Caremark* duties") that it must meet to satisfy its duty of good faith. Specifically, management breaches its fiduciary duties if it fails to address sufficient red flags that would warrant specific investigation. *See In re* Caremark Int'l Inc. Deriv. Litig., 698 A.2d 959, 971 (Del. Ch. 1996). Alternatively, management may be liable if, absent red flags, "[management] utterly failed to implement any reporting or information system or controls; or having imple-

ing violation of the law, even where such a violation benefits the firm.[79]

Finally, it is worth noting that although a firm has multiple constituencies with differing interests—such as owners, creditors, employees, and customers—the duties of care and loyalty are owed to the firm's owners, not its creditors.[80] However, there is a dispute among jurisdictions and entity types as to whether creditors are owed fiduciary duties when a firm is in financial distress.[81] Under Delaware corporate law, a corporation's management never owes fiduciary duties directly to creditors,[82] but creditors may bring derivative claims for breach of fiduciary duty upon insolvency because "creditors take the place of the shareholders as the residual beneficiaries of any increase in value."[83] While most jurisdictions have adopted the Delaware corporate law rule,[84] others have not.[85] Further, unlike Delaware corporate creditors, LLC creditors cannot bring derivative claims for breach of fiduciary duty even when the firm is insolvent.[86]

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mented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Stone*, 911 A.2d at 370.

79. *See* Miller v. Am. Tel. & Tel. Co., 507 F.2d 759, 762 (3d Cir. 1974); In re *Walt Disney Co.*, 907 A.2d at 755.

80. *See* Revlon v. MacAndrew & Forbes Holdings, Inc., 506 A2d 173, 176 (Del. 1986); Geyer v. Ingersoll Publ'ns Co., 621 A.2d 784, 787 (Del. Ch. 1992).

81. *See* Mansha Consulting LLC v. Alakai, No. 16-00582 ACK-RLP, 2017 WL 3659163, at *15 (D. Haw. Aug. 23, 2017); *see also* Marshall S. Huebner & Darren S. Klein, *The Fiduciary Duties of Directors of Troubled Companies*, 34 AM. BANKR. INST. J. 18, 18 (2015) ("For years, practitioners, legal scholars and even judges had struggled with whether (and when) directors and officers owed such duties to creditors as a company approached or entered insolvency.").

82. *See* Quadrant Structured Prods. Co., v. Vertin, 102 A.3d 155, 176 (Del. Ch. 2014).

83. N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007). *See also* Robert J. Stearn, Jr. & Cory D. Kandestin, *Delaware's Solvency Test: What Is It and Does It Make Sense? A Comparison of Solvency Tests Under the Bankruptcy Code and Delaware Law*, 36 DEL. J. CORP. L. 165, 171 (2011).

84. *See, e.g.*, Wells Fargo Bank v. Konover, No. 3:05-CV-1924 (CFD), 2011 WL 1225986, at *16 (D. Conn. Mar. 28, 2011); *In re* Sec. Asset Capital Corp., 396 B.R. 35, 40 (Bankr. D. Minn. 2008); Sanford v. Waugh & Co., 328 S.W.3d 836, 846-47 (Tenn. 2010); Caulfield v. Packer Grp., Inc., 56 N.E.3d 509, 519 (Ill. App. Ct. 2016).

85. *See, e.g.*, PCS Nitrogen, Inc. v. Ross Dev. Corp., 126 F. Supp. 3d 611, 629 (D.S.C. 2015) ("South Carolina law recognizes a direct cause of action by a creditor against directors of an insolvent corporation for breach of fiduciary duties owed that creditor."); Koninklijke Philips Elecs. N.V. v. Nat'l Film Labs. Inc., No. CV 12-4576 GAF (FFMx), 2014 WL 12581759, at *4 (C.D. Cal. May 15, 2014); *In re* Joseph Walker & Co., Inc., 522 B.R. 165, 196-97, 196-97 nn.42-43 (Bankr. D.S.C. 2014); *In re* MS55, Inc., 420 B.R. 806, 819-20 (Bankr. D. Colo. 2009). *But see In re* AWTR Liquidation Inc., 548 B.R. 300, 325 (Bankr. D. Cal. 2016).

86. *See* CML V, LLC v. Bax, 28 A.3d 1037, 1046 (Del. 2011).

3. LLC Veil Piercing

While courts have concluded that the LLC veil can be pierced in certain circumstances,[87] LLC veil piercing continues to be an ongoing debate.[88] Proposed solutions to this issue have ranged from reinventing the veil-piercing doctrine as applied to LLCs,[89] to eliminating the application of veil piercing from LLCs entirely.[90]

The standard courts will apply in LLC veil-piercing cases is unclear,[91] as courts recognize the corporation and the LLC are vastly different in structure and purpose.[92] However, conversely, the issue is further complicated by the misunderstanding that some courts have regarding the differences between the corporation and the LLC.[93] Consequently, some courts automatically apply corporate law standards in LLC veil-piercing cases without much thought or deliberation.[94]

However, some courts and legislatures,[95] including the Revised Uniform Limited Liability Company Act ("RULLCA"), have concluded that certain veil-piercing factors from corporate law should not be imported into LLC law. For example, RULLCA provides that failure to observe formalities is not grounds for imposing liability on the owners

87. *See* Gallinger v. N. Star Hosp. Mut. Assurance, Ltd., 64 F.3d 422, 425-28 (8th Cir. 1995); Kaycee Land & Livestock v. Flahive, 46 P.3d 323, 327-28 (Wyo. 2002).

88. *See* Jeffrey K. Vandervoort, *Piercing the Veil of Limited Liability Companies: The Need for a Better Standard*, 3 DEPAUL BUS. & COM. L.J. 51, 67 (2004).

89. *See id.* at 85-90 (discussing numerous proposals to alter the LLC veil-piercing test).

90. *See* Bainbridge, *supra* note 35, at 102-06.

91. *See* 2 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN & KEATINGE ON LIMITED LIABILITY COMPANIES § 12.3 (1st ed. 2017).

92. *See, e.g.*, Bernstein v. TractManager, Inc., 953 A.2d 1003, 1009-10 (Del. Ch. 2007) ("Limited liability companies and corporations differ in important ways . . . .").

93. *See, e.g.*, Farm Fresh Direct Direct By a Cut Above LLC v. Downey, No. ELH-17-1760, 2017 WL 4865481, at *2 (D. Md. Oct. 26, 2017) (describing an LLC as a "limited liability corporation"); Jones v. Marquis Props., LLC, 212 F. Supp. 3d 1010, 1011 (D. Colo. 2016) (same); Gentex Corp. v. Abbott, 978 F. Supp. 2d 391, 394-95 (M.D. Pa. 2013) ("Helicopter Helmet, LLC is a Delaware corporation . . . ."); HAW. CIV. CT. R. 83.11 ("Business entities, including . . . limited liability corporations, . . ."); *see also* Joshua P. Fershee, *LLCs and Corporations: A Fork in the Road in Delaware?*, HARV. BUS. L. REV. ONLINE, June 6, 2011 ("A May 2011 search of Westlaw's 'ALLCASES' database provides 2,773 documents with the phrase 'limited liability corporation,' yet most (if not all) such cases were actually referring to LLCs—limited liability *companies*.").

94. *See* REVISED UNIFORM LIMITED LIABILITY COMPANY ACT § 304(b) cmt. (UNIF. LAW COMM'N 2006) ("[C]ourts regularly (and sometimes almost reflexively) apply [piercing the corporate veil] to limited liability companies."); *see also* Ditty v. CheckRite, Ltd., 973 F. Supp. 1320, 1335-36 (D. Utah. 1997) ("[M]ost commentators assume that the doctrine applies to limited liability companies."); Bainbridge, *supra* note 35, at 82, 82 n.29.

95. *See infra* notes 101-105 and accompanying text.

of an LLC.[96] Excluding the failure to observe formalities factor from the LLC veil-piercing analysis is only logical as "informality of organization and operation is both common and desired" for LLCs.[97] Nonetheless, some courts continue to consider whether *corporate* formalities were followed in LLC veil-piercing cases.[98] Additionally, domination by a single owner has been identified as a weak rationale for piercing the LLC veil. Unlike corporations—which are designed, and therefore expected to have, separation between management and ownership—LLC statutes support flexible management structures; consequently, LLCs are often member-managed firms.[99] Not surprisingly, courts have observed that the domination factor is usually satisfied for LLCs.[100]

As a result of this lack of uniformity, some states have not left the LLC veil-piercing question to the courts. For example, LLC statutes in California, Georgia, and Minnesota mandate courts apply corporate law standards.[101] On the other hand, many LLC statutes—most notably, the DLLCA—do not have such a requirement and are silent on the issue.[102] Other jurisdictions, such as Wyoming, take a more nuanced approach. Specifically, Wyoming's LLC statute prohibits courts from considering "factors intrinsic to the character and operation of" the LLC, such as failure to observe formalities relating the LLC's powers or management and domination by a single owner.[103] By contrast, Wyoming courts may consider fraud, inadequate capitalization, commingling of assets, and "[f]ailure to observe company formalities as required by law."[104] Additionally, interestingly, fraud is a dispositive factor to impose liability in Wyoming.[105]

In short, LLC veil piercing can best be described as "murky,"[106] and no universal consensus has emerged from courts or legislatures.

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96. *See* REVISED UNIFORM LIMITED LIABILITY COMPANY ACT § 304(b) (UNIF. LAW COMM'N 2006); *see also* CONN. GEN. STAT. §34-251a(b) (2017); GA. CODE ANN. § 14-11-314 (2017); Wamsley v. Ehmann, No. 1845 EDA 2009 (Pa. Super. Ct. Feb. 28, 2012).

97. REVISED UNIFORM LIMITED LIABILITY COMPANY ACT § 304(b) cmt (UNIF. LAW COMM'N 2006).

98. *See, e.g.*, Ackison Surveying, LLC v. Focus Fiber Sols., LLC, No. 2:15-CV-2044, 2017 WL 958620, at *3 (S.D. Ohio Mar. 13, 2017).

99. *See* Vandervoort, *supra* note 88, at 70-72; Eric Fox, Note, *Piercing the Veil of Limited Liability Companies*, 62 GEO. WASH. L. REV. 1143, 1174 (1994).

100. *See, e.g.*, Stone v. Frederick L. Hobby Assocs. II, No. CV000181620S, 2001 WL 861822, at *10 (Conn. Super. Ct. July 10, 2010).

101. *See* CAL. CORP. CODE § 17703.04(b) (West 2017); GA. CODE ANN. § 14-11-314; MINN. STAT. ANN. § 322B.303(2) (West 2017).

102. *See* DEL. CODE ANN. tit. 6, § 18-303(a).

103. *See* WYO. STAT. ANN. § 17-29-304(d) (West 2017).

104. *Id.* § 17-29-304(c).

105. *Id.*

106. RIBSTEIN & KEATINGE, *supra* note 91, § 12.3.

III. VOLUNTARY CREDITORS AND LLC VEIL PIERCING

As it stands, veil piercing is generally applied equally to corporations and LLCs regardless of whether the creditor is voluntary or involuntary. However, such broad application of the doctrine ignores important considerations with respect to the type of creditor, the contractual nature of the LLC, and conflicting business law doctrines. This Section takes these considerations into account and discusses the statutory support and doctrinal differences between the corporation and the LLC to establish that voluntary creditors should not be permitted to pierce the LLC veil.

A. Statutory Support

Because Delaware "dominates the market" for LLCs, an analysis of the DLLCA is a logical starting point.[107] Several provisions of the DLLCA support the argument that voluntary creditors should not be permitted to pierce the LLC veil. Indeed, Delaware courts have observed that the DLLCA "includes specific statutory features that appear designed (at least in part) with creditors in mind, and which creditors can use to obtain additional rights and protections."[108] Accordingly, because LLCs "are creatures of contract, designed to afford the maximum amount of freedom of contract,"[109] voluntary creditors can protect themselves through their contractual agreements with the firm under the DLLCA.[110]

As a baseline, section 18-101(7) of the DLLCA allows a firm's operating agreement "to provide rights to any person, including a person who is not a party to the [operating] agreement."[111] Thus, assuming the voluntary creditor is sophisticated, the creditor can bargain for express terms intended to decrease the likelihood that the firm will default on its obligations while remaining a nonparty to the operating agreement. Further, the creditor can even condition approval of an amendment to the operating agreement on the satisfaction of specified conditions or creditor consent.[112] Similarly, as an enforcement mechanism, the voluntary creditor may use other provisions of the DLLCA

107. Allen et al., *supra* note 54, at 68-69.

108. CML V, LLC v. Bax, 6 A.3d 238, 250 (Del. Ch. 2010).

109. TravelCenters of Am., LLC v. Brog, No. 3516-CC, 2008 WL 1746987, at *1 (Del. Ch. Apr. 3, 2008) (internal quotation marks omitted); *see also* Kahn v. Portnoy, No. 3515-CC, 2008 WL 5197164, at *1 (Del. Ch. Dec. 11, 2008).

110. *See* Del. Code Ann. tit. 6, § 18-1101(b); *see also* Prod. Res. Grp., L.L.C. v. NCT Grp., Inc., 863 A.2d 772, 787 (Del. Ch. 2004) ("It is presumed that creditors are capable of protecting themselves through the contractual agreements that govern their relationships with firms.").

111. Del. Code Ann. tit. 6, § 18-101(7).

112. *See id.* § 18-302(e) ("If [an LLC] agreement provides for the manner in which it may be amended, including by requiring the approval of a person who is not a party to

to include penalty clauses in the operating agreement if the creditor's rights are breached or upon the occurrence of some specified event.[113]

Moreover, voluntary creditors can even bargain for their own fiduciary duties in the operating agreement. Even though creditors of an insolvent LLC cannot bring derivative suits for breach of fiduciary duty[114] (unlike corporate creditors),[115] section 18-1101 provides that "member[s'] or manager[s'] . . . [fiduciary] duties may be expanded . . . by provisions in the [LLC] agreement."[116] Such a provision may be more common than expected in closely held LLCs,[117] as voluntary creditors often require the owners of a firm to personally guarantee the performance of the firm's obligations.[118] Indeed, the DLLCA expressly permits such an arrangement by providing that "a member or manager may agree to be obligated personally for any or all of the debts, obligations and liabilities of the [LLC]."[119] This type of personal guarantee acts similar to a contractual lifting of the veil. Relatedly, similar to a member bringing a derivative suit,[120] the DLLCA gives creditors the right to enforce a member to make contributions to the LLC if the creditor "reasonably relied" on the member's obligation to make a contribution.[121] Usury is not a defense,[122] nor is an inability to contribute because of death, disability, or some other reason.[123]

If creditors want to get creative, they can use the DLLCA's series LLC provision to attach a security interest in a specific asset. An op-

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the limited liability company agreement or the satisfaction of conditions, it may be amended only in that manner or as otherwise permitted by law . . . .").

113. *See id.* § 18-306(2) ("[An LLC] agreement may provide that: . . . At the time or upon the happening of events specified in the limited liability company agreement, a member shall be subject to specified penalties or specified consequences."); § 18-402 ("Unless otherwise provided in [an LLC] agreement, the management of [an LLC] shall be vested in its members . . . . [A] manager shall cease to be a manager as provided in [an LLC] agreement.").

114. *See* CML V, LLC v. Bax, 28 A.3d 1037, 1046 (Del. 2011).

115. *See* N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101-02 (Del. 2007).

116. DEL. CODE ANN. tit. 6, § 18-1101(c).

117. *See* O'NEAL & THOMPSON, *supra* note 60, § 5.2.

118. *See id.* § 2.4 ("Banks and other lending institutions force the participants [of a closely held business] to assume personal liability for the corporation's obligations as a condition to providing needed resources for the business."); *see also* Douglas Baird & Edward R. Morrison, *Serial Entrepreneurs and Small Business Bankruptcies*, 105 COLUM. L. REV. 2310, 2362 tbl.17 (2005) (noting 55.8% of owners of small businesses filing Chapter 11 petitions made personal guarantees to lenders).

119. DEL. CODE ANN. tit. 6, § 18-303(b).

120. *See* ROBERT L. SYMONDS, JR. & MATTHEW J. O'TOOLE, DELAWARE LIMITED LIABILITY COMPANIES § 15.02, at 15-7 (2007) ("Thus, in proper circumstances, [an LLC] creditor in effect may be placed in a position similar to that of the company itself in enforcing rights against members for contributions and returns.").

121. DEL. CODE ANN. tit. 6, § 18-502(e).

122. *See id.* § 18-505.

123. *See id.* § 18-502(a).

erating agreement can establish one or more series of LLC assets that "may have separate rights, powers or duties with respect to specified property or obligations of the [LLC] or profits and losses associated with specified property or obligations."[124] Thus, while members may be able to utilize the series LLC provision to protect their assets in a similar fashion to the shareholder in *Walkovszky v. Carlton*,[125] a creditor can just as effectively attach a security interest to an asset that the borrowing LLC cannot use until it satisfies its obligation to the creditor. Finally, in some circumstances, section 18-805 of the DLLCA permits a creditor of a cancelled LLC (i.e., dissolved and wound up)[126] to protect itself by securing the appointment of a trustee or a receiver.[127] Alternatively, as a general matter, creditors of an LLC have a common law right to apply for a receiver.[128]

In sum, by default, LLC voluntary creditors have numerous avenues under the DLLCA to bargain for protection. Thus, because LLC voluntary creditors are granted these opportunities, allowing them to pierce the veil would afford them another opportunity to alter their agreements with the firm ex post.[129] Of course, including these types of provisions would require some sophistication on behalf of the creditor.[130] Indeed, commentators who argue for the preservation of LLC veil piercing claim unsophisticated parties would be unprotected without veil piercing.[131] However, as previously noted, veil piercing does not appear to be rooted within concerns of inequitable bargains.[132] Moreover, there are other doctrines, such as negligent and fraudulent misrepresentation, that are better situated for addressing these concerns.[133] Therefore, while utilization of the DLLCA's contractual privileges may require some sophistication on the part of the voluntary creditor, veil piercing is not needed to protect the interest of unsophisticated creditors.

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124. *Id.* § 18-215.

125. 223 N.E.2d 6 (N.Y. 1996).

126. *See* DEL. CODE ANN. tit. 6, § 18-203.

127. *See id.* § 18-805.

128. *See* Ross Holding & Mgmt. Co. v. Advance Realty Grp., LLC, No. 4113-VCN, 2010 WL 3448227, at *6 (Del. Ch. Sept. 2, 2010).

129. *See* Bainbridge, *supra* note 35, at 96-97 ("Where a contract creditor fails to bargain around the limited liability default rule, there is no justification for giving it a second bite at the apple through a veil piercing remedy.").

130. *See* Geoffrey Christopher Rapp, *Preserving LLC Veil Piercing: A Response to Bainbridge*, 31 J. CORP. L. 1063, 1083 (2006) ("Just as an LLC is most likely a small business, those who engage in commerce with that LLC are most likely to be small businesses or individuals.").

131. *See id.* at 1082-84.

132. *See supra* notes 34-37 and accompanying text.

133. *See infra* Section IV.B.

The DLLCA also includes provisions that implicitly suggest voluntary creditors should not be able to bring claims against an LLC's members if those claims are not grounded in contract. Specifically, sections 18-1001 and 18-1002 of the DLLCA "both *create*[ ] the right to sue derivatively on behalf of an LLC and *expressly limit*[ ] that right to 'member[s]' or 'assignee [s].'"[134] By contrast, the Delaware General Corporation Law Act does not expressly limit derivative standing to shareholders.[135] Further, the Supreme Court of Delaware has expressly held that creditors of an insolvent corporation have standing to bring claims derivatively for breach of fiduciary duty.[136] This difference in treatment for corporations and LLCs is likely intentional: as LLCs are primarily creatures of contact, it would be logical for the DLLCA to limit the claims of LLC voluntary creditors to those grounded in contract. Consequently, veil piercing provides voluntary creditors with an opportunity to bring noncontractual claims, which contradicts other provisions of the DLLCA and the holdings of the Supreme Court of Delaware.

Moreover, other provisions of the DLLCA support greater protection for LLC participants than corporate participants.[137] Specifically, section 18-303 provides that members and managers of an LLC cannot be held personally liable for any debts or obligations of the LLC "*solely* by reason of being a member or . . . a manager."[138] In other words, unlike corporate law, insulation from liability is extended to LLC management by default.[139] Further, compare other LLC statutes—such as Wyoming's—that include similar "solely by reason" language, but also *expressly* include circumstances where LLC veil piercing is

134. CML V, LLC v. Bax, 28 A.3d 1037, 1046 (Del. 2011). *See also* DEL. CODE ANN. tit. 6, § 18-1001 ("A member or an assignee of [an LLC] interest may bring an action . . . in the right of [an LLC] to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed."); *id.* § 18-1002 ("In a derivative action, the plaintiff must be a member or an assignee of [an LLC] interest . . . .").

135. *See* DEL. CODE ANN. tit. 8, § 327; *see also* CML V, LLC v. Bax, 6 A.3d 238, 242 (Del. Ch. 2010) ("Section 327 demonstrates that the General Assembly can readily adopt a non-exclusive limitation on derivative standing. Section 18-1002, by contrast, uses exclusive language.").

136. *See* N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101-02 (Del. 2007).

137. *See* O'NEAL & THOMPSON, *supra* note 60, § 2.7 ("Some [LLC] statutes purport to provide insulation against liability of participants greater than that provided in corporate form.").

138. DEL. CODE ANN. tit. 6, § 18-303(a) (emphasis added). *Cf.* DEL. CODE ANN. tit. 8, § 102(b)(6) (2015) ("[T]he stockholders of a corporation shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts."); *id.* § 145 (permitting corporations to indemnify their officers and managers in certain circumstances).

139. *See also* Bainbridge, *supra* note 35, at 83, 83 n.32.

permitted.[140] While it is doubtful courts will expand insulation for LLC participants beyond corporate participants based on section 18-303 alone,[141] it is at least persuasive when considered in conjunction with the DCLLA's other provisions.

An obvious and fair response to all this statutory interpretation is that if legislatures wanted to prohibit veil piercing in LLCs, then they could have easily included anti-piercing language in their LLC statutes.[142] However, the converse can be argued just the same in jurisdictions such as Delaware: if legislatures wanted courts to apply corporate veil piercing to LLCs, then they could have easily included veil-piercing language in their LLC statutes. Indeed, as noted above, many states have, in fact, included such language in their LLC statutes.[143] Further, this argument also assumes that an LLC statute must expressly prohibit a corporate-law doctrine for that doctrine not to apply to LLCs. Yet, despite the absence of express language in the DLLCA, the Supreme Court of Delaware has *interpreted* the DLLCA to prohibit derivative standing for LLC creditors when the firm is insolvent.[144] In fact, the Delaware Chancery Court used the same provisions from the DLLCA analyzed above to conclude that LLC creditors never have standing to bring breach of fiduciary duty claims.[145] In sum, arguing that veil piercing applies to LLCs merely because the legislature did not expressly prohibit it in the statute does not hold much weight.

B. Difficulty and Confusion with Importing Corporate Law Standards

Another justification for eliminating LLC veil piercing for voluntary creditors is the differences between the corporation and the LLC.[146]

As a threshold matter, there is nothing absurd about different legal principles applying to corporations and LLCs. "Because the conceptual underpinnings of the corporation law and Delaware's [alternative entity] law are different, courts should be wary of uncriti-

140. *See* Wyo. Stat. Ann. § 17-29-304(c)-(d); *see also* N.D. Cent. Code Ann. § 10-32.1-26 (West 2015); Wis. Stat. Ann. § 183.0304 (West 2017).

141. *See* O'Neal & Thompson, *supra* note 60, § 2.7.

142. *See* Rapp, *supra* note 130, at 1080.

143. *See supra* notes 101-105 and accompanying text.

144. *See* CML V, LLC v. Bax, 28 A.3d 1037, 1046 (Del. 2011).

145. *See* CML V, LLC v. Bax, 6 A.3d 238, 250-52 (Del. Ch. 2010).

146. *See* Presser, *supra* note 17, § 4.2; Vandervoort, *supra* note 88, at 83-84.

cally importing requirements from the [Delaware General Corporate Law] into the [alternative entity] context."[147]

LLCs utilize a partnership-like governance structure,[148] and the LLC has been the predominant entity choice for closely held businesses. Like any close firm—especially those with a governance structure similar to a partnership—one could expect[149] members of an LLC to be more involved in the management of the firm.[150] Indeed, it is even more reasonable to expect such a thing in LLCs because LLC statutes typically authorize—by default—flexible governance structures.[151] By contrast, "[t]he corporation's statutorily-prescribed governance structure is a hierarchical one which mandates the separation of ownership and control."[152] In other words, without specific facts suggesting otherwise, creditors may expect—by default—there to be adequate separation between a corporation's owners and managers.[153] Thus, allowing voluntary creditors to use the LLC's expected characteristics against it through veil piercing is an unfair consequence that is not shared by the corporation.

Moreover, the differences in the corporation and the LLC remain a confusion for many courts.[154] While this Article does not argue for the total elimination of veil piercing, perhaps the confusion surrounding veil piercing would be mitigated if we reduced the opportunity in which courts may use the doctrine. Indeed, commentators have already suggested replacing veil piercing with other doctrines, such as actual fraud, because so many of the most important corporate-veil-piercing factors should not apply in LLC veil-piercing cases.[155] Similarly, courts may give too much weight to other factors imported from corporate law, such as undercapitalization, because they recognize certain factors, such as failure to follow formalities and domination by

147. CML V, LLC v. Bax, 6 A.3d 238, 242 (Del. Ch. 2010) (first and third alteration in original) (quoting Twin Bridges LP v. Draper, No. Civ.A. 2351-VCP, 2007 WL 2744609, at *19 (Del. Ch. Sept. 14, 2007)).

148. *See supra* notes 53-55 and accompanying text.

149. *See* DEL. CODE ANN. tit. 6, § 18-102 (requiring "the words 'Limited Liability Company' or the abbreviation 'L.L.C.' or the designation 'LLC'" be in any Delaware LLC's name).

150. *See, e.g.*, O'NEAL & THOMPSON, *supra* note 60, § 5.2.

151. *See, e.g.*, DEL. CODE ANN. tit. 6, § 18-1101(b) ("It is the policy of [the DLLCA] to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements."); *see also* PRESSER, *supra* note 17, § 4.2 (noting it is the legislative intent of LLC statutes to allow small, one-person businesses).

152. Bainbridge, *supra* note 35, at 103.

153. *See* O'NEAL & THOMPSON, *supra* note 60, § 5.3 ("[D]eference to contract has a somewhat longer reach in LLC law [than in corporate law]. . . . Contract plays a greater role in LLCs than in organizing close corporations in part because of differences in the statutes governing each form of business.").

154. *See supra* notes 93-94 and accompanying text.

155. *See* PRESSER, *supra* note 17, § 4.2.

a single owner, are inapplicable in the LLC context.[156] Consequently, startup companies, which typically lack adequate capitalization, may be deterred from using the LLC despite its numerous benefits in fear of personal liability.

Finally, by eliminating veil piercing for voluntary LLC creditors, we reduce the likelihood that courts will reach the wrong result. Recall that voluntary creditors are less successful than involuntary creditors.[157] Thus, without voluntary creditors bringing veil-piercing claims, the percent of meritorious claims will increase overall via involuntary creditors. Consequently, courts will be less likely to reach the wrong conclusion.

C. Conflicting Doctrines: Breach of Fiduciary Duty and Veil Piercing

Recall that the DLLCA permits the fiduciary duties of members, managers, or other persons that are a party to, or bound by, the operating agreement to "be expanded or restricted or eliminated by the [operating] agreement."[158] So if an LLC's operating agreement eliminates management's duty of care and loyalty—thereby preventing the firm's members from bringing a derivative action for decisions that could be considered breaches of management's fiduciary duties (if it had any)—should the firm's creditors be permitted to hold management liable for those very same decisions?

Consider the fact that many common veil-piercing factors—such as significant undercapitalization, domination of the firm's operations, failure to observe formalities, intermingling of assets, and absence of records—are merely business decisions of the firm's management. Assume, first, that an LLC waives management's fiduciary duties—meaning, regardless of whether it did, in fact, breach any duties, the LLC's owners cannot sue management for these types of decisions. Even if the LLC did not waive management's fiduciary duties, the business judgment rule would almost certainly prevent the owners from succeeding on a derivative action that challenged these decisions as management is merely required to "attribute [its decisions] to *any* rational business purpose."[159] Regardless, the LLC's creditors can use

156. *Id.* (discussing cases).
157. *See supra* note 30 and accompanying text.
158. Del. Code Ann. tit. 6, § 18-1101(c).
159. *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (emphasis added). For example, perhaps undercapitalization was the result of an investment that turned out poorly. Further, the domination of the firm's operations was because management feared it would be in breach of its fiduciary duty of care if it was not involved in the affairs of the firm. *See* Smith v. Van Gorkom, 488 A.2d 858, 881 (Del. 1985). Additionally, the decision to forgo formalities or keep records was because management had been so busy running the firm that it believed focusing on the firm's operations was

these decisions as proof that the LLC's management manipulated the limited liability form (i.e., the first prong of most veil-piercing tests) in a veil-piercing claim.

Additionally, consider the fact that many of the rationales for piercing the veil are comparable to breaches of management's duty of good faith (i.e., a subcomponent of the duty of loyalty). First, management breaches its duty of good faith by acting fraudulently or for failing to disclose all material facts in a transaction involving owners.[160] Likewise, courts pierce the veil when owners of a firm make false statements or misrepresentations to obtain credit.[161] Second, management breaches its duty of good faith if it consciously fails to monitor its actions or its agents for bad acts.[162] Similarly, commentators have noted courts will pierce the veil for involuntary creditors to discourage inadequate oversight by the firm's management.[163] Third and finally, management breached its duty of good faith if its actions were illegal.[164] Equally, courts will pierce the veil to enforce a regulatory scheme that the firm's owners have tried to circumvent through incorporation or formation.[165] It is also worth noting that not only are these rationales for piercing the veil but also evidence of unfair or inequitable conduct (i.e., the second prong of most veil-piercing tests).

Granted, this argument is a stretch as there are more nuances to the duties of care and loyalty. Nonetheless, the interesting crossroads between these doctrines demonstrate a conflict with permitting creditors to sue management (vis-à-vis veil piercing) over decisions that insiders of a firm cannot challenge (either because of the business judgment rule or because the LLC waived management's fiduciary duties).[166] Moreover, consider a further complication if the creditor was a party to the operating agreement and the operating agreement waived management's fiduciary duties. Should creditors receive more rights than they expressly bargained for via veil piercing by challenging decisions that would have been breaches of the duties of care or

more important than mere formalities. *See* O'NEAL & THOMPSON, *supra* note 60, § 1.33 (noting "the board is often viewed as only a legal formality" in close corporations). Finally, the intermingling of assets was due to the managers need for salaries; however, if they ever took more than was needed to maintain their cost of living, they put the extra back.

160. *See supra* note 76 and accompanying text.
161. *See* Macey & Mitts, *supra* note 18, at 113.
162. *See supra* note 78 and accompanying text.
163. *See* Macey & Mitts, *supra* note 18, at 128.
164. *See supra* note 79 and accompanying text.
165. *See* Macey & Mitts, *supra* note 18, at 115.
166. *See also* PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS 8 (1983) ("[Veil piercing] does not contribute to legal understanding because it is an intellectual construct, divorced from business realities . . . .").

loyalty?[167] Furthermore, the conflict is additionally complicated by the fact that creditors of an insolvent corporation can bring claims derivatively for breach of fiduciary duty, while creditors of an insolvent LLC cannot. If we accept the similarities between veil piercing and breach of fiduciary duty claims (especially their shared trait of insolvency), then veil piercing allows voluntary LLC creditors to challenge business decisions Delaware courts have expressly prohibited them from challenging.

Perhaps the intersection of veil piercing and breach of fiduciary duty claims has broader implications across business law in general. For now, it at least demonstrates veil piercing creates a conflict in LLC law that should not be ignored. If courts can conclude that voluntary creditors are not entitled to fiduciary protection because of their ability to bargain for contractual protections,[168] then voluntary LLC creditors should not be permitted to challenge those very same business decisions via veil piercing.

IV. MOVING BEYOND VEIL PIERCING'S BLANKET APPLICATION

If truth were not often suggested by error, if old implements could not be adjusted to new uses, human progress would be slow.[169]

—Justice Oliver Wendell Holmes

Based on the above discussion, we can conclude that voluntary LLC creditors should not be permitted to pierce the veil. This Section argues the distinction between voluntary and involuntary LLC creditors remains important, and that veil piercing should still be utilized in limited circumstances involving involuntary creditors.[170] This Section also discusses the next steps courts and legislatures should take to prevent any further LLC veil piercing by voluntary creditors.

A. Justifying Unequal Treatment: Involuntary Creditors

In general, there is no reason why courts must treat voluntary and involuntary creditors the same. In fact, courts currently do not treat voluntary and involuntary creditors the same for veil-piercing

167. *See In re* BH S & B Holdings LLC, 420 B.R. 112, 145 n.13 (S.D.N.Y. Bankr. 2009) ("Even creditors may be 'otherwise bound' by an LLC agreement that expressly waives fiduciary duties as between the LLC's members.").

168. *See* Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P., 906 A.2d 168, 199 (Del. Ch. 2006).

169. Oliver Wendell Holmes, The Common Law (1881).

170. *Cf.* Bainbridge, *supra* note 35, at 97-99 (arguing that abolition of the veil-piercing doctrine is preferable to reform).

purposes.[171] Nevertheless, courts need to go further, as there are numerous reasons why voluntary creditors should not receive the same protections as involuntary creditors.

First, because there is no contract between the creditor and the firm, involuntary creditors are the same for both LLCs and corporations. Thus, many of the statutory and fiduciary duty arguments from above are not applicable. Second, and relatedly, unlike voluntary creditors, "it can hardly be argued that an involuntary creditor of an LLC consented to the creation of the LLC's contract."[172] Thus, involuntary creditors are not offered the same opportunities granted by the DLLCA to protect themselves. Piercing the veil for involuntary creditors does not conflict with basic contract law, as is the case for voluntary creditors who are granted an ex post opportunity to protect their investments through veil piercing.

Third, many of the negative externalities of limited liability—for example, putting hazardous activities in separate subsidiaries or series LLCs—and consequently, the resulting need to pierce the veil, are the result of firms attempting to evade tort damages.[173] Thus, allowing involuntary creditors to pierce the LLC veil prevents those who wish to abuse limited liability in the most egregious of ways. Fourth and finally, forcing involuntary creditors to seek recovery through other doctrines related to fraud would subject them to greater litigation cost than voluntary creditors. Claims that involve some aspect of fraud, such as actual fraud or fraudulent conveyance, have high pleading and burden of proof requirements, and consequently, high discovery cost.[174] As a result, because involuntary creditors do not have voluntary creditors' opportunities to investigate and monitor firms, involuntary creditors will be required to conduct more discovery, and therefore, be subject to greater litigation cost.

B. Protecting the Veil: Voluntary Creditors

Courts and legislatures must recognize that voluntary creditors should not be permitted to pierce the LLC veil. Jurisdictions that require corporate-veil-piercing standards to be applied in LLC veil-piercing cases should amend their LLC statutes to eliminate such pro-

171. *See supra* note 30 and accompanying text.

172. Cohen, *supra* note 51, at 488.

173. *See* Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 Yale L.J. 1879, 1881 (1991).

174. *See, e.g.*, Matthew Roskowski, Note, *A Case-by-Case Approach to Pleading Scienter Under the Private Securities Litigation Reform Act of 1995*, 97 Mich. L. Rev. 2265, 2267 (1999).

visions.[175] Conversely, for courts in jurisdictions that do not have such statutory requirements, the task is easier.[176] "[C]reditors are afforded protection through contractual agreements, fraud and fraudulent conveyance law, implied covenants of good faith and fair dealing, bankruptcy law, general commercial law and other sources of creditor rights."[177] Indeed, there are a wide variety of other doctrines that can protect voluntary LLC creditors. Some may argue that the greater pleading requirements and discovery cost for claims couched in fraud will hinder voluntary creditors from bringing claims. However, such an argument ignores the fact that the lack of predictability in veil-piercing cases "results in a situation in which creditors lack the disincentive to sue—and defendants lack the incentive to settle."[178] Thus, because veil piercing is already a haphazardly applied doctrine, it is doubtful its removal will have any significant impact for voluntary LLC creditors.

Additionally, while courts assume that all creditors are sophisticated enough to draft sufficient contractual protections,[179] courts will now be required to analyze the sophistication of voluntary LLC creditors more thoroughly. Indeed, the doctrines of fraudulent and negligent misrepresentation will prove to be invaluable causes of action for those unsophisticated voluntary LLC creditors who were not able to utilize the DLLCA's contractual protections.

V. CONCLUSION

While veil piercing may be applied incoherently and haphazardly, there may be predictable rationales courts use to pierce the veil. Nonetheless, veil piercing's application and rationales for voluntary LLC creditors contradict both the DLLCA (and similar statutes that pattern the DLLCA) and LLC law in general. This Article demonstrates that the DLLCA grants voluntary LLC creditors numerous opportunities to protect themselves. In fact, permitting voluntary creditors to pierce the LLC veil may be inconsistent with the DLLCA

175. *See* PRESSER, *supra* note 17, § 4.2 ("[M]ember-managers should take care that formalities are followed to the extent possible to avoid risk of personal liability until the courts have determined that certain corporate standards are inappropriate for LLCs, or until the relevant statutes are amended.").

176. *See id.*

177. N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 99 (Del. 2007). *See also* Prod. Res. Grp., L.L.C. v. NCT Grp., Inc., 863 A.2d 772, 787 (Del. Ch. 2004).

178. Macey & Mitts, *supra* note 18, at 105.

179. *See* Quadrant Structured Prods. Co., Ltd. v. Vertin, No. 6990-VCL, 2015 WL 6157759, at *12 (Del. Ch. Oct. 20, 2015); *see also* Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P., 906 A.2d 168, 199 (Del. Ch. 2006) ("[F]inancial creditors . . . know how to craft contractual protections that restrict their debtors' use of assets.").

and LLC common law, such as fiduciary duties. Accordingly, courts and legislatures should prevent any further LLC veil piercing by voluntary creditors.

THE POSSIBILITY OF REJECTION: THE FRAMERS' CONSTITUTIONAL DESIGN FOR SUPREME COURT APPOINTMENTS

ERIC T. KASPER†

I. INTRODUCTION

The nomination and confirmation of a United States Supreme Court Justice is a rare moment in American politics where the Constitution requires the selection of a member of one branch of government by the other two branches. On February 13, 2016, Justice Antonin Scalia died at the age of seventy-nine, creating a vacancy on the Court.[1] The same day that Justice Scalia's death was announced, posturing began on when and how his vacated seat on the Court would be filled, and who should nominate his successor. Republican Senate Majority Leader Mitch McConnell announced that the "American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new [P]resident."[2] Republican Senate Judiciary Committee Chair Chuck Grassley reinforced this position by claiming that "[t]his [P]resident, above all others, has made no bones about his goal to use the courts to circumvent Congress and push through his own agenda. It only makes sense that we defer to the American people who will elect a new [P]resident to select the next Supreme Court Justice."[3]

President Barack Obama, however, held a press conference that evening in which he stated, "I plan to fulfill my constitutional responsibilities to nominate a successor in due time," asking "the Senate to fulfill its responsibility to give that person a fair hearing and a timely

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1. Amy Brittain & Sari Horwitz, *Justice Scalia Spent His Last Hours with Members of this Secretive Society of Elite Hunters*, WASH. POST (Feb. 24, 2016), https://www.washingtonpost.com/world/national-security/justice-scalia-spent-his-last-hours-with-members-of-this-secretive-society-of-elite-hunters/2016/02/24/1d77af38-db20-11e5-891a-4ed04f4213e8_story.html; Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0

2. Burgess Everett & Glenn Thrush, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, POLITICO (Feb. 13, 2016), http://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248.

3. *Id*.

vote."[4] Senate Democratic Minority Leader Harry Reid expressed his support for the President's position as well, asserting that the "President can and should send the Senate a nominee right away," because it "would be unprecedented in recent history for the Supreme Court to go a year with a vacant seat. Failing to fill this vacancy would be a shameful abdication of one of the Senate's most essential [c]onstitutional responsibilities."[5]

Just over one month later on March 16, 2016, the President nominated the sixty-three-year-old Chief Judge of the United States Court of Appeals for the District of Columbia, Merrick Garland, who has served on that court since 1997.[6] During the announcement, the President invoked the Constitution several times, describing how, of "the many powers and responsibilities that the Constitution vests in the Presidency, few are more consequential than appointing a Supreme Court [J]ustice."[7] He went on to "ask Republicans in the Senate to give [Garland] a fair hearing and then an up-or-down vote," because if they failed to do this, "it will not only be an abdication of the Senate's constitutional duty, it will indicate a process for nominating and confirming judges that is beyond repair."[8] He closed his remarks by proclaiming, "I have fulfilled my constitutional duty. Now it's time for the Senate to do theirs."[9]

Senator McConnell responded in the Senate the same day, proclaiming that it "is a [P]resident's constitutional right to nominate a Supreme Court Justice, and it is the Senate's constitutional right to act as a check on a [P]resident and withhold its consent."[10] Judiciary Chair Grassley agreed, saying that "[t]oday the President has exercised his constitutional authority. A majority of the Senate has decided to fulfill its constitutional role of advice and consent by withholding support for the nomination during a presidential election year, with millions of votes having been cast in highly charged con-

4. *The Death of Justice Scalia: Reactions and Analysis*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/live/supreme-court-justice-antonin-scalia-dies-at-79/video-president-obamas-statement-on-scalias-death/.

5. Everett & Thrush, *supra* note 2.

6. Nina Totenberg & Carrie Johnson, *Merrick Garland Has a Reputation of Collegiality, Record of Republican Support*, NPR (Mar. 16, 2016), http://www.npr.org/2016/03/16/126614141/merrick-garland-has-a-reputation-of-collegiality-record-of-republican-support.

7. *Transcript: Obama Announces Nomination of Merrick Garland to Supreme Court*, WASH. POST (Mar. 16, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/03/16/transcript-obama-announces-nomination-of-merrick-garland-to-supreme-court/.

8. *Id*.

9. *Id*.

10. Amita Kelly, *McConnell: Blocking Supreme Court Nomination 'About a Principle, Not a Person*,' NPR (Mar. 16, 2016), http://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person.

tests."[11] On the other side of the aisle, Democratic Minority Leader Reid confirmed his support for the President: "The American people expect their elected leaders to do their jobs. President Obama is performing his constitutional duty. I hope Senate Republicans will do theirs."[12]

Interest groups weighed in as well. Liberal organizations—such as EMILY's List, the American Constitution Society, and the NAACP—were supportive of Judge Garland and made public comments that the Senate had a constitutional requirement to act on the nomination.[13] Conservative interest groups—such as the American Conservative Union, National Right to Life, and the Judicial Crisis Network—issued statements supportive of Senate Republicans not confirming the nominee, or any nominee, until after the presidential election; in some cases these groups claimed that constitutional issues they cared for would be decided unfavorably if Garland were confirmed to the Court.[14] In response, the White House created the first Twitter account in support of a Supreme Court nominee, "@SCOTUSnom"; some of the tweets proclaimed the President's "constitutional duty" to nominate a United States Supreme Court Justice and called upon Senators to "meet their constitutional duty" as well.[15] Vice President Joe Biden stated that if the Senate would not act on the Garland nomination, it "could lead to a genuine [c]onstitutional crisis born out of the dysfunction of Washington."[16] It appears that most members of the public agreed with the White House at the time of the nomination. In a national CNN poll taken in the days after President Obama nomi-

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11. *Id*.

12. *Id*.

13. *EMILY's List Statement on Supreme Court Nominee Merrick Garland*, EMILY'S LIST (Mar. 16, 2016), http://emilyslist.org/news/entry/emilys-list-statement-on-supreme-court-nominee-merrick-garland; *American Constitution Society President on Nomination of Merrick B. Garland to U.S. Supreme Court*, ACS (Mar. 16, 2016), http://www.acslaw.org/news/press-releases/american-constitution-society-president-on-nomination-of-merrick-b-garland-to-us; *NAACP Statement on the Nomination of Chief Judge Garland to the US Supreme Court*, NAACP (Mar. 16, 2016), http://www.naacp.org/latest/naacp-statement-on-the-nomination-of-chief-judge-garland-to-the-us-supreme/.

14. *Merrick Garland 60-Second Ad*, JCN (Mar. 23, 2016), http://judicialnetwork.com/judicial-crisis-network-launches-digital-ad-campaign-exposing-merrick-garlands-record-as-a-liberal/ *ACU Statement on Judge Merrick Garland's Nomination to the Supreme Court*, AM. CONSERVATIVE UNION (Mar. 16, 2016), http://conservative.org/acu-statement-on-judge-merrick-garlands-nomination-to-the-supreme-court/; *National Right to Life: The Next President Will Pick Justice Scalia's Successor*, NAT'L RIGHT TO LIFE (Mar. 16, 2016), http://www.nrlc.org/communications/releases/2016/release031616/.

15. @SCOTUSnom, TWITTER (Mar. 16, 2016), https://twitter.com/SCOTUSnom?lang=en.

16. John T. Bennett, *Biden: 'Constitutional Crisis' Coming with Split Supreme Court*, ROLL CALL (Mar. 24, 2016, 2:17 PM), http://www.rollcall.com/news/politics/biden-constitutional-crisis-coming-8-judge-court.

nated Judge Garland, fifty-two percent of survey respondents wanted to see him confirmed, fifty-seven percent thought President Obama should make the nomination (as opposed to the next President making it), and sixty-four percent thought confirmation hearings should be held for Garland.[17] Nevertheless, Garland was not given a confirmation hearing or a floor vote. When it appeared the Democratic candidate Hillary Clinton might win the Presidency, Texas Republican Senator Ted Cruz even insinuated that the Senate could refuse to confirm any Supreme Court nominees during her term, stating that there is "certainly long historical precedent for a Supreme Court with fewer [J]ustices."[18] Garland's Court nomination expired on January 3, 2017, leaving Scalia's successor to be nominated by President Donald J. Trump.[19]

From the outset of this vacancy occurring on the Court, the President, key Senators, other political leaders, and various interest groups all proclaimed that the position they supported—whether it was making a nomination during a presidential election year or refusing to confirm a nominee—was either mandated by the Constitution or was a right granted to the President or the Senate under the Constitution. However, beyond the relatively vague and brief text of Article II that deals with the appointment of United States Supreme Court Justices, what does the Constitution dictate or allow in this process? What did the Framers of the Constitution have in mind with United States Supreme Court appointments?

This Article will recount the discussions and compromises at the 1787 Constitutional Convention over the federal judicial appointment process and the consensus the Framers formed that summer over the power the President and the Senate would exercise. Section II will provide the historical context of the Constitutional Convention, including explaining how the judiciary fit into the larger scheme of the separation of powers, exploring how judicial appointments fulfill the Framers' concerns with protecting judicial independence, and introducing the five factors the Framers emphasized when deliberating over the structure of judicial appointments. Section III then discusses the Framers' desire that the process they created would lead to high nominee quality, including nominees who had requisite knowledge,

17. Jennifer Agiesta, *Support for SCOTUS Hearings Remains Strong, CNN/ORC Poll Finds*, CNN (Mar. 25, 2016), http://www.cnn.com/2016/03/25/politics/merrick-garland-supreme-court-nominee/.

18. Eugene Scott & Ted Barrett, *Cruz Cites 'Long Historical Precedent' of SCOTUS Vacancies, Lays Ground for Potential Fight*, CNN (Oct. 27, 2016), http://www.cnn.com/2016/10/27/politics/ted-cruz-supreme-court/.

19. Jess Bravin, *President Obama's Supreme Court Nomination of Merrick Garland Expires*, WALL STREET J. (Jan. 3, 2017), http://www.wsj.com/articles/president-obamas-supreme-court-nomination-of-merrick-garland-expires-1483463952.

experience, and ethics. Section IV examines how the Framers thought political beliefs would be factored into the appointment process. Section V looks at the Framers' emphasis on nominee representativeness, broadly defined. Section VI uses the Framers' statements to demonstrate that they thought the judicial appointment process they created would be proper because it ensured both the President and the Senate would check and balance each other, thus reinforcing a goal incorporated throughout the Constitution. Section VII then examines the role the Framers thought public input and feedback would play in the process. Finally, Section VIII returns to the Garland nomination to examine how that confirmation battle fit into the larger context of what the Framers desired with respect to United States Supreme Court appointments, as well as how that nomination shaped President Trump's nomination of Judge Neil Gorsuch. As the paragraphs below will demonstrate, many of the alterations over time to the Supreme Court selection process are the result of constitutional changes since the 1780s, both in terms of subsequently ratified constitutional amendments and in terms of new interpretations of the Constitution by the Court itself. However, the general contours of the original system endure, and the same types of considerations the Framers wanted Presidents and Senators to have remain important.

II. JUDICIAL APPOINTMENTS WITHIN THE CONTEXT OF THE SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE

Relatively early during the 1787 Constitutional Convention in Philadelphia, the delegates decided that a national supreme court was necessary and that the judges on that court would be appointed rather than elected.[20] However, the delegates spent nearly the entire convention disagreeing over the question of who would select the justices of that court.[21] To understand why this took so long to decide, it is important to state briefly why the Convention took place, what the major disputes were, and how this appointment process fits within the larger scheme of the separation of powers.

The Articles of Confederation created a unicameral Confederation Congress with a limited set of powers; exercising these powers, and conducting virtually any business, required a two-thirds majority

20. Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 759-61 (1984).

21. Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL'Y, 103, 110-20 (2005).

(nine of thirteen states at the time).[22] There was no separate Executive Branch, nor was there any national court system, and the overwhelming majority of powers were left to the states.[23] With no power by the Confederation Congress to directly collect taxes, regulate interstate commerce, or enforce treaties, the national government proved early on to be ineffective.[24] The lack of revenue being particularly acute, the Confederation Congress proposed an amendment to the Articles of Confederation to raise revenue directly from tariffs in 1786; however, the states had to ratify unanimously any amendment to the document, and only twelve of thirteen did so.[25] Finally, the national government experienced trouble raising funds to put down Daniel Shays's Rebellion in western Massachusetts in 1786-87, when rebels forcibly closed some of the State's courts to prevent indebted farmers from having their lands foreclosed.[26]

At the 1787 Philadelphia Convention, the delegates initially met for the expressed purpose of revising the Articles of Confederation,[27] but they quickly abandoned those plans and instead decided to create a completely new system of government.[28] With some key events from 1786-87 in mind, the Framers produced a more powerful national government, giving Congress significantly more authority, including the authority to raise and collect taxes and to regulate interstate commerce; the document also fashioned a national executive with commander-in-chief and foreign affairs powers, as well as the outline of a federal judiciary.[29] However, fearing the problems that too much power could entail, they also built a system of separated institutions exercising powers that checked each other, including giving the President veto authority, providing Congress impeachment and removal powers over the President, conferring on Congress the ability to determine federal court jurisdiction, and bestowing upon the President par-

22. BARBARA SILBERDICK FEINBERG, THE ARTICLES OF CONFEDERATION: THE FIRST CONSTITUTION OF THE UNITED STATES 37-41 (2002); Donald S. Lutz, *The Articles of Confederation as the Background to the Federal Republic*, 40 PUBLIUS 55-70 (1990); Eric M. Freedman, *The United States and the Articles of Confederation: Drifting toward Anarchy or Inching toward Commonwealth*, 88 YALE L.J. 142 (1978).

23. Lutz, *supra* note 22.

24. Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 618-19 (1999).

25. Robert A. Feer, *Shays' Rebellion and the Constitution: A Study in Causation*, 42 NEW ENG. Q. 388, 390 (1969).

26. Rachel R. Parker, *Shays' Rebellion: An Episode in American State-Making*, 34 SOC. PERSP. 95, 100-01 (1991).

27. Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 270 (1997).

28. Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891, 898 (1990).

29. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 62 (1994).

doning power over defendants convicted in federal court.[30] James Madison explained in *Federalist No. 51* the necessity of this system of checks and balances. He believed that the self-interested human nature we possess has to be reflected in the design of the Constitution as follows: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[31] He hoped for virtuous persons to be in government, but he also knew there would be no guarantee of that. If tyrants seized authority in this mightier national government, Madison said the Constitution's design still protected us via federalism and the separation of powers: "[T]he power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people."[32] Since some authority remains lodged at the state level, and by creating three distinct branches of the national government, no one need fear runaway federal power. According to Madison, this arrangement would work because it ensures that "[a]mbition must be made to counteract ambition," in that each branch will have sufficient ability to check and balance the power of the other two branches.[33]

The phrase "checks and balances" is used frequently to refer to this type of institutional checking.[34] But the Framers also sought to create "balance" in the groups who selected federal officials and in those officials' length of time in office. As originally designed, there were four different types of federal officials under the Constitution selected by different groups of people for different terms of office. Members of the House were meant to be closest to the people, so the voters have always directly elected them for the relatively short period of two years.[35] The Presidency, as originally formulated by the Framers, was indirectly elected after deliberations in each state by the Electoral College, a group meant to be selected by the voters for its familiarity with potential presidential candidates; Presidents have always had

30. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 201 (1913); JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 23 (1966); RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 226-57 (2009).

31. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

32. *Id*. at 323.

33. *Id*. at 322.

34. *See, e.g.*, David H. Moore, *Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power*, 90 NOTRE DAME L. REV. 1019 (2015); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994).

35. RALPH A. ROSSUM, FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY 76-77 (2001).

the slightly longer term of four years.[36] Until the ratification of the Seventeenth Amendment,[37] Senators were chosen by state legislatures to represent state interests, and even today they retain more autonomy with their longer six-year terms.[38] Finally, United States Supreme Court Justices are most indirectly tied to the people, given that the President and Senate select them for what are essentially life terms.[39] In this sense, each portion of the new federal government would not just have new powers to check the others—we would expect each institution to do so because the personnel in those four different institutions are responsive to different publics at different times. With this greater understanding of both checks *and* balances, as well as the connection to the general public, it is easier to see the theory behind the design of the Federal Judiciary, the need for the Judiciary to be independent of the other two branches, and the reasons for both the President and the Senate having a role in that selection process.

Indeed, in 1787 the Constitutional Convention delegates expressed a concerned desire to protect judicial independence.[40] None other than James Madison claimed that all branches, including the Judiciary, should be "independent of each other" and that their powers should "be *independently* exercised."[41] John Dickinson stated that the Judiciary "ought to be made as independent as possible."[42] Rufus King wanted "the Executive and the Judiciary" to be "separate and independent."[43] John Francis Mercer claimed at the Convention that it "is an axiom that the Judiciary ought to be separate from the Legislative: but equally so that it ought to be independent of that department."[44] For Charles Pinckney, "Judges should be possessed of competent property to make them independent."[45] Edmund Randolph believed that the Constitution should not include any provisions that one could interpret "as weakening too much the independence of the Judges."[46] James Wilson agreed that the Judiciary and the other two branches should be "distinct and independent."[47]

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36. *Id*.
37. U.S. CONST. amend. XVII.
38. ROSSUM, *supra* note 35.
39. *Id*.
40. Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113 (2003).
41. MADISON, *supra* note 30, at 311, 326 (emphasis in original).
42. *Id*. at 56.
43. *Id*. at 333.
44. *Id*. at 462.
45. *Id*. at 425.
46. *Id*. at 537.
47. *Id*. at 61.

This concern for judicial independence at the Convention led the delegates to give Article III federal judges terms of "good behavior" and prohibit Congress from reducing their salaries.[48] The Framers agreed to these provisions very early on in the Convention. On May 29, the Virginia Plan proposed the federal court life term, and the delegates approved it just one week later on June 5; on the same day, the Convention adopted the provision that judicial salaries could not be diminished while federal judges served.[49] Although John Dickinson made a motion later in the Convention to permit Presidents to have some removal power over federal judges, several members spoke against the amendment, including Edmund Randolph, Gouverneur Morris, James Wilson, and John Rutledge. The motion was quickly and overwhelmingly defeated.[50] This concern with judicial independence was expressed by Alexander Hamilton after the Convention in *Federalist No. 78*, where he proclaimed that the "complete independence of the courts of justice is peculiarly essential in a limited Constitution," and that "nothing can contribute so much to its firmness and independence as permanency in office."[51]

Although the delegates promptly decided on the importance of the separation of powers and the need to protect judicial independence, the decision on how to select those judges plagued the Convention for an extended period of time. Randolph's Virginia Plan included a stipulation that "a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature."[52] During subsequent debate early in the Convention, Madison successfully moved to eliminate from the provision that federal judges be appointed "by the Legislature," because he initially advocated for the Senate only to have such power.[53] This motion passed; Charles Pinckney, though, announced that on a later date he would try to reintroduce the language permitting appointment by the entire national legislature.[54] In the meantime, Hamilton proposed that the Executive select judges, with the Senate having "a right of rejecting or approving" the nominees.[55] With no resolution in sight, Pinckney and Roger Sherman moved to reinsert the language

48. U.S. CONST. art. III, § 1.

49. MADISON, *supra* note 30, at 32, 68-69.

50. *Id.* at 536-37; CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 29-30 (2006).

51. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

52. MADISON, *supra* note 30, at 32.

53. *Id*. at 68; 1 YALE UNIV. PRESS, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 126 (Max Farrand ed., 1966).

54. YALE UNIV. PRESS, *supra* note 53, at 116.

55. *Id*. at 128.

that the House and the Senate jointly appoint federal judges; Madison argued against allowing the House a role in the appointment process, leading Pinckney and Sherman to withdraw their motion.[56] The delegates then temporarily agreed to create "a national Judiciary," including "one supreme tribunal," whose judges were to be appointed by the Senate.[57] However, when William Paterson subsequently introduced the New Jersey Plan, the small state-centric rival to the Virginia Plan, it included a provision that federal judges would "be appointed by the Executive."[58] Two camps had now developed, with some delegates favoring appointment by the Senate, and others advocating appointment by the President.

Still, in June of 1787, Randolph submitted a revised Virginia Plan, which still created a "national Judiciary" consisting of "One Supreme Tribunal" that would have judges appointed by the Senate.[59] Randolph's proposal kept that language in the draft Constitution for approximately one month, until mid-July when Nathaniel Gorham recommended that judges be "appointed by the Executive with the advice and consent of the second branch," by which he meant the Senate.[60] Gorham developed this position because he believed that even one chamber of Congress would contain too many people to engage effectively in the selection of judges alone.[61] James Wilson, not impressed by what he saw as a half-measure, made a motion to permit the President to have sole appointment power, something seconded by Gouverneur Morris.[62] In what was some significant debate, Luther Martin, Roger Sherman, George Mason, and Gunning Bedford argued against the motion, and Gorham and Gouverneur Morris spoke in favor of it.[63] When the vote was called on the motion to give the President sole appointment authority, it failed.[64]

This led Gorham to seek a compromise, with him proposing that "Judges be nominated and appointed by the Executive by and with the advice and consent of the second branch and every such nomination shall be made at least ___ days prior to such appointment."[65] With very little recorded debate, a vote was called with the motion failing

56. MADISON, *supra* note 30, at 112-13.
57. *Id*. at 116.
58. *Id*. at 120.
59. *Id*. at 150.
60. *Id*. at 314.
61. *Id*.
62. *Id*.
63. *Id*. at 314-17.
64. *Id*. at 317.
65. *Id*.

on a tie vote.[66] Madison responded with a compromise proposal of his own, allowing the Senate to check presidential appointment power, but only if a supermajority of two-thirds of the Senate rejected a nominee.[67] During subsequent debate, Madison spoke in favor of his amendment, as did Randolph and Morris; but Charles Pinckney, Oliver Ellsworth, and Mason rebutted these arguments, defending the Senate's sole appointment authority.[68] Because of the strong opposition, Madison modified his amendment so that the Senate could reject a presidential appointment by a majority vote, but this proposal also failed.[69] Following this, the Convention voted to affirm that judicial appointment power should remain in the Senate.[70]

In late July, the delegates agreed to insert language giving the President power "to appoint to Offices in cases not otherwise provided for," showing a trend in the Convention towards lodging appointment power generally in the Presidency.[71] At the end of July, and throughout most of August, the judicial appointment power stayed with the Senate alone in drafts of the Constitution.[72] But the tide began to turn at the end of August and early September. Morris took to the Convention floor and argued against the Senate having judicial appointment power because of what he characterized as the unwieldiness of a legislative body exercising that responsibility.[73] The levy then broke in early September when the Committee of Eleven brought forth nine compromise proposals to the Convention floor, including that the "President . . . shall nominate and by and with the advice and consent of the Senate shall appoint . . . Judges of the Supreme Court."[74] Without any debate recorded on the issue of judicial appointment, the delegates unanimously approved that language.[75] When the Convention finally adjourned, the finalized language of the Appointments Clause read as follows: "The President . . . shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court."[76]

Regarding judicial appointment power, the Framers initially disagreed over the best way to achieve their goals of separation of pow-

66. 2 YALE UNIV. PRESS, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 38 (Max Farrand ed., 1966).
67. MADISON, *supra* note 30, at 317.
68. *Id*. at 344-46.
69. *Id*. at 346.
70. YALE UNIV. PRESS, *supra* note 66, at 72.
71. *Id*. at 116.
72. *Id*. at 144-45, 169, 183.
73. MADISON, *supra* note 30, at 517.
74. *Id*. at 575.
75. *Id*. at 598-99; YALE UNIV. PRESS, *supra* note 66, at 533.
76. U.S. CONST. art II, § 2.

ers, checks and balances, and judicial independence. However, the Framers eventually settled on that method of appointment because they thought it would best carry out these goals. As the remainder of this Article will explain, the Framers collectively thought five factors would be paramount regarding judicial selection, and these five factors coincided with their goals for the new government overall. Numerous Framers discussed these five factors throughout the Convention, and shortly after the Convention, key Framers wrote about them in the *Federalist Papers*.

When constructing the judicial appointment process, the selection of a highly qualified nominee was the number one factor that the Framers thought was necessary. Second, the Framers knew that political beliefs—including ideology, constitutional vision, and policy attitudes—would ultimately become a consideration factored into the Supreme Court selection process if politicians chose the Justices. Third, the Framers' statements indicated that they understood some level of representativeness would, and should, factor into the selection process for United States Supreme Court Justices, because Senators and Presidents would need to appeal to the different constituencies that put them into office. Fourth, the Framers' emphasis on checks and balances was, and continues to be, on full display in the Supreme Court selection process, meaning that they intended an active role in the process from both the President and the Senate, understanding the other considerations (like those cited above) would drive senators to be more or less likely to confirm a President's nominee. Fifth, the Framers anticipated that there would be some indirect input and feedback from the public in a judicial selection process that was carried out by elected politicians.

III. PRODUCING A QUALIFIED JUDICIAL NOMINEE

The number one factor that the Framers thought was necessary to consider in their construction of the judicial appointment process was the selection of a highly qualified nominee. The criteria they identified at their Convention debates, and shortly after the Convention, were having a legal background and having legal experience, possibly some judicial experience, and devotion to ethics. Benjamin Franklin talked of this early on at the Convention when he claimed, perhaps a bit comically, that in Scotland lawyers chose judges, and in doing so they "always selected the ablest of the profession in order to get rid of him, and share his practice among themselves," and that the delegates should keep in mind "the interest of the electors to make the

best choice, which should always be made the case if possible."[77] Thus, Franklin not only thought those who were the most capable and knowledgeable about the law should be chosen as judges, but he also thought, like Madison, that the self-interest of human nature should also be incorporated into the structure of government.[78] Franklin's statement made clear his belief that whoever selects federal judges needs to have an interest in that process that would promote the selection of quality jurists.

Madison continued this same line of thought as Franklin, claiming that if legislators chose judges it would be problematic because "many of [them] were not judges of the requisite qualifications. The Legislative talents which were very different from those of a Judge, commonly recommended men to the favor of Legislative Assemblies."[79] Madison assailed congressional selection, claiming that the whole Congress would be "incompetent Judges of the requisite qualifications" for a United States Supreme Court Justice because they would likely choose judges with legislative experience or who were owed political favors by members of Congress.[80] In this way, Madison feared that Congress would select persons "without any of the essential qualifications for an expositor of the laws," permitting such nominees to "prevail over a competitor not having these recommendations, but possessed of every necessary accomplishment."[81] Madison further stated at the Convention that he wanted the selection of federal judges to tend toward those who would possess "every necessary accomplishment," again emphasizing the importance of quality, including requisite experience, in judicial nominees.[82] Earlier in the Convention Madison supported Senate appointment of judges, but as the Convention progressed, Madison assured his fellow delegates that it would be best if the President has this appointment power, subject to rejection by the Senate, because "the Executive . . . would in general be more . . . likely to select fit characters than the Legislature."[83]

Several other delegates also emphasized the need for the process to promote the appointment of qualified judges. For instance, Nathaniel Gorham wanted a selection process which would "ensure a good choice."[84] Several delegates who spoke on the subject emphasized this point, regardless of which appointment method they advo-

77. MADISON, *supra* note 30, at 67-68.
78. Peter C. Ordeshook, *"The Calculus of Consent": Reforming Political Science*, 152 PUB. CHOICE 423, 425 (2012).
79. MADISON, *supra* note 30, at 68.
80. *Id*. at 112-13.
81. *Id*. at 113.
82. *Id*.
83. *Id*. at 113, 344.
84. *Id*. at 314.

cated. Roger Sherman specified the need for an ethical nominee and believed appointment by senators was the best way to achieve this; he declared that it "would be less easy for candidates to intrigue with them, than with the Executive Magistrate."[85] Charles Pinckney also defended appointment power by the Senate alone because the President would not have "the requisite knowledge of characters."[86] According to Elbridge Gerry, he "could not conceive that the Executive could be as well informed of characters throughout the Union, as the Senate."[87] Oliver Ellsworth, also emphasizing the need for ethical Justices, claimed of the President that "it was not to be supposed he could have a better knowledge of characters. He will be more open to caresses [and] intrigues than the Senate."[88]

On the other hand, Edmund Randolph commented that he laid "great stress on the responsibility of the Executive as a security for fit appointments. Appointments by the Legislatures have generally resulted from cabal [or] from personal regard."[89] Moreover, Gouverneur Morris maintained that Senators "must take the character of candidates from the flattering pictures drawn by their friends. The Executive in the necessary intercourse with every part of the [United States] required by the nature of his administration, will or may have the best possible information."[90] Clearly, there is no doubt that throughout the Convention, the delegates thought there was a need to appoint meritorious candidates, including not just having proper experience, but also, based on comments about fitness and character, possessing ethical qualities.[91]

James Madison and Alexander Hamilton emphasized the same themes in the *Federalist Papers*. For instance, Alexander Hamilton expressed the following sentiments regarding the quality of the President's appointees in *Federalist No. 76*:

> The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will . . . investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.[92]

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85. *Id*. at 316.
86. *Id*. at 344.
87. *Id*. at 345.
88. *Id*.
89. *Id*. at 344.
90. *Id*. at 345.
91. William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 638-50 (1987).
92. THE FEDERALIST NO. 76, at 455-56 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Put another way, Hamilton believed that Presidents' concerns with their legacies would lead them to make quality appointments. He then claimed that if instead the Senate had the appointment power, "the intrinsic merit of the candidate will be too often out of sight" due to the logrolling of candidates.[93] Such horse-trading would be less likely under the Constitution's design, according to Hamilton, leading to the selection of better candidates. In the same paper, Hamilton argued that the Senate would confirm most nominees: "[I]t is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal."[94] The Senate would approve most nominations if the President chose a meritorious candidate with no ethical problems. For Hamilton, it is the Senate checking the President that will "tend greatly to prevent the appointment of unfit characters."[95] In other words, Hamilton predicted that overall, candidates of real quality, not cronies, were likely to be appointed.[96]

In *Federalist No. 51*, Madison wrote similar thoughts to those he expressed at the Convention and by his colleague, Hamilton. Referring to the Federal Judiciary, Madison wrote that "peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications."[97] This line leaves no doubt that Madison, like the other Framers who wrote and spoke on the subject, thought judges needed to have specific qualifications and that the Constitution's selection process would best ensure candidates of such merit.

Thus, there is ample evidence among many key Framers' statements that indicate an overriding concern with making sure that United States Supreme Court Justices would be of the highest quality, broadly defined. They believed in the need for minimum basic qualifications for federal jurists. They did not place on federal judges any formal qualifications—such as the age, residency, and citizenship qualifications they required for Presidents,[98] Senators,[99] and House members[100]—but they did consistently express during the Constitutional Convention and afterwards the need for qualified, ethical appointees to the Court. There is no question that Presidents and Senators through today have been concerned about the quality of a Court nominee. Indeed, all nominees have been lawyers, almost all

93. *Id*. at 456.
94. *Id*. at 457.
95. *Id*.
96. Ross, *supra* note 91, at 640.
97. THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961).
98. U.S. CONST. art II, § 1.
99. *Id.* art I, § 3.
100. *Id.* § 2.

have had governmental (often judicial) experience, and many in the modern era have attended elite law schools.[101] On the Senate side, nominees ranked as highly qualified in newspaper editorials tend to receive many more votes than those who are unqualified,[102] and nominees with ethical shortcomings will often provide Senators with reasons to vote against them,[103] making them less likely to be confirmed.

IV. THE ROLE OF POLITICAL BELIEFS

In addition to wanting qualified, meritorious, ethical Justices, the Framers believed they were setting a process in motion where other factors would be relevant. Being the political scientists they were, they also believed that political beliefs (including ideologies, constitutional visions, and policy attitudes) would be considered in the United States Supreme Court nomination process. The Constitution has sometimes been referred to as a "bundle of compromises,"[104] and in this sense, it demonstrates that the Framers at the Constitutional Convention were practical politicians.[105] Thus, this group also knew that, as a practical matter, they were establishing a selection process in which Presidents, and indirectly Senators, would try to put Justices on the Court who held beliefs commensurate with their own. In doing this, they envisioned a system in which politics would be an inevitable part of the federal judicial appointment process.[106] Although this factor was frequently articulated in implicit (as opposed to explicit) statements by the delegates, because they were uneasy about this consideration dominating the process, their statements reveal that they were aware they were creating a process where political beliefs would be regularly contemplated during judicial appointments. One point is noteworthy in this regard. Political parties as we understand them today did not exist at the Constitutional Convention. However, the delegates disagreed strongly over states' rights—including the fissures between large states and small states, as well as the one that divided slave states from free states—and these disagreements were

101. Susan Navarro Smelcer, *Supreme Court Justices: Demographic Characteristics, Professional Experience, and Legal Education, 1789-2010*, CONG. RES. SERV. 11-31 (Apr. 9, 2010), https://fas.org/sgp/crs/misc/R40802.pdf.

102. LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 103-06 (2005).

103. JOHN MASSARO, SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS 8 (1990).

104. FARRAND, *supra* note 30, at 201.

105. Richard B. Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1584 (1987).

106. James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 355-57 (1989).

comparable to the partitions that eventually arose between political parties in the early United States during the 1790s.[107]

Regarding this factor, James Madison was once again a leading figure at the Convention. When he proposed for Justices to be appointed by the President unless rejected by a two-thirds vote of the Senate, he claimed that "in case of any flagrant partiality or error, in the nomination it might be fairly presumed that [two-thirds] of the second branch would join in putting a negative on it."[108] Madison's language here is telling. He could have stated that if there were *any* partiality by the President in judicial appointments, then the Senate would be justified in rejecting the appointment. Instead, he proclaimed that the Senate would be able to reject an appointment involving "*flagrant* partiality or error." This implies that *some* political partiality would be acceptable in judicial appointments, and it is something we should expect in a political selection process. Edmund Randolph also expressed his concerns with too much partiality injected into judicial appointments if Congress controlled the entire process: "Appointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications."[109] Randolph's characterization of some "other consideration" is most logically understood as overt partiality or similar political considerations. It cannot be "cabal" or "personal regard," as he had already cited those factors. Since Randolph's statement was during the same debate as Madison's above, one can conclude that the "other consideration" was something akin to political or ideological contemplations. This potential problem of legislative judicial appointments, Randolph and Madison argued, would not occur as much with presidents making the selections, although their wording suggests that political considerations will still surface in any appointment made by public officials.[110]

Those delegates who wanted a stronger role for the Senate in the appointment process made similar statements about political considerations. As noted above, George Mason defended unilateral Senate power over judicial appointments. Before the Convention had decided on which body would conduct presidential impeachments, he made the following statement: "The mode of appointing the Judges may depend in some degree on the mode of trying impeachments of the Executive. If the Judges were to form a tribunal for that purpose, they surely

107. *Id*. at 357-58.

108. MADISON, *supra* note 30, at 344.

109. *Id*.

110. John C. Eastman, *The Limited Nature of the Senate's Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 643 (2003).

ought not to be appointed by the Executive."[111] Mason believed that if federal judges formed an impeachment tribunal (which the delegates eventually placed in the duties of the Senate),[112] a Justice who has the same political views or ideology as a President, particularly a President who appointed that Justice, would be likely to keep that President in office when the evidence clearly would suggest otherwise to a neutral observer. There could be other reasons for Mason to have this concern about executive influence, such as Presidents engaging in nepotism in their Supreme Court appointments, but political similarities also lead to this concern.[113] During the same debate, Gouverneur Morris implied a comparable concern about the potential for ideological or political closeness between Justices and the Presidents who appointed them, when he proclaimed that "it would be improper for an impeachment of the Executive to be tried before the Judges. The latter would in such case be drawn into intrigues with the Legislature and an impartial trial would be frustrated."[114] This was an even more forthright claim, and it is evidence that the Framers thought federal judges, including Supreme Court Justices, would be political actors. This would also then be something they would expect Presidents and Senators to factor into their decisions on appointments, although they could not have precisely envisioned the effects of partisan polarization in contemporary American politics.[115]

Once the Convention ended, Hamilton addressed this factor multiple times in *The Federalist Papers*. For instance, in *Federalist No. 66*, Hamilton told his readers that, since the President would be permitted to nominate a second Justice if the Senate rejected the first one, "it could hardly happen, that the majority of the Senate would feel any other complacency towards the object of an appointment than such as the appearances of merit might inspire, and the proofs of the want of it destroy."[116] Like Madison and Randolph above, Hamilton's word choice is telling. He noted not that *actual* merit, but rather the *appearance* of merit, would be a factor that Senators would use when voting on a judicial nomination. Therefore, one can deduce that Hamilton expected Senators to publicly claim they were searching for proof of merit, but by stating that they would be interested in the *appearance* of merit, he was implying that both Presidents and Senators

111. MADISON, *supra* note 30, at 315.
112. U.S. CONST. art. I, § 3.
113. Gauch, *supra* note 106, at 344-45.
114. MADISON, *supra* note 30, at 315.
115. James I. Wallner, *The Foundations of Advice & Consent: Original Intent & the Judicial Filibuster*, 31 J.L. & POL. 297, 329 (2016).
116. THE FEDERALIST NO. 66, at 405 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

could collaborate on the appointment of Justices, focusing on the public "merit" of a nominee, when the real reason behind their support of the candidate is because of the similarity of political/ideological beliefs. Although others have used this passage by Hamilton as evidence that Hamilton thought merit should be the only criterion considered by the Senate during Court confirmations,[117] a more careful reading of Hamilton's choice of language here implies otherwise.

Indeed, Hamilton continued this line of reasoning in *Federalist No. 69*, where he made this statement: "In the national government, if the Senate should be divided, no appointment could be made."[118] This short sentence does not just explain procedurally the appointment process, but also implies that he expected the President and the Senate to consider the political views of judicial nominees. Hamilton's use of the word "divided" cannot be read to mean that there would be a tie vote in the Senate, as then the Vice President would cast the tie-breaking vote, which one would typically expect to be in support of the President's nominee,[119] even before the formation of political parties that led to presidential and vice-presidential candidates to run on tickets together. Again, unlike House members, Senators, and Presidents, the Constitution does not require any qualifications for Justices,[120] so it is not unreasonable to expect that political considerations would factor into the process accordingly. Moreover, if Senators were "divided" politically, then they would likely reject a nominee out of line with their political beliefs.

Finally, in *Federalist No. 76*, Hamilton reasoned that "in every exercise of the power of appointing to offices, by an assembly of men, we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly."[121] Therefore, according to Hamilton, the "choice which may at any time happen to be made under such circumstances, will of course be the result either of a victory gained by one party over the other, or of a compromise between the parties."[122] Put another way, Hamilton shows us why we

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117. *See, e.g.*, Matthew D. Marcotte, *Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 519, 533 (2001); Roger D. Miner, *Advice and Consent in Theory and Practice*, 41 AM. U. L. REV. 1075, 1079 (1992).

118. THE FEDERALIST NO. 69, at 421 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

119. Wallner, *supra* note 115, at 311-12.

120. JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 17-18 (1998).

121. THE FEDERALIST NO. 76, at 456 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

122. *Id*.

should fear a legislature exclusively holding judicial appointment power, because in that case, party consideration would be on *full* display; nevertheless, the implication is that if a legislative body is involved in an appointment process, we would expect *some* party consideration to occur. Indeed, although a confirmation does not involve an exclusive decision by a legislative body, similar considerations would certainly arise in that same setting. In other words, we can never completely take the politics out of the appointment process, even if the Framers tried to minimize it by also requiring the President's involvement.

The Framers were well aware of how political the process would be, and they saw a balance in a Court that was both independent, with life terms and salary protections, but also subject to political accountability via selection by politicians like Presidents and Senators. Although the Framers did not express their concern with this factor as explicitly as they did regarding the necessity for quality in Supreme Court appointees, a critical inspection of the Framers' relevant statements and writings reveal that they knew politics would inevitably be part of the selection process. This factor has remained an indelible part of the Supreme Court appointment process, with more than four of five Court nominees over the last century being of the same political party as the President, and with political ideology remaining an important consideration for Presidents when choosing nominees.[123]

V. REPRESENTATIVENESS OF JUDICIAL NOMINEES

Another factor the Framers contemplated was representativeness, which also can be understood when one thinks of the Framers' concern with accountability, noted above. What constitutes "representativeness" has changed over time—initially from geographical representativeness to religion, and then to race and gender—but it is another persistent part of the judicial appointment process.[124] There are multiple reasons why a judicial nominee's background, specifically geographical origins, were important at the Constitutional Convention. First, the Framers permitted federal courts to have diversity jurisdiction in Article III,[125] ensuring that a judge's state of origin would be an important consideration. Second, the Framers gave a role in the appointment process to the Senate, a body intended to protect

123. Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 485-95 (1998).

124. William J. Daniels, *The Geographic Factor in Appointments to the United States Supreme Court, 1789-1976*, 31 WESTERN POL. Q. 226 (1978); SMELCER, *supra* note 101, at 6-11.

125. Stone Grissom, *Diversity Jurisdiction: An Open Dialogue in Dual Sovereignty*, 24 HAMLINE L. REV. 372, 378-81 (2001).

state interests, particularly small state interests; in this sense, the Framers put in place a system in which geography would not go unnoticed in judicial appointments.[126] Third, the state-based Electoral College elects the President, so there would be reasons for the President to think about the geography of Supreme Court nominees when considering reelection.[127] Later, constitutional amendments expanding the right to vote and Supreme Court decisions protecting religious liberty helped to promote other demographic factors being considered in judicial nominations, including religion,[128] race,[129] and gender.[130] Nevertheless, under the unamended Constitution, the type of representativeness that Presidents and Senators were most concerned with initially involved geographical diversity. Put succinctly by Gouverneur Morris, "the States in their corporate capacity will frequently have an interest staked on the determination of the Judges."[131]

Delegates raised this geographical concern multiple times at the Constitutional Convention, especially while the delegates were arguing over which of the first two branches should appoint members of the third branch. Those who initially advocated for appointment solely by the Senate saw this as a particularly striking argument in favor of their position. According to Roger Sherman, "the Judges ought to be diffused, which would be more likely to be attended to by the second branch, than by the Executive."[132] Clearly, one very reasonable reading of Sherman's use of the term "diffused" is to support geographical distribution in the Judiciary, although one can also understand this to include diversity in other forms.[133] For Edmund Randolph, "the hope of receiving appointments would be more diffusive if they depended on the Senate, the members of which would be diffusively known, than if they depended on a single man who could not be personally known to a very great extent."[134] Gunning Bedford agreed,

126. Gauch, *supra* note 106, at 350.

127. *See* Bradley W. Joondeph, *Law, Politics, and the Appointments Process*, 46 SANTA CLARA L. REV. 737, 760 (2006) (reviewing LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS (2005)).

128. *See* U.S. CONST. amend. I; Everson v. Bd. of Educ., 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296 (1940); Reynolds v. United States, 98 U.S. 145 (1879).

129. *See* U.S. CONST. amend. XIV, § 1; *id.* amend. XV, § 1; South Carolina v. Katzenbach, 383 U.S. 301 (1966); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

130. *See* U.S. CONST. amend. XIV, § 1; *id.* amend. XIX; Craig v. Boren, 429 U.S. 190 (1976).

131. MADISON, *supra* note 30, at 345.

132. *Id*. at 315.

133. *See* David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1499 (1992).

134. MADISON, *supra* note 30, at 316.

stating that smaller states in particular would be more likely to be represented on the Supreme Court if the Senate did the appointing, because the President "would put it in his power to gain over the larger States, by gratifying them with a preference of their Citizens,"[135] in order to get reelected. George Mason feared that if the President had sole judicial appointment power,

> as the Seat of Government must be in some one State, and as the Executive would remain in office for a considerable time, for [four], [five], or [six] years at least, he would insensibly form local and personal attachments within the particular State that would deprive equal merit elsewhere, of an equal chance of promotion.[136]

Put another way, for Mason, geography would inevitably enter into the judicial appointment process, but he wished for that to be minimized (when compared to merit), and he thought the best way to do this would be to give the Senate that power because the Senators collectively would not be beholden to special interests from the same place.

However, delegates who early on at the Convention advocated for the President to have sole appointment power also argued that geographical diversity would be better served under their proposal. For instance, Nathaniel Gorham claimed that as "the Executive will be responsible in point of character at least, for a judicious and faithful discharge of his trust, he will be careful to look through all the States for proper characters."[137] On the other hand, he argued that members of the Senate "will be as likely to form their attachments at the seat of Government where they reside, as the Executive. If they cannot get the man of the particular State to which they may respectively belong, they will be indifferent to the rest."[138] Moreover, for Gorham, "the Senate could have no better information than the Executive. They must like him, trust to information from the members belonging to the particular State where the Candidates resided."[139] James Madison claimed that the "Executive Magistrate would be considered as a national officer, acting for and equally sympathizing with every part of the United States,"[140] implying that the President would be better suited to choosing Justices from throughout the country because the President would represent the entire country.[141] Madison continued

135. *Id*.
136. *Id*. at 315.
137. *Id*.
138. *Id*.
139. *Id*. at 316.
140. *Id*. at 344.
141. Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 753 (1997).

on to note, however, that if the Senate "alone should have this power, the Judges might be appointed by a minority of the people, though by a majority, of the States, which could not be justified on any principle as their proceedings were to relate to the people, rather than to the States."[142] For example, the smallest states might band together to ensure that judicial nominees come from their states, something possible in an institution like the Senate that gives equal representation to each state. In particular, Madison expressed worry that slavery would divide the Senators too much, as he opined that the issue would "throw the appointments entirely into the hands of the Northern States, [and] a perpetual ground of jealousy and discontent would be furnished to the Southern States."[143] According to Madison, the sectional interests on each side of the slavery issue, divided geographically, would be better and more equitably represented on the federal bench with appointment by the President.[144]

Thus, there is no question that delegates on both sides of the "Presidency versus Senate" judicial appointment debate believed that a representative Court was important. Once they agreed to a joint appointment method and concluded their business at the Convention, Alexander Hamilton in the *Federalist Papers* continued to stress this concern. For instance, in *Federalist No. 76*, Hamilton made clear his belief that since the President, who represents the entire country, initiates the judicial appointment process, this prevents the President from choosing someone because of "[s]tate prejudice,"[145] something more likely to be seen in legislative appointments. Put another way, Hamilton assured his readers that the President would not typically select a nominee "from the same State to which he particularly belonged,"[146] a factor which might become the norm in a legislative appointment process. For a final post-Convention validation about the relevance of geographical diversity in the judicial selection process, one can turn to a letter from James Madison to Thomas Jefferson on June 27, 1823. In Madison's estimation, the Constitutional Convention "intended the Authority vested in the Judicial Department as a final resort in relation to the States," which one can see in the fact that the appointment process requires "the concurrence of the Senate chosen by the State Legislatures, in appointing the Judges."[147] For

142. MADISON, *supra* note 30, at 344.

143. *Id*.

144. Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473, 488 (1988).

145. THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

146. *Id*. at 458.

147. *Letter from James Madison to Thomas Jefferson (Jun. 27, 1823)*, *in* MADISON: WRITINGS 801 (Jack N. Rakove ed., 1999).

an older Madison looking back at the Convention's work, Senators from each state have an opportunity to scrutinize judicial nominees and protect their regional interests, yet another proclamation that this type of representativeness would be factored into the judicial appointment process.

There is no question, then, that the Framers were concerned about Supreme Court nominees being representative. The first informal form of representativeness was based on geography, which is an expected consequence of having a Senate representing states and a President who is eligible for reelection by the state-based Electoral College. The Justices' circuit riding during the Court's first century intensified this factor.[148] As circuit riding ended, however, and as presidential elections changed and Senators were subject to direct election, identity politics became the norm.[149] This led to geography being superseded by religion, then by race and gender.[150] Indeed, as Supreme Court decisions more strongly protected the freedom of religion under the First Amendment,[151] and as constitutional amendments were ratified mandating that the right to vote may not be denied based on race and gender,[152] this (along with social movements and supportive Supreme Court decisions) eventually spurred on more political participation by women, persons of color, and persons of different religious faiths.[153] This resulted in more emphasis on these factors during the Supreme Court nomination process, demonstrating the enduring importance of representativeness, even if the forms of representation most strongly considered by Presidents and Senators have changed over time. Indeed, representativeness—measured geographically, or more modernly in terms of race, gender, or religion—has been an enduring factor in Court appointments since 1789.[154]

148. Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 475 (1989).

149. Ken I. Kersch, *Constitutional Conservatives Remember the Progressive Era*, *in* THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE 130, 146 (Stephen Skowronek et al. eds., 2016).

150. SMELCER, *supra* note 101, at 6-11.

151. *See Cantwell*, 310 U.S. 296; *Everson*, 330 U.S. 1.

152. *See* U.S. CONST. amend. XV, § 1; *id.* amend. XIX.

153. *See* Lauren E. Smith & Lee Demetrius Walker, *Belonging, Believing, and Group Behavior: Religiosity and Voting in American Presidential Elections*, 66 POL. RES. Q. 399 (2013); Tasha S. Philpot et al., *Winning the Race: Black Voter Turnout in the 2008 Presidential Election*, 73 PUB. OPINION Q. 995 (2009); Glenn Firebaugh & Kevin Chen, *Vote Turnout of Nineteenth Amendment Women: The Enduring Effect of Disenfranchisement*, 100 AM. J. SOC. 972 (1995).

154. *See* SMELCER, *supra* note 101, at 6-11.

VI. CHECKS AND BALANCES

In many ways, the factors above lead to the conclusion that the judicial selection process is part of the larger system of checks and balances that the Framers forged at the Constitutional Convention. Specifically, this selection process was meant to offer active roles to both the President and the Senate,[155] meaning that the types of nominees ultimately selected would be a product of the relative standing of the President and Senate. In other words, Presidents in more powerful political positions would be more likely to get nominees of their choosing confirmed, and those in a less powerful position would be less likely to accomplish this feat. Likewise, if the Senate were in a more advantageous position politically, it would be more likely to force the President's hand when making a nomination or rejecting a nominee on the Senate floor.[156] What the Framers envisioned here was that the factors cited above would ultimately lead to either an agreeable or a hostile Senate, resulting in either confirmation or some form of non-appointment. The most important consideration with this factor is that since the delegates could not agree on one or the other (the President or the Senate) appointing Justices, they ensured that the two branches would need to work together and moderate each other.

As demonstrated above, during much of the Convention, the delegates were divided into two camps over judicial appointment: those who supported unilateral appointment by the Senate and those who advocated sole appointment by the President. Each side believed that the other side's position would lead to some type of danger, which is why they collectively had difficulty reaching a consensus over who should appoint the Justices. For instance, James Wilson defended Executive appointment because he believed that "[i]ntrigue, partiality, and concealment" would result from Legislative appointment, whereas a "principal reason for unity in the [E]xecutive was that officers might be appointed by a single, responsible person."[157] According to James Madison early in the Convention, "the election of the Judges by the Legislature or any numerous body" was disagreeable.[158] For Madison, if Congress selected federal judges, members of Congress would be "too much influenced by their partialities," and instead of appointing persons of merit, the legislators would appoint those to whom they owed political favors.[159] Nathaniel Gorham agreed, claiming of the Senate that the body was "too numerous, and

155. Strauss & Sunstein, *supra* note 133, at 1494.
156. MASSARO, *supra* note 103, at 33.
157. MADISON, *supra* note 30, at 67.
158. *Id*. at 68.
159. *Id*. at 112.

too little personally responsible."[160] Gorham would later remark that "[p]ublic bodies feel no personal responsibility, and give full play to intrigue & cabal," when compared to a singular President.[161]

On the other side of the argument, John Rutledge wanted the Senate to choose judges because he "was by no means disposed to grant so great a power to any single person. The people will think we are leaning too much towards Monarchy."[162] Roger Sherman agreed, stating to the Convention that he "was clearly for an election by the Senate. It would be composed of men nearly equal to the Executive, and would of course have on the whole more wisdom."[163] Edmund Randolph thought that the debate and method of tallying the votes in a legislative body like the Senate would be better than leaving the choice to a single person with no record of deliberation on the issue: "[T]he advantage of personal responsibility might be gained in the Senate by requiring the respective votes of the members to be entered on the Journal."[164] Along the same lines, Gunning Bedford thought there were "solid reasons against leaving the appointment to the Executive," due to the fact that the President "must trust more to information than the Senate."[165] For Oliver Ellsworth, the "Executive will be regarded by the people with a jealous eye" because "[e]very power for augmenting unnecessarily his influence will be disliked"[166] if the President would have the sole appointment power of federal judges. Finally, George Mason considered "appointment by the Executive as a dangerous prerogative. It might even give him an influence over the Judiciary department itself,"[167] something Mason saw as upsetting the balance of power in the inability of the branches to check each other.

The delegates disagreed over which potential appointer—the President or the Senate—would be more dangerous, yet everyone in the Convention seemed to believe that at least *one* institution would be dangerous. As noted above, this sentiment led Madison initially to propose a compromise position in which the President would appoint federal judges as long as at least one-third of senators agreed.[168] Madison told his fellow delegates that his compromise position would "unite the advantage of responsibility in the Executive with the security afforded in the second branch against any incautious or corrupt

160. *Id*. at 314.
161. *Id*. at 315.
162. *Id*. at 67.
163. *Id*. at 316.
164. *Id*.
165. *Id*.
166. *Id*. at 345.
167. *Id*.
168. *Id*. at 316.

nomination by the Executive."[169] This emphasis on checks and balances is something Madison later averred as sensible because "the Executive . . . would in general be more capable . . . than the Legislature, or even the second branch of it, who might hide their selfish motives under the number concerned in the appointment."[170] Madison believed that a presidential nomination and some form of Senate confirmation would work best because the Senate would be "composed of equal votes from all the States," and "the principle of compromise" would prevail "in this that there should be a concurrence of two authorities."[171] For Madison (as well as Hamilton),[172] the membership of the House would be too numerous to handle judicial appointments, but the smaller Senate would be so divided by its system of equal representation for each state that it could not effectively appoint judges either. If some of his colleagues feared giving the President too much power with appointments, and others were concerned about giving the Senate too much power (Madison had concerns about either institution exercising the power unilaterally),[173] why not share the power between the President and the Senate? Furthering the notion that checks and balances should be built into the Constitution, Madison thought that his approach was in line with the "principle of compromise," something that permeated the entire Convention.[174] George Mason, however, thought that Madison's "compromise" position was really giving the appointment power to the President: "Notwithstanding the form of the proposition by which the appointment seemed to be divided between the Executive and Senate, the appointment was substantially vested in the former alone."[175] As described above, this compromise failed when Madison proposed it, and it probably did so because, in the eyes of too many delegates, it gave the President an inordinate amount of power in the appointment process, as it would have required Senate rejections to be by the supermajority vote of two-thirds.[176]

When the Committee of Eleven recommended the compromise position that the Convention eventually affirmed, it did offer the Senate

169. *Id*.

170. *Id*. at 344.

171. *Id*.

172. Mary L. Clark, *Advice and Consent vs. Silence and Dissent?: The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, 71 LA. L. REV. 451, 459 (2011).

173. Wallner, *supra* note 115, at 305-06.

174. FARRAND, *supra* note 30, at 201.

175. MADISON, *supra* note 30, at 345.

176. Brent Wible, *Filibuster vs. Supermajority Rule: From Polarization to a Consensus—and Moderation—Forging Mechanism for Judicial Confirmations*, 13 WM. & MARY BILL RTS. J. 923, 939 (2005).

more checking power in the process, including the ability to reject a nominee with a simple majority vote.[177] When this proposal went before the Convention in September, there was no recorded debate specific to judicial appointments, with the delegates instead generally discussing the President's appointment power over all federal offices. There were at least two delegates, James Wilson and Charles Pinckney, who expressed concerns with the sharing of appointment power between the President and the Senate.[178] However, that portion of Article II, Section 2 was adopted by the Convention, and before it was, Gouverneur Morris maintained that "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."[179] This short statement clearly surmises that the delegates believed the President and the Senate would check and balance each other on judicial appointments, meaning that each institution would have a significant role in the process.

Alexander Hamilton confirmed the importance of this factor in a series of statements he made in the *Federalist Papers*. For example, Hamilton wrote favorably of the "expediency of the junction of the Senate with the Executive, in the power of appointing to offices."[180] This was a confirmation that Hamilton wanted to see power exercised by both the Senate and the President in the judicial appointment process. In this vein, Hamilton viewed the President's role as relatively constrained within a checks and balances framework.[181] In *Federalist No. 69*, he wrote that there is

> a great inferiority in the power of the President, in this particular, to that of the British king; nor is it equal to that of the governor of New York, if we are to interpret the meaning of the constitution of the State by the practice which has obtained under it.[182]

Hamilton went on to characterize the President's role as one of nothing more than a "concurrent authority in appointing to offices."[183] Later, in *Federalist No. 76*, he explained that giving the Senate a role in the appointment process prevents the "disadvantages which might attend the absolute power of appointment in the hands of" the Presi-

177. MADISON, *supra* note 30, at 598-99.

178. *Id*. at 598.

179. *Id*.

180. THE FEDERALIST NO. 66, at 403 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

181. Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 269 (2009).

182. THE FEDERALIST NO. 69, at 421 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

183. *Id*. at 422.

dent.[184] He would go on to succinctly state that the Senate's advice and consent power would have "a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President."[185] Thus, the Senate could exercise its power both before and after the President makes a nomination. According to Hamilton's commentary in *Federalist No. 77*, the Senate's role is one of "influencing the President" in the sense of "restraining him" before the choice is even made.[186]

Indeed, Hamilton argued in the *Federalist Papers* that there would be inherent dangers if the President had sole appointment power, surmising that "a man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body."[187] Under the system laid out in Article II of the Constitution, though, the "possibility of rejection [by the Senate] would be a strong motive to care in proposing" nominees.[188] When viewed in light of his statements above, Hamilton in this passage was asserting to his readers that Presidents would need to assess the political environment of the Senate and make nominations not just of the President's liking but also of the liking of a sufficient number of Senators. This way of limiting the President protects the public from poor choices in judicial nominees, as "the restraint would be salutary," while also not "destroy[ing] a single advantage to be looked for from the uncontrolled agency of that Magistrate."[189] In other words, involving both branches in the nomination process would "produce all the good, without the ill"[190] because they would check each other in this regard similar to how it was expected that Congress and the President would check each other over treaties, laws, and other matters.[191]

Yet, Hamilton also had to assuage the fears of those who were opposed to the President having too small of a role in the judicial appointment process. He largely did this in *Federalist No. 66* by stating

184. THE FEDERALIST NO. 76, at 456 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
185. *Id*. at 457.
186. THE FEDERALIST NO. 77, at 460 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
187. THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
188. *Id*. at 458.
189. THE FEDERALIST NO. 77, at 460 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
190. *Id*.
191. Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745 (2008).

that it would be the duty of "the President to *nominate*, and, with the advice and consent of the Senate, to *appoint*," and that there "will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose*, they can only ratify or reject the choice of the President."[192] According to Hamilton, even though there would be a sharing of power between these two institutions, the President would have the choice of nominees, with the Senate holding the power to evaluate these nominations.[193] Granted, the Senate could "entertain a preference to some other person, at the very moment they were assenting to the one proposed, because there might be no positive ground of opposition to him," but Senators would also need to be careful in rejecting a nomination because "they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favorite, or upon any other person in their estimation more meritorious than the one rejected."[194] Nevertheless, Hamilton envisioned an energetic role for the Senate, and one of not just deciding whether or not to give consent, but also, based on his comments, one of actively offering "advice" on whom future Supreme Court nominees should be by entertaining their preference for someone else.

Throughout the statements and writings of the Constitutional Convention, delegates expressed, repeatedly, that a reliance on checks and balances within a system of separated powers would help promote the best possible judicial selections. The Framers had a strong distrust of any persons who held power in government generally,[195] and their views on whoever would fill the office of President and U.S. Senators were no different. In this regard, they thought that checks and balances would help ensure that a quality, representative nominee would be chosen. Indeed, based on Framer statements cited in Section IV,[196] we can also infer that, although the Framers thought political considerations would filter into the judicial selection process, those considerations would be tempered by having both the Executive and the Senate jointly participating in these appointments. Overall, a President's Court nominee is less likely to be confirmed if the President is in a relatively weak position compared to the Senate, or if the

192. THE FEDERALIST NO. 66, at 405 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original).

193. William G. Ross, *The Supreme Court Appointment Process: A Search for a Synthesis*, 57 ALB. L. REV. 993, 998 (1994).

194. THE FEDERALIST NO. 66, at 405 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original).

195. *See,* e.g., THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (emphasis in original).

196. *See supra* notes 108-09, 111, 114, 116, 118, 121-22 and accompanying text.

Senate is not controlled by the President's party,[197] demonstrating that the world's greatest deliberative body continues to serve as a check on the President's ability to pack the Court, just as the Framers envisioned.

VII. INPUT AND FEEDBACK FROM THE PUBLIC

One last major factor the Constitutional Convention delegates considered in 1787 was the function public feedback and input would play in Supreme Court nominations. Much like the role of checks and balances, some ability of the people (beyond U.S. Senators) to be involved in the selection process was seen as a way to help guarantee both quality and representativeness on the Court. In this sense, the Framers believed that members of the public would offer input to Presidents before nominations were made, and that they would give feedback on nominations to Senators during the confirmation process; the system was also designed so that after a confirmation or rejection, the public could offer its feedback to both the President and the Senate at the ballot box. Even though the ability of the public to influence the President and the Senate was relatively limited under the original Constitution,[198] the Framers saw a role for members of the public to offer input both before and during the selection process.

To be sure, James Madison professed at the Constitutional Convention that appointment solely by Congress (including both the House and the Senate) was problematic because members of a large legislature would tend to appoint judges who had "assisted . . . members in the business of their own, or of their Constituents."[199] Put another way, Madison was expressing a fear that too much input into the judicial selection process would result in legislators appointing judges as a way to repay political favors. However, as the paragraphs below demonstrate, Madison and his colleagues did believe that some input by, or feedback from, the public would be proper, and even encouraged by the selection process. Hamilton confirmed that he believed in this being factored into judicial appointments as well, when he proclaimed at the Constitutional Convention that in a representative government, "magistrates" should be "appointed, and vacancies . . . filled, by the people, or a process of election originating with the people."[200]

Indeed, at the Convention, there were several other statements by the delegates advocating for some, but not too much, public involve-

197. *See,* e.g., MASSARO, *supra* note 103, at 33; MALTESE, *supra* note 120, at 5.
198. *See* ROSSUM, *supra* note 35.
199. MADISON, *supra* note 30, at 113.
200. *Id*. at 136.

ment in the judicial nomination and confirmation process; however, what was envisioned at the time was a much lower level of public input and feedback compared to what we see in contemporary judicial nominations.[201] This was a sentiment shared by those who had more fear of the President—and those who had more fear of the Senate—holding the appointment power. Gunning Bedford, noting the power of elections to moderate politicians' behaviors, believed that Senators could be punished for poor choices by not being returned to office, but for the more powerful President, the "responsibility of the Executive so much talked of was chimerical. He could not be punished for mistakes."[202] For Bedford, Presidents would be in a position of too much power to ever be "punished" by those who selected them, unlike Senators, who could face such wrath when up for re-selection, at that time by state legislators.[203] Similarly, Luther Martin announced at the Convention that he was "strenuous" for senatorial appointment because "[b]eing taken from all the States it would be best informed of characters and most capable of making a fit choice."[204] In other words, Martin believed that the Senators' constituents would help supply them with more information on potential judges. Roger Sherman also thought that Senators "would bring into their deliberations a more diffusive knowledge of characters."[205] For these Framers, then, some limited role for the public to influence the judicial selectors was paramount, and senatorial appointment of the Justices was the best way to ensure this.

However, there were also delegates who wanted a strong (and early in the Convention, a unilateral) role for the President in the Supreme Court selection process, and they thought public involvement was important, too. Nathaniel Gorham advocated for sole presidential appointment power because he argued that the President "would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone."[206] In other words, since the President was one person, and the Senate was a collective body, it would be easier to determine that the President made a good or bad appointment to the Court, and take action appropriately, than it would against a collective body like the Senate, where membership changes and Senators may even decline to vote.[207] When Madison put

201. Charles W. "Rocky" Rhodes, *Navigating the Path of the Supreme Appointment*, 38 FLA. ST. U. L. REV. 537, 549-50 (2011).
202. MADISON, *supra* note 30, at 316.
203. William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 56 (1990).
204. MADISON, *supra* note 30, at 314.
205. *Id*. at 316.
206. *Id*. at 316-17.
207. Volokh, *supra* note 191, at 767.

forth a proposal to share appointment power between the President and the Senate, he alluded to the role of public input, in that their joint appointment roles would ensure "in one of which the people, in the other the States, should be represented."[208] Likewise, Elbridge Gerry claimed that the "appointment of the Judges . . . should be so modelled as to give satisfaction both to the people and to the States."[209] Again, these delegates consistently support the public having a role, albeit indirectly, in the judicial selection process.[210]

That this factor—of limited involvement of the public in judicial selection—was on the Framers' minds is confirmed if one reads the *Federalist Papers*. For instance, commenting on the appointment power in *Federalist No. 76*, Hamilton claimed that the "exercise of it by the people at large will be readily admitted to be impracticable [as] it would leave them little time to do anything else."[211] Furthermore, if the public directly voted for federal judges, Hamilton feared that the people might make choices out of the "spirit of cabal and intrigue."[212] Nevertheless, even though Hamilton did not think it was feasible for the public to select judges directly, he saw an important, albeit indirect, role for them in the process outlined in the Constitution. Indeed, Hamilton thought that the President would need to be mindful of the public in nominations because of the "danger to his own reputation, and . . . to his political existence" if the President were to make an appointment out of "favoritism."[213] Hamilton believed that presidential concerns about legacy and reelection would serve as a "barrier" to the President making poor nominations.[214]

Hamilton further explained that the Senate would be constrained by the desires of the public, too, when deciding whether to confirm nominations. Writing in *Federalist No. 77*, he claimed that "the public would be at no loss to determine what part had been performed by the different actors."[215] Indeed, according to Hamilton, the "blame of a bad nomination would fall upon the President singly and absolutely," but the "censure of rejecting a good one would lie entirely at the door of the Senate; aggravated by the consideration of their having counteracted the good intentions of the Executive."[216] Furthermore, if "an ill

208. MADISON, *supra* note 30, at 344.
209. *Id*. at 345.
210. *See* Ross, *supra* note 203, at 56.
211. THE FEDERALIST NO. 76, at 455 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
212. *Id*.
213. *Id*. at 458.
214. *Id*.
215. THE FEDERALIST NO. 77, at 461 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
216. *Id*.

appointment should be made, the Executive for nominating, and the Senate for approving, would participate, though in different degrees, in the opprobrium and disgrace."[217] Throughout these statements by Hamilton, there is an underlying theme: the public is listening and speaking, so both Presidents and Senators should pay attention to this fact when making these appointments.[218]

Some of Madison's contributions to the *Federalist Papers* emphasize this same concept, and they do so in papers that are not primarily on the topic of appointment power or the Judiciary. In *Federalist No. 10*, Madison expressed his concerns about factions taking power and abusing the rights of others.[219] Indeed, he characterized factions as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[220] Madison believed that a well-constructed government would prevent these factions from taking power.[221] However, since he was also committed to a representative republic (as opposed to either a direct democracy or a monarchy), he thought that the form of representative government under the Constitution, including the Senate and the Presidency, would "refine and enlarge the public views by passing them through the medium of a chosen body of citizens."[222] Thus, public input on all matters, clearly including on Supreme Court appointments, was important to Madison, although he wanted this to be an indirect involvement, so that the "refined" leaders would make the ultimate appointment decisions. In *Federalist No. 39*, Madison substantiates the theory that Presidents and Senators should consider the people's views on judicial appointments when he admits that "[e]ven the judges . . . will . . . be the choice, though a remote choice, of the people themselves."[223]

Overall, then, the Framers wanted some limited public input and feedback in the judicial selection process. This was evident both at the Convention itself and during the subsequent ratification debate on the Constitution. Moreover, this factor fit very well with the notion of checks and balances to promote the appointment of Justices who would represent the qualities desired by the Framers. Indeed, there

217. *Id*.

218. Stephanie K. Seymour, *The Judicial Appointment Process: How Broken Is It?*, 39 TULSA L. REV. 691, 692 (2004).

219. Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 634 (1999).

220. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

221. *Id*. at 77 (emphasis added).

222. *Id*. at 82.

223. THE FEDERALIST NO. 39, at 343 (James Madison) (Clinton Rossiter ed., 1961).

has consistently been involvement of the public in offering input and feedback,[224] although this has certainly grown over time, particularly after the ratification of the Seventeenth Amendment mandating the direct election of Senators.[225] Today, this means that confirmation battles give the public an opportunity to give input to their Senators about what they think is the proper interpretation of the Constitution itself.[226]

VIII. CONCLUSIONS

At the 1787 Constitutional Convention, the Framers focused on five factors regarding judicial appointments. When constructing the process by which federal judges, including United States Supreme Court Justices, would be appointed, they emphasized: (1) appointing qualified jurists, (2) the inevitability of politics, (3) representativeness, (4) the need for checks and balances, and (5) public input and feedback. Remarkably, these factors, in modified forms, all remain part of the appointment process for Justices. This is not to discount that there were other concerns on the minds of the Framers when they were debating judicial nomination and confirmation. Nor does it mean that during judicial selection we should consider only what the Framers wanted the Appointments Clause to mean, as there are certainly other, non-originalist methods of constitutional interpretation that merit consideration.[227] Nevertheless, what the Framers thought about the constitutional aspects of judicial appointment remains relevant to understanding what is required and appropriate in selecting Justices today.

Returning to the Garland nomination, both sides can claim support, at least in part, from the Framers, as both sides emphasized factors important to the delegates at the Constitutional Convention. On President Obama's side, Garland undoubtedly was a high-quality nominee, with a distinguished history as a federal prosecutor and court of appeals judge.[228] There were no ethical questions raised about him. The fact that Garland, at the time of his nomination, was considered moderately liberal politically[229] is not out of line with what

224. *See* Ross, *supra* note 203.

225. PAUL M. COLLINS, JR., & LORI A. RINGHAND, SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE 36 (2013).

226. *Id*. at 71-74.

227. *See* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987); Mark Tushnet, *A Note on the Revival of Textualism*, 58 S. CAL. L. REV. 683 (1985).

228. *See* Totenberg & Johnson, *supra* note 6.

229. Adam Liptak, *Where Merrick Garland Stands: A Close Look at His Judicial Record*, N.Y. TIMES (Mar. 17, 2016), https://www.nytimes.com/2016/03/18/us/politics/merrick-garlands-record-and-style-hint-at-his-appeal.html?_r=0.

we should expect from a Democratic President; that President Obama chose someone more moderate and slightly older to appease Republican Senators shows that he took the Framers' notion of checks and balances into account with his selection. And yet, Republicans in the Senate also had ground to stand on regarding the Framers' factors. President Obama was in a relatively weak position, in that his approval rating was hovering right around fifty percent[230] in his last year in office. Since the other political party controlled the Senate, we should expect President Obama's chances to place someone he wanted on the Court to be lower when considering checks and balances. With no mandate in Article II that the Senate *must* vote on a nominee, the Senators can still comply with the Constitution without taking action. Indeed, the Senate has failed to take action on Supreme Court nominations ten times over the country's history.[231] Nevertheless, outside of nominations that have occurred at the end of the legislative session, the Senate failing to take *any* action on a nominee has been relatively rare, with its last mid-session occurrence before 2016 being in 1866.[232] Such inaction risks creating a new norm of senatorial-presidential conflict for Court nominations when different political parties control the two institutions, which could stretch the notion of checks and balances farther from what was intended. Finally, both sides had interest groups and citizen activists extolling the virtues of their respective positions,[233] meaning that there was public feedback supportive of both confirmation and rejection. The White House's creation of a Twitter account to connect directly with the public was also in line with this factor, as it was clearly an attempt to increase public support for the nominee, with the hopes that more constituents would contact their Senators to advocate for confirmation of Judge Garland. The Framers could not have envisioned something like Twitter, but they did understand the public's connection to the President and the Senate.

These same factors can also help us understand the nomination by President Trump of Neil Gorsuch for the Court vacancy President Obama tried to fill with Judge Garland. Judge Gorsuch was nominated at the relatively young age of forty-nine, but in that time amassed impeccable credentials, earning a law degree from Harvard

230. *Presidential Job Approval Center*, GALLUP, http://www.gallup.com/interactives/185273/presidential-job-approval-center.aspx (last visited Feb. 12, 2018).

231. *See Supreme Court Nominations: present-1789*, U.S. SENATE, https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited Feb. 12, 2018).

232. Richard S. Beth & Betsy Palmer, *Supreme Court Nominations: Senate Floor Procedure and Practice, 1789-2011*, CONG. RES. SERV. 17 (Mar. 11, 2011), https://fas.org/sgp/crs/misc/RL33247.pdf.

233. *See supra* notes 13-14 and accompanying text.

and a doctorate from Oxford, clerking for both Justice Byron White and Justice Anthony Kennedy, and working in private practice and for the United States Justice Department before serving for over ten years as a judge for the United States Court of Appeals for the Tenth Circuit.[234] During the 2016 presidential campaign, Donald Trump pledged to nominate a Justice to this seat who shared a similar ideology and constitutional vision as Justice Scalia, and the available evidence at the time of the nomination suggested that Judge Gorsuch fit that mold as a conservative jurist.[235] Representativeness in terms of religion may have also played a role in the pick, as Gorsuch, an Episcopalian, became the only Protestant on a Court that, before his nomination, held five Catholics and three Jewish Justices.[236] Considering checks and balances, this nomination was ultimately successful, although the vote was relatively close.[237] President Trump's public approval rating (forty-five percent) in January 2017 was lower than President Obama's was when nominating Garland in 2016,[238] but the Gorsuch nomination was made very early in President Trump's first year in office with a Republican-controlled Senate, giving President Trump more freedom to nominate a more conservative Justice. And from the outset of the nomination, it was clear that the public would be relevant in the confirmation battle. Not to be outdone by the Twitter account for the Garland nomination, the Trump White House created an account titled "Gorsuch Facts" the same night the nomination was announced[239] to help manage the confirmation and give its readers ammunition to sway Senators. Furthermore, interest groups began lining up right away to take sides by lobbying Senators, most notably with the conservative Judicial Crisis Network immediately announcing plans after the nomination was made to spend ten million dollars in favor of confirmation.[240]

Without taking a position on whether Judge Garland was the best choice by President Obama or whether Republican Senators in 2016

234. Ariane de Vogue, *President Trump Nominates Neil Gorsuch for Supreme Court*, CNN (Feb. 1, 2017), http://www.cnn.com/2017/01/31/politics/donald-trump-supreme-court-nominee/; Julie Hershfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html.

235. Alicia Parapiano & Karen Yourish, *Where Neil Gorsuch Would Fit on the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-supreme-court-nominee.html?hp&action=click&pgtype=Homepage&clickSource=g-artboard%20g-artboard-v3%20&module=b-lede-package-region&region=top-news&WT.nav=top-news.

236. Davis & Landler, *supra* note 234.

237. 163 CONG. REC. S2435-46 (daily ed. Apr. 7, 2017).

238. *See* GALLUP, *supra* note 230.

239. @GorsuchFacts, TWITTER (Jan. 31, 2017), https://twitter.com/GorsuchFacts.

240. Davis & Landler, *supra* note 234.

made the right decision in taking no action on the nomination, what can be said is that each side could legitimately claim that their actions had some basis in both the Constitution and the Framers' understanding of judicial appointments. The President certainly had the power to nominate Garland, but the Senate also had the authority to withhold its consent. The public was able to offer feedback about the actions (or inactions) taken by the political actors involved. Indeed, the factors that played a part in Garland's unsuccessful nomination were some of the same ones emphasized by the Framers. Thus, President Obama went too far in asserting that failing to confirm Garland meant the system of judicial appointment was "beyond repair." At the same time, while Senate Republicans were acting constitutionally by denying Garland so much as a hearing, that does not mean they were morally justified in their inaction. Likewise, without taking a position on Justice Gorsuch's nomination to the Supreme Court, President Trump and his advisors certainly paid attention to these same factors emphasized by the Framers. Given the constitutional structure created by the Framers, these longstanding factors will to continue being a part of the Supreme Court selection process for the foreseeable future.

CORPORATE SOCIAL RESPONSIBILITY IN THE AGE OF HYDRAULIC FRACTURING IN THE UNITED STATES AND THE UNITED KINGDOM

MARK K. BREWER†

I. INTRODUCTION

An ever-increasing body of literature seeks to define, justify, and influence the purpose of a corporation, fueling a battle between proponents of shareholder value theory[1] on the one hand and those arguing for a broader view of the corporation and its stakeholders ("stakeholder theory") on the other hand. The manner in which law defines, depicts, and measures a corporation is of acute importance where laws and regulations struggle to keep pace with technology and innovation. Over the past few years, the production of unconventional gas[2] trapped in deep underground rock layers has become an increasingly important source of energy in the United States[3] and may have a similar potential in the United Kingdom.[4] Hydraulic fracturing (commonly called "fracking") is a process by which large quantities of water, sand, or other propping agent and chemicals are pumped underground to break apart rock layers to release shale gas.[5] Environmental hazards include gas leaking into the atmosphere,[6] gas or contaminants from wells or fractures seeping into aquifers, and sur-

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1. This Article will generally use the phrase "shareholder value theory" to denote the concept that directors must act in the best interest of the shareholders, although other literature assigns the terms "shareholder value maximization theory" or "shareholder primacy theory."

2. The phrase "unconventional gas" refers to shale gas, coal bed methane, and underground coal gasification.

3. Russell Gold, *Fracking Gives U.S. Energy Boom Plenty of Room to Run*, WALL STREET J. (Sept. 14, 2014, 5:04 PM), http://www.wsj.com/articles/fracking-gives-u-s-energy-boom-plenty-of-room-to-run-1410728682.

4. U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2015 WITH PROJECTIONS FOR 2040 (2015), http://www.eia.gov/forecasts/aeo/pdf/0383(2015).pdf.

5. T. J. GALLEGOS, B. A. VARELA, S. S. HAINES, & M. A. ENGLE, HYDRAULIC FRACTURING WATER USE VARIABILITY IN THE UNITED STATES AND POTENTIAL ENVIRONMENTAL IMPLICATIONS 5839 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4758395/pdf/WRCR-51-5839.pdf.

6. Robert W. Howarth, *A Bridge to Nowhere: Methane Emissions and the Greenhouse Gas Footprint of Natural Gas*, 2 ENERGY SCI. & ENG'G 47, 47-50 (2014).

face spills of contaminated water.[7] While the practice has been used for decades,[8] discovery of significant reserves, coupled with improved technology, has propelled the hydraulic fracturing industry in the United States into an unparalleled source of energy.[9] Although available data suggests the United Kingdom only possesses moderate shale gas reserves, hydraulic fracturing could potentially contribute to a significant number of jobs in areas of high unemployment, provide a source of tax revenue, and reduce the cost of energy in the country.[10] In both U.S. corporate law and U.K. company law (together, "Anglo-American corporate law"[11]), shareholder value theory—the dominant view in the judiciary and the academy—has inhibited higher levels of corporate sustainability, often termed Corporate Social Responsibility ("CSR"). The risks associated with hydraulic fracturing illustrate the importance of reorienting legal scholarship away from the dominance of shareholder value theory to models that prioritize sustainability.

This Article argues the dominance of the shareholder value theory exposes local communities to environmental and social risks by encouraging energy companies to seek short-term gain without addressing detrimental externalities for the local community, the environment, and other stakeholders. Although stricter and more streamlined regulation is desirable, this Article argues that Anglo-American corporate law itself must be more responsive to CSR as well as support other initiatives to improve corporate behavior. This Article initially presents the legal background relevant to hydraulic fracturing in the United States, the United Kingdom, and the European Union. Then, the Article outlines the risks that the hydraulic fracturing industry presents, including water contamination, greenhouse gas emissions, stress on local communities, and other issues. Next, the Article explains the debate between the shareholder value theory and the stakeholder theory and its impact on the hydraulic fracturing in-

7. GALLEGOS ET AL., *supra* note 5, at 5843.

8. *See generally* Jason Schumacher & Jennifer Morrissey, *The Legal Landscape of 'Fracking': The Oil and Gas Industry's Game-Changing Technique Is Its Biggest Hurdle*, 17 TEX. REV. L. & POL'Y 241, 241 (2012-2013). The authors note that the first horizontal well was completed in 1929, and since the 1940s, the process has been regularly used. *Id*.

9. Susan Williams, *Discovering Shale Gas: An Investor Guide to Hydraulic Fracturing*, SUSTAINABLE INV. INST. 8 (Feb. 2012), http://www.siinstitute.org/special_report.cgi?id=21.

10. EDWARD WHITE, MIKE FELL & LOUISE SMITH, BRIEFING PAPER: SHALE GAS AND FRACKING 8 (2015), researchbriefings.files.parliament.uk/documents/CDP-2016-0018/CBP06073.pdf.

11. While distinct legal systems, U.S. corporate and U.K. company law both share an emphasis on shareholder primacy and wealth maximization in contrast to continental European corporate models that focus on a broader range of stakeholders.

dustry. Finally, the Article presents recommendations for addressing problems facing the industry with respect to deficiencies in the law.

II. BACKGROUND AND REGULATORY ENVIRONMENT IN THE UNITED STATES, THE UNITED KINGDOM, AND THE EUROPEAN UNION

Conventional oil and gas are found in permeable rocks, including sandstone.[12] Shale gas, however, is contained in impermeable shale, which requires fracturing in order to release the trapped gas.[13] The product of hydraulic fracturing is natural gas, which, while cleaner than other fossil fuels, still contributes to carbon emissions.[14] Oil companies in the United States and elsewhere have aggressively employed hydraulic fracturing over the past few years as more accessible carbon fuels have been depleted and extraction technology has improved.[15] In July 2014, the British Department of Energy and Climate Change ("DECC") began receiving applications for licenses to engage in hydraulic fracturing in the United Kingdom and announced the successful bids in 2015.[16]

A. Regulatory Structure in the United States

As the purpose of this Article is to examine the possible influence of corporate law on hydraulic fracturing activities, an extended discussion of environmental regulation is outside the scope of this research; however, an overview of the regulatory landscape provides the background for this Article's main discussion. Over the past few years, the hydraulic fracturing industry has grown exponentially in the United States.[17] Although a patchwork of federal and state regulations addresses hydraulic fracturing in the United States, there is no comprehensive regulatory regime at the federal level.[18] While Congress may claim authority to regulate the industry under the Commerce Clause, individual states have generally governed the most important is-

12. *Developing Onshore Shale Gas and Oil—Facts About 'Fracking*,' U.K. Dep't Energy & Climate Change (Dec. 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265972/Developing_Onshore_Shale_Gas_and_Oil__Facts_about_Fracking_131213.pdf [hereinafter *Facts About Fracking*].

13. *Id.*

14. Howarth, *supra* note 6, at 47-50.

15. Schumacher & Morrissey, *supra* note 8, at 241.

16. Jeanne Delebarre, Elena Ares & Louise Smith, Shale Gas and Fracking 15 (2017), http://researchbriefings.files.parliament.uk/documents/SN06073/SN06073.pdf.

17. Schumacher & Morrissey, *supra* note 8, at 241.

18. *Id.* at 260.

sues,[19] including drilling process integrity, well location, and fracturing chemical disclosure.[20]

The hydraulic fracturing industry enjoys exemptions from a number of federal regulatory regimes, including, inter alia, the Resource Conservation and Recovery Act[21] ("RCRA"), the Safe Drinking Water Act[22] ("SDWA"), the Clean Water Act[23] ("CWA"), and the Emergency Planning and Community Right-To-Know Act[24] ("EPCRA"). First, RCRA requires parties treating, storing, or disposing of toxic waste to comply with strict technical and financial guidelines. Although fracking fluids typically contain trace elements subject to RCRA regulation, Congress exempted oil and gas waste through the Solid Waste Disposal Act Amendments of 1980,[25] which resulted in less stringent storage requirements.[26] Second, Congress enacted the Solid Waste Disposal Act[27] ("SDWA") in 1965 to safeguard surface and underground water sources that are actually or potentially available for human consumption. Through the Energy Policy Act of 2005,[28] Congress exempted the hydraulic fracturing industry from regulatory requirements under the SDWA, which safeguards drinking water aquifers through its technical and reporting requirements to prevent contamination.[29] Third, the CWA regulates the disposal of wastewater as well as the adoption of measures to prevent pollution in storm water discharges.[30] Fourth, the EPCRA is designed to help protect communities from chemical hazards that could threaten public health, the environment, and safety.[31] However, firms that engage in fracking currently are not required to comply with the EPCRA's requirement to submit annual reports (i.e., "Toxic Chemical Release Form") relating to toxic chemicals to the Environmental Protection Agency ("EPA").[32]

Congressional attempts to regulate the industry on a federal level have largely failed. On June 9, 2009, Dianna DeGette, Maurice

19. *Id.* at 242.
20. *Id.*
21. Pub. L. No. 94-580, 90 Stat. 2795 (1976).
22. Pub. L. No. 93-523, 88 Stat. 1660 (1974).
23. 62 Stat. 1155 (1948).
24. Pub. L. No. 99-499, 100 Stat. 1728 (1986).
25. Pub. L. No. 96-482, 94 Stat. 2334 (1980).
26. 40 C.F.R. § 243.200-1(a) (2002).
27. Pub. L. No. 89-272, 79 Stat. 997 (1965).
28. Pub. L. No. 109-58, 119 Stat. 594 (2005).
29. 42 U.S.C. § 300h(d)(1)(B) (2005).
30. U.S. ENVTL. PROTECTION AGENCY, http://www2.epa.gov/enforcement/water-enforcement#cwa (last visited Jan. 24, 2018).
31. *Id.*
32. William J. Brady & James P. Crannell, *Hydraulic Fracturing Regulation in the United States: The Laissez-Faire Approach of the Federal Government and Varying State Regulations*, 14 VT. J. ENVTL. L. 39, 48 (2012).

Hinchey, and Jared Polis introduced the Fracturing Responsibility and Awareness of Chemicals Act[33] ("FRAC Act") in the House of Representatives while Bob Casey and Chuck Schumer concurrently introduced the FRAC Act in the Senate. The FRAC Act would recognize hydraulic fracturing as a federally regulated activity under the SDWA, which would require hydraulic fracturing firms to disclose the chemicals in hydraulic fracturing fluid. After the 111th Congress adjourned without passing the FRAC Act in January 2011, Bob Casey and Diana DeGette reintroduced it in March 2011 in the Senate and the House of Representatives, respectively, although it did not pass. Currently not passed, the FRAC Act was reintroduced on June 11, 2013.[34] From March 2010, the EPA engaged in a multiyear study of a number of well sites throughout the United States and published an interim report in 2012 that detailed the extent of the study.[35] In 2016, the EPA released its final report examining the impact of hydraulic fracturing on the quality and volume of drinking water resources.[36]

Beyond meeting any relevant federal thresholds, states[37] enjoy discretion to regulate hydraulic fracturing as they see fit, which has resulted in a lack of uniformity nationally with some states granting their respective environmental agency independent authority while others allow regulation through their respective processes of granting well permits.[38] Currently, Vermont,[39] New York,[40] and Maryland[41] have all banned hydraulic fracturing. Other states, such as Texas and Louisiana, have assigned regulatory authority to a particular state agency. For example, in Texas, the Oil and Gas Division of the Texas Railroad Commission has the authority to grant permits for hydraulic fracturing[42] while the Louisiana Department of Natural Resources Office of Conservation has authority in Louisiana.[43]

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33. H.R. REP. NO. 1084 (2009); S. REP. NO. 587 (2009).

34. S. REP. NO. 1135 (2013).

35. *See* U.S. ENVTL. PROTECTION AGENCY, HYDRAULIC FRACTURING FOR OIL AND GAS: IMPACTS FROM THE HYDRAULIC FRACTURING WATER CYCLE ON DRINKING WATER RESOURCES IN THE UNITED STATES (FINAL REPORT) (2016).

36. *See* U.S. ENVTL. PROTECTION AGENCY, *supra* note 30.

37. A comprehensive review of state regulation is beyond the scope of this Article. For a summary of such regulation, *see* Schumacher & Morrissey, *supra* note 8, at 280-300.

38. Brady & Crannell, *supra* note 32, at 53.

39. *See* VT. STAT. ANN., tit. XXIX, § 571(a) (West 2017).

40. *See* N.Y. DEP'T OF HEALTH, A PUBLIC HEALTH REVIEW OF HIGH VOLUME HYDRAULIC FRACTURING FOR SHALE GAS DEVELOPMENT 3 (2015), http://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf.

41. MD. CODE ANN., ENVIR. § 14-107.1 (West 2017).

42. Brady & Crannell, *supra* note 32, at 60-61.

43. *Id.* at 61-62.

B. U.K. Regulatory Environment

As in the United States, a number of different bodies exert influence on the fracking industry in the United Kingdom. The Department of Business, Energy and Industrial Strategy ("BEIS"), previously the DECC, has the authority to grant permission for fracking[44] with the same process for obtaining permission for drilling as that of conventional and unconventional gas.[45] The Oil and Gas Authority is responsible for issuing licenses.[46] If required, the operator must complete an environmental-impact assessment.[47] In addition, the regional Environmental Agency must grant the appropriate permits to the operator.[48] The operator must also notify the Health and Safety Executive of the well design and plans for operation.[49] The operator must ensure that an independent well examiner conducts a complete examination of the well's design and construction.[50] Further, the operator must obtain planning permission from the Minerals Planning Authority, local council, or the equivalent.[51] Under the Water Resources Act of 1991, the operator must serve notification of intention to drill to the Environment Agency.[52] Additionally, the operator must apply for consent to drill from the DECC as well as include a hydraulic fracturing plan and advise the British Geological Survey. In December 2012, the British Government set up the Office of Unconventional Gas and Oil within the DECC to be responsible for "the safe, responsible, and environmentally sound recovery of the U.K.'s unconventional reserves of gas and oil."[53] Following the en-

44. *See generally*, *Guidance on Fracking: Developing Shale Gas in the UK*, Dep't Bus., Energy & Indus. Strategy (Jan. 13, 2017), https://www.gov.uk/government/publications/about-shale-gas-and-hydraulic-fracturing-fracking/developing-shale-oil-and-gas-in-the-uk [hereinafter *Guidance on Fracking*].

45. The precise regulatory framework is summarized by the Department of Business, Energy and Industry. *See Roadmap: Onshore Oil and Gas Exploration in the U.K. Regulation and Best Practice*, Dep't Bus., Energy & Indus. Strategy (Dec. 17, 2013), https://www.gov.uk/government/publications/regulatory-roadmap-onshore-oil-and-gas-exploration-in-the-uk-regulation-and-best-practice (last updated Mar. 14, 2018) [hereinafter *Roadmap*]; *Onshore Oil and Gas Exploration in the UK: Regulation and Best Practice*, Dep't Bus., Energy & Indus. Strategy, (Dec. 2015), https://www.gov.uk/. . ./Onshore_UK_oil_and_gas_exploration_England_Dec15.pdf [hereinafter *Regulation & Best Practice*] (setting forth the framework in greater detail).

46. *See Guidance on Fracking*, *supra* note 44.

47. *Id.*

48. *Id.*

49. *Id.*

50. *See Regulation & Best Practice*, *supra* note 45.

51. *Id.*

52. *Id.*

53. Off. Unconventional Gas & Oil (OUGO), https://www.gov.uk/government/policy-teams/office-of-unconventional-gas-and-oil-ougo (last visited Mar. 29, 2018).

dorsement of the House of Lords,[54] the BEIS began awarding licenses with the latest announced on July 25, 2017.[55]

C. European Union Developments and Requirements

Recent European Union measures regulate the development of the hydraulic fracturing industry in Europe. The Commission Recommendation of January 22, 2014 sets forth "the minimum principles" applicable to member states that permit hydraulic fracturing, including requirements for assessments of the impact on the environment and human health, a system of permits for exploration and production, and risk assessments of the impact on groundwater or the area of the installation.[56] These minimum principles also require an environmental (baseline) study on the condition of the installation site prior to operations, installation design and construction that prevents leaks and spills, and development and infrastructure that minimize environmental and health risks.[57] Further, the measures require companies to use best techniques and practices in their operations, to use minimal water and hazardous chemicals, to monitor environmental impacts regularly, and to guarantee their ability to cover liability for potential hazards.[58] Finally, the minimum principles require proper administrative oversight by the member states, an examination of the environmental status of the installation site and its surroundings upon closure, and dissemination of information to the public concerning chemical substances and amounts of water used as well as regular and prompt publication of the volume of activity and incidents or violations.[59]

III. RISKS THAT THE HYDRAULIC FRACTURING INDUSTRY PRESENTS

In the United States, the current lack of comprehensive federal regulatory oversight[60] and the lack of uniformity in state and local regulation[61] leave many communities at risk for water contamina-

54. Econ. Affairs Comm., The Economic Impact on UK Energy Policy of Shale Gas and Oil, 2013-14, HL (UK), http://www.publications.parliament.uk/pa/ld201314/ldselect/ldeconaf/172/172.pdf.

55. *See Licensing Authority*, Oil & Gas Authority, https://www.ogauthority.co.uk/licensing-consents/licensing-rounds/ (last updated July 27, 2016).

56. The European Comm'n, Commission Recommendation of 22 January 2014 on Minimum Principles for the Exploration and Production of Hydrocarbons (Such as Shale Gas) Using High-Volume Hydraulic Fracturing (2014).

57. *Id.*

58. *Id.*

59. *Id.*

60. Brady and Crannell, *supra* note 32, at 43.

61. *Id*. at 53.

tion[62] and may expose the atmosphere to unacceptable levels of methane.[63] As the United Kingdom has limited experience with hydraulic fracturing to release shale gas, it is too early to state with certainty the precise problems that the industry will encounter, although British environmental groups express similar concerns to those in the United States.[64] While a comprehensive discussion of the environmental and social risks associated with hydraulic fracturing is beyond the scope of this Article, the following summarizes the most serious risks.

A. Water Contamination

Much of the criticism of hydraulic fracturing relates to potential contamination of local water supplies.[65] Depending on the type of rock formation, the EPA has suggested that hydraulic fracturing requires between 50,000 to 350,000 gallons of water for drilling through coal formations and two to five million gallons for horizontal drilling through shale formations.[66] The so-called "flowback," i.e., the water and other substances recovered from the well, must be disposed properly.[67] Concerns have been raised about the "integrity of wellbores, the possibility of leaks through faulty cement casings as the well passes through the water table, and the possibility of migration of gas or contaminants from the fractured well into the drinking water supply."[68] Recent studies have documented elevated levels of chemicals such as bromide and radium in treated water from hydraulic fracturing.[69]

In the United States, fluids used in hydraulic fracturing contain approximately 98% to 99.2% water, with the remainder including a combination of chemicals, some of which may be toxic.[70] U.S. legal

62. Gallegos et al., *supra* note 5, at 5843.

63. Howarth, *supra* note 6, at 47-50.

64. Veronika Moore, Alison Beresford & Benedict Gove, Hydraulic Fracturing for Shale Gas in the UK: Examining the Evidence for Potential Environmental Impacts 45 (2014), https://www.rspb.org.uk/Images/shale_gas_report_evidence_tcm9-365779.pdf.

65. Schumacher & Morrissey, *supra* note 8, at 243.

66. However, these estimates may overestimate the amount of water required due to improvements in technology. *See generally* Heather Cooley & Kristina Donnelly, *Hydraulic Fracturing and Water Resources: Separating the Frack from the Fiction,* Pac. Inst. (2012), https://www.pacinst.org/wp-content/uploads/sites/21/2013/02/full_report25.pdf.

67. Schumacher & Morrissey, *supra* note 8, at 244.

68. *Id.* at 244.

69. *See generally* Nathaniel R. Warner, Cidney A. Christie, Robert B. Jackson & Avner Vengosh, *Impact of Shale Gas Wastewater Disposal on Water Quality in Western Pennsylvania*, 47 Envtl. Sci. & Tech. 11849 (2013).

70. *Chemical Use In Hydraulic Fracturing*, FracFocus, http://fracfocus.org/water-protection/drilling-usage (last visited Mar. 29, 2018).

efforts to address concerns on water quality have largely focused on disclosure.[71] A number of states, including Wyoming, Pennsylvania, Arkansas, Texas, Colorado, New Mexico, Montana, West Virginia, Idaho, and North Dakota have some form of public disclosure requirement for hazardous chemicals. Additionally, FracFocus acts as a national hydraulic fracturing chemical registry.[72] Managed by the Ground Water Protection Council and Interstate Oil and Gas Compact Commission, FracFocus provides the public information concerning the chemicals used for hydraulic fracturing for particular geographic areas.[73] While a focus on disclosure can help raise awareness of potential risks, it has its limitations as a regulatory tool. In other areas of the law, scholars have criticized disclosure-based regulation because it has failed to prevent significant harm.[74] For example, the securities industry, underpinned by disclosure-based regulation, has been dominated by cyclical financial crises precipitated by corporate behavior that eluded regulators and that were unaddressed by a disclosure-based regime.[75] Moreover, Professor Jason Schumacher and Professor Jennifer Morrissey argue that "[e]ven where there are disclosure requirements, there are other issues ranging from perceived loopholes in existing regulatory schemes to the ability of state environmental regulators in gas-boom regions to adequately handle the ever-increasing number of permit requests."[76]

In contrast to the disclosure-based system in the United States, the United Kingdom has taken a stronger regulatory approach to ensuring U.K. water quality. According to a recent House of Lords Economic Affairs Select Committee report, U.K. law and practice should eliminate the main issues that contribute to water contamination given the existence of rules that require the disclosure of chemicals in fracking fluids as well as the prohibition of certain hazardous substances in the hydraulic fracturing process.[77] Despite the strong approach, the same report conditions its conclusion on the premise that

71. Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16127 (Jun. 24, 2015) (codified at 80 C.F.R. § 3160).

72. FRACFOCUS, *supra* note 70.

73. *Id*.

74. *See* Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1091 (2007).

75. *See generally* Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J.L. & PUB. POL'Y 199 (2005); Stephen M. Bainbridge, *Mandatory Disclosure: A Behavioral Analysis*, 68 U. CIN. L. REV. 1023 (2000); Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 CAL. L. REV. 627 (1996).

76. Schumacher & Morrissey, *supra* note 8, at 249.

77. ECON. AFFAIRS COMM., *supra* note 54.

regulators must *enforce* these prohibitions so that "hydraulic fracturing fluid poses no risk to groundwater in the U.K."[78]

Beyond the risk of contamination by flowback and surface water, the integrity of wells has raised concerns among scientists.[79] In the United States, states generally regulate the integrity of wellbores,[80] although the industry has developed a number of "best practices" as it increases its self-policing.[81] In the United Kingdom, Professor Richard J. Davies and others report that among the 2,152 onshore hydrocarbon wells drilled onshore between 1902 and 2013, 65.2% are probably not visible because "UK regulations state that, after abandonment, the well should be sealed and cut and the land reclaimed."[82] Despite the relatively limited data indicating problems with the integrity of wellbores in the United Kingdom,[83] "well integrity failure may be more widespread than the presently limited data show" since "monitoring of abandoned wells does not take place in the UK (or any other jurisdiction) and less visible pollutants such as methane leaks are unlikely to be reported."[84]

B. Natural Gas and Greenhouse Emissions

While natural gas may be widely regarded as a "clean fuel," it is a fossil fuel and produces carbon dioxide when combusted.[85] Moreover, leaks during extraction and distribution further contribute to the release of methane and other greenhouse gases into the atmosphere, which is notable, as Professor Robert W. Howarth points out that "[m]ethane is far more effective at trapping heat in the atmosphere than is carbon dioxide, and so even small rates of methane emission can have a large influence on . . . greenhouse gas footprints. . . ."[86] In addition, the use of drilling equipment involved in well construction and gas extraction as well as emissions from the transport of water

78. *Id*.

79. Richard J. Davies et al., *Oil and Gas Wells and Their Integrity: Implications for Shale and Unconventional Resource Exploitation*, 56 Marine & Petroleum Geology 239, 239 (2014).

80. Schumacher & Morrissey, *supra* note 8, at 244.

81. *Id.* at 245.

82. Davies et al., *supra* note 79, at 252.

83. *Id*. Davies and the others note that "[o]nly [two] wells in the UK have recorded well integrity failure (Hatfield Blowout and Singleton Oil Field) but this figure is based only on data that were publicly available or accessible through UK Environment Agency and only out of the minority of UK wells which were active." *Id.*

84. *Id.*

85. *See generally* John Broderick et al., Shale Gas: An Updated Assessment of Environmental and Climate Change Impacts (2011), http://www.mace.manchester.ac.uk/media/eps/schoolofmechanicalaerospaceandcivilengineering/newsandevents/news/research/pdfs2011/shale-gas-threat-report.pdf.

86. Howarth, *supra* note 6, at 47.

necessary for hydraulic fracturing further contribute to airborne pollution.[87] Moreover, focusing energy policy on natural gas will ultimately detract from the development of renewable energy sources such as solar, wind, and hydroelectric power.

According to Professor Joshua P. Fershee, an examination of practices in the State of North Dakota indicates that "risky portions of the process are not well monitored . . ." as regulators do "not have the resources to conduct the currently expected level of oversight."[88] Wells that are idle, abandoned, or orphaned present particularly difficult challenges, especially where the operator has become bankrupt. As discussed above, since few, if any, jurisdictions require the monitoring of abandoned oil and gas wells, leaks of methane and other pollutants are unlikely to be reported.[89] Current laws are deferential to oil and gas companies and offer little guidance in terms of best practices. Accordingly, poorly regulated-and-monitored operations have the potential to contribute significantly to the emission of greenhouse gases. As Professor Davies and others report, "[i]t is important . . . that the appropriate financial and monitoring processes are in place, particularly after well abandonment, so that legacy issues associated with the drilling of wells for shale gas and oil are minimized."[90]

C. Impact of Rapid Development on Local Host Communities

While many emphasize the economic benefits and reduced environmental damage associated with hydraulic fracturing compared to other forms of carbon fuels, the impact on the local host community can be devastating.[91] Rapid development on local communities without adequate planning and infrastructure may lead to "overburdened transportation and health infrastructure, and disproportionate increases in social problems, particularly in small isolated rural communities . . . ."[92] While increased standards of living among some residents may benefit communities financially, Professor Fershee has argued that a sudden influx of wealth may have an adverse effect on the social fabric of the host communities, creating "boomtown problems"[93] with "increased levels of drug use, domestic violence, and prostitution"[94] as well as "increased incidence of sexually-transmitted

87. Schumacher & Morrissey, *supra* note 8, at 251.
88. Joshua P. Fershee, *North Dakota Expertise: A Chance to Lead in Economically and Environmentally Sustainable Hydraulic Fracturing*, 87 N.D. L. Rev. 485, 498 (2011).
89. Davies et al., *supra* note 79, at 252.
90. *Id*.
91. N.Y. State Dep't of Health, *supra* note 40.
92. *Id*. at 6.
93. *Id.* at 53.
94. Fershee, *supra* note 88, at 494.

diseases . . . [and] acute housing shortages . . . ."[95] Scarcity of housing may exacerbate socioeconomic inequality as it "creates tremendous opportunities for landlords and other landowners, but it creates hardship for many of those not working in the oil industry trying to remain in the region."[96] Local communities have experienced "significant infrastructure damage in some localities due to increased truck traffic . . ."[97] as well as traffic jams and dramatic increases in road accidents and fatalities.[98] In the United Kingdom, legal title to mineral rights may prevent many local communities from directly benefitting from exploitation of shale gas deposits, although the government has introduced guidelines to address such concerns, such as authorizing local payments for drilling in those areas.[99]

D. Other issues

Stakeholders have raised additional concerns including seismic activity and land-use issues. Although the limited amounts of water used in hydraulic fracturing are insufficient to produce significant tremors, injection of liquid waste may cause deep underground pressure that pushes "existing faults to 'slip' in response to changes in pressure, particularly as higher pressures are required over time to inject the waste as the underground reservoir fills up."[100] Despite the lack of consensus, Professor Schumacher and Professor Morrissey note that "there is mounting evidence of increased, and possibly induced, seismic events in areas where natural gas production has increased and . . . which also involves the injection of large volumes of fluids into the ground."[101]

IV. SHAREHOLDER VALUE THEORY/STAKEHOLDER THEORY DEBATE AND ITS IMPACT

While the complex patchwork of local and national laws and rules provide various levels of protection for local communities, exposing some to greater risks than others, some aspects of the law are also complicit in creating potentially greater risks and more widespread harm. In particular, the law promotes corporate interests above those of other stakeholders. This Article will initially address the overall threat of the systemic problems created by law itself and then addresses specific threats in particular.

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95. N.Y. State Dep't of Health, *supra* note 40, at 53.
96. Fershee, supra note 88, at 493.
97. N.Y. State Dep't of Health, *supra* note 40, at 55.
98. Fershee, *supra* note 88, at 494.
99. *Facts About Fracking*, *supra* note 12, at 8.
100. Schumacher & Morrissey, *supra* note 8, at 252-53.
101. *Id.* at 253.

In the absence of coordinated action to establish effective, comprehensive regulations for hydraulic fracturing, it is fundamental that corporate law and the judiciary balance economic considerations and sustainable behavior by fracking firms. Yet, the Anglo-American concept of a corporation is dominated by shareholder value theory[102] that inadequately takes into account the impact of corporations on the environment, the local community, and other stakeholders.[103] Alternative models that seek to promote CSR may play an important role in managing such externalities. Nonetheless, the law continues to limit the positive impact CSR may have since it has institutionalized shareholder value theory. The following provides an overview of the theoretical concepts of corporations dominant in law, followed by an examination of the limits of these models.

Since the 1930s, legal scholars[104] and economists[105] have attempted to explain the organization and purpose of firms, developing various models that largely focus on the rights and duties of shareholders and directors. At the heart of these models lies the basic question of the purpose of a corporation. Among the theories focusing on the relationship between shareholders and management, two competing models have dominated scholarship, namely models that focus on shareholder primacy/shareholder value maximization and those that focus on stakeholder theory.[106] More recently, models that stress CSR have been promulgated, yet they have had only a limited impact on the law and the judiciary. The following discussion focuses on the shareholder value theory while subsequent portions of this Article address the necessity to incorporate CSR into the law.

Based on the assumptions of the "law and economics movement" that originated in the United States[107] and spread to Europe,[108] the shareholder value theory has dominated the economic, financial, and

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102. *See generally* Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856 (1997).

103. Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 87, 91 (2005).

104. *See generally* E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

105. Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

106. A. Keay, *Getting to Grips with the Shareholder Value Theory in Corporate Law*, 39 COMMON L. WORLD REV. 358, 358 (2010).

107. *See generally* Krešimir Piršl, *Trends, Developments, and Mutual Influences Between United States Corporate Law(s) and European Community Law(s)*, 14 COLUM. J. EUROPEAN L. 277, 278 (2007-2008).

108. Klaus J. Hopt, *Comparative Company Law*, *in* OXFORD HANDBOOK OF COMPARATIVE LAW 1161, 1184-86 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

legal[109] understanding of the corporation. The theory's roots lie in the pioneering work of Professor Adolf Berle and Professor Gardiner Means,[110] which relies on Berle's depiction of managers as the trustees of a company's shareholders and therefore required to act for the benefit of the shareholders.[111] Building on these assumptions, Professor Michael Jensen and Professor William Meckling's seminal work, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*[112] depicts the shareholders and management as rational economic actors who contract with one another.[113] Shareholder value theory identifies the purpose of a corporation as explained by Professor Milton Friedman in his frequently quoted statement: "There is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud."[114] Professor Jonathan Macey also notes:

> Under traditional state and corporate law doctrine, officers and directors of both public and closely held firms owe fiduciary duties to shareholders and to shareholders alone. Directors and officers are legally required to manage a corporation for the exclusive benefit of its shareholders, and protection for other sorts of claimants exists only to the extent provided by contract.[115]

The interests of remaining stakeholders, including employees, the local community, and others affected by corporate decisions are secondary to shareholders, who, in the view of shareholder value theory, have the "greatest stake in the outcome of corporate decision-making."[116] According to such logic, it follows, as explained by Professor Robert Sprague, that "[s]hareholders invest . . . with the understanding that managers will strive to maximize shareholder value . . . ."[117]

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109. *See generally* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.").

110. *See generally* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

111. Adolf A. Berle, *Corporate Powers as Trust*, 44 HARV. L. REV. 1049, 1064 (1931).

112. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

113. *Id.* at 308-09.

114. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 124-33 (40th ed. 1962).

115. Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 23 (1991).

116. *Id*. at 26.

117. Robert Sprague, *Beyond Shareholder Value: Normative Standards for Sustainable Corporate Governance*, 1 WM. & MARY BUS. L. REV. 47, 50 (2010).

Later research has defended managerial discretion against shareholder directives, arguing that management requires the business judgment rule ("BJR") in order to operate effectively.[118] According to the BJR, broad discretion should be granted to the board of directors in evaluating its decisions on *behalf* of the corporation. In addition to the academic theoretical basis, the law and economics movement has also pointed to seminal U.S. cases such as *Dodge v. Ford*,[119] *Schlensky v. Wrigley*,[120] and *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[121] for authority to support the assumption that companies must maximize immediate shareholder value at the expense of long-term value. The Delaware courts, the most influential judiciary in U.S. corporate-law matters, has also adopted a shareholder-centric model, depicting directors as agents of the shareholders.[122] Moreover, as Professor Boot and Professor Macey point out, "[t]he U.S. system relies on capital markets, which pressure corporate managers to deliver profits."[123]

While the majority of corporate scholars depict the corporation exclusively from an economic perspective,[124] Professor Reza Dibadj argues that "the laissez-faire law and economics approach . . . rests on a remarkably shaky foundation."[125] Scholarship that depicts corporations as nothing more than "legal fictions which serves as a nexus for . . . contracting relationships"[126] fails to recognize the roles such corporations play in society and the manner in which their stakeholders exert influence over them. Professor Leonard I. Rotman aptly notes that "[a]lthough the apparent simplicity and definiteness of the shareholder primacy model is attractive, it drastically oversimplifies matters."[127] In particular, cases cited in support of shareholder value theory, such as *Dodge*, are not "as absolutely dedicated to the advancement of shareholder wealth maximisation as observers have generally posited."[128] Professor Kent Greenfield notes that it is "truly awkward . . . to assert that corporate managers best advance societal well-

118. *See generally* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003).
119. 170 N.W. 668 (Mich. 1919).
120. 237 N.E.2d 776 (Ill. App. Ct. 1968).
121. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).
122. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 663 (Del. Ch. 1988).
123. Arnound W. A. Boot & Jonathan R. Macey, *Monitoring Corporate Performance: The Role of Objectivity, Proximity, and Adaptability in Corporate Governance*, 89 CORNELL L. REV. 356, 356-93 (2004).
124. Ian B. Lee, *Citizenship and the Corporation*, 34 L. & SOC. INQUIRY 129, 313 (2009).
125. Reza Dibadj, *Delayering Corporate Law*, 34 HOFSTRA L. REV. 469, 477 (2005).
126. Jensen & Meckling, *supra* note 112, at 311.
127. Leonard I. Rotman, *Debunking the "End of History" Thesis for Corporate Law*, 33 B.C. INT'L & COMP. L. REV. 219, 270 (2010).
128. *Id.* at 230.

being by ignoring it."[129] Simply put, the outdated economic depiction of corporations is unconvincing in its notion that a corporation is nothing but a "nexus of contracts"; instead, corporations under the law are legal creatures that enjoy both rights and responsibilities. Moreover, Professor Judd Sneirson argues that "[n]o corporate law statute or court decision explicitly requires firms to adhere to the shareholder primacy view."[130] Accordingly, shareholder value theory fails to adequately address corporations as legal persons who enjoy similar rights to natural persons and therefore should presumably have similar obligations and duties to those of natural persons. A failure to address systematic shortcomings in corporate law institutionalizes an inequality between natural persons and corporations, encouraging recklessness and unreasonable risks by corporate boards. In particular, "a fixation on shareholder interests will result at times in managerial decisions that are overly risky from society's perspective."[131] Accordingly, shareholder value theory ignores the externalities that become a public cost.

The interaction of tort, criminal, and corporate law raises further problems. In particular, although corporations may be held liable for tortious conduct, their culpable behavior is the result of individuals, and penalties routinely affect the corporation as a whole rather than the culpable individuals. As Professor Robert J. Rhee succinctly notes: "Tort law finds liability; corporation law excuses it."[132] Among the problems with this remedy, two in particular stand out. First, the stakeholders of the corporation all suffer from the harm caused by the perpetrators, who are often protected from personal harm. Second, the concept of limited liability may encourage management to engage in "excessive levels of risk-taking"[133] that it would not pursue as individual persons. Given the fundamentally different nature of tort and corporate law, "directors must not be held liable for negligent, stupid, careless, unlucky, or egregious decisions in spite of any visceral impulse to blame and levy liability for a bad outcome."[134] As company charters routinely provide that officers and directors will be indemnified from liability of corporate actions, there is no adequate means to hold any natural person accountable for harm caused by the corporation. This anomaly elevates corporate boards to a position no natural

129. Greenfield, *supra* note 103, at 100 (emphasis in the original).

130. Judd F. Sneirson, *The Sustainable Corporation and Shareholder Profits*, 46 WAKE FOREST L. REV. 541, 550 (2011).

131. Greenfield, *supra* note 103, at 101.

132. Robert J. Rhee, *The Tort Foundation of Duty of Care and Business Judgment*, 88 NOTRE DAME L. REV. 1139, 1141 (2013).

133. Virginia Harper Ho, *Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?*, 52 COLUM. J. TRANSNAT'L L. 113, 136 (2013).

134. Rhee, *supra* note 132, at 1157.

person enjoys: corporations routinely profit but do not suffer from risky behavior. Accordingly, high-risk activities may benefit the corporation in the short-term if successful but result in harmful externalities for other stakeholders. However, board decision-making may involve a myriad of issues that include essentially corporate matters, such as mergers and acquisitions, but also may include far-reaching policies and actions that affect the environment, local communities, and other stakeholders. Increasingly, scholars are calling for greater accountability for board decision-making with respect to human rights issues; similarly, the potential harm associated with hydraulic fracturing deserves higher accountability. In terms of criminal law, some jurisdictions, including the United Kingdom, have extended elements of the criminal law to influence corporate behavior, such as the concept of corporate manslaughter;[135] however, neither the law nor the judiciary subscribes the same ethical obligations to corporate entities that routinely attach to the concept of citizenship.

In addition, shareholder value theory has not resolved the agent-principal relationship whereby management acts on behalf of the shareholders.[136] While the problems of this relationship have been well rehearsed and are beyond the scope of this research, it is recognized that shareholders have limited scope for directing the board, allowing the board wide discretion to follow agendas that do not necessarily maximize shareholder value. In the United States, the law and the judiciary further complicate this dilemma through the broad application of the BJR, which protects the decisions of the board from shareholder challenges as long as the board is able to identify a business reason for taking such action.[137] According to the BJR, a court will not question the decisions of a company's director if they were made in good faith, with the care of a reasonably prudent person, and in the belief the director was acting in the company's best interest.[138] As a result, corporate entities and their managers are insulated routinely from liability for decisions and policies that may adversely affect shareholders as well as the local community and other stakeholders.[139] Professor Franklin A. Gevurtz has noted that the Delaware courts have applied "the [BJR] in a highly deferential manner to exonerate directors . . . ."[140] Further, Professor Dibadj has

135. Celia Wells, *Corporate Criminal Liability*, CRIM. L. REV. 849, 853-62 (2014).

136. *See generally* Jensen & Meckling, *supra* note 112.

137. Dibadj, *supra* note 125, at 484-85.

138. Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L. REV. 1, 9-11 (2005).

139. *See generally* Sneirson, *supra* note 130, at 548-54.

140. Franklin A. Gevurtz, *The Globalization of Corporate Law: The End of History or A Never-Ending Story?*, 86 WASH. L. REV. 101, 144 (2011).

noted that "wide management discretion" under the BJR has led to "results [that] have been, to put it kindly, less than stellar."[141] A broader reading of the shareholder value theory should recognize that concern for other stakeholders may significantly maximize shareholder value, especially in the long-term. Moreover, Professor Sneirson argues that corporate management pursuing policies that consider a wide variety of stakeholders have little to fear in terms of litigation since the broadness of the BJR means that "company decisions, including sustainability-motivated decisions that depart from a profit-maximizing objective, will withstand . . . challenges."[142] Research that dismisses social issues is at best misleading and at worst a red herring for courts that mechanically apply the BJR. The fundamental problem with a narrow reading of the shareholder value theory is that it fails to recognize the important impact that social factors may have on shareholder value maximization and the destructive impact of applying a broad BJR. According to Professor Lee, "[t]he best interests of the corporation is evidently not a formula that can be applied mechanically so as to yield a unique, incontestably correct decisional outcome . . . ."[143] Finally, the law and economics movement's narrow reading of case law inaccurately circumscribes the actions of corporations as short-term profit maximization is not actually required by the corporate law.[144] Above all, a growing body of research argues that corporate law does not in fact "[impose] a legal requirement that corporate fiduciaries maximize shareholder wealth and eschew sustainable and socially responsible business practices."[145]

In the United Kingdom, the common law has also followed a philosophy of "shareholder primacy" when examining the nature of companies and the role of officers and directors. Seminal case law, including *Percival v. Wright*,[146] has defined the relationship between shareholders and the board of directors. Essentially, the common law duties dictate that directors are to manage the company in the interests of all shareholders.[147] Directors' duties are to the company, not to individual shareholders or others, with the objective of maximizing

141. Dibadj, *supra* note 125, at 515.
142. Sneirson, *supra* note 130, at 553.
143. Lee, *supra* note 124, at 149.
144. *See* Lynn Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163 (2008). Professor Stout notes: "In sum, whether gauged by corporate charters, state corporation codes, or corporate case law, the notion that corporate law as a positive matter 'requires' companies to maximize shareholder wealth turns out to be spurious." *Id*. at 172.
145. Sneirson, *supra* note 130, at 549.
146. [1902] 2 EWHC (ch) 421 (Eng.).
147. Daniel Attenborough, *How Directors Should Act When Owing Duties to the Companies' Shareholders: Why We Need to Stop Applying* Greenhalgh, 20 INT'L COMPANY & COM. L. REV. 339, 339 (2009).

shareholder wealth.[148] However, through the Companies Act 2006, Parliament broadened the duties of directors by codifying the common law rules on directors' duties in sections 170 to 177 as well as introducing the concept of "enlightened shareholder value." Under this approach, directors are "required to promote the success of the company in the collective best interest of the shareholders, but in doing so they will have to have regard to a wider range of factors, including the interests of employees and the environment."[149] As Professor Andrew Keay points out:

> [T]he shareholder value theory does not provide any consistent definition, [and] even though it gives the connotation of being an objective criterion, it is malleable and can mean many different things, and can be used to support or challenge "any management action by manipulating either the test of profit maximization or the 'facts' to which the test is applied."[150]

Given the shortcomings of shareholder value theory, a broad range of approaches which advocate CSR has emerged.[151] Such models have provided more sustainable solutions and addressed the deficiencies of shareholder value theory. At the international level, the United Nations Global Compact[152] and the Global Reporting Initiative[153] are but two examples of supranational approaches to engage "participants from business, community, labor, academic, and professional institutions . . . to demonstrate organizational commitment to sustainable business practices."[154] Nonetheless, efforts to impose such obligations through CSR initiatives often flounder as such are frequently based in aspirational codes of conduct or too general as to be required by the law or the courts. Although an emphasis on CSR can have a positive impact on businesses and society, Professor Gail Henderson points out:

> [T]here are . . . limits on what this particular form of private transnational regulation can achieve[, and] . . . [s]ubstantial

148. *Id.*

149. 6 June 2006, Parl Deb HC (2006) col. 125 (UK).

150. Keay, *supra* note 106, at 376-77 (citing G. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1311 (1984)).

151. John Elkington's "triple bottom line" approach has been particularly influential in reorienting businesses to consider economic, environmental, and social justice factors. *See* JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS 2 (reprinted ed. 2002).

152. UNITED NATIONS GLOBAL COMPACT, https://www.unglobalcompact.org/ (last visited Sept. 17, 2017).

153. *See* ABOUT GRI, https://www.globalreporting.org/information/about-gri/Pages/default.aspx (last visited Sept. 17, 2017).

154. Kristen Rice, *Freezing to Heat the Future: Streamlining the Planning and Monitoring of Arctic Hydrocarbon Development*, 24 COLO. NAT. RES., ENERGY & ENVTL. L. REV. 391, 414 (2013) (footnotes omitted).

> improvements in corporations' environmental performance will come about only by focusing on the source of the problem—corporations themselves—and imposing the legal obligation to take into account environmental factors on corporate boards of directors . . . .[155]

In addition, Professor Cynthia A. Williams queries whether "voluntary initiatives can fully solve concerns about corporate social accountability, or, rather, whether they are primarily a strategy to deflect mandatory regulation . . . [requiring] higher standards . . . ."[156] Against these concerns, the remainder of this Article examines possible approaches to enhancing corporate sustainability in the hydraulic fracturing industry.

V. RECOMMENDATIONS FOR ADDRESSING PROBLEMS FACING THE INDUSTRY WITH RESPECT TO DEFICIENCIES IN THE LAW

Models that stress shareholder value maximization will encourage corporations to pursue shale gas with the minimum legal standards in order to maximize shareholder profits. Current regulations do not adequately protect communities from the externalities caused by hydraulic fracturing. Therefore, this Article argues for a reorientation of the assumptions of shareholder value theory to include consideration of other factors and show more responsiveness to CSR concerns. In particular, this Article argues that: (1) focusing on corporate governance guidelines could supplement inadequate government regulation; (2) modern standards of citizenship should be extended to corporations as entities currently enjoying the rights but not obligations of legal persons; and (3) engaging hydraulic fracturing companies with local communities can build trust and minimize future risks. Through promoting corporate governance initiatives, CSR charters, engagement with the local community and other stakeholders, the hydraulic fracturing industry could help supplement the regulatory lacunae and help alleviate the concerns raised above.

A. Focusing on Corporate Governance Guidelines Could Supplement Inadequate Government Regulation

Recent research has shown that just twenty corporate entities have been responsible for almost thirty percent of greenhouse gas

155. Gail E. Henderson, *Making Corporations Environmentally Sustainable: The Limits of Responsible Investing*, 13 German L.J. 1412, 1415 (2012).

156. Cynthia A. Williams, *Civil Society Initiatives and "Soft Law" in the Oil and Gas Industry*, 36 N.Y.U. J. Int'l L. & Pol'y 457, 462 (2004).

emissions for the period 1751-2010.[157] These corporations are bound into a web of various stakeholders, including shareholders, employees, management, customers, the local community, governments, and other individuals and groups affected by the actions of these corporations. While traditional notions of corporations place the maximization of wealth as the basic purpose of a corporation as discussed above,[158] multinational corporations are under increasing pressure from stakeholders to behave ethically and adopt sustainable policies.[159] Scholars have wrestled with the question of enhancing corporate-law sustainability, with Professor Klaus J. Hopt pointing out that requiring sustainability as a legal requirement would "disrupt central tenets of modern corporate law" and "would also be difficult to enforce . . . ."[160] Therefore, reforms should include measures that are more likely to be effective, such as encouraging adherence to corporate governance codes as well as other industry codes of conduct.

Corporate governance broadly describes efforts to promote transparency and responsibility in the way companies are controlled and directed.[161] The primary goals of good corporate governance include enhancing the efficiency, transparency, and accountability of companies. International corporate governance standards, such as those of the Organization for Economic Cooperation and Development's Principles of Corporate Governance ("OCED"),[162] are a form of "soft" law, formulated upon the recommendations of public and private actors. Corporate governance guidelines may become binding through either the adoption into law by states or the listing requirements of stock exchanges.[163] For example, the New York Stock Exchange has specific corporate governance standards required of its listed corporations.[164] If these corporations fail to meet the requirements, they are

157. Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, 122 CLIMATE CHANGE 229, 237 (2014).

158. Sneirson, *supra* note 130, at 548 ("[T]he conventional view in law and business [is] that corporations are to be managed for the sole purpose of maximizing shareholder profits.").

159. Williams, *supra* note 156, at 466-70.

160. Snierson, *supra* note 130, at 557.

161. Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 6-7 (2011).

162. OECD, PRINCIPLES OF CORPORATE GOVERNANCE, http://www.oecd.org/corporate/principles-corporate-governance.htm (last visited Sept. 17, 2017).

163. Hopt, *supra* note 161, at 14-15.

164. N.Y. STOCK EXCH., NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 303A (2013), http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp%5F1%5F4%5F3&manual=%2Flcm%2Fsections%2Flcm%2Dsections%2F.

subject to delisting,[165] which could have a devastating impact on their stock value. While corporate governance standards initially focused on the relationship between management and shareholders, ethical concerns increasingly affect the nature of corporate governance standards. Similarly, corporate governance standards concerning fracking could set guidelines "to minimize risk, mitigate harms, and maximize benefits in pursuit of long-term growth and prosperity."[166] While such standards could not replace national and local laws and regulations, such private standards would serve not only to self-regulate the main contributors to climate change but would also provide standards of best practices that would encourage oil and gas companies to seek the common good while identifying economically viable innovations to address climate change.

In addition, the law should work to recognize and improve best standards formulated by the hydraulic fracturing industry. For example, the American Petroleum Institute ("API")[167] has formulated a number of codes of practice that comprehensively address practices in the energy industry, including fracking. While critics may argue that the API's standards focus on the interests of the energy companies at the expense of other stakeholders, its members, representing "producers, refiners, suppliers, pipeline operators and marine transporters"[168] nonetheless possess the technical expertise to formulate safe and effective practices. International guidelines, such as the Guidelines for Multinational Enterprises promulgated by the OCED, address a wide range of ethical issues related to international businesses.[169] Yet, such guidelines depend on multinational cooperation and ultimately on the willingness of corporations to adhere to such ethical guidelines. International standards often set general aspirational goals and cannot fundamentally alter the concept and the personality of a corporation in a particular jurisdiction. Despite the weaknesses of disclosure as a regulatory system, further mandatory and voluntary disclosure standards should be encouraged.

While purely voluntary codes of conduct are desirable, Professor Sneirson argues that "[a] middle ground between mandatory reforms and voluntary action can work to establish the suggested behaviors as new norms supporting sustainability and exert subtle pressure on

165. *See generally* Andreas Charitou, Christodoulos Louca & Nikos Vafeas, *Boards, Ownership Structure, and Involuntary Delisting from the New York Stock Exchange*, 26 J. ACCT. & PUB. POL'Y 249 (2007).

166. Fershee, *supra* note 88, at 487.

167. *See generally* ENERGY API, http://www.api.org (last visited Sept. 17, 2017).

168. ENERGY API, ORGANIZATION, http://www.api.org/globalitems/globalheaderpages/about-api/api-overview (last visited Sept. 17, 2017).

169. ORG. FOR ECON. CO-OPERATION & DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), http://dx.doi.org/10.1787/9789264115415-en.

firms . . . ."[170] Accordingly, mechanisms could require the adoption of sustainability standards much like those required under securities laws in the United States and the United Kingdom with respect to corporate codes of conduct,[171] allowing businesses to still "pursue financial goals" but "treading as lightly as possible on the earth and its natural resources" while "supporting . . . local communities . . . ."[172]

Considering the U.K. Corporate Governance Code "comply or explain" requirements for corporate governance standards,[173] the U.S. Sarbanes Oxley's code of ethics rules,[174] or the U.S. Dodd-Frank's conflict minerals disclosure requirements,[175] similar mechanisms to promote sustainable behavior could be adapted to the hydraulic fracturing industry. In particular, these could require companies engaged in hydraulic fracturing to publicly disclose their due diligence, engagement with local communities, adherence to highest industry standards, and commitment to monitoring the safety of their operations during development, extraction, and post-production. Not only would such proposals help reduce the detrimental impact on local communities and the environment, these measures would also allow companies to publicly document their adherence to best practices and industry standards, thereby reducing possible liability for unforeseen damage. Corporate governance standards themselves are far from a panacea; indeed, their effectiveness relies on "a balanced interplay between distinct internal and external control devices."[176] However, they provide a concrete enforcement mechanism that has been effective in other areas of the law.

B. Modern Standards of Citizenship Should Be Extended to Corporations as Entities Currently Enjoying the Rights But Not Obligations of Legal Persons

Many companies recognize that a number of considerations other than maximizing short-term profits actually contribute to their medium- and long-term viability. Further, the concept of CSR occupies an increasingly important role in affecting corporate behavior, with a

170. Sneirson, *supra* note 130, at 557-58.
171. *Id.* at 557.
172. *Id.* at 543.
173. Marc T. Moore, *The End of "Comply or Explain" in UK Corporate Governance?*, 60 N. Ir. Legal Q. 85, 86 (2009).
174. Public Company Accounting Reform and Investor Protection Act, 15 U.S.C. § 7264 (2002).
175. Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78m(p) (2010).
176. Klaus J. Hopt & Patrick C. Leyens, *Board Models in Europe—Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy*, 1 European Company & Fin. L. Rev. 135, 139 (2004).

growing interest in "socially responsible conduct"[177] and greater engagement with stakeholders. Against this background, there is an unprecedented opportunity to engage multinational corporations and their stakeholders in efforts to develop other forms of effective and sustainable governance. Corporate law sets forth the manner in which legal entities enjoy legal personhood with accompanying rights and responsibilities. The United States Supreme Court has long recognized that "[a] corporation is an artificial being, indivisible, intangible, and existing only in contemplation of law."[178] As discussed above, the dominant view in the legal corporate academy suggests that such legal existence should be blind to any obligation beyond the maximization of shareholder wealth.

Indeed, limited liability companies offer significant protection for corporate entities although the concept poses a significant obstacle to "accountability for human rights impacts . . . ."[179] However, in *Kiobel v. Royal Dutch Petroleum Co.*,[180] the United States Supreme Court seemed to suggest that corporations could be liable for violations of human rights violations.[181] According to Professor Franklin A. Gevurtz, "if a company's production significantly damages the environment, one cannot measure the impact of the company's activity on the total wealth of society without subtracting the damage to the environment in the calculation."[182] Beyond the considerations above, the legal personality of corporations and the judiciary's preference for imposing a shareholder value theory should be addressed in legal reforms, which modify the legal personality of corporations to take into account the externalities they cause as well as reduce the excessive risks boards take as a result of limited liability. In the United Kingdom, section 172 of the Companies Act of 2006 requires directors to act with an "enlightened shareholder value" approach; however, much discretion is left to the "director of a company. . . [to] act in a way he considers, in good faith, would be most likely to promote the success of

177. Joshua A. Newberg, *Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct*, 29 VT. L. REV. 253, 287 (2005).

178. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

179. Ho, *supra* note 133, at 161.

180. 569 U.S. 108 (2014).

181. Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 110 (2014).

182. Franklin A. Gevurtz, *Using Comparative and Transnational Corporate Law to Teach Corporate Social Responsibility*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 39, 40 (2011). Professor Gevurtz further explains:

> [T]o assume that corporate law—the laws governing the selection, duties, and liabilities of those in charge of corporations and of the owners of the corporation—is irrelevant to these concerns is a bit like assuming that the laws governing the election of representatives in a democracy are irrelevant to the policies the government will ultimately follow.

Id. (citing Joseph E. Stiglitz, *Multinational Corporations: Balancing Rights and Responsibilities*, 101 AM. SOC'Y INT'L L. 3, 45-46 (2007)).

the company. . . ."[183] Without further specificity, it is unlikely that the full range of shareholder interests would be considered at the same level as maximizing profit for shareholders. Further legal reforms are necessary to remedy this deficiency.

C. Engaging Hydraulic Fracturing Companies with Local Communities Can Build Trust and Minimize Future Risks

According to Professor Schumacher and Professor Morrissey, high profile environmental damage has "fueled public suspicion of the oil and gas industry," which has largely responded by depicting "these incidents as highly unusual" while the "public however, perceives the industry as secretive, resistant to reasonable safeguards and oversight, and callous toward local populations."[184] In particular, firms engaged in hydraulic fracturing "must be publicly transparent about managing their environmental footprint and social impacts, and engage with key community stakeholders to earn and maintain their social license to operate" by disclosing the actions they take "to minimize risks, acknowledg[ing] . . . challenges and failures, and clearly defin[ing] steps to continually improve operations."[185] Finally, Professor Henderson points out that "making corporate activity environmentally sustainable is less a matter of blanket prohibitions or universal standards of conduct and more a matter of managing the environmental impacts of economic activity on a case-by-case basis."[186]

The United Kingdom framework promotes the engagement of hydraulic fracturing companies with local communities in both the planning and development stages.[187] Additionally, U.K. practices entitle local communities that host hydraulic fracturing sites to £100,000 worth of benefits as well as one percent of revenues from production.[188] While there has been criticism of these financial incentives,[189] they nonetheless represent a tangible mechanism whereby local communities may benefit financially from hydraulic fracturing operations.[190] Nonetheless, monitoring of these commitments and the

183. United Kingdom Companies Act 2006, c. 2 (UK).
184. Schumacher & Morrissey, *supra* note 8, at 254-55.
185. *Extracting the Facts: An Investor Guide to Disclosing Risk from Hydraulic Fracturing Operations*, Interfaith Ctr. on Corp. Resp. 3, http://www.iehn.org/documents/frackguidance.pdf (last visited Mar. 30, 2018).
186. Henderson, *supra* note 155, at 1424-25.
187. *See Guidance on Fracking*, *supra* note 44.
188. *Id.*
189. *See generally* Damien Short & Anna Szolucha, *Fracking Lancashire: The Planning Process, Social Harm and Collective Trauma,* Geoforum (Mar. 17, 2017), https://ac.els-cdn.com/S0016718517300519/1-s2.0-S0016718517300519-main.pdf?_tid=535dd254-046c-11e8-86d3-00000aab0f6b&acdnat=1517172574_2ecc6b273e0a49904403e803872d0f3b.
190. *See Guidance on Fracking*, *supra* note 44.

activities of hydraulic fracturing firms in local communities will actually identify whether this level of support is adequate in light of the potential negative impact on local communities.[191] Indeed, such monitoring is required under relevant U.K. practices. Further, the U.K. government has expressed a commitment to creating a shale wealth fund for the benefit of host communities of hydraulic fracturing activities.[192] However, the standards and commitments are premised on voluntary charters; therefore, it is too early to predict their effectiveness.[193] If successful, they may represent a set of specific actions that may more effectively engage host communities. As the true impact of these initiatives become known, host communities across the United States should have the opportunity to demand similar commitments from hydraulic fracturing firms operating in their local areas. Nevertheless, even if these initiatives increase the engagement of local communities while rewarding them financially, they cannot substitute for a reorienting of the expectations of corporate citizenship as argued in this Article.

VI. CONCLUSION

Current laws and regulations are inadequate to ensure sustainability and safety in the hydraulic fracturing industry, and effective governance in the area is necessary to protect against unintended consequences as well as to encourage promising innovation. While there is certainly a role for governments and other authorities to improve effective governance mechanisms, corporate law itself should also be an area of reform. A substantial body of research identifies the limits of the shareholder value theory, arguing instead that a stakeholder approach can maximize shareholder returns while providing sustainability for companies, their stakeholders, and the environment. The risks associated with hydraulic fracturing illustrate the importance of reorienting legal scholarship away from the dominant shareholder value theory to more sustainable models. Against these concerns, this Article calls for a fundamental reform of the citizenship of corporations, which could help ensure safe, sustainable energy production for both shareholders and other stakeholders.

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191. *Id*.
192. *Id*.
193. *See generally* Matthew Cotton, *Fair Fracking? Ethics and Environmental Justice in United Kingdom Shale Gas Policy and Planning*, 22 LOC. ENV'T 185 (2017).

THE USE OF THE MEDICAL DIAGNOSIS OR TREATMENT EXCEPTION TO HEARSAY IN DOMESTIC VIOLENCE CASES: THE ADMISSIBILITY OF TESTIMONY FROM MEDICAL PROVIDERS ABOUT STATEMENTS REGARDING THE IDENTITY OF AN ALLEGED PERPETRATOR UNDER NEBRASKA RULE OF EVIDENCE 803(3)

I. INTRODUCTION

Domestic violence perpetrators have acquired the reputation of using bullying tactics and extortion to instill fear in their victims, ensuring victims refuse to testify out of fear for their safety.[1] The Nebraska Legislature has expressed concern regarding the help that domestic violence victims receive through Nebraska's criminal justice system.[2] When a victim refuses to testify, the State is faced with a dilemma in proving the defendant committed the alleged crime, and therefore the State is unable to provide the protections the legislature has expressed is an issue for statewide concern.[3] However, the State may still be able to prove a defendant is guilty even though a victim refuses to testify, thus affording the desired protections to domestic

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1. *See* Davis v. Washington, 547 U.S. 813, 833 (2006) ("[Domestic violence crimes are] notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial."); *see also* NEB. REV. STAT. § 29-4301 (Reissue 2016) ("The Legislature finds that because of the fear and stigma that often results from crimes of . . . domestic violence, and because of the risk of retaliatory violence by the perpetrator, many victims hesitate to seek help even when it is available at no cost to them.").

2. NEB. REV. STAT. § 29-4301. The statute provides:

> [V]ictims may fail to receive needed vital care and counseling and thus lack the support, resources, and information necessary to recover from the crime, to report the crime, to assist in the prosecution of the crime, to participate effectively in the justice system, to achieve legal protections, and to prevent future sexual assaults and domestic violence. This is a matter of statewide concern, and the prevention of violence is for the protection of the health, safety, and welfare of the public.

Id.

3. *See* Oldman v. State, 998 P.2d 957, 960 (Wyo. 2000) (explaining the victim of domestic violence failed to appear at trial and the State proffered the identity of the defendant through testimony from medical providers over the defendant's hearsay objections); *see also* NEB. REV. STAT. § 29-4301 (explaining the use of the criminal justice system to eradicate domestic violence "is a matter of statewide concern"). *Cf.* State v. Smith, 876 N.W.2d 180, 194 (Iowa 2016) (Waterman, J., dissenting) (citations omitted) ("The rate of recantation among domestic violence victims has been estimated between eighty and ninety percent.").

violence victims.[4] The medical diagnosis or treatment exception to hearsay has become a tool utilized in court that allows the identity of an alleged perpetrator into evidence in domestic violence cases.[5]

This Note will first state background information regarding the Nebraska Rules of Evidence governing hearsay.[6] This Note will then provide facts and background to Nebraska Supreme Court cases that used the medical diagnosis or treatment exception as a tool to admit the identity of a child sexual abuse perpetrator into evidence.[7] Next, this Note will detail cases where parties used the medical diagnosis or treatment exception to admit the identity of perpetrators of domestic violence into evidence.[8] Then, this Note will provide cases where courts held the opposite and determined the identity of perpetrators in domestic violence cases were not admissible under the exception.[9] Finally, this Note will argue why the medical diagnosis or treatment exception has logical support to admit the identity of perpetrators in domestic violence cases and will urge the Nebraska Supreme Court to adopt this reasoning.[10]

II. BACKGROUND

A. The Medical Diagnosis or Treatment Exception to the Hearsay Rule of Evidence in Nebraska

1. The Nebraska Hearsay Rules

Nebraska Revised Statute section 27-801 ("Rule 801") defines hearsay as a statement made by someone other than a declarant during his or her testimony at a trial or hearing that is offered as evidence to demonstrate the truthfulness of the matter alleged.[11] Nebraska

4. *See Oldman*, 998 P.2d at 960 (noting the prosecution utilized the medical diagnosis or treatment exception after the victim of domestic violence failed to appear as a witness at trial, admitting the identity of the defendant as the assailant into evidence).

5. *Id*. *See, e.g.*, Perry v. State, 956 N.E.2d 41 (Ind. Ct. App. 2011) (opining that the medical diagnosis or treatment exception could be used to admit testimony about the identity of the perpetrator in a domestic violence case).

6. *See infra* notes 11-15 and accompanying text.

7. *See infra* notes 16-71 and accompanying text.

8. *See infra* notes 72-146 and accompanying text.

9. *See infra* notes 147-180 and accompanying text.

10. *See infra* notes 181-237 and accompanying text.

11. Neb. Rev. Stat. § 27-801(1)-(3) (Reissue 2016). The statute provides:

> (1) A statement is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by him as an assertion; (2) A declarant is a person who makes a statement; (3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Id.

Revised Statute section 27-802 ("Rule 802") provides the general rule that statements constituting hearsay are inadmissible.[12]

However, Nebraska Revised Statute section 27-803 denotes several exceptions where hearsay testimony would be otherwise excluded as stated in Rule 802.[13] More specifically, Nebraska Revised Statute section 27-803(3) ("Rule 803(3)") provides an exception to the hearsay rule that allows statements to be admitted into evidence when the statements are for the purpose of medical diagnosis or treatment.[14] Although the declarant may be available to testify, the rules allow testimony from third parties regarding a declarant's statement so long as the statement was reasonably pertinent for medical treatment or diagnosis.[15]

2. State v. Vaught*: The Nebraska Supreme Court Held Testimony from a Medical Provider Regarding Identity Is Admissible Under Rule 803(3) in a Child Sexual Abuse Case*

In *State v. Vaught*,[16] the Nebraska Supreme Court concluded the identity of a perpetrator in a child sexual abuse case was admissible under Rule 803(3), the medical diagnosis or treatment exception, because the statements regarding identity were the type delineated by Rule 803(3).[17] In *Vaught*, the State charged Darrel J. Vaught with first degree sexual assault of a child.[18] Testimony during a bench trial in the Douglas County District Court showed Vaught digitally penetrated a four-year-old female's vagina.[19] After staying at her grandparents' house, where Vaught resided, the victim's stepmother observed discoloration and inflammation of the victim's genital area.[20] Those events led to a conversation with the victim about what oc-

12. *See id.* § 27-802 (Reissue 2016) ("Hearsay is not admissible except as provided by these rules, by other rules adopted by the statutes of the State of Nebraska, or by the discovery rules of the Supreme Court.").

13. *See id.* § 27-803 (declaring statements constituting an exception to the hearsay rule "[a]re not excluded . . . even though the declarant is available as a witness").

14. *See id.* § 27-803(3) ("[S]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment . . . .").

15. *Id*.

16. 682 N.W.2d 284 (Neb. 2004).

17. *See* State v. Vaught, 682 N.W.2d 284, 293 (Neb. 2004) (concluding the doctor's "testimony regarding the victim's identification of [the defendant] as the perpetrator was admissible under § 27-803(3)").

18. *Vaught*, 682 N.W.2d at 286.

19. *Id.* "[T]he victim said that 'her Uncle DJ put his finger in her pee-pee.'" *Id*. Dr. Cathy Hudson "testified that the injury was consistent with digital penetration." *Id.*

20. *Id.*

curred during the stay, and she indicated Vaught caused the injury.[21] After arriving at the emergency room, Dr. Larry Lamberty performed an examination of the victim's genital area.[22] Dr. Lamberty testified that he had identified himself as a doctor to the victim and was going to administer a medical examination.[23] Furthermore, Dr. Lamberty testified he believed the victim understood that he was a doctor, and was aware she was in a hospital.[24]

Vaught objected to Dr. Lamberty's testimony regarding the victim's statements on hearsay grounds.[25] The trial court overruled Vaught's objections and allowed Dr. Lamberty to proceed with his testimony.[26] Dr. Lamberty testified that during his examination he asked the victim about her injuries, and she replied that Vaught digitally penetrated her vagina.[27] A subsequent examination by another doctor corroborated the victim's allegation of digital penetration.[28]

The court found Vaught guilty of first degree sexual assault of a child and sentenced him to six to ten years in prison.[29] Vaught appealed to the Nebraska Court of Appeals, and the court subsequently affirmed his conviction.[30] In doing so, the court reasoned that the Nebraska Supreme Court had previously ruled on facts similar to *Vaught* that statements made to medical professionals by a child sexual assault victim were admissible under Rule 803(3).[31] Furthermore, the court acknowledged that Dr. Lamberty's testimony indicated that identity is important in treating a patient's overall mental health.[32] Moreover, Dr. Lamberty testified that knowing the identity of the of-

21. *See id*. ("[T]he victim's father's wife had a conversation with the victim about what had happened, which conversation prompted the victim's father's wife to ask the victim's father who 'DJ' was.").

22. *Id*.

23. *Id.*

24. *See id*. ("[Dr. Lamberty] testified that he saw the victim in one of the examination rooms, that he introduced himself as a doctor, and that he had no concerns that the victim was unable to understand where she was or who he was.").

25. *Id.*

26. *Id*.

27. *Id.* "[Dr. Lamberty] testified that the victim said that 'her Uncle DJ put his finger in her pee-pee.'" *Id.*

28. *Id.* "Dr. Cathy Hudson testified that she saw the victim a few days later for a more thorough examination . . . [and] . . . that the injury was consistent with digital penetration." *Id*.

29. *Id.* at 286.

30. *Id.* at 287.

31. *Id*. at 288. "In rejecting Vaught's hearsay argument, the Court of Appeals notes that [the Nebraska Supreme Court] has previously found statements similar to the statement admitted in this case and made under somewhat similar circumstances to be admissible under § 27-803(3)." *Id*.

32. *Id*. at 287. "Dr. Lamberty further testified that it is important for him, in assessing the patient's condition and determining treatment, to know who the perpetrator was . . . for purposes of treating the patient's mental well-being." *Id.*

fender is important to ensure the patient's safety and to avoid entrusting the patient to a potential perpetrator.[33]

On appeal to the Nebraska Supreme Court, the court reviewed the court of appeals' affirmance of the trial court's ruling that admitted Dr. Lamberty's testimony regarding Vaught's identity under Rule 803(3).[34] The Nebraska Supreme Court affirmed the court of appeals' ruling and concluded that Dr. Lamberty's testimony identifying Vaught as the perpetrator was admissible under Rule 803(3).[35] The court began its analysis with a premise promulgated by the United States Court of Appeals for the Eighth Circuit that the medical diagnosis or treatment exception is founded on the notion that a person has a selfish motive when disclosing information to a medical professional in order to receive the correct treatment for injuries sustained.[36] Because this reasoning focused on the victim's state of mind, the court expressly declined to adopt the Eighth Circuit's rule, but noted this rationale helped guide the decision in *Vaught*.[37]

The court reasoned that for testimony to be admissible under Rule 803(3), a party must show three things: (1) the statement was reasonably pertinent to medical diagnosis or treatment; (2) the doctor

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33. *Id*. The court explained:

> Dr. Lamberty testified that it is important for a medical professional in the situation he was in to obtain a thorough history regarding the causation and nature of the injury. Dr. Lamberty further testified that it is important for him, in assessing the patient's condition and determining treatment, to know who the perpetrator was . . . so that he does not release a patient into the care of a perpetrator . . . .

Id.

34. *Id*. The court stated the appellant's argument on appeal: "Vaught asserts that the Court of Appeals erred in concluding that the district court did not err in admitting Dr. Lamberty's testimony . . . ." *Id*.

35. *See id*. at 288 (concluding Dr. Lamberty's testimony regarding what the victim relayed to him was admissible under Rule 803(3)). The Nebraska Supreme Court noted that "[w]here the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion." *Id*. at 287.

36. *Id*. The court noted "the Eighth Circuit stated that the hearsay exception for statements made for purposes of medical treatment 'is bottomed upon the premise that a patient's "selfish motive". . . in receiving the proper treatment guarantees the trustworthiness of the statements made to her physician.'" *Id.* (quoting Olesen v. Class, 164 F.3d 1096, 1098 (8th Cir. 1999)).

37. *See Vaught*, 682 N.W.2d at 289 (rejecting the rule promulgated by the Eighth Circuit that focused on the victim's state of mind, but noting the reasoning helped shape the decision reached in *Vaught*). The court stated that:

> Focusing on the victim's state of mind, the Eighth Circuit held that such statements were admissible only when the prosecution is able to demonstrate that the victim's motive in making the statement was consistent with the purpose of promoting treatment-that is, "where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding."

Id. at 288-89 (quoting *Olesen*, 164 F.3d at 1098).

reasonably relied upon the statement while make a medical diagnosis or treatment; and (3) the purpose of the statement was to provide assistance to a medical professional for the diagnosis or treatment of the patient.[38] The court also noted that Rule 803(3) allows for circumstantial evidence to reasonably infer a declarant's state of mind at the time of the statement.[39]

The court deemed the evidence sufficient for the trial court to admit Dr. Lamberty's testimony regarding the victim's statement made about the perpetrator's identity under Rule 803(3).[40] The court stressed the importance that Dr. Lamberty testified that the victim understood he was performing a medical examination and the questions asked were to promote medical treatment, which fulfilled the requirement that the statement provide assistance to a medical provider for treatment.[41] Because of those factors, the court reasoned that the victim was motivated to make the statements in order to gain medical treatment.[42]

The court further inferred from Dr. Lamberty's testimony that he reasonably relied upon the statements proffered by the victim in order to administer medical treatment.[43] Moreover, the statement was reasonably pertinent to the victim's medical treatment because the identity of the perpetrator was a consideration for the safety and mental health of the victim.[44] Finally, the court repeated that Dr. Lamberty's

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38. *See id*. at 289 ("In order for testimony to be admissible under § 27-803(3), it is necessary to establish that the statement at issue falls within the exception, bearing in mind the purposes noted by the [Eighth Circuit]."). In further explaining the rule, the court provided:

> [T]he evidence must satisfactorily demonstrate that the circumstances under which the statement was made were such that the declarant's purpose in making the statement was to assist in the provision of medical diagnosis or treatment, that the declarant's statement was reasonably pertinent to such diagnosis or treatment and, further, that a doctor would reasonably rely on such statement.

Id.

39. *See id*. (noting that direct evidence is not required to prove the declarant's state of mind for purposes of Rule 803(3)).

40. *Id*. at 289-90.

41. *See id*. at 289 (stating Dr. Lamberty's testimony was sufficient to show the victim's purpose in the making the statement was to provide information for medical treatment, inferred from Dr. Lamberty's testimony that the victim understood she was in a hospital and speaking to a doctor).

42. *See id*. ("[The] circumstances were such that the [four]-year-old victim clearly understood that a medical examination was being performed, that the purpose of the doctor's questions was to assist in medical diagnosis and treatment and, thus, that the victim's statements were motivated by seeking treatment.").

43. *See id*. ("Dr. Lamberty testified that he had no concerns that the victim did not understand the nature of the examination, and his testimony indicates his state of mind was such that he reasonably relied on the victim's statement.").

44. *See id*. ("Dr. Lamberty also testified that there were valid medical treatment purposes for learning the identity of the perpetrator and that such purposes were pertinent to diagnosis and treatment.").

testimony was adequate to deduce the victim's state of mind when offering the statement to Dr. Lamberty.[45] Therefore, the statement identifying Vaught as the perpetrator met all of the requirements to satisfy admission under Rule 803(3).[46] Based on the foregoing reasons, the Nebraska Supreme Court affirmed the court of appeals' ruling that Dr. Lamberty's testimony regarding Vaught's identity was admissible under Rule 803(3).[47]

3. State v. Vigil*: The Nebraska Supreme Court Determines a Medical Provider's Testimony About the Identity of a Perpetrator of a Child Sexual Assault Is Admissible Under Rule 803(3)*

In *State v. Vigil*,[48] the Nebraska Supreme Court affirmed that under Rule 803(3), a child sexual assault victim's statements made during a forensic interview were admissible when the statements' purpose helped a medical professional recommend a treatment plan.[49] The State of Nebraska indicted Jorge Vigil on two counts of first degree child sexual assault for incidents involving his stepdaughter.[50] D.S., the victim, stated Vigil forced her to perform oral sex on him on multiple occasions until D.S. informed her mother of the abuse.[51]

When D.S.'s mother reported the abuse to the sheriff's office, Kelli Lowe at Northeast Nebraska Child Advocacy Center ("CAC") subsequently administered a forensic interview to D.S.[52] Lowe explained the purpose of the forensic interview is to compile information from a victim so the victim only has to endure sharing the information one time.[53] Lowe further explained if a treating physician does not observe the interview, she summarizes and briefs the interview to the physician, who then determines the appropriate course for a victim's aftercare.[54]

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45. *Id*. at 287.

46. *See id*. at 289-90 (concluding "[s]uch testimony by Dr. Lamberty was sufficient to infer the victim's state of mind in making the statement," and the trial court properly admitted the testimony regarding the identity of Vaught under Rule 803(3)).

47. *Id*. at 293.

48. 810 N.W.2d 687 (Neb. 2012).

49. State v. Vigil, 810 N.W.2d 687, 698 (Neb. 2012). The Nebraska Supreme Court determined that "[t]he trial court did not err in finding that the elements of the medical purpose exception found in Rule 803(3) were met." *Id*.

50. *Vigil*, 810 N.W.2d at 691.

51. *Id*. "D.S. had told her mother that Vigil had repeatedly forced her to perform oral sex on him over the course of the previous 2 years." *Id.*

52. *Id*. at 692. In her job capacity as a forensic interviewer, Lowe's duties included performing a forensic interview with patients to inquire into suspected abuse or injuries. *Id.* at 693.

53. *See id*. ("Lowe testified that the purpose of the interviews was not to aid and assist law enforcement. Her job is 'simply . . . to gather the information for all, for everyone involved so that the child only has to go through it one time.'").

54. *Id*. The court described the interviewer's role as follows:

Before Lowe interviewed D.S. at the CAC, an investigator from the Madison County Sheriff's Office informed D.S.'s mother the purpose of a forensic interview was to ensure victims received appropriate medical attention.[55] The investigator disclosed that after the interview, a doctor or nurse would perform a medical examination.[56] At trial, D.S.'s mother testified she explained to D.S. the process of the interview and medical examination.[57] Moreover, D.S.'s mother testified she was concerned with her daughter's wellbeing and mental health.[58]

At the start of the interview, Lowe explained her role to D.S. and then began asking general questions regarding the alleged abuse.[59] D.S. detailed that over a period of two years, Vigil forced D.S. to observe pornography and engage in oral sex approximately ten to twenty times.[60] Lowe's information gathering ultimately helped detail a treatment plan by D.S.'s treating physician.[61] The doctor discharged D.S. with instructions to obtain therapy and a physical examination.[62]

A jury convicted Vigil of two counts of sexual abuse of a child, with a sentence of twenty to thirty years per count to run consecutively.[63] Vigil appealed directly to the Nebraska Supreme Court, alleging the trial court erred in overruling his motion in limine to prohibit Lowe's interview of D.S. from being introduced into evidence

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> If the treating physician is there, he or she will observe the interview through closed-caption television in another room. If the treating physician is not present, it is Lowe's job to summarize the interview for the physician . . . Lowe testified that the treating physician utilizes the forensic interview in determining the proper treatment and therapy for the patient.

Id.

55. *See id*. (stating the investigator referred D.S. and D.S.'s mother to the CAC and noted the purpose of the interview is to "make sure [children who allege sexual abuse] are medically screened and receive proper followup [sic] care").

56. *Id*.

57. *Id.*

58. *See id*. (stating D.S.'s mother worried because D.S. "had been 'complaining a lot' about being 'sick in her throat'" and she was concerned about D.S.'s emotional feelings after two years of abuse).

59. *Id*. at 693.

60. *Id*. "Lowe proceeded to ask D.S. open-ended questions about the abuse, and D.S. described the sexual assaults in detail. In summary, D.S. reported that Vigil forced D.S. to perform oral sex on him 10 to 20 times over a period of 2 years. He also made her watch pornography." *Id.*

61. *Id.* The court detailed the interviewer's role:

> Lowe testified that her interview of D.S. was for the purpose of determining a medical or psychological diagnosis and a recommended treatment plan. Lowe explained that the details of the sexual abuse are a necessary part of medical diagnosis and treatment. In particular, such details are relevant to therapy, possible sexually transmitted diseases, and safety plans.

Id.

62. *Id*.

63. *Id*. at 694.

at trial.[64] Moreover, Vigil asserted the forensic interview did not satisfy the admissibility requirements under Rule 803(3) because the interview's primary purpose was a law enforcement investigation and not medical treatment.[65]

In *Vigil*, the Nebraska Supreme Court determined that a statement may be admissible despite having a dual purpose of prosecution and medical treatment.[66] In order to be admissible under Rule 803(3), the proponent must demonstrate that the statement made was reasonably pertinent to medical treatment and the statement was made for the purpose of providing medical treatment.[67] If the two requirements are met, the court declared that the primary investigatory purpose in eliciting the statement does not preclude admission under Rule 803(3) if the statement is also made in contemplation of medical treatment.[68] Despite having a dual purpose, the court concluded that

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64. *Id*.

65. *Id*. at 691. The court summarized Vigil's argument: "Jorge Vigil . . . argues that because some time had passed since the sexual assaults and the victim did not see the physician that day, the primary purpose of the interview was for law enforcement purposes and it should not fall under [R]ule 803(3)." *Id.* The Nebraska Supreme Court also explained "we will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds." *Id*.

66. *See id*. at 695-97 (reasoning that a statement can have the dual purpose of medical treatment and investigatory purposes, and be admitted under Rule 808(3), as long as the statement meets the requirements of assisting in medical treatment and being reasonably pertinent to medical treatment). The court stated that "courts agree that the purpose of the statement need not be solely for the purpose of medical diagnosis or treatment in order to fall under Rule 803(3)." *Id*. at 695. *See also* Ohio v. Clark, 135 S. Ct. 2173, 2180 (2015) (citation omitted) ("[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. 'Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.'").

67. *See Vigil*, 810 N.W.2d at 696-97 (explaining the requirements for a statement to be admitted under Rule 803(3) are the statements show that the person making the statements did so in order to assist in treatment and the statement was reasonably pertinent to medical treatment). The Nebraska Supreme Court explained:

> [S]tatements gathered strictly for investigatory purposes do not fall under [R]ule 803(3). Statements having a dual purpose are admissible under [R]ule 803(3) only if the proponent of the statements demonstrates that (1) the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment and (2) the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional.

Id. (citing *In re* Interest of B.R., 708 N.W.2d 586, 591 (Neb. 2005); State v. Vaught, 682 N.W.2d 284, 289 (Neb. 2004)). Although the Nebraska Supreme Court cited to *Vaught*, which indicated there are three requirements that need to be present to be admissible under Rule 803, the court did not mention the requirement that a doctor must reasonably rely upon the statement in *Vigil*. *Id*.

68. *See id*. (declaring that a statement is admissible under Rule 803(3) despite having dual purposes of investigation and medical treatment). The Nebraska Supreme Court reasoned that statements regarding identity in relation to the medical treatment of a child sexual abuse victim are reasonably pertinent because:

Lowe's recorded interview of D.S. identifying Vigil as the abuser was correctly admitted because the statements satisfied both requirements of Rule 803(3).[69] Therefore, the statement affected the treatment of D.S.'s psychological and physical health, and the trial court properly admitted the statements.[70] Thus, the court affirmed the trial court's ruling that Lowe's testimony regarding Vigil's identity was admissible under Rule 803(3).[71]

B. Domestic Violence Cases: Instances Where Courts Considered Admitting the Identity of an Alleged Perpetrator Under the Medical Diagnosis or Treatment Exception

1. United States v. Joe*: The Tenth Circuit's Seminal Decision to Extend the use of the Medical Diagnosis or Treatment Exception to Encompass Statements Relating to Identity in a Domestic Sexual Assault Case*

In *United States v. Joe*,[72] the United States Court of Appeals for the Tenth Circuit concluded a medical provider's testimony regarding the identity of the victim's alleged rapist was admissible under the Federal Rule of Evidence 803(4) ("Federal Rule 803(4)").[73] In *Joe*, a jury convicted Melvin Joe of one count of first degree murder and one

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> while statements relating to fault are generally not admissible under [R]ule 803(3), when a child is sexually abused, and especially when the child has a familial relationship with the child's abuser, the identity of the perpetrator is reasonably pertinent to diagnosis and treatment, because the victim cannot be effectively treated if sent right back into the abuser's clutches.

Id. at 698 (footnote omitted).

69. *Id.* at 697-98. The Nebraska Supreme Court further detailed why identity was reasonably pertinent:

> [T]here were concerns about D.S.' psychological health. Details of the abuse are relevant to psychological implications regardless of whether any physical injury occurred . . . .
>
> The frequency and nature of the sexual contacts with Vigil were part of D.S.' medical history. Lowe indicated that information was necessary for determining medical or psychological diagnosis, and for a recommended treatment and safety plan.

Id.

70. *Id.* at 698.

71. *Id.*

72. 8 F.3d 1488 (10th Cir. 1993).

73. United States v. Joe, 8 F.3d 1488, 1495 (10th Cir. 1993). *See also* Fed. R. Evid. 803(4) (detailing the requirements for a statement to be admitted under the medical diagnosis or treatment exception to hearsay). Federal Rule 803(4) provides:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . . A statement that: (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

Id. *See also In re* Interest of B.R., 708 N.W.2d 586, 690-91 (Neb. 2005) (explaining Fed. R. Evid. 803(4) is "identical" to Neb. Rev. Stat. § 27-803(3)); Neb. Rev. Stat. § 27-

count of second degree murder.[74] At trial, Dr. Brett Smoker testified to statements made by the victim eight days prior to the victim's murder.[75] Dr. Smoker's testimony indicated the victim relayed to him that Joe was the individual that perpetrated the rape.[76] Joe objected to Dr. Smoker's testimony on hearsay grounds, but the trial court ultimately overruled the objections.[77] The United States District Court for the District of New Mexico ruled the victim's statements regarding the identity of her assailant as Joe were admissible under the then existing mental, emotional, or physical conditions exception to hearsay.[78]

Joe subsequently appealed to the Tenth Circuit after his convictions.[79] On appeal, the Tenth Circuit stated there were no grounds to admit the victim's statements under that exception, but noted a court may rely on alternative grounds to admit the statements that were not promulgated in the trial court.[80] The Tenth Circuit relied upon Federal Rule 803(4) to conclude Dr. Smoker's testimony regarding Joe's identity was admissible.[81]

The Tenth Circuit began its reasoning by stating Federal Rule 803(4), the medical diagnosis or treatment exception, is founded on the notion that a patient possesses a selfish motive and therefore will impart accurate information to a doctor in order to receive the proper treatment.[82] The Tenth Circuit then noted the United States Su-

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803(3) (stating the medical diagnosis or treatment exception to hearsay). The Nebraska Rule of Evidence for the medical diagnosis or treatment exception provides:

> [T]he following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment . . . .

§ 27-803(3).

74. *Joe*, 8 F.3d at 1500-01.

75. *Id*. at 1491.

76. *See id*. ("Dr. Smoker, an Indian Health Service family physician, testified that, eight days before Ms. Joe was killed, he treated her for an alleged rape and that she had identified her assailant as the defendant, Mr. Joe.")

77. *Id*. at 1491-92. "The trial court admitted Dr. Smoker's testimony over defense counsel's timely objection . . . . The court . . . ruled that the [victim's statements about Joe's identity] were admissible under the hearsay exception contained in FED. R. EVID. 803(3), rather than the Rule 803(4) exception proffered by the government." *Id.*

78. *Id.*

79. *Id*. at 1492.

80. *Id*. at 1493.

81. *Id*. at 1495. "Thus, we conclude that Dr. Smoker's testimony regarding Ms. Joe's rape statement, which identified Mr. Joe as her assailant, is admissible under FED. R. EVID. 803(4)." *Id.*

82. *See id.* at 1493-94 (citations omitted) ("The [Federal] Rule 803(4) exception to the hearsay rule is founded on a theory of reliability that emanates from the patient's own selfish motive—her understanding 'that the effectiveness of the treatment received will depend upon the accuracy of the information provided to the physician.'").

preme Court endorsed the notion that statements provided in the course of medical treatment possess substantial guarantees of the statement's overall trustworthiness.[83] After establishing the foundational argument for the exception, the court explained this notion usually only extends to statements regarding causation and not statements about fault.[84]

Despite the premise that identity is generally not admissible under Federal Rule 803(4), the Tenth Circuit highlighted that in cases of child sexual abuse by a family member, identity of the abuser is reasonably pertinent and therefore admissible under the rule.[85] The Tenth Circuit explained identity in these types of cases is reasonably pertinent because the treating physician must provide care for the victim's psychological and emotional injuries, which are often dependent upon the identity of the abuser.[86] To further justify this reasoning, the Tenth Circuit articulated the importance of a treating physician to know the identity of the abuser because the physician is under a statutory duty to prevent a child from being released back in the custody of an abuser.[87]

Thus, the Tenth Circuit extended the logic used to admit identity of the perpetrator in a child sexual abuse case to encompass cases where domestic sexual assault of an adult occurred.[88] The court expounded identity is reasonably pertinent in virtually all cases of domestic sexual assaults because of the psychological and emotional injures that stem directly from the victim's abuser.[89] Furthermore,

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83. *See id*. at 1494 (citing White v. Illinois, 502 U.S. 346, 355 (1992)) ("The [United States] Supreme Court has noted that 'statements made in the course of receiving medical care . . . are made in contexts that provide substantial guarantees of their trustworthiness.'").

84. *See id*. ("While this guaranty of trustworthiness extends to statements of causation, it does not ordinarily extend to statements regarding fault.").

85. *See id*. (commenting that the United States Courts of Appeal for the Fourth, Eighth, and Ninth Circuits held statements to a doctor regarding identity, when made by a victim of domestic child sexual abuse, may be reasonably pertinent and thus admissible under Federal Rule 803(4)).

86. *See id*. (citing United States v. Renville, 779 F.2d 430, 437 (8th Cir. 1985)) ("Statements revealing the identity of the child abuser are 'reasonably pertinent' to treatment because the physician must be attentive to treating the child's emotional and psychological injuries, the exact nature and extent of which often depend on the identity of the abuser.").

87. *Id*.

88. *See id*. ("The identity of the abuser is reasonably pertinent to treatment in virtually every domestic sexual assault case, even those not involving children.").

89. *Id*. at 1494-95. The Tenth Circuit explained:

> All victims of domestic sexual abuse suffer emotional and psychological injuries, the exact nature and extent of which depend on the identity of the abuser. The physician generally must know who the abuser was in order to render proper treatment because the physician's treatment will necessarily differ when the abuser is a member of the victim's family or household.

Id.

the court stated that the identity of the perpetrator is reasonably pertinent because a doctor may recommend a specialized treatment plan or provide a recommendation to the victim to remove herself from the abusive environment.[90] The Tenth Circuit concluded Dr. Smoker's testimony was adequate to determine Joe's identity was reasonably pertinent for purposes of Federal Rule 803(4) and the trial court properly admitted Dr. Smoker's testimony.[91]

2. Oldman v. State*: Under the Medical Diagnosis or Treatment Exception, the Supreme Court of Wyoming Held Testimony from a Medical Provider Regarding the Identity of a Domestic Violence Perpetrator Was Admissible*

In *Oldman v. State*,[92] the Supreme Court of Wyoming held that testimony from an emergency room physician regarding statements about identity that were made by a victim of domestic violence were admissible under the medical diagnosis or treatment exception.[93] In *Oldman*, the pregnant victim received medical attention from an emergency room physician for bruised eyes, bruising on her face, and numerous human bite marks on different portions of her body.[94] During the examination, the victim voluntarily offered the explanation that her husband inflicted her wounds without the physician inquiring.[95]

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90. *Id*. at 1495. The Tenth Circuit further expounded:

> In the domestic sexual abuse case, for example, the treating physician may recommend special therapy or counseling and instruct the victim to remove herself from the dangerous environment by leaving the home and seeking shelter elsewhere. In short, the domestic sexual abuser's identity is admissible under [the medical diagnosis or treatment exceptions] where the abuser has such an intimate relationship with the victim that the abuser's identity becomes 'reasonably pertinent' to the victim's proper treatment.

Id.

91. *See id.* (concluding Dr. Smoker's testimony regarding Joe's identity was reasonably pertinent to the medical diagnosis or treatment exception because Dr. Smoker recommended a specific treatment plan based on the fact Joe was the abuser, and therefore the statements were admissible under Federal Rule 803(4)). The Tenth Circuit reasoned the doctor's testimony was sufficient to determine the identity of the assailant and was reasonably pertinent because:

> Dr. Smoker testified that the identity of the sexual assailant was important for his recommendation regarding Ms. Joe's after-care, including appropriate counseling. Moreover, after discovering her assailant's identity, Dr. Smoker specifically recommended that Ms. Joe seek protection, offering her the number of the Navajo Police Department and referring her to the women's shelter . . . .

Id.

92. 998 P.2d 957 (Wyo. 2000).

93. Oldman v. State, 998 P.2d 957, 692 (Wyo. 2000).

94. *Oldman*, 998 P.2d at 959 ("The attending physician, who saw the victim in the emergency room, noted a black and blue eye; facial bruising; and a 'significant number of human bite marks' on her back, arm, thigh, hands, and feet.").

95. *See id*. ("Although, the physician did not ask, the victim told him that her husband had beaten her and bitten her."). Additionally, the court noted that "[t]he victim

The State charged Steven Oldman with aggravated assault upon a woman whom he knew to be pregnant, and a jury subsequently convicted Oldman of the charge.[96] During trial, Oldman objected to the physician's testimony on hearsay grounds.[97] The trial court overruled Oldman's objection and cited Wyoming Rule of Evidence 803(4) ("Wyoming Rule 803(4)"), the medical diagnosis or treatment exception, as support for the court's ruling.[98] Oldman appealed his conviction and sentence to the Supreme Court of Wyoming, which affirmed Oldman's conviction.[99]

The court noted under the language of Wyoming Rule 803(4), in order for a statement to be admissible, the statement's purpose must be for the promotion of medical diagnosis or treatment and describe a person's medical status, while also being reasonably pertinent to treatment or diagnosis.[100] Moreover, the court acknowledged statements that attribute fault are generally excluded under Wyoming Rule 803(4) because the statements are perceived to be irrelevant to medical diagnosis or treatment.[101] However, the court stated it recognized Wyoming Rule 803(4) applied to statements attributing fault

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and Oldman had lived together off and on for some ten to twelve years. They had four children together, and although never formally married, they held themselves out as husband and wife." *Id*.

96. *Id*. at 960.

97. *Id*. The Wyoming Rules of Evidence state the medical diagnosis or treatment exception:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

WYO. R. EVID. 803(4). *See also* NEB. REV. STAT. § 27-803(3) (providing for purposes of the medical diagnosis or treatment exception, a statement must be made for purposes of medical diagnosis or treatment, describe medical symptoms, and be reasonably pertinent to diagnosis or treatment).

98. *Oldman*, 998 P.2d at 960.

99. *Id*. "Oldman objected to the testimony of the attending physician as hearsay, but the trial court overruled the objection, invoking W.R.E. 803(4)." *Id.*

100. *Id*. at 961. The Wyoming Supreme Court stated:

> Pursuant to W.R.E. 803(4), "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" can be received in evidence.

Id.

101. *Id.* "Statements that have the effect of attributing fault or causation generally are not admissible in evidence under W.R.E. 803(4) because they are not relevant to diagnosis or treatment." *Id.*

when the statement is viewed as being necessary for diagnosis or treatment.[102]

Furthermore, the court outlined a two prong test in order to evaluate the admissibly of a statement under Wyoming Rule 803(4).[103] First, a declarant's purpose in making the statement must be congruous with the promotion of medical diagnosis or treatment.[104] Second, the content of the declarant's statement must be reasonably relied upon by a treating physician in the course of medical treatment of diagnosis.[105] While detailing this test, the court noted identity is seldom germane to the promotion of medical diagnosis or treatment, but in cases of child abuse, the court recognized statements about identity could be for the promotion of treatment or diagnosis.[106] Furthermore, the court explained the reason the identity of the perpetrator could be used to promote medical treatment is because the emotional and psychological injuries that stems from child abuse crimes must be treated by a physician.[107]

Moreover, the court justified the holding in *Oldman* by discussing precedent where the court extended Wyoming Rule 803(4) to encompass statements about identity in a domestic sexual abuse case.[108] Then, the court cited to *United States v. Joe*[109] and declared there is no logical justification for not extending Wyoming Rule 803(4) to include statements about identity when the victim is a victim of domestic physical abuse.[110] The court stated sexual abuse is simply a subcategory of physical abuse, and, therefore, extending Wyoming

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102. *See id*. (recognizing statements attributing fault are admissible under Wyoming Rule 803(4) if "the statement is perceived as necessary for diagnosis or treatment").

103. *Id.* at 961-62.

104. *See id*. at 961 (citation omitted) (stating for purposes of the medical diagnosis or treatment exception, "[t]he first prong of the . . . test demands that 'the declarant's motive in making the statement must be consistent with the purposes of promoting treatment [or diagnosis]'").

105. *See id*. at 962 (citation omitted) ("[The] second prong [of] the . . . test requires that 'the content of the statements must be such as is reasonably relied on by a physician in treatment of diagnosis.'").

106. *See id*. at 961-62 (citations omitted) ("Identity rarely is germane to the promotion of treatment or diagnosis, but we, as well as other courts, have recognized that such statements can be relevant to treatment in instances of child abuse.").

107. *See id*. at 962 (citation omitted) ("The rationale for relevance in such instances is that 'the physician must be attentive to treating the emotional and psychological injuries which accompany this crime.'").

108. *See id*. (discussing a case where the court extended Wyoming Rule 803(4) to encompass statements attributing fault made by a victim of domestic sexual abuse).

109. 8 F.3d 1448 (10th Cir. 1993).

110. *See Oldman*, 998 P.2d at 962 (citing United States v. Joe, 8 F.3d 1488, 1494-95 (10th Cir. 1993)) (quoting the Tenth Circuit's reasoning for extending Federal Rule 803(4) from child abuse victims to victims of domestic sexual assault). The court stated "[t]here is no logical reason for not applying [the rationale of admitting identity under the medical diagnosis or treatment exception used in domestic sexual abuse cases] to

Rule 803(4) to cover statements made by a victim of domestic violence was a logical extension of previous case law.[111]

The court held the statements made by the victim to the emergency room physician were admissible under Wyoming Rule 803(4) because the statements satisfied both prongs of the test.[112] Under the first prong, the court held the statement possessed the requisite purpose of being for the promotion of medical diagnosis and treatment.[113] Second, the court highlighted the importance of identify in the case in order for the treating physician to administer the appropriate treatment.[114] Moreover, the court provided two justifications for holding the identity satisfied the second prong.[115] First, because of the numerous human bite marks the victims sustained, identity became important in order for the physician to be able to treat infectious conditions that resulted directly from the person who inflicted the bite marks.[116] Second, the court reasoned knowing the identity of the perpetrator was essential to the treating physician in order to protect the victim's safety and treat the abuse as the underlying cause in conjunction with the physical injuries the victim sustained.[117] Therefore, the

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non-sexual, traumatic abuse within a family or household, since sexual abuse is simply a particular kind of physical abuse." *Id*.

111. *See id*. (declaring "sexual abuse is simply a particular kind of physical abuse," and holding the victim's statements about Oldman's identity to the physician was congruent with the promotion of medical diagnosis and treatment).

112. *Id.*

113. *See id*. ("We hold that the victim's statements to the emergency room physician were consistent with the purpose of promoting diagnosis and treatment.").

114. *See id*. ("In most cases, to treat or diagnose a physician would have no need to know who was responsible for the injury . . . ; [i]n a case such as this, however, the identity of the assailant is highly relevant in order for the physician to prescribe an appropriate course of treatment.").

115. *Id.*

116. *See id*. (holding a domestic violence victim's statements were reasonably relied upon by the physician because, "[f]irst, the victim's injuries included numerous human bites; it was important for the emergency room physician to know the source of the bites in order to treat the victim properly for any infectious condition related to the assailant").

117. *See id*. (reasoning the identity of assailant could be used to protect the victim's safety by preventing the assailant's entry into the hospital; treat the victims psychological and physical injuries; and used to treat the victim's abuse instead of just the physical injuries sustained from this occasion). The Wyoming Supreme Court explained how identity was reasonably pertinent as:

> Second, the victim had been so brutally abused by the named assailant that the hospital reasonably could rely on her statement in order to deny access to the hospital by the assailant. This would prevent further abuse or injury which could impede her recovery both physically and psychologically. The identity of the assailant in this case was relevant to the effort of the emergency room physician to treat the abuse as an underlying cause, rather than simply the injuries that were inflicted on this occasion.

Id.

court held the trial court correctly admitted the emergency room physician's testimony under Wyoming Rule 803(4).[118]

3. Perry v. State*: The Indiana Court of Appeals Concluded that Identity Is Admissible Under the Medical Diagnosis or Treatment Exception in a Domestic Violence Case*

In *Perry v. State*,[119] the Indiana Court of Appeals concluded a nurse's testimony regarding the identity of an assailant in a strangulation and sexual abuse case was admissible under the medical treatment or diagnosis exception to hearsay because the perpetrator's identity was reasonably pertinent to a nurse's treatment of the victim's physical injuries, possible treatment for HIV or any sexually transmitted diseases, and the victim's aftercare.[120] Following an assault, N.D. was admitted to a hospital where sexual assault nurse examiner Natalie Calow performed an evaluation.[121] The evaluation consisted of assessing N.D.'s overall appearance, including her mental state, followed by questions regarding the perpetrator.[122] Calow testified the perpetrator's identity is important because the identity shapes her treatment plan for the patient.[123] During the exam, N.D. indicated her ex-boyfriend, Dennis Perry, strangled and sexually assaulted her.[124] Calow documented her findings and the victim's statement in a report.[125]

Although N.D. refused to testify at trial, Calow attested to N.D.'s statements regarding Perry's identity.[126] The Marion Superior Court admitted Calow's report over Perry's hearsay objection.[127] The jury

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118. *Id.*

119. 956 N.E.2d 41 (Ind. Ct. App. 2011).

120. *See* Perry v. State, 956 N.E.2d 41, 46, 50 (Ind. Ct. App. 2011) (reasoning because the identity of the perpetrator was reasonably pertinent to the nurse's treatment of the victim, the nurse's testimony was properly admitted under the medical diagnosis or treatment exception).

121. *Perry*, 956 N.E.2d at 45-46.

122. *Id*. at 46.

123. *Id*. Nurse Calow testified she takes:

> any medical history . . . if [a patient] knows the assailant's medical history too it's important. That guides me, the treatment plan that I'm going to do. Where I need to look for injuries. I get the history of the assault too with the social work[er] present. We both do. Then after I get all the history . . . I set up my room 'cause there's certain swabs we take, certain pictures we take depending on what she tells me. And the social work[er] stays, makes sure she does some counseling with the patient.

Id.

124. *Id*.

125. *See id.* ("Nurse Calow completed a medical report which documented N.D.'s treatment, relayed N.D.'s account of the incident in question, and identified Perry as the suspected perpetrator.").

126. *Id*.

127. *Id*.

subsequently found Perry guilty of strangulation but deadlocked on the sexual assault charges.[128] Perry appealed, alleging the trial court erred in allowing Calow's testimony and medical report under the medical diagnosis or treatment exception.[129]

The court of appeals considered whether the trial court erred in admitting Calow's narration in the medical record that indicated Dennis Perry strangled N.D. and N.D. experienced pain from this strangulation.[130] After Calow's narrative about the incident between Perry and N.D., the medical record indicated Calow recommended aftercare that included sexually transmitted disease testing, pregnancy testing, and medications.[131] During Calow's testimony at trial, the State proffered the medical report as evidence and Perry objected to the record as hearsay.[132] The trial court admitted the record after redacting portions, but Perry's identity remained in the report.[133]

The court of appeals first indicated that Indiana Rule of Evidence 803(4) ("Indiana Rule 803(4)") provides the medical diagnosis or treatment exception to hearsay.[134] The court noted the idea behind Indi-

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128. *See id*. (explaining that the jury deadlocked on Class B felony rape and Class C felony criminal confinement and convicted on strangulation, possession of cocaine, and criminal mischief).

129. *Id*. at 46-47. The Indiana Court of Appeals noted:

> Perry raises several issues, only three of which [the court of appeals] find[s] necessary to address: (I) whether the trial court erred by admitting Nurse Calow's examination record, (II) whether the court erred by admitting evidence of Perry's prior arrests for domestic violence involving N.D., and (III) whether the evidence is sufficient to sustain Perry's convictions such that retrial would not offend double jeopardy.

Id. (footnote omitted).

130. *Id.* at 47.

131. *Id*. at 48. Nurse Calow detailed:

> The report's aftercare information indicated that N.D. had been tested for 'legal evidence,' pregnancy, and HIV, and that she was given medication to reduce the risk of contracting . . . other sexually transmitted diseases. It recommended that she follow up in various intervals for a general health examination and additional testing.

Id.

132. *Id*.

133. *See id*. (noting the trial court overruled Perry's objection to the hearsay but redacted the irrelevant portion and kept Perry's identity in the record).

134. *See id*. at 49 (explaining Indiana Rule 803(4) governs the admissibility of statements under the medical diagnosis or treatment exception). The court stated:

> [Indiana] Rule 803(4) provides for the admissibility of statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Id. Moreover, the court noted "courts may exercise their discretion in admitting medical diagnosis statements which relay the identity of the perpetrator." *Id*. *See also* NEB. REV. STAT. § 27-803(3) (providing statements that are reasonably pertinent, describe medical history, and are made for the purpose of medical diagnosis or treatment are admissible under the medical diagnosis or treatment exception).

ana Rule 803(4) is that a patient will be truthful when providing information because of his or her's self-interested motive to receive the proper medical treatment.[135] Furthermore, the court set forth a two-pronged evaluation of the admissibility of a statement under Indiana Rule 803(4) and noted a trial court has discretion in admitting statements regarding identity under Indiana Rule 803(4).[136] First, a party must demonstrate a patient's motive in making the statement was to relay truthful information so proper medical attention could be provided.[137] Second, a party must demonstrate an expert in the medical field would reasonably rely upon the statement in order to administer proper treatment or diagnosis.[138]

Next, the court explained that generally identity is not admissible under the medical diagnosis or treatment exception because identity is not reasonably pertinent for medical purposes.[139] However, the court also opined that exceptions to the rule exist in the form of child abuse cases, sexual assaults, and domestic violence cases, but the admissibility was left to the discretion of the trial court.[140]

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135. *See Perry*, 956 N.E.2d at 49 ("The rationale underlying the exception is that a declarant's self-interest in seeking treatment reduces the likelihood that she will fabricate information that she provides to those who treat her."); *see also* Oldman v. State, 998 P.2d 957, 961 (Wyo. 2000) (citation omitted) ("[The] exception finds its basis in 'the likelihood that the patient believes that the effectiveness of the treatment depends on the accuracy of the information provided to the doctor.'").

136. *Perry*, 956 N.E.2d at 49.

137. *See id*. (stating for purposes of the medical diagnosis and treatment exception, "courts evaluate . . . whether the declarant's motive was to provide truthful information to promote diagnosis and treatment").

138. *See id*. ("[The second prong is] whether the content of the statement is such that an expert in the field would reasonably rely upon it in rendering diagnosis or treatment.").

139. *See id*. ("Statements attributing fault or establishing a perpetrator's identity are typically inadmissible under the medical diagnosis exception, as identification of the person responsible for the declarant's condition or injury is often irrelevant to diagnosis and treatment."); *see also* State v. Koederitz, 166 So. 3d 981, 984 (La. 2015) ("Louisiana subscribes to the general rule that [the medical diagnosis or treatment] hearsay exception . . . ordinarily does not encompass statements ascribing fault in the case of the injuries treated."); State v. Robinson, 718 N.W.2d 400, 404 (Minn. 2006) (explaining that statements attributing fault of how or who inflicted the injury are not generally admissible for purposes of the medical diagnosis or treatment exception).

140. *See Perry*, 956 N.E.2d at 49 ("[I]n cases involving child abuse, sexual assault, and/or domestic violence, courts may exercise their discretion in admitting medical diagnosis statements which relay the identity of the perpetrator."); *see also Koederitz*, 166 So. 3d at 985 (explaining "[t]he [medical diagnosis and treatment] hearsay exception . . . has . . . received particular application in cases of child sexual abuse, including statements of fault" because of an expressed desire by the state legislature to protect child sexual abuse victims); Moore v. City of Leeds, 1 So. 3d 145, 150 (Ala. Crim. App. 2008) (extending the application of the medical diagnosis or treatment exception, which encompasses identity, to domestic violence cases); NEB. REV. STAT. § 28-902 (Reissue 2016) (stating medical providers are required to report to law enforcement when they treat a patient that possibly sustained injuries from the commission of a crime).

The court concluded Calow's statements regarding the identity of Perry and the ensuing assault were admissible under Indiana Rule 803(4).[141] The court reasoned the statements made by N.D. to Calow were pertinent to medical treatment because the statements formed the basis of the treatment plan created by Calow.[142] The court emphasized the importance of identity in facilitating sexually transmitted disease testing and psychological counseling for domestic violence.[143] Moreover, N.D.'s statements that Perry grabbed and strangled her were pertinent to treatment as well.[144] Thus, the court concluded Calow's statements about the information N.D. provided were admissible under Indiana Rule 803(4).[145]

4. State v. Smith*: The Iowa Supreme Court Noted the Legitimacy of the Medical Diagnosis or Treatment Exception to Find Identity Admissible in Domestic Violence Cases, but Found the Facts Did Not Support the Legal Reasoning*

In *State v. Smith*,[146] the Iowa Supreme Court ruled the State failed to lay proper foundation for purposes of the medical diagnosis or treatment exception for a statement regarding the identity of an alleged perpetrator during a domestic violence trial.[147] In *Smith*, M.D. told police her child's father, Trent Smith, hit and kicked her in the

141. *Perry*, 956 N.E.2d at 50. *See also Koederitz*, 166 So. 3d at 986 ("These statements are non-hearsay as a matter [under the medical diagnosis and treatment exception] and are therefore admissible as substantive evidence because they were made for purposes of diagnosis and treatment, essential components under current medical practice in cases of domestic violence."); *Oldman,* 998 P.2d at 962 (holding testimony from a doctor regarding the identity of a domestic violence perpetrator was properly admitted by the trial court under the medical diagnosis or treatment exception).

142. *See Perry*, 956 N.W.2d at 50 (noting that trial courts have discretion to determine what statements are pertinent to medical treatment or diagnosis).

143. *See id*. ("[N].D.'s identification of her assailant was pertinent to potential treatment for HIV or other sexually transmitted diseases, relevant to any psychological counseling for domestic abuse, and significant to medical personnel in deciding how to discharge their patient."); *see also City of Leeds*, 1 So. 3d at 150 (stating a victim of domestic violence provided her doctor with information that her husband broke her nose was pertinent to medical treatment, and therefore was admissible under the medical diagnosis or treatment exception).

144. *See Perry*, 956 N.E.2d at 50 (determining N.D.'s statements regarding the strangulation were reasonably pertinent because it helped the doctor treat her physical injuries).

145. *Id*. *See, e.g.*, *City of Leeds*, 1 So. 3d at 150 (holding that a domestic violence victim's statements about the identity of the assailant were admissible under the medical diagnosis or treatment exception because the statements were used by the doctor to treat the victim's "overall medical condition").

146. 876 N.W.2d 180 (Iowa 2016).

147. *See* State v. Smith, 876 N.W.2d 180, 182 (Iowa 2016) (concluding "there was insufficient foundation to admit the statements under [the medical diagnosis or treatment exception]").

head, causing her to lose consciousness.[148] After M.D. arrived at the hospital for treatment, M.D. reported to the nurse her child's father assaulted her.[149] M.D. further described her injuries to the treating nurse and doctor, who subsequently elected to only treat M.D.'s physical injuries and not M.D.'s mental or emotional traumas.[150] Following M.D.'s release from patient care, M.D. refused to sign a statement written by a police officer based on the officer's documentation of the incident.[151]

At a pretrial hearing, the State notified the court that M.D. planned to recant the story of how M.D. obtained her injuries.[152] The State intended to use the statements M.D. gave to the police and treating physicians in order to prove Smith was the perpetrator.[153] The State further indicated it intended to use Iowa Rule of Evidence 5.803(4) ("Iowa Rule 803(4)"), the medical diagnosis or treatment exception, in order to admit Smith's identity into evidence.[154] Moreover, the State expected to introduce the statements through M.D.'s treating doctor and nurse.[155] The trial court allowed Smith's identity into

148. *Smith*, 876 N.W.2d at 182-83. The Iowa Supreme Court detailed the underlying facts of the case:

> [S]he had been upstairs and after hearing a sound was "hit" by something when going downstairs in the dark to investigate. She also said she lost consciousness after she was kicked in the head. She told the officers she believed the assailant had entered her residence through a locked door. M.D. eventually identified her assailant as "Trent Daniel," whom dispatch officers later identified as Trent Smith.

Id.

149. *See id*. at 183 ("The doctor found M.D. to be 'in a moderate amount of distress' and 'extremely shaken up.' The nurse asked M.D. to explain what had happened to her. M.D. responded that she was 'assaulted by her baby's daddy around midnight.'").

150. *See id.* ("She [M.D.] told the nurse that she had been kicked in the head and right arm, and she felt that her front teeth were loose."). The court explained how the testimony by the doctor was insufficient to make a finding that identity is reasonably pertinent:

> The doctor did not make any domestic abuse diagnosis or render any treatment for emotional or psychological injuries based on the identity of the perpetrator. The identity of the assailant or the effects of domestic abuse were not mentioned as a part of any treatment or diagnosis. The treatment consisted of radiology testing and other medical care to those areas of the body that had sustained physical injury. The diagnosis by the doctor pertained solely to the physical injuries sustained by M.D.

Id.

151. *Id*.

152. *Id*.

153. *Id.*

154. *Id*. *See* IOWA R. EVID. 5.803(4) ("Statement made for medical diagnosis or treatment [is] a statement that: (A) Is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) Describes medical history, past or present symptoms or sensations, or the inception or general cause of symptoms or sensations.").

155. *Smith*, 876 N.W.2d at 183.

evidence under Iowa Rule 803(4), and the jury later found Smith guilty of two charges of domestic abuse.[156]

During the trial, M.D.'s treating physicians testified about the statements M.D. made regarding the identity of the perpetrator.[157] However, there was no testimony regarding how the identity of M.D.'s attacker was relevant to M.D.'s medical diagnosis or treatment.[158] Smith appealed to the Iowa Court of Appeals, which affirmed his conviction; subsequently, the Iowa Supreme Court granted review to decide whether the trial court erred by allowing the testimony under Iowa Rule 803(4).[159]

First, the Iowa Supreme Court noted that the medical diagnosis or treatment exception is premised on the idea that a patient is motivated to tell the truth to receive the proper treatment for the injuries sustained.[160] This, in turn, mitigates the concern that hearsay should be excluded from evidence because it is unreliable.[161] Therefore, the rationale for the medical diagnosis or treatment exception undermines the concerns raised by admitting hearsay into evidence.[162]

Next, the court elaborated that in order for a statement to qualify under Iowa Rule 803(4), two showings must be made: why the identification of an alleged perpetrator is relevant and the effect identity has on the medical diagnosis or treatment.[163] The court declared that both prongs must be reasonably pertinent to medical diagnosis or

156. *See id*. (stating the trial court overruled Smith's objection that M.D.'s statements were not for medical treatment, allowing the State to present the testimony regarding Smith's identity under Iowa Rule 803(4)).

157. *See id*. at 184 ("The officers and medical providers recalled the statements M.D. made to them the night of the incident that identified Smith as her assailant.").

158. *Id*.

159. *See id*. (noting the Iowa Court of Appeals affirmed Smith's conviction because it found M.D.'s statements made to the medical professionals were for medical diagnosis or treatment). The court provided "[t]he statements at issue in this case—third-party accounts of identification statements made by M.D.—are hearsay. The question is whether they are admissible under an exception to the rule against hearsay." *Id*. at 185.

160. *See id.* ("The rationale for the exception is that statements made by a patient to a doctor for purposes of medical diagnosis or treatment are 'likely to be reliable because the patient has a selfish motive to be truthful.'"); *see also* State v. Robinson, 718 N.W.2d 400, 404 (Minn. 2006) ("The rationale behind [the medical diagnosis or treatment exception] is 'the patient's belief that accuracy is essential to effective treatment.'").

161. *See Smith*, 876 N.W.2d at 185 (declaring hearsay is excluded because of unreliability; however, under Iowa Rule 803(4), the motive for a patient to be truthful "[e]xists because the effectiveness of the medical treatment rests on the accuracy of the information imparted to the doctor," therefore curing unreliability).

162. *See id*. ("[T]he circumstances of statements made for diagnosis and treatment provide 'special guarantees of credibility' and justify the exception to the rule against hearsay.").

163. *See id*. at 189 (opining in order for statements to be admitted under Iowa Rule 803(4), the proponent must "establish[ ] why the identity of the assailant is important in a domestic abuse case, as opposed to stranger assault, and what effect that identity has on diagnosis or treatment").

treatment.[164] Furthermore, the court stressed that the nexus between identity and medical treatment must be reasonable.[165]

With this general framework, the court went on to consider whether identity in this case was reasonably pertinent to medical treatment and diagnosis.[166] The court noted the skepticism surrounding the notion that identity was reasonably pertinent to the medical diagnosis or treatment of M.D.[167] Furthermore, because identity is sometimes understood to be irrelevant for medical treatment, statements regarding identity necessarily lack the characteristics that would justify admittance under Iowa Rule 803(4).[168]

The court rejected the State's argument favoring a categorical approach to admitting identity in child abuse cases.[169] The court stressed that each case must be considered on a case-by-case basis because proper foundation must be shown first to admit identity.[170]

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164. *See id*. (citing 7 LAURIE KRATKY DORÉ, IOWA PRACTICE SERIES: EVIDENCE § 5.803.4, at 952 (2012)) ("Yet as to both requirements, the statement must also 'be reasonably pertinent to diagnosis or treatment.'").

165. *See id*. at 190 ("The [medical diagnosis or treatment exception] . . . requires that the connection between the statement and the treatment be 'reasonable.'").

166. *Id*.

167. *See id*. ("[T]here was no evidence to suggest M.D. believed the identity of the perpetrator was reasonably pertinent to her treatment or diagnosis."); *see also Robinson*, 718 N.W.2d at 405 (explaining the court was not equipped to make the determination about whether the identity of the perpetrator is reasonably pertinent to medical diagnosis and treatment). The Minnesota Supreme Court explained:

> [W]e are not as familiar with the medical issues concerning domestic violence. [This court is] not able to determine, by judicial notice or general knowledge, whether the notion that the identification of the perpetrator of domestic violence is reasonably pertinent to medical diagnosis and treatment is generally accepted in the medical profession. To this extent, the medical exception to the hearsay rules depends, in the first instance, on the views of the medical profession, not on the views of the courts.

Id.

168. *See Smith*, 876 N.W.2d at 190 (explaining M.D.'s statements regarding Smith's identity lacked the characteristics required for Iowa Rule 803(4) because the record failed to show how the identity of Smith was reasonably pertinent to M.D.'s treatment). The court understood that:

> The general circumstances presented at trial do not suggest a motivation by M.D. to be untruthful in her identification of Smith as her assailant to the emergency room nurse and doctor. Her statements of identity were not prompted by any cues asking for the identity of the perpetrator, and she only conveyed Smith's identity as part of the description of how she was injured. Yet the exception does not seek to use the absence of a motive to be untruthful, but it requires evidence of a specific motivation to be truthful derived from its rationale.

Id.

169. *See id*. at 188 (rejecting the State's argument that "statements of identity by victims of domestic abuse should be categorically admissible because such statements are now commonly admitted in cases of child abuse").

170. *See id*. (holding statements admitted under Iowa Rule 803(4) must be evaluated pursuant to the two-prong test); *see also Robinson*, 718 N.W.2d at 405 (clarifying that in cases of child abuse, courts should evaluate each case to determine if statements

Moreover, the court noted that the circumstances surrounding the statement at the time it was made are central to determining whether admittance is proper under Iowa Rule 803(4).[171]

While acknowledging the issues surrounding domestic violence cases, the court ultimately concluded the trial court erred in admitting M.D.'s physician's testimony regarding Smith's identity.[172] The court reasoned the State proffered insufficient evidence to support a conclusion that M.D.'s statement was reasonably pertinent under Iowa Rule 803(4).[173] Furthermore, the court highlighted that the doctor's testimony did not show Smith's identity was involved in M.D.'s treatment.[174] Finally, the court limited its holding that identity was not properly admitted on the facts of *Smith*, but stated the conclusion did not exclude future cases from allowing identity of domestic violence perpetrators into evidence under Iowa Rule 803(4).[175]

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should be admitted under the medical diagnosis or treatment exception and refusing to adopt a categorical approach in cases of domestic violence).

171. *Smith*, 876 N.W.2d at 190.

172. *Id*.

173. *Id*. The court explained the insufficiency by stating:

> There was no evidence the nurse or doctor told M.D. the identity of the perpetrator was important to the treatment or diagnosis of her injures. There was not evidence the nurse or doctor used the identity of the perpetrator to treat or diagnosis M.D.'s injuries. In fact, there was nothing from the circumstances at the hospital to reasonably indicate M.D.'s treatment or diagnosis would have been different if she had not mentioned the identity of her perpetrator in describing how she was injured.

Id. *See also* State v. Beeder, 707 N.W.2d 790, 797 (Neb. 2006), *disapproved on other grounds by* State v. McCullouch, 742 N.W.2d 727, 733 (Neb. 2007) (concluding a medical provider's testimony about the identity of an domestic abuser is inadmissible hearsay because the state failed to prove the identity is reasonably pertinent to medical treatment); *Robinson*, 718 N.W.2d at 405 (noting the record from the trial court "contain[ed] no medical expert testimony on the scope of the customary treatment of a victim of domestic violence or whether the identity of the domestic abusers is reasonably pertinent to that treatment").

174. *Smith*, 876 N.W.2d at 190.

175. *Id*. The Iowa Supreme Court detailed the holding of the case:

> [The] conclusion does not mean the identity of a perpetrator of domestic abuse can never be admitted into evidence under [Iowa Rule 803(4)]. It only means that the State must introduce evidence to establish the necessary foundation regarding both the declarant's motive in making the statement and the pertinence of the identification in diagnosis or treatment.

Id. *See also Robinson*, 718 N.W.2d at 407 (explaining the holding in the case does not bar the possibility that there are facts sufficient enough to find identity is reasonably pertinent in a domestic violence case). The Minnesota Supreme Court elucidated:

> We do not foreclose the possibility that we might in the future adopt a properly limited categorical rule of admissibility under the medical exception to hearsay for statements of identification by victims of domestic violence . . . . And we do not suggest that accusations by victims of domestic abuse are unreliable. We only hold that where, as here, there is an insufficient evidentiary foundation to establish that the identity of the person who caused an injury was reasonably pertinent to the medical diagnosis or treatment of that injury, the statement of identity is not admissible under [the medical diagnosis or treatment exception].

Id. (footnote omitted).

The dissenting opinion in *Smith* emphasized that M.D.'s statements regarding Smith's identity came as a reply to standard protocol questions.[176] The dissent reiterated the two-prong test the majority utilized and concluded M.D.'s statements were, in fact, reasonably pertinent to medical treatment.[177] The dissenting opinion argued the standard questions the nurse asked M.D. did aid in M.D.'s medical treatment.[178] Furthermore, under Iowa Rule 803(4), statements made do not need to be used for actual treatment.[179] Instead, the circumstances and context in which the statement was made is the driving consideration for admittance under Iowa Rule 803(4).[180]

III. ANALYSIS

Testimony from medical providers about the identity of the alleged perpetrator in domestic violence cases should be admitted under the medical diagnosis or treatment exception to hearsay in Nebraska courts.[181] If testimony from a medical provider demonstrates that a statement made by a victim of domestic violence is given with purpose of providing assistance to the medical provider for the victim's treat-

176. *Smith*, 876 N.W.2d at 192 (Waterman, J., dissenting).

177. *Id*. at 193-94.

178. *See id*. at 193 (explaining that M.D.'s statements to the nurse were in response to standard protocol questions and indicated M.D. was subjected to abuse by Smith, which can then be used for diagnosis or treatment).

179. *Id*. at 194. Justice Waterman stated:

> The questions about domestic abuse are asked for a reason—to allow the treating physicians and nurses to understand what happened and properly conduct follow-up treatment as necessary. . . . [Iowa Rule 803(4)] does not condition admissibility on a showing that the patient's statements given for medical treatment and diagnosis were actually used for treatment.

Id.

180. *See id*. ("The context in which the identification is made is what matters, not what the treating physician and nurse did with that information.").

181. *Compare* Perry v. State, 956 N.W.2d 41, 50 (Ind. Ct. App. 2011) (concluding statements made by a victim of domestic violence were admissible under the medical diagnosis or treatment exception), *with* Oldman v. State 998 P.2d 957, 962 (Wyo. 2000) (holding testimony from a medical provider regarding statements from a domestic violence victim was admissible under the medical diagnosis treatment). *Cf.* State v. Beeder, 707 N.W.2d 790,797 (Neb. 2006), *disapproved on other grounds by* State v. McCullouch, 742 N.W.2d 727, 733 (Neb. 2007) (stating identity should not be admitted under Rule 803(3) unless the government shows the identity of the defendant was reasonably pertinent to the medical diagnosis or treatment of the victim). The Nebraska Supreme Court illustrated the facts of the case did not support a finding that the identity of the assailant was reasonably pertinent

> because the State provided no reason why the defendant's identity would be reasonably pertinent to [the victim's] diagnosis and treatment and because [the treating physician] suggested that it was not . . . . [The] testimony . . . should be excluded as hearsay . . . unless the defendant's identity is redacted or *the State demonstrates that the defendant's identity is reasonably pertinent* to [the victim's] diagnosis and treatment.

Beeder, 707 N.W.2d at 797 (emphasis added).

ment, the statement is reasonably pertinent to medical treatment, and a physician would reasonably rely upon the statement, then it should be admissible under Rule 803(3).[182] Statements regarding perpetrator identity by domestic violence victims can be utilized in providing medical treatment for purposes of safety, prophylactic treatment, and psychological treatment, therefore possessing the requisite elements of Rule 803(3).[183]

First, this Analysis will show that admitting the testimony from medical providers regarding the identity of the alleged domestic violence perpetrator is permissible under the medical diagnosis or treatment exception to hearsay because statements regarding identity can possess the requisite purposes for admissibility under Rule 803(3).[184] Next, this Analysis will argue that the Nebraska Supreme Court should adopt the framework utilized by other jurisdictions in order to evaluate the admissibility of medical providers' testimony on a case-by-case basis.[185] Subsequently, this Analysis will address a possible objection that identity is normally not perceived as being pertinent to medical treatment because statements ascribing fault are generally not admissible under Rule 803(3).[186] Lastly, this Analysis will rebut that possible objection and demonstrate how other courts have deemed the identity of the alleged perpetrator to be reasonably pertinent to the medical treatment of a victim of domestic abuse, including how identity is used to treat the emotional, psychological, and physical well-being of the victim and other policy reasons.[187]

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182. *Compare* State v. Vaught, 682 N.W.2d 284, 289 (Neb. 2004) (denoting in order for statements to be admissible under Rule 803(3), "the declarant's purpose in making the statement was to assist in the provision of medical diagnosis or treatment, that the declarant's statement was reasonably pertinent to such diagnosis or treatment and, further, that a doctor would reasonably rely on such statement"), *with* State v. Vigil, 810 N.W.2d 687, 694 (Neb. 2012) (explaining in order to be admissible under Rule 803(3), the statement must be of a nature that "assist[s] in the provision of medical diagnosis or treatment," and the statement was "reasonably pertinent to medical diagnosis or treatment by a medical professional").

183. Compare *Oldman*, 998 P.2d at 962 (explaining safety, treating a possible infectious disease from human bite marks, and treating the underlying abuse as well as the physical injuries made the identity of the domestic violence perpetrator reasonably pertinent), *with Perry*, N.W.2d at 50 ("N.D.'s identification of her assailant was pertinent to potential treatment for HIV or other sexually transmitted diseases, relevant to any psychological counseling for domestic abuse, and significant to medical personnel in deciding how to discharge their patient.").

184. *See infra* notes 188-206 and accompanying text.

185. *See infra* notes 207-212 and accompanying text.

186. *See infra* notes 213-221 and accompanying text.

187. *See infra* notes 222-237 and accompanying text.

A. Testimony from Medical Providers About the Identity of the Alleged Perpetrator in Domestic Violence Cases Should be Admissible Pursuant to Nebraska's Medical Diagnosis or Treatment Exception to Hearsay

1. Foundation for the Medical Diagnosis or Treatment Exception

Rule 802 provides the general rule that hearsay is not admissible into evidence.[188] However, Rule 803 affords exceptions to the general hearsay rule.[189] Specifically, Rule 803(3) provides an exception to the hearsay rule for statements that are reasonably pertinent to and made for the purpose of medical diagnosis or treatment.[190] Moreover, Rule 803(3) is premised upon the belief that an individual making statements to a medical provider about his or her condition is doing so in a truthful manner in order to receive the correct treatment.[191]

In order for testimony to be admissible under Rule 803(3), the proponent of that testimony must lay the proper foundation.[192] First, there must be a demonstration that the declarant's motive in making the statements was to help facilitate the medical diagnosis or treat-

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188. *See* Neb. Rev. Stat. § 27-802 ("Hearsay is not admissible except as provided by these rules, by other rules adopted by the statues of the State of Nebraska, or by the discovery rules of the Supreme Court.").

189. *See id.* § 27-803 ("[T]he following [statements] are not excluded by the hearsay rule, even though the declarant is available as a witness . . . .").

190. *See id.* § 27-803(3) (stating "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past of present symptoms, pain, or sensation, or the inception or general character of the cause or external source there of insofar as reasonably pertinent to diagnosis or treatment" are not excluded as hearsay); *see also* Ind. R. Evid. 803(4) (outlining the requirements from a statement to be admitted under the medical diagnosis or treatment exception). Indiana Rule 803(4) provides:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness [a] statement that: (A) is made by a person seeking medical diagnosis or treatment;(B) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (C) describes medical history; past or present symptoms, pain or sensations; their inception; or their general cause.

Id.

191. *Compare* State v. Vigil, 810 N.W.2d 687, 694 (Neb. 2012) (noting an assumption that person seeking medical attention will be truthful to ensure correct treatment is received), *with* State v. Smith, 876 N.W.2d 180, 185 (Iowa 2016) (explaining the rationale behind medical diagnosis or treatment exception is that a statement made by an individual to a medical provider is "likely to be reliable because the patient has a selfish motive to be truthful" in order to receive accurate treatment), *and* Oldman v. State, 998 P.2d 957, 961 (Wyo. 2000) (stating the medical diagnosis or treatment exception is rooted in the premise that a patient's belief in the effectiveness of medical treatment is dependent upon the correctness of the statements made to a medical provider).

192. *See Vigil*, 810 N.W.2d at 694 (stating the two requirements for statement to be admissible under Rule 803(3) are the statement's purpose was to assist in the medical provider's treatment and the statement was "reasonably pertinent to medical diagnosis or treatment by a medical professional").

ment provided.[193] Second, the statements made must be reasonably pertinent to the promotion of a medical diagnosis or treatment by a medical provider.[194] Thus, if the party who is seeking to introduce testimony under Rule 803(3) establishes these two prerequisites, then the testimony from medical providers is admissible under Rule 803(3).[195]

2. Relevancy of Identity for Purposes of the Medical Diagnosis or Treatment Exception

Rule 803(3) states that so long as the statements made are reasonably pertinent for medical diagnosis or treatment, the statements describe pain, previous medical history, symptoms, sensations, or the general origin or character of the cause, the statement should not be excluded as hearsay.[196] Courts in Nebraska are ordinary in the fact that statements attributing fault of an injury are generally not admissible under Rule 803(3) and allows trial courts to have discretion in admitting statements regarding identity.[197] However, other courts have carved out an exception to this general rule by allowing the iden-

193. *Compare id*. (acknowledging it must be demonstrated that the purpose of making the statement was to aid in the assistance of a medical diagnosis or treatment), *with Smith*, 876 N.W.2d at 185 (clarifying the requirement that the purpose of a declarant's statement must be analogous with the purpose of promoting medical treatment).

194. *Compare Vigil*, 810 N.W.2d at 694 (explaining for purposes of Rule 803(3), a statement must be reasonably pertinent to medical treatment or diagnosis), *with Smith*, 876 N.W.2d at 185 (requiring the statement to be reasonably relied upon by a doctor for medical diagnosis or treatment, as well as reasonably pertinent).

195. *See Vigil*, 810 N.W.2d at 696-97 (explaining that statements are admissible under Rule 803(3) "only if the proponent of the statements demonstrates that (1) the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment and (2) the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional").

196. *See* NEB. REV. STAT. § 27-803(3) (specifying "statements made for purposes of medical diagnosis or treatment and describing medical history, or past of present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" will be admitted under Rule 803(3)).

197. *Compare Vigil*, 810 N.W.2d at 698 (noting generally that statements made for purposes of ascribing fault are not admissible under Rule 803(3)), *with* State v. Koederitz, 166 So. 3d 981, 984 (La. 2015) (expressing the general rule in Louisiana that statements regarding the fault of injuries are not encompassed by the medical diagnosis or treatment exception), State v. Robinson, 718 N.W.2d 400, 404 (Minn. 2006) (remarking that statements attributing fault, including identity, generally are not admissible under the medical diagnosis or treatment exception), *Oldman*, 998 P.2d at 961 (explaining statements regarding fault or causation are generally not admissible because the relevancy of those statements is questionable for purposes of medical treatment or diagnosis), *and* State v. Vaught, 682 N.W.2d 284, 287 (Neb. 2004) (stating when the Nebraska Rules of Evidence are at issue, the Nebraska Supreme Court reviews the trial court's discretion under an abuse of discretion standard), *with* Perry v. State, 956 N.W.2d 41, 49 (Ind. Ct. App. 2011) (noting courts can exercise their discretion when admitting statements stemming from medical diagnosis, which convey the identity of the alleged perpetrator).

tity of an alleged perpetrator in cases where child sexual abuse is alleged.[198] In prior cases involving child sexual abuse, the identity of the perpetrator is reasonably pertinent to medical treatment when a party successfully demonstrates that the identity assisted in effective physical and mental treatment, as well as ensuring a child's safety.[199]

The extension of the reasoning and logic behind admitting statements regarding identity under the medical diagnosis or treatment exception from victims of child sexual abuse to cases of domestic sexual abuse is logical.[200] The identity of an abuser is reasonably pertinent to medical treatment because the extent and character of the emotional and psychological injuries suffered by victims of domestic sexual abuse are dependent upon the identity of the abuser.[201] Using this reasoning, courts have extended the foundational premise that identity is reasonably pertinent to the treatment of domestic sexual abuse victims to encompass instances where the victim was a victim of domestic violence.[202] Some courts have declined to admit the identity

198. *Compare Vigil*, 810 N.W.2d at 698 (clarifying identity is relevant and reasonably pertinent for treatment of child sexual abuse victims because there is a concern for a child's safety if a familial relationship involved), *with Koederitz*, 166 So. 3d at 985 (differentiating the exception for child sexual abuse to the general rule that identity is excluded under the medical diagnosis or treatment exception), *Robinson*, 718 N.W.2d at 404-05 (mentioning statements from child sexual abuse victims regarding identity are usually admissible under the medical diagnosis or treatment exception, but denying a categorical rule of that nature), *and Oldman*, 998 P.2d at 961 (asserting that identity is relevant for child sexual abuse and domestic sexual abuse victims under the medical diagnosis or treatment exception).

199. *Compare Vigil*, 810 N.W.2d at 698 (indicating identity of an abuser in a child sexual abuse case is reasonably pertinent to treatment because treatment would not be successful if the victim is returned to the abuser's custody), *with Koederitz*, 166 So. 3d at 985 (explaining the Louisiana legislature's interest in allowing the identity of an abuser to come in under the medical diagnosis or treatment exception in order to protect victims of child sexual abuse), *Smith*, 876 N.W.2d at 186 (clarifying identity is relevant in treating child abuse victims because of the possibility of reoccurring abuse and treatment by doctors for physical, emotional, and psychological abuse), *and Oldman*, 998 P.2d at 961 (quoting United States v. Renville, 779 F.2d 430, 437 (8th Cir. 1985)) (describing that identification of an abuser in a child abuse case is relevant to the treatment of emotional and psychological injuries resulting from the crime).

200. *See* United States v. Joe, 8 F.3d 1488, 1494 (10th Cir. 1993) ("The identity of the abuser is reasonably pertinent to treatment in virtually every domestic sexual assault case, even those not involving children.").

201. *See id.* ("All victims of domestic sexual abuse suffer emotional and psychological injuries, the exact nature and extent of which depend on the identity of the abuser.").

202. *See Oldman*, 998 P.2d at 962 (declaring, after a quote from *Joe*, 8 F.3d at 1494-95, that "there is no logical reason for not applying [the rationale for domestic sexual abuse cases] to non-sexual, traumatic abuse within a family or household, since sexual abuse is simply a particular kind of physical abuse"); *see also Perry*, 956 N.W.2d at 50 (indicating statements about the identity of the alleged perpetrator made by the victim of domestic abuse to a nurse were admissible because the identity was pertinent for treatment of physical injuries, psychological counseling, and decisions regarding the discharge of the patient); *Koederitz*, 166 So. 3d at 986 (citing *Joe*, 8 F.3d at 1493-95)

of an alleged perpetrator in domestic violence cases, not because of the rationale used, but because the facts of the case did not demonstrate that identity was reasonably pertinent to medical treatment.[203]

3. Courts in Nebraska Should Allow Testimony About the Identity of an Alleged Perpetrator in Domestic Violence Cases Under Rule 803(3)

If a proponent can demonstrate that a statement made to a medical provider is reasonably pertinent to medical treatment and the statement's purpose was to facilitate treatment, then the statement is admissible for purposes of Rule 803(3).[204] Moreover, a statement from a victim of domestic violence to a medical provider concerning the identity of the alleged perpetrator can be reasonably pertinent to medical treatment and also for the promotion of medical treatment.[205] Therefore, if a proponent makes these showings, the testimony from a

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(extending the logic to encompass statements of fault by domestic violence victims); Moore v. City of Leeds, 1 So. 3d 145,150 (Ala. Crim. App. 2008) (citing *Joe*, 8 F.3d at 1493-95) (holding that a victim's statements to a doctor in a domestic violence case about the identity of the person who caused her injuries was admissible under the medical diagnosis or treatment exception because the identity was used for the treatment of the overall medical condition).

203. *See Robinson*, 718 N.W.2d at 407 (holding there was an insufficient factual basis to find that the identity of an alleged perpetrator in a domestic violence case was reasonably pertinent to medical treatment, but noting that the court does not exclude the possibility of adopting a rule concerning the admissibility of identity under the medical diagnosis or treatment exception in domestic violence cases); *see also Smith*, 876 N.W.2d at 190 (articulating that while the State laid insufficient foundation to show that the identity of the assailant was reasonably pertinent to the medical treatment of a domestic violence victim, the court does not conclude that the identity will never be reasonably pertinent in future cases for purposes of the medical diagnosis or treatment exception); State v. Beeder, 707 N.W.2d 790, 797 (Neb. 2006), *disapproved on other grounds by* State v. McCullouch, 742 N.W.2d 727, 733 (Neb. 2007) (concluding a medical provider's testimony about the identity of a domestic abuser is inadmissible hearsay because the State failed to prove the identity is reasonably pertinent to medical treatment for purposes of Rule 803(3)).

204. *Compare Vigil*, 810 N.W.2d at 695-97 (declaring admissibility of statements under Rule 803(3) is determined by deciding whether the person making the statement had the purpose of assisting in medical treatment and the statement was reasonably pertinent to medical treatment), *with Perry*, 956 N.W.2d at 49 ("In determining the admissibility of hearsay under [the medical diagnosis or treatment exception], courts evaluate (1) whether the declarant's motive was to provide truthful information to promote diagnosis and treatment and (2) whether the content of the statement is such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment.").

205. *Compare Oldman*, 998 P.2d at 962 (reasoning statements from a victim about the identity of the perpetrator were admissible under the medical diagnosis or treatment exception because it was important to know who inflicted the victim's bite marks in order to treat for infectious disease, as well as care for the safety of the victim during her recovery), *with Perry*, 956 N.W.2d at 50 (concluding identity of the assailant was admissible under the medical diagnosis or treatment exception because it was pertinent to the treatment of the victim for possible sexually transmitted diseases, psychological counseling, and the victim's safety after discharge).

medical provider about the identity of an alleged perpetrator of domestic violence should be admissible under Rule 803(3).[206]

B. The Nebraska Supreme Court Should Rule that the Identity of an Alleged Perpetrator in Domestic Violence Cases Is Admissible Under Rule 803(3)

The Nebraska Supreme Court should extend the already existing case law and logic surrounding the admissibility of identity in child abuse cases and allow medical providers to testify regarding the identity of an alleged perpetrator in domestic violence cases.[207] Like other states, Nebraska provides a hearsay exception for medical diagnosis and treatment under Rule 803(3).[208] Moreover, Nebraska precedent, instructively in child abuse cases, dictates if a proponent can show the declarant made the statement in contemplation of providing assistance to a medical provider, and the statement is reasonably pertinent to medical treatment, then the statement is admissible under Rule 803(3).[209]

Furthermore, the Nebraska Supreme Court has previously ruled the identity of the perpetrator in child sexual assault cases was admis-

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206. *Compare Oldman*, 998 P.2d at 962 (reasoning a statement from a victim about the identity of the perpetrator in a domestic violence case was relevant and properly admitted under the medical diagnosis and treatment exception), *with Perry*, 956 N.W.2d at 50 (concluding the victim's statements made to the nurse about the identity of a perpetrator in a domestic violence case was admissible under the medical diagnosis or treatment exception), *City of Leeds*, 1 So. 3d at 150 (holding statements from a victim to a doctor concerning the identity of the perpetrator were admissible under the medical diagnosis or treatment exception), *and Koederitz*, 166 So. 3d at 986 (recognizing hospital records that denote the identity of the perpetrator in a domestic violence case were admissible under the medical diagnosis or treatment exception).

207. *Compare* State v. Vaught, 682 N.W.2d 284, 293 (Neb. 2004) (concluding that a doctor's testimony regarding the child sexual abuse victim's identification of the perpetrator was admissible under Rule 803(3)), *with* Oldman v. State, 998 P.2d 957, 962 (Wyo. 2000) (declaring there is no reason to exclude the identity of an assailant in domestic abuse cases since identity is allowed under the medical diagnosis or treatment exception for cases involving domestic sexual abuse), *and* Moore v. City of Leeds, 1 So. 3d 145, 150 (Ala. Crim. App. 2008) (recognizing the rationale used for admitting identity under the medical diagnosis or treatment exception in domestic sexual assault cases is applicable to domestic violence cases as well).

208. Neb. Rev. Stat. § 27-803(3). *See also, e.g.*, Iowa R. Evid. 5.803(4) (denoting the medical diagnosis or treatment exception to hearsay).

209. *See* State v. Vigil, 810 N.W.2d 687, 696-97 (Neb. 2012) (stating the two requisites for a statement to admitted under Rule 803(3) are that the statement must have provided assistance to medical diagnosis or treatment, and the statement must be reasonably pertinent to a medical provider for treatment or diagnosis); *see also Vaught*, 682 N.W.2d at 289 (explaining that for purposes of Rule 803(3), "the evidence must satisfactorily demonstrate that the circumstances under which the statement was made were such that the declarant's purpose in making the statement was to assist in the provision of medical diagnosis or treatment, that the declarant's statement was reasonably pertinent to such diagnosis or treatment and, further, that a doctor would reasonably rely on such statement").

sible under Rule 803(3).[210] The Nebraska Supreme Court determined the statements regarding the identity of the perpetrators were reasonably pertinent and assisted doctors in rendering the appropriate treatment.[211] Thus, because the Nebraska Supreme Court has set forth the foundation for the admissibility of statements by medical providers about the identity of an alleged perpetrator in child sexual abuse cases under Rule 803(3), the court should extend this logic to allow statements about identity in domestic violence cases.[212]

C. Possible Objection that Statements Made to a Medical Provider About the Identity of an Alleged Perpetrator are not Reasonably Pertinent to Medical Diagnosis or Treatment of Domestic Violence Victims

Some courts have struggled with determining whether a statement is reasonably pertinent for purposes of the medical diagnosis or treatment exception when the statement identified an alleged perpetrator in domestic violence cases.[213] The exception is premised upon the notion that the hearsay is reliable due to the selfish motive a pa-

210. *See Vigil*, 810 N.W.2d at 698 (determining the identity of the perpetrator was correctly admitted under Rule 803(3) in a child sexual abuse case); *see also Vaught*, 682 N.W.2d at 293 (concluding a statement from a child sexual abuse victim to her medical provider about the perpetrator's identity was properly admitted under Rule 803(3)).

211. *See Vigil*, 810 N.W.2d at 697-98 (reasoning the identity of the perpetrator was relevant to the medical treatment of the victim because the doctor needed to know who caused the injuries in order to provide proper psychological treatment, prophylactic treatment for sexually transmitted diseases, and care for the safety of the victim); *see also Vaught*, 682 N.W.2d at 289 ("[The doctor's] testimony indicate[d] his state of mind was such that he reasonably relied on the victim's statement. [The doctor] also testified that there were valid medical treatment purposes for learning the identity of the perpetrator and that such purposes were pertinent to diagnosis and treatment.").

212. *Compare Vigil*, 810 N.W.2d at 696-97 (declaring statements are admissible under Rule 803(3) if the statement had the purpose of providing assistance to the medical provider during treatment and it was reasonably pertinent), *with Oldman,* 998 P.2d at 692 (reasoning there is a logical extension from admitting the identity of the perpetrator under the medical treatment or diagnosis exception in domestic sexual assault cases to the identity of perpetrators in domestic abuse cases), *City of Leeds*, 1 So. 3d at 150 (holding the identity of the perpetrator in a domestic violence case was admissible under the medical treatment or diagnosis exception because, like a sexual assault victim, a domestic violence victim also needed treatment for her overall medical condition), *and* Perry v. State, 956 N.W.2d 41, 50 (Ind. Ct. App. 2011) (concluding "the material statements [the victim] made to [the nurse] . . . were admissible pursuant to [the medical diagnosis or treatment exception]").

213. State v. Smith, 876 N.W.2d 180, 186 (Iowa 2016). The court explained that identity of the perpetrator who inflicted the injury "can be vexing for judges and lawyers. Normally, the identity of the perpetrator of physical injuries is not understood to be necessary information for effective medical treatment." *Smith*, 876 N.W.2d at 186. *See also* State v. Robinson, 718 N.W.2d 400, 405 (Minn. 2006) (acknowledging the court is "not able to determine by judicial notice or general knowledge whether the notion that the identification of the perpetrator of domestic violence is reasonably pertinent to medical diagnosis and treatment is generally accepted in the medical profession").

tient has to impart accurate information to a medical professional in order to receive proper treatment.[214] Despite this presumption, there is a hesitation to rule that identity is reasonably pertinent to treatment because identity is not generally relevant to treatment of physical injuries.[215] Normally, identity is not thought to be necessary in the medical profession in order to provide effective medical treatment.[216]

As a general rule, statements that attribute fault or causation are not admissible for purposes of the medical diagnosis or treatment exception.[217] The reasoning behind this general rule is statements of that nature are not relevant for purposes of medical diagnosis or treatment.[218] Furthermore, whether the medical profession generally accepts identity as pertinent to medical treatment is not a question for a court to decide, but rather an issue within the medical profession.[219]

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214. *Compare* State v. Vigil, 810 N.W.2d 687, 694 (Neb. 2012) (specifying Rule 803(3) is premised on the idea that a patient obtaining medical treatment will be truthful in order to receive proper treatment), *with Robinson*, 718 N.W.2d at 404 (articulating the notion behind the medical diagnosis or treatment exception is the belief a person is relaying accurate information to the treating physician so proper medical treatment is rendered).

215. *See Smith*, 876 N.W.2d at 186 (quoting United States v. Joe, 8 F.3d 1488, 1494 (10th Cir. 1993)) (recognizing that "the identity of the perpetrator of physical injuries is not understood to be necessary information for effective medical treatment"); *see also Robinson*, 718 N.W.2d at 404 ("In contrast to the general notion that statements explaining the cause of an injury are admissible under the medical diagnosis exception, statements attributing fault, including statements identifying the accused perpetrator, are ordinarily not admissible.").

216. *See Smith*, 876 N.W.2d at 186 (stating identity of a perpetrator is not generally understood to be necessary information in order to provide a victim with medical treatment); *see also Robinson*, 718 N.W.2d at 406 (detailing how the court is unable to determine identity of a perpetrator in a domestic violence case is reasonably pertinent for medical diagnosis and treatment when the issue depends upon the "views of the medical profession, not on the views of the court").

217. *Compare Robinson*, 718 N.W.2d at 404 ("[U]nder the medical diagnosis exception, statements attributing fault, including statements identifying the accused perpetrator, are ordinarily not admissible."), *with* State v. Oldman, 998 P.2d 957, 961 (Wyo. 2000) ("Statement that have the effect of attributing fault or causation generally are not admissible in evidence under [the medical diagnosis or treatment exception] . . . .").

218. *Compare Smith*, 876 N.W.2d at 186 (citation omitted) ("Normally, the identity of the perpetrator of physical injuries is not understood to be necessary information for effective medical treatment."), *with Oldman*, 998 P.2d at 961 (noting generally under the medical diagnosis or treatment exception, statements attributing fault or causation are not relevant to medical diagnosis or treatment).

219. *See Robinson*, 718 N.W.2d at 406 (explaining how the views of the court for purposes of medical diagnosis or treatment exception is dependent upon the "views of the medical profession"). *Cf. Smith*, 876 N.W.2d at 187 (explaining how testimony by medical professional detailing how the identity of the perpetrator is pertinent to the victim's treatment is needed in order to establish the proper foundation for the medical diagnosis or treatment exception in a child abuse case). The Iowa Supreme Court rejected a categorical rule for admitting identity and explained:

> While it is common for statements of identity made by victims of child abuse to be admitted under [Iowa Rule 803(4)], the statements are not admitted simply

Without testimony indicating otherwise, speculation as to whether the medical field generally accepts identity as relevant to the treatment of a victim as a whole is what a court is left with, and therefore a court is hesitant to deviate from the general rule that identity of an alleged perpetrator is not reasonably pertinent.[220] Thus, some courts have refused to rule that the identity of an alleged perpetrator in a domestic violence case is reasonably pertinent to medical treatment of victims.[221]

D. Statements Concerning the Identity of the Alleged Perpetrator Are Reasonably Pertinent to the Medical Diagnosis or Treatment of Domestic Violence Victims

Declining to allow testimony regarding the identity of a perpetrator in a domestic violence case is incorrect when a court determines identity is not reasonably pertinent to receiving medical treatment.[222] A proponent must demonstrate a statement regarding identity is reasonably pertinent to the receipt of medical treatment in order to be

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> because they fall within a category of statements made to doctors or medical personnel by victims of abuse. Instead, these statements are admitted only when there is evidence that the statements of identity were made by a child-abuse victim for purposes of diagnosis or treatment by a doctor or medical provider and the identity was pertinent to the diagnosis or treatment . . . . [T]he value of that information is established by the foundational testimony of the doctors and medical providers in each case, and that testimony explains the pertinence of the perpetrator's identity to the diagnosis and treatment of the victim in the unique circumstances of each case.

Id.

220. *See Robinson*, 718 N.W.2d at 406 (noting that the court is only left with speculation as to whether the medical profession has evolved to acknowledge treating a victim of domestic violence includes the treating of the whole person). The Minnesota Supreme court elaborated:

> We can speculate that the medical profession may have evolved to recognize the importance of treating the whole person of a victim of domestic violence, including the emotional and psychological effects of past violence and the potential of future violence. But we can do no more than speculate. The record before us contains no medical expert testimony on the scope of the customary treatment of a victim of domestic violence or whether the identity of the domestic abuser is reasonably pertinent to that treatment.

Id.

221. *Compare id.* ("We are not able to determine, by judicial notice or general knowledge, whether the notion that the identification of the perpetrator of domestic violence is reasonably pertinent to medical diagnosis and treatment is generally accepted in the medical profession."), *with Smith*, 876 N.W.2d at 189 (emphasizing there was insufficient evidence to find the identity of a perpetrator was reasonably pertinent to the treatment of a domestic violence victim), *and* State v. Beeder, 707 N.W.2d 790, 797 (Neb. 2006), *disapproved on other grounds by* State v. McCullouch, 742 N.W.2d 727, 733 (Neb. 2007) ("[T]he State provided no reason why the defendant's identity would be reasonably pertinent to [the victim's] diagnosis and treatment . . . .").

222. *See* State v. Smith, 876 N.W.2d 180, 194 (Iowa 2016) (Waterman, J., dissenting) (arguing there should be a categorical rule for the admission of identity in domestic violence cases under the medical diagnosis or treatment exception because identity is reasonably pertinent).

admissible under Rule 803(3).[223] The Nebraska Supreme Court insisted the purpose behind a declarant's statement may be reasonably deduced from the circumstances surrounding the statement.[224] Regardless of the declarant's age, the presumption that a declarant provided truthful information for treatment remains.[225] Thus, if a medical provider can provide testimony to support the inference that the declarant's purpose in stating the identity of the assailant was to assist in medical treatment and the statement was reasonably pertinent to treatment, then the statement is admissible under Rule 803(3).[226]

The Nebraska Legislature has codified its legislative findings that victims of domestic violence are reluctant to seek out help because of the stigma and fear that attach due to the nature of the crime.[227] The Nebraska Legislature also expressed in its finding a direct correlation between the victim's reluctance to seek help due to the retaliatory violence offenders engage in, and victims receiving the help they need.[228] Victims of domestic violence are failing to receive necessary care and counseling, which results in the lack of support, information, and resources that are vital to the victim's recovery from the abuse.[229] Furthermore, because victims of domestic violence are reluctant to seek help, they are failing to report incidents, assist with the prosecution of

223. *See* State v. Vigil, 810 N.W.2d 687, 696-97 (Neb. 2012) (defining the second prong of admissibility under Rule 803(3) as "the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional"); *see also Smith*, 876 N.W.2d at 194 (Waterman, J., dissenting) ("[The medical diagnosis or treatment exception] does not condition admissibility on a showing that the patient's statements given for medical treatment and diagnosis were actually used for treatment . . . . The context in which the identification is made is what matters, not what the treating physician and nurse did with that information.").

224. *See Vigil*, 810 N.W.2d at 697 (quoting State v. Vaught, 682 N.W.2d 284, 289 (Neb. 2004)) ("[T]he appropriate state of mind of the declarant may be reasonably inferred from the surrounding circumstances.").

225. *See Vaught*, 682 N.W.2d at 289 (noting "[Rule 803(3)] does not make any exception or qualifications based on the age of the declarant").

226. *See* State v. Beeder, 707 N.W.2d 790, 797 (Neb. 2006), *disapproved on other grounds by* State v. McCullouch, 742 N.W.2d 727, 733 (Neb. 2007) (explaining testimony regarding the identity of a perpetrator should be excluded as hearsay unless the State showed that the statement was reasonably pertinent to medical treatment). *Cf. Vaught*, 682 N.W.2d at 289-90 (opining that a doctor's testimony about the identity of a perpetrator in a child abuse case "was sufficient for the district court to conclude that the victim's statement was of the type described in § 27-803(3) and therefore admissible under that statute").

227. NEB. REV. STAT. § 29-4301 ("The Legislature finds that because of the fear and stigma that often results from crimes of . . . domestic violence . . . many victims hesitate to seek help even when it is available at no cost to them.").

228. *See id*. ("[B]ecause of the risk of retaliatory violence by the perpetrator, many victims hesitate to seek help . . . .").

229. *See id*. ("[V]ictims may fail to receive needed vital care and counseling and thus lack the support, resources, and information necessary to recover from the crime . . . .").

the crime, participate meaningfully in the criminal justice system, acquire legal protections, and stop future crimes of domestic violence.[230] As a result of these findings, the Legislature has expressly stated the lack of help victims are receiving is matter of concern for the State of Nebraska.[231]

The Nebraska Legislature enacted a mandatory reporting statute that requires medical professionals to notify law enforcement when a patient appears to have received their injuries from the commission of a crime.[232] The Nebraska Legislature has expressed its clear intent to protect victims of violence through the use of the criminal justice system.[233] Thus, the Nebraska Supreme Court should comport with the Legislature's intent to protect victims of domestic violence and extend the existing case law surrounding Rule 803(3) to allow medical providers to testify to a victim's statement regarding his or her abuser.[234]

The modern understanding of domestic violence victims is evolving to include the understanding that victims need treatment of the whole person, including emotional and psychological injuries.[235] The

230. *See id*. ("[V]ictims may fail . . . to report the crime, to assist in the prosecution of the crime, to participate effectively in the justice system, to achieve legal protections, and to prevent future . . . domestic violence.").

231. *See id*. ("This is a matter of statewide concern, and the prevention of violence is for the protection of the health, safety, and welfare of the public.").

232. *See* NEB. REV. STAT. § 28-902 ("Every person engaged in the practice of medicine and surgery, or who is in charge of any emergency room or first-aid station in this state, shall report every case, in which he is consulted for treatment or treats a wound or injury of violence which appears to have been received in connection with the commission of a criminal offense . . . .").

233. *Compare id.* § 29-4301 (finding protection of domestic violence victims through the use of the criminal justice system, as well as providing support and resources, is a matter of concern for the State of Nebraska), *with* § 28-902 (requiring medical professionals to report to law enforcement when a patient appears to have sustained injuries in connection with the commission of a crime).

234. *Compare id.* § 29-4301 (declaring the Nebraska Legislature's finding that ensuring victims of domestic violence are receiving the proper care, which includes the utilization of the criminal justice system), *and* § 28-902 (mandating medical professionals to report when a patient received their injuries in connection with the commission of a crime), *with* State v. Koederitz, 166 So. 3d 981, 985 (La. 2015) (stating "[t]he [medical diagnosis and treatment] hearsay exception . . . has . . . received particular application in cases of child sexual abuse, including statements of fault" because of an expressed desire by the state legislature to protect child sexual abuse victims), *and* United States v. Joe, 8 F.3d 1488, 1494 (10th Cir. 1993) (providing justification for ruling identity was reasonably pertinent, in part, because "physicians often have an obligation under state law to prevent an abused child from being returned to an abusive environment"). *Cf. Vaught*, 682 N.W.2d at 293 (concluding a doctor's testimony regarding a statement about identity made to him by a child sexual abuse victim was admissible under Rule 803(3)); *Koederitz*, 166 So. 3d at 985 (extending the rationale under the medical diagnosis or treatment exception for admitting statements regarding identity from child sexual abuse victims to include similar statements made by victims of domestic violence).

235. *See* Oldman v. State, 998 P.2d 957, 962 (Wyo. 2000) ("The identity of the assailant in this case was relevant . . . to treat the abuse as an underlying cause, rather than simply the injuries that were inflicted on this occasion."); *see also* Moore v. City of

identity of the person that commits domestic violence is relevant and reasonably pertinent because victims receive different treatment for abuse in familial relationships, as opposed to an attack by a stranger, safety concerns, and reoccurring abuse.[236] If the medical provider can provide testimony that the identity of the assailant pertained to a victim's treatment, then a court should find the statement about identity of an alleged perpetrator is reasonably pertinent to medical treatment.[237]

IV. CONCLUSION

Courts have correctly admitted the identity of domestic violence perpetrators under the medical diagnosis or treatment exception to hearsay.[238] If the proponent can demonstrate that a victim's statement regarding the perpetrator's identity is reasonably pertinent to medical treatment, and establishes the proper foundation required for the medical diagnosis or treatment exception, then the statement should be admitted.[239] Moreover, in Nebraska, a declarant's state of mind may be inferred from the testimony of medical professionals.[240] Medical professionals are able to testify in order to establish the foundational requirements under Rule 803(3), as well as if the statements regarding identity were reasonably pertinent.[241] Thus, in Nebraska, domestic violence victim's statements can be reasonably pertinent and for the purpose of medical treatment, and testimony by medical professionals regarding the identity of the perpetrator should be admitted under the medical diagnosis or treatment exception.[242]

Leeds, 1 So. 3d 145, 150 (Ala. Crim. App. 2008) (holding the identity of the assailant in a domestic violence case was admissible under the medical diagnosis or treatment exception for purposes of rendering aid to the victim's overall medical condition); Perry v. State, 956 N.W.2d 41, 50 (Ind. Ct. App. 2011) (reasoning that identity of the perpetrator was admissible because it was reasonably pertinent to the victim's psychological counseling and treatment of a potential sexually transmitted disease).

236. *See Oldman*, 998 P.2d at 962 (emphasizing that identity of the assailant was relevant to treating human bite marks, safety of the victim at the hospital, and treatment of the underlying issues of repeated abuse); *see also Perry*, 956 N.W.2d at 50 (explaining that identity of the perpetrator was admissible because the treating nurse used the information to create discharge and treatment plans).

237. *See Perry*, 956 N.W.2d at 50 (indicating testimony from the treating nurse about the identity of a domestic violence perpetrator was reasonably pertinent because of the treatment and ongoing care the nurse provided to the victim). *Cf. Vaught*, 682 N.W.2d at 289-90 (stating that the doctor's testimony about the identity of the perpetrator was relevant to the medical treatment of the child abuse victim and therefore, admissible under Rule 803(3)).

238. *See supra* notes 72-146 and accompanying text.

239. *See supra* notes 188-206 and accompanying text.

240. *See supra* notes 207-212 and accompanying text.

241. *See supra* notes 222-237 and accompanying text.

242. *See supra* notes 188-237 and accompanying text.

Domestic violence victims are subjected to repeated abuses and traumas that are physical as well as psychological. Victims are afraid of their abusers and refuse to testify either for safety concerns or reliance upon the false promises made by their abusers to stop the abuse. The medical diagnosis or treatment exception provides an alternative to victims that find themselves in these endless cycles of abuse and provides an escape from the abuse that is within the confines of the law. Allowing a medical provider to testify to the identity of an abuser gives victims power to say that they were not the reason a defendant was put into jail. Instead, a third party that is not connected to the defendant can act as a scapegoat for the victim and better ensure the victim's future safety. Allowing prosecutors to properly utilize this exception provides an alternative to providing justice without requiring victims to relive their abuse in front of their abuser and a courtroom.

Faith Kjelstrup—'19

RISHOR V. FERGUSON: THE NINTH CIRCUIT ERRED IN HOLDING THAT RULE 59(E) MOTIONS ARE NOT SUBJECT TO THE RESTRICTIONS OF AEDPA WHEN THOSE MOTIONS DO NOT PRESENT ENTIRELY NEW CLAIMS FOR HABEAS CORPUS RELIEF

I. INTRODUCTION

Congress's passage of the Antiterrorism and Effective Death Penalty Act of 1996[1] ("AEDPA") severely limits the subject matter jurisdiction of federal judges in reviewing habeas corpus applications made to the federal courts by state prisoners.[2] Perhaps the most notable limitation placed on a federal judge's jurisdiction is the ability to review a second or successive habeas corpus petition made by a state prisoner.[3] In *Gonzalez v. Crosby*,[4] the United States Supreme Court held that a Federal Rule of Civil Procedure Rule 60(b) motion for relief from the judgment of a district court is to be treated as a second or successive petition when that motion asserts or reasserts an attack on the state trial court's ruling.[5] Since the *Gonzalez* decision, circuit courts of appeals faced the task of determining if the analysis used by the Court to determine if Rule 60(b) motions for relief from judgment should also apply to Rule 59(e) motions to alter or amend a judgment.[6]

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1. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 28 U.S.C. §§ 2241-2255 (2012)).

2. *See generally* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(b) (2012) (preventing federal judges from reviewing any habeas corpus claim made by a state prisoner in federal court which the prisoner had already made in a prior application, and, in most cases, proscribing federal judges from reviewing claims that the prisoner failed to state on a prior habeas corpus application).

3. 28 U.S.C. § 2244(b)(1). The statute states that "[a] claim presented in a second or successive habeas corpus application under § 2254 [another AEDPA provision providing for the federal relief of petitioners in captivity subject to a state judgment] that was presented in a prior application shall be dismissed." *Id*.

4. 545 U.S. 524 (2005).

5. Gonzalez v. Crosby, 545 U.S. 524, 538 (2005).

6. Rishor v. Ferguson, 822 F.3d 482, 491 (9th Cir. 2016). Circuit courts have split on this issue. *Rishor*, 545 U.S. at 538. Some courts reason that a Rule 59(e) motion can never be considered a second or successive petition and thus is not subject to the restrictions of AEDPA. Blystone v. Horn, 664 F.3d 397, 415 (3d Cir. 2011); Howard v. United States, 533 F.3d 472, 475-76 (6th Cir. 2008); Curry v. United States, 307 F.3d 664, 665 (7th Cir. 2002). Other courts have analogized Rule 59(e) motions to Rule 60(b) motions and held that they are subject to the restrictions of AEDPA only when they meet the criteria discussed by the United States Supreme Court in *Gonzalez*. Williams v. Thaler, 602 F.3d 291, 303-05 (5th Cir. 2010); Ward v. Norris, 577 F.3d 925, 935 (8th Cir. 2009); United States v. Pedraza, 466 F.3d 932, 934 (10th Cir. 2006).

This question has ultimately resulted in differing opinions between the circuit courts of appeals.[7]

In *Rishor v. Ferguson*,[8] the United States Court of Appeals for the Ninth Circuit combined the two differing lines of reasoning from other circuit courts to create a hybridized analysis for determining if or when a Rule 59(e) motion is subject to the restrictions of AEDPA.[9] In *Rishor*, convict-petitioner Kirk Rishor filed for habeas corpus relief from his state conviction, which the United States District Court for the Western District of Washington subsequently dismissed.[10] Rishor promptly filed a Rule 59(e) motion requesting that the court reconsider its decision.[11] The court granted the motion, and the State then appealed, arguing that Rishor's Rule 59(e) motion was a second or successive habeas corpus petition under AEDPA and thus statutorily barred from review by the district court.[12] Upon review, the Ninth Circuit held that Rishor's Rule 59(e) motion was not a second or successive petition under AEDPA and that the restrictions of AEDPA only apply to Rule 59(e) motions when those motions raise a new claim for habeas relief.[13]

This Note will first review the facts and holding of *Rishor*.[14] This Note will then briefly discuss the history of the writ of habeas corpus and how it has been infused into the United States Constitution and the laws of the United States.[15] This Note will also briefly discuss Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure.[16] This Note will then discuss the United States Supreme Court's decision in *Gonzalez* and how that decision relates to post-judgment motions made in the habeas context.[17] Next, this Note will discuss the approach taken by the United States Court of Appeals for the Eighth Circuit in determining when a Rule 59(e) motion is subject to the re-

7. *Compare Williams*, 602 F.3d at 305 (holding that Rule 59(e) motions are subject to the restrictions of AEDPA when they meet the criteria set out in *Gonzalez*), *Ward*, 577 F.3d at 935 (concluding that the Rule 59(e) motion was improper because it amounted to a second habeas corpus petition), *and Pedraza*, 466 F.3d at 935 (denying petitioner's Rule 59(e) motion because the motion was subject to the restrictions of AEDPA), *with Blystone*, 664 F.3d at 415 (holding that Rule 59(e) motions are not a second or successive habeas corpus petition), *Howard*, 533 F.3d at 475 (holding that Rule 59(e) motions are not subject to the limitations of AEDPA), *and Curry*, 307 F.3d at 666 (reasoning that Rule 59(e) motions are not subject to the limitations of AEDPA).

8. 822 F.3d 482 (9th Cir. 2016).

9. *Rishor*, 822 F.3d at 492.

10. *Id*. at 488.

11. *Id*. at 488-89.

12. *Id*. at 489.

13. *Id*. at 492.

14. *See infra* notes 22-74 and accompanying text.

15. *See infra* notes 75-116 and accompanying text.

16. See *infra* notes 117-127 and accompanying text.

17. *See infra* notes 128-158 and accompanying text.

strictions of AEDPA.[18] Then, this Note will discuss how the United States Court of Appeals for the Third Circuit approached the issue of whether a Rule 59(e) motion is subject to the restrictions of AEDPA.[19] This Note will then demonstrate why the Ninth Circuit's approach in *Rishor* was erroneous in light of the holding in *Gonzalez* and also the plain language of the AEDPA statutes.[20] Finally, this Note will conclude that, in *Rishor*, the Ninth Circuit improperly applied the analysis used by the United States Supreme Court in *Gonzalez* to determine when a post-judgment motion is subject to the restrictions of AEDPA.[21]

II. FACTS AND HOLDING

In *Rishor v. Ferguson*,[22] the United States Court of Appeal for the Ninth Circuit considered whether a Rule 59(e) motion is considered a second or successive habeas corpus petition subject to the restrictions of AEDPA.[23] In May 2004, the Superior Court of Whatcom County, Washington, oversaw Kirk Rishor's trial on four different criminal charges.[24] Those charges included one count of first-degree assault, two counts of second-degree assault, and one count of first-degree unlawful possession of a firearm.[25] In a pretrial hearing, Rishor requested that the court allow him to represent himself pro se.[26] Rishor disregarded the warnings of the trial judge in his pretrial hearing and proceeded to represent himself.[27]

At the conclusion of the trial, the jury acquitted Rishor of both second-degree assault charges.[28] The jury impliedly acquitted Rishor of the first-degree assault charge when it found Rishor guilty instead for the lesser included offense of second-degree assault.[29] Further,

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18. *See infra* notes 159-182 and accompanying text.
19. *See infra* notes 183-223 and accompanying text.
20. *See infra* notes 224-285 and accompanying text.
21. *See infra* notes 286-295 and accompanying text.
22. 822 F.3d 482 (9th Cir. 2016).
23. Rishor v. Ferguson, 822 F.3d 482, 492 (9th Cir. 2016).
24. *Rishor*, 822 F.3d at 487.
25. *Id*. at 486.
26. *Id*.
27. *Id*. at 487. Judge Mura of the Whatcom County Superior Court gave stern warnings to Rishor during his *Faretta* hearing regarding his request to proceed pro se, saying, "[a]s a practical matter the court might as well sign an order sending you to prison without possibility of parole right now because you're going to screw your case up; do you understand that?" *Id*. *See also* Faretta v. California, 422 U.S. 806, 835 (1975) (ruling that a trial court must provide a hearing that ensures that a defendant who chooses to proceed pro se in his trial is doing so knowingly, intelligently, and is aware of the risks involved in pro se representation).
28. *Rishor*, 822 F.3d at 487.
29. *See id*. (explaining Rishor was not actually acquitted of the first-degree assault charge in its totality, but rather impliedly acquitted of the first-degree assault by de-

the jury found Rishor guilty of the unlawful possession of a firearm.[30] Ultimately, the court sentenced Rishor to serve 115 months in prison as a result of his convictions.[31]

Following his sentencing, Rishor began the direct review process of appeal, where his second-degree assault conviction was reversed on account of erroneous jury instructions.[32] The Washington Court of Appeals ordered that Rishor's case be remanded to the trial court for a new trial on the same charge of second-degree assault.[33] In November 2006, Rishor appeared at the trial court for his pretrial hearing and requested that he once again proceed pro se but requested standby counsel for the purpose of filing motions.[34] The trial judge instructed Rishor to draft a motion appointing his standby counsel, and Rishor did so accordingly.[35]

On remand, the State of Washington amended the charges from second-degree assault back up to first-degree assault while armed with a deadly weapon.[36] On January 8, 2007, the State of Washington amended its charges against Rishor again.[37] The amended charges against Rishor were filed as second-degree assault, this time without a firearm.[38] On the same day that the amended charges were filed, Rishor pled guilty to the lesser charge of second-degree assault without a firearm.[39]

Following his guilty plea, Rishor appealed with the assistance of counsel.[40] The Washington Court of Appeals affirmed Rishor's judg-

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fault because the jury found him guilty of the lesser included offense of second-degree assault). Because Rishor's charge of first-degree assault was dropped to the lesser included offense of second-degree assault, Rishor was technically acquitted of the greater charge and convicted of the lesser charge by the jury. *Id*.

30. *Id*.

31. *See id*. (ordering Rishor to serve a sentence running concurrently, which included thirty-six months for the enhanced charge of assault while in possession of a firearm and 102 months for the unlawful possession of a firearm).

32. *Id*.

33. *Id*.

34. *Id*. Rishor chose to take the assistance of standby counsel in this proceeding because of the difficulty associated with filing motions while being incarcerated. *Id*.

35. *See id*. (explaining that the trial judge appointed to Rishor's second trial was the same Judge Mura that had been appointed to Rishor's original trial and the same judge that had explained to Rishor in detail the dangers of pro se representation). There is no indication that Judge Mura warned Rishor of the dangers of pro se representation in his second trial. *Id*.

36. *Id*. Rishor was charged with first-degree assault while armed with a deadly weapon in his first trial, triggering a possible double jeopardy issue. *Id.* at 487-88.

37. *Id.* at 487.

38. *Id*.

39. *Id*. Rishor was sentenced to serve an eighty-four-month sentence of imprisonment to run concurrently with his 102-month sentence for unlawful possession of a firearm. *Id* at 488.

40. *Id*.

ment and sentence.[41] Rishor declined to seek any further review from the Washington Supreme Court, and Rishor's series of direct appeals ended.[42]

Following his direct appeals, Rishor began the collateral review process of habeas corpus at the state level.[43] Rishor pled for state habeas relief on three grounds.[44] First, Rishor argued that he was not formally arraigned when his case was remanded to the trial court.[45] Then, Rishor argued that he was coerced into pleading guilty, and the State had erred by not providing him with a pretrial hearing to make him aware of the dangers associated with pro se representation; therefore, he had not effectively waived his right to counsel prior to his second trial.[46] Both the Washington Court of Appeals and the Washington Supreme Court rejected Rishor's allegations, and his state habeas petitions were brought to an end.[47]

Following his state habeas proceedings, Rishor filed a federal habeas corpus petition in the United States District Court for the Western District of Washington.[48] Rishor raised four issues in his habeas corpus petition.[49] Rishor alleged that he had not received notice of the charges against him, he was not properly arraigned, he had not effectively waived his right to counsel for his second trial, and that the state had violated the double jeopardy rule.[50] The district court

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41. *Id*.

42. *Id*. *See also* O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999) ("Section 2254(c) requires only that state prisoners give state courts a fair opportunity to act on their claims."). In other words, it is only necessary for a habeas petitioner to appeal his or her underlying claim once; he or she does not have to push the claim all the way up to the state supreme court for the claim to be exhausted and, thus, primed for federal habeas review. *O'Sullivan*, 526 U.S. at 844 (explaining the requirements of claim exhaustion and stating that "a prisoner does not have to ask the state for collateral relief, based on the same evidence and issues already decided by direct review").

43. *Rishor*, 822 F.3d at 487. Collateral review in the State of Washington is known as a "personal restraint petition" ("PRP") and serves as the state level equivalent of a federal habeas corpus petition. *Id.*

44. *Id*.

45. *Id*.

46. *Id*. Rishor's allegation that he had not effectively waived his right to counsel was rooted in the fact that Judge Mura failed to provide him with a *Faretta* hearing for his second trial. *Id*. at 488.

47. *Id*. at 487. *See also* 28 U.S.C. § 2254(b)(1)(A) (requiring that all petitioners who seek federal habeas corpus relief first exhaust all habeas corpus relief that is available to them at the state level).

48. *Rishor*, 822 F.3d at 488. *See also* 28 U.S.C. § 2254 (permitting a petitioner who is being held in custody at the state level to file a habeas corpus petition in federal court).

49. *Rishor*, 822 F.3d at 488.

50. *Id*. Rishor alleged that the state violated double jeopardy when it charged him with first-degree assault after the jury impliedly acquitted him of first-degree assault in his first trial, finding him guilty of the lesser-included offense of second-degree assault. *Id*.

dismissed Rishor's habeas corpus claim with prejudice and subsequently entered a judgment against him.[51]

Rishor promptly filed a Rule 59(e) motion and requested that the district court reconsider his habeas application.[52] More specifically, Rishor requested that the district court consider, for a second time, if he was entitled to habeas relief because the State failed to hold a pretrial hearing putting him on notice of the dangers associated with pro se representation and that he had not effectively waived his right to counsel in his second trial.[53] Further, Rishor's Rule 59(e) motion requested that the district court reconsider if double jeopardy principles were violated when the State recharged him with first-degree assault after he had been impliedly acquitted of that same charge in his first trial.[54]

In December 2014, the same district court that had previously denied Rishor's habeas corpus petition vacated its prior decision and held that Rishor was entitled to habeas relief.[55] The district court held that Rishor was entitled to relief based on both his double jeopardy claim and his waiver-of-counsel claim.[56] The State filed a timely appeal on the grounds that the district court did not have jurisdiction to review Rishor's Rule 59(e) motion due to AEDPA's restrictions against second or successive petitions.[57]

Upon appeal, the Ninth Circuit held that Rishor's Rule 59(e) motion was not a second or successive habeas corpus petition.[58] In coming to this conclusion, the Ninth Circuit first acknowledged that AEDPA proscribes second or successive habeas corpus petitions.[59] The court explained that second and successive petitions are barred from review with only two narrow exceptions.[60] The first exception applies when a petitioner is able to show that his or her claim depends

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51. *Id*.
52. *Id*. at 488-89.
53. *Id*. at 489.
54. *Id*. at 489 n.4. The Ninth Circuit determined that Rishor was entitled to relief on his double jeopardy and waiver-of-counsel claims because each underlying claim was meritorious. *Id.* at 496, 498-99. The Ninth Circuit explained in a footnote that the district court did not consider, or even discuss, if Rishor's double jeopardy claim was meritorious enough to justify habeas relief. *Id*. at 489 n.4.
55. *Id*. at 489. Prior to reviewing the merits of a petitioner's claim, and determining if that petitioner is entitled to relief, a court must first ensure that there are no bars to the petitioner's claim being reviewed. BRANDON L. GARRETT & LEE KOVARSKY, FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION 13 (Robert C. Clark et al. eds., 2013). Bars to review include a petitioner's claim not being exhausted, procedural default, successive petitions, and the statute of limitations. *Id*.
56. *Rishor*, 822 F.3d at 489.
57. *Id*.
58. *Id*. at 492.
59. *Id*. at 490.
60. *Id*.

on a newly recognized rule of constitutional law that is made retroactive to habeas claims on collateral review by the United States Supreme Court.[61] The second exception applies when a petitioner is able to show that his or her claim relies on newly discovered evidence that could not have been discovered previously through the exercise of due diligence.[62]

Then, the Ninth Circuit considered if the United States Supreme Court's ruling in *Gonzalez v. Crosby*,[63] where the State argued that petitioner's Rule 60(b) motion was subject to the limits of AEDPA, provided any guidance for determining if Rule 59(e) motions are barred by AEDPA.[64] The Ninth Circuit explained that, according to the holding in *Gonzalez*, the Federal Rules of Civil Procedure are applicable to habeas corpus proceedings unless they are inconsistent with the statutes found in AEDPA.[65] Furthermore, the Ninth Circuit conceded that the United States Supreme Court held in *Gonzalez* that AEDPA bars any motion that advances a habeas corpus claim attacking a federal court's ruling on the merits.[66]

The Ninth Circuit then considered the two primary positions taken by the other circuit courts in determining how the holding from *Gonzalez* applied to Rule 59(e) motions.[67] First, the Ninth Circuit considered the approach taken by the United States Courts of Appeal for the Fifth, Eighth, and Tenth Circuits where those courts held that Rule 59(e) motions advancing a petitioner's claim are second or successive habeas petitions and therefore barred by AEDPA.[68] Then the Ninth Circuit considered the approach taken by the United States Courts of Appeal for the Third, Sixth, and Seventh Circuits, where those courts held that a Rule 59(e) motion is never a second or succes-

61. *See id*. (paraphrasing 28 U.S.C. § 2244(b)(1)(A) and demonstrating the first exceptional circumstance that must be in place before a federal judge is permitted to review a second or successive habeas corpus petition).

62. *See id*. (paraphrasing 28 U.S.C. § 2244(b)(1)(B) and demonstrating the second exceptional circumstance that must occur before a federal judge is permitted to review a second or successive habeas corpus petition).

63. 545 U.S. 524 (2005).

64. *Rishor*, 822 F.3d at 490-91.

65. *Id*. at 491.

66. *See id*. at 490 ("AEDPA's restriction on second or successive habeas petitions prevent the repeated filing of habeas petitions that attack the prisoner's underlying conviction.").

67. *Id*. at 491.

68. *Id*. *See also* Williams v. Thaler, 602 F.3d 291, 304-05 (5th Cir. 2010) (reasoning that a district court was without jurisdiction to consider a Rule 59(e) motion due to it being a second or successive petition under AEDPA and thus barred); Ward v. Norris, 577 F.3d 925, 942-43 (8th Cir. 2009) (explaining that a post judgment motion is second or successive when it advances a claim already presented to the court); United States v. Pedraza, 466 F.3d 932, 934 (10th Cir. 2006) (affirming that the district court was correct in dismissing a petitioner's Rule 59(e) motion due to the motion being a second or successive petition under AEDPA and thus barred from review by the district court).

sive habeas petition regardless of whether that motion advances a petitioner's habeas claim.[69]

The Ninth Circuit ultimately hybridized these approaches and held that a Rule 59(e) motion should be considered a second or successive habeas petition only when that motion presents a *new* claim not previously adjudicated.[70] Further, a Rule 59(e) motion should not be considered a second or successive habeas petition if that motion calls for the district court to right an error of law or fact that the district court's decision rests upon.[71] The court reasoned that applying the analysis from *Gonzalez* to Rule 59(e) motions pertaining to previously adjudicated claims was incorrect because it was unlikely that Congress intended AEDPA to prohibit the reconsideration of just-entered judgments.[72] The court went on to explain that Rule 59(e) motions are distinct from the Rule 60(b) motion considered in *Gonzalez* because Rule 59(e) motions simply suspend the litigation and toll the time for appeal in order to allow a district court to correct its own errors; Rule 60(b) motions occur after the time for appeal has expired, thus starting an entirely new round of litigation.[73] The court reasoned that a Rule 59(e) motion was neither a collateral attack on a decision nor a second or successive habeas corpus petition, but rather just a portion of a petitioner's complete opportunity to review the lawfulness of his or her custody.[74]

69. *Id*. *See also* Blystone v. Horn, 664 F.3d 397, 415 (3d Cir. 2011) (holding that a Rule 59(e) motion can never be considered a second or successive petition in the habeas context); Howard v. United States, 533 F.3d 472, 476 (6th Cir. 2008) (overturning the district court's denial and concluding that Rule 59(e) motions were not subject to AEDPA's restrictions on second or successive petitions); Curry v. United States, 307 F.3d 664, 666 (7th Cir. 2002) (vacating the district court's denial and instructing the district court to consider the Rule 59(e) motion despite the limitations set forth in AEDPA).

70. *Rishor*, 822 F.3d at 492.

71. *Id*.

72. *Id*. The court quoted the Third Circuit when it explained that "[i]f the holding of *Gonzalez* applied to Rule 59(e) motions, it would almost always be effectively impossible for a district court to correct flaws in its reasoning, even when the problems were immediately pointed out and could easily be fixed by that court." *Id.* After finding that Rishor's Rule 59(e) motion was not a second or successive petition, the Ninth Circuit went on to consider Rishor's claim on the merits and ultimately ruled against him. *See id*. at 494-501 (analyzing the merits of Rishor's habeas petition).

73. *Id*. at 493.

74. *Id*.

III. BACKGROUND

A. A Brief History of the Writ of Habeas Corpus, the Infusion of the Writ into the United States Constitution, and Current Legislative Trends to Prevent Abuse of the Writ

The writ of habeas corpus originated in English common law.[75] *Darnel's Case*,[76] more commonly referred to as the *Case of the Five Knights*, is perhaps the most notable of all English common law cases in the habeas corpus context and the cornerstone of habeas corpus jurisprudence.[77] In the *Case of the Five Knights*, King Charles I imprisoned five wealthy subjects, including Sir Thomas Darnel, after Darnel and four other noblemen refused to fund King Charles's unpopular war campaign in France.[78] The five knights promptly filed a *writ of habeas corpus ad subjiciendum et recipiendum*, asking for the jailer to show cause for keeping them in custody.[79] The Knights argued that it was necessary for the jailer to show actual cause for their detention.[80] Unfortunately for the five knights, when they were brought in front of Lord Chief Justice Hyde of the King's Bench, the court denied the five knights relief from being held in custody.[81] The bench reasoned that because the knights were being held in custody at King Charles's discretion, there was no official cause for their underlying arrest, and because the five knights had not actually violated a law, there was no question of the law for the court to consider.[82] Thus, there were no grounds on which the court could release the five knights.[83]

Parliament passed the Petition of Right of 1628[84] in response to the public outrage that followed the *Case of the Five Knights*.[85] The Petition of Right ordered that no person be held in custody contrary to

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75. Garrett & Kovarsky, *supra* note 55, at 13. *See also* William F. Duker, A Constitutional History of Habeas Corpus 62 (1980) (explaining that habeas corpus was developed as a means for compelling the bench to allow prisoners to make an appearance before the King's Court).

76. (1627) 3 How. St. Tr. 1 (Eng.).

77. Garrett & Kovarsky, *supra* at 55, at 15.

78. *Id*.

79. *Id*. *Habeas corpus ad subjiciendum et recipiendum* translates to "you may have the body to undergo and receive." *Id*. at 13.

80. *Id*. at 15.

81. *Id*.

82. Darnel's Case, (1627) 3 How. St. Tr. 1, 59 (Eng.)

83. Garrett & Kovarsky, *supra* at 55, at 16. Garrett and Kovarsky explain that "in short *Five Knights* was about whether custody was lawful simply because the Crown ordered it . . . . Was King Charles above the law?" *Id*. at 15.

84. Petition of Right of 1628, 3 Car., c. 1, §§ 1-11 (Eng).

85. Garrett & Kovarsky, *supra* at 55, at 15.

the laws and franchise of the land.[86] English judges responded to the public's outcry by wording the writ of habeas corpus so as to require the jailer who held a person in custody to show the cause of that person's detention and also the cause for their arrest.[87] This allowed courts to keep the King's abusive imprisonment of his subjects in check.[88] The Habeas Corpus Act of 1679[89] was the collective legislative and judicial response to the *Case of the Five Knights*.[90]

The Habeas Corpus Act of 1679 was so influential that it was the statutory prototype used to design the habeas statutes in the original thirteen American colonies.[91] The drafters of the United States Constitution incorporated the habeas corpus common law principles in Article I of the Constitution.[92] It should perhaps be noted as a testament of its importance that the habeas privilege is the one and only remedy explicitly mentioned in the United States Constitution.[93] Yet neither the Constitution nor the committee notes kept from the Constitutional Convention indicate what that privilege covers or where the source of that privilege is derived.[94] There is no doubt, however, that granting the privilege was not a matter of contention at the Constitutional Convention.[95] The only indication of a disagreement between the delegates on the subject was that some believed that the privilege should be inviolable.[96]

For over a century, the habeas privilege evolved and slowly expanded from a remedy only exercised by petitioners being held in cus-

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86. *Id*. *See also* Boumediene v. Bush, 553 U.S. 723, 742 (2008) (explaining that the petition of right was the legislative response to the public's discontent with the bench's decision in the *Case of the Five Knights*).

87. GARRETT & KOVARSKY, *supra* at 55, at 16.

88. *Id*. In the *Case of the Five Knights*, the prisoners were being held in custody and had not broken any official law. *Id*. at 15.

89. Habeas Corpus Act of 1679, 31 Cha. 2, c. 2 (Eng.).

90. GARRETT & KOVARSKY, *supra* note 55, at 16-17. There was so much contention between Parliament and King Charles I, King Charles dissolved the Parliament as a response to the Parliament's passage of the Petition of Right of 1628. *Boumediene*, 533 U.S. at 742. When Parliament Reconvened in 1640, it began the long legislative process of what ultimately became the Habeas Corpus Act of 1679. *Id*.

91. *Boumediene*, 533 U.S. at 742. *See also* GARRETT & KOVARSKY, *supra* note 55, at 17 (explaining that the Habeas Corpus Act of 1679 was a "landmark achievement in the advancement of human liberty").

92. *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

93. GARRETT & KOVARSKY, *supra* note 55, at 18.

94. *Id*.

95. DUKER, *supra* note 75, at 129-31.

96. *See* Francis Paschal, *The Constitution and Habeas Corpus*, 19 DUKE L.J. 605, 607 (1970) (explaining that the pertinent drafters and committee members of the Constitutional Convention considered the habeas privilege to be inviolable in light of the belief that no person should be held in custody contrary to the laws and franchise of the land).

tody under federal authority to one available to petitioners held in custody under State authority.[97] In 1953, the United States Supreme Court heard *Brown v. Allen*,[98] where petitioner Brown appealed to the federal courts for habeas corpus relief from his State conviction.[99] In *Brown*, a young African-American man was convicted of rape and subsequently sentenced to death by execution in the State of North Carolina.[100] Brown claimed that the prosecution had garnered a coerced confession from him and systematically organized a grand jury devoid of other African Americans in violation of his Fifth and Fourteenth Amendment rights.[101] The United States Supreme Court granted certiorari to determine if errors in state criminal procedures were cognizable in federal courts through federal habeas corpus review.[102] The United States Supreme Court answered that question in the affirmative, and as a result, federal filings of habeas corpus claims by state prisoners increased drastically.[103]

When the United States Supreme Court heard *Brown*, there were fewer than one thousand federal habeas corpus filings made by state prisoners each year.[104] By the year of 1996, there were approximately twenty thousand federal habeas corpus filings made by state prisoners each year.[105] With so many federal habeas corpus petitions being made by state prisoners each year, Congress became particularly concerned with the writ of habeas corpus being abused by state prisoners.[106] In response to this concern, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, more commonly known as AEDPA.[107] AEDPA codifies the doctrinal defense of *abuse of the writ* used by the states in a habeas corpus proceeding and provides that the

97. GARRETT & KOVARSKY, *supra* note 55, at 99.

98. 344 U.S. 443 (1953).

99. *See generally* Brown v. Allen, 344 U.S. 443 (1953) (reviewing the conviction of state prisoner Brown).

100. *Brown*, 344 U.S. at 466.

101. *Id*. at 466-69. Brown contended that there were essentially five factors showing evidence of his coercion to confess, including: (1) he was an illiterate person; (2) he was not charged until five days after his arrest; (3) he did not receive his preliminary hearing following his arrest until eighteen days later; (4) during his detention the State provided no counsel to him; and (5) the alleged confessions were obtained before the appointment of counsel and preliminary hearing. *Id*. at 475-76. The Court did make note, however, that there was no physical coercion. *Id*. at 476.

102. *See id.* at 443 (stating the purpose for granting certiorari).

103. GARRETT & KOVARSKY, *supra* note 55, at 99.

104. *Id*. at 135.

105. *Id*.

106. *Id*. at 73. Congress's concern with the habeas writ being abused was rooted in the idea that petitioners having unfettered access to habeas review would promulgate meritless habeas claims and thus continue to overwhelm the judiciary; therefore, Congress passed AEDPA. *Id*.

107. *Id*.

habeas petitioner is abusing the writ by making a new claim for the first time in a second or successive petition.[108]

The provision of AEDPA most germane to this writing is 28 U.S.C. § 2244(b), *Finality of Determination*.[109] This section first bars any federal judge from reviewing any claim that a state prisoner submits in a habeas corpus petition to the federal court when he or she has already submitted that claim in a prior habeas corpus application to a federal court.[110] Then this section proscribes any federal judge from reviewing any claim that is being presented in any second or successive habeas corpus petition by a state petitioner, unless that second or successive petition meets at least one of two narrow exceptions.[111] The first exception states that if the state prisoner's claim is founded on new constitutional law that the United States Supreme Court has enforced retroactively to cases on collateral review and was not previously available to that state prisoner, the district court may hear the claim.[112] The second exception allows jurisdiction if the state prisoner's claim relies on newly found facts that could not have been previously found through the use of due diligence.[113] Furthermore, the newly discovered facts must show by clear and convincing evidence that, when considered with all of the evidence already presented at the state prisoner's trial, no reasonable factfinder would have found the state prisoner guilty.[114] When a state prisoner does come forward with a second or successive petition and alleges that his or her petition fits within one of the two exceptions, he or she must first appeal to the

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108. *Id*. Garrett and Kovarsky explain that the verbiage "abuse of the writ" can be misleading because there are instances when a habeas petitioner may not include a claim in his or her first petition and then subsequently include that claim in a second petition and do so in good faith. *Id*.

109. *See* H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.) (stating that AEDPA is intended to reduce frequency in which the writ of habeas corpus is abused).

110. 28 U.S.C. § 2244(b)(1). "A Claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." *Id*.

111. 28 U.S.C. § 2244(b)(2). "A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed . . . ." *Id*.

112. 28 U.S.C. § 2244(b)(2)(A). This exception to the successive petition rule exists when "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable . . . ." *Id*.

113. 28 U.S.C. § 2244(b)(2)(B)(i). This clause provides an exception to a successive petition exists when "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence . . . ." *Id*.

114. 28 U.S.C. § 2244(b)(2)(B)(ii). The newly discovered evidence must demonstrate that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id*.

federal circuit court rather than the federal district court.[115] If the circuit court finds that the petitioner's claim fits within one of the two narrow exceptions provided in AEDPA for second or successive petitions, then it will allow the claim to be reviewed by the district court; otherwise, the circuit court will dismiss the petitioner's claim.[116]

B. Rule 59(e) Motion to Alter or Amend a Judgment, and Rule 60(b) Grounds for Relief from a Final Judgment, Order, or Proceeding: The Purposes Behind the Rules and Their Differences

Both Rule 59(e) and Rule 60(b) were drafted by the United States Supreme Court and are found in the Federal Rules of Civil Procedure.[117] Rule 59(e) and Rule 60(b) are post-judgment motions.[118] Rule 59(e) of the Federal Rules of Civil Procedure provides that a party to litigation may motion to alter or amend the judgment of that litigation so long as that motion is filed within twenty-eight days from the time the judgment was entered.[119] Rule 59(e) motions are typically used to correct errors of law that a judgment relies on.[120] In other cases, Rule 59(e) motions may be used to correct errors in fact that a judgment relies on.[121] The purpose of Rule 59(e) is to provide for speedy and final dispositions of litigated matters.[122]

Rule 60(b) of the Federal Rules of Civil Procedure states that a party to litigation may be provided relief from a judgment against him

115. 28 U.S.C. § 2244(b)(3)(A). "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." *Id*.

116. *Id*.

117. *See* Larry L. Teply, Ralph U. Whitten, & Denis F. McLaughlin, Civil Procedure: Cases, Text, Notes, and Problems 20 (3d ed. 2013) (explaining that pursuant to the Rules Enabling Act of 1934, codified as amended at 28 U.S.C. § 2072 (2012), Congress granted the United States Supreme Court the power to prescribe the rules of the federal judiciary and that those rules would later become known as the Federal Rules of Civil Procedure).

118. *See* Fed. R. Civ. P. 59(e) (providing the parameters by which a motion to alter or amend a judgment must be filed); Fed. R. Civ. P. 60(b) (providing grounds for relief from a final judgment); *see also* Fed. R. Civ. P. 81(a)(4) ("These rules [referring to the Federal Rules of Civil Procedure] apply to proceeding for habeas corpus . . . ."); Gonzalez v. Crosby, 545 U.S. 524, 529 (2005) ("Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only to the extent that [it is] not inconsistent with applicable federal statutory provisions and rules.").

119. Fed. R. Civ. P. 59(e). "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." *Id*.

120. *See* Teply, Whitten & McLaughlin, *supra* note 117, at 1013 (explaining that, in some circumstances, an error in law may be the result of an intervening change in the law most material to the litigation).

121. *See id.* (explaining that Rule 59(e) also serves to protect litigants against manifest injustice that may occur when the court is mistaken as to the facts of the case).

122. Browder v. Dir., Dep't of Corr. of Ill., 434 U.S. 257, 271 (1978).

or her, by motion and under just terms, when there has been a mistake, newly discovered evidence, fraud, or any other reason that may justify relief.[123] Rule 60(b) was designed to allow courts to reach the desirable legal objective when ruling on the merits of a case.[124] The purpose of Rule 60(b) is to correct mistakes arising out of special circumstances.[125] The primary distinction between a Rule 59(e) motion and a Rule 60(b) motion is that a Rule 60(b) motion is a device used to ask a court to reconsider, while a Rule 59(e) motion is a device to restart or cause new litigation.[126] While these rules are distinct in some respects, they are both post-judgment motions and are still subject to the limitations of other federal statutes such as AEDPA.[127]

C. *Gonzalez v. Crosby*: The United States Supreme Court Held that Any Motion that Advances a Claim in the Habeas Corpus Context is Subject to the Restrictions of AEDPA

In *Gonzalez v. Crosby*,[128] the United States Supreme Court held that a Rule 60(b) motion filed subsequently to a petition for habeas corpus relief is considered a second or successive petition when that petition asserts or reasserts claims of errors in the petitioner's state conviction.[129] In *Gonzalez*, convict-petitioner Gonzalez sued for habeas corpus relief from his state conviction in Florida, claiming that he had not entered his guilty plea in his original trial knowingly and voluntarily.[130] The United States District Court for the Southern District of Florida dismissed Gonzalez's habeas corpus petition reasoning that the petition was statutorily time-barred and could not be re-

123. Fed. R. Civ. P. 60(b).

124. Patapoff v. Vollstedt's, Inc., 267 F.2d 863, 865 (9th Cir. 1959).

125. *See* Russell v. Delco Remy, 51 F.3d 746, 749 (7th Cir. 1995) (explaining that the special circumstances that may give rise to a litigant justly filing a Rule 60(b) motion are listed in the rule itself and include mistake by the court, inadvertence, surprise, excusable neglect, newly discovered evidence that could not have otherwise discovered through due diligence, fraud, misrepresentation, misconduct by opposing part, a void judgment, or any other reason that justifies relief).

126. United States v. Fiorelli, 337 F.3d 282, 288 (3d Cir. 2003). "Rule 60(b) provides six bases for reconsideration, including 'mistake, inadvertence, surprise, or excusable neglect.'" *Fiorelli*, 337 F.3d at 288. "A motion under Rule 59(e) is a 'device to relitigate the original issue' decided by the district court, and used to allege legal error." *Id*.

127. Fed. R. Civ. P. 81(a)(4). *See* Barnett v. Roper, 541 F.3d 804, 807 (8th Cir. 2008) (explaining that habeas corpus proceedings are governed by the Federal Rules of Civil Procedure).

128. 545 U.S. 524 (2005).

129. Gonzalez v. Crosby, 545 U.S. 524, 538 (2005).

130. *Gonzalez*, 545 U.S. at 526-27. *See also* Brady v. United States, 397 U.S. 742, 758 (1970) (noting that a guilty plea was valid because it was made knowingly and voluntarily).

viewed.[131] The district court concluded that AEDPA only tolls the one-year statute of limitations when a habeas corpus petition is properly and timely submitted.[132] According to the district court, Gonzalez's petition was untimely and, as a result, improperly submitted; thus, there had been no tolling of the statute of limitations that would allow the district court to review his petition.[133]

Gonzalez then appealed to the United Stated Court of Appeals for the Eleventh Circuit, and the Eleventh Circuit denied Gonzalez his certificate of appealability.[134] Gonzalez then filed a Rule 60(b) motion with the district court requesting that the district court alter or amend its prior decision concerning Gonzalez's habeas corpus petition.[135] Gonzalez's Rule 60(b) motion relied on a United States Supreme Court ruling made five years prior to his habeas petition that held an application for post-conviction relief can be properly filed even if it has been dismissed and procedurally barred.[136] The district court denied Gonzalez's Rule 60(b) motion.[137] Gonzalez once again appealed to the Eleventh Circuit.[138] Ultimately, in an en banc decision, the Eleventh Circuit held that the district court was barred from reviewing Gonzalez's Rule 60(b) motion pursuant to the restrictions of AEDPA.[139] The Eleventh Circuit reasoned that any post-judgment

131. *Id*. at 527. *See also* 28 U.S.C. § 2244(d) (proscribing any applications for the writ of habeas corpus beyond one year after a judgment has been entered by a state court).

132. *Gonzalez*, 545 U.S. at 527. *See also* 28 U.S.C. § 2244(d)(2) (tolling the amount of time applied toward the statute of limitations while the claim is pending).

133. *Gonzalez*, 545 U.S. at 527.

134. *Id*. Pursuant to AEDPA restrictions, a petitioner is required to first apply to the appropriate court of appeals when making a second or successive petition. 28 U.S.C. § 2244(b)(3). If the court of appeals finds that the petitioner's second or successive claim is meritorious the petitioner will be granted a certificate of appealablity and, therefore, granted permission to appear before the federal district court to present his second or successive petition. *Id*.

135. *Gonzalez*, 545 U.S. at 527. Gonzalez's Rule 60(b) motion was filed as a device seeking extraordinary relief. *Id*. *See also* FED. R. CIV. P. 60(b) (providing the specific circumstances that warrant the use of the motion).

136. *Gonzalez*, 545 U.S. at 527. Subsequent to Gonzalez's original petition for habeas corpus relief to the district court, the United States Supreme Court held in Artuz v. Bennett, 531 U.S. 4, 10 (2000), that an application for post-conviction relief on the state level can be properly filed even if the state court dismisses the petition as procedurally barred. *Gonzalez,* 545 U.S. at 527 (citation omitted).

137. *Gonzalez*, 545 U.S. at 527. Rule 60(b), a catch all rule, authorizes post-judgment relief for "any . . . reason that justifies relief." FED. R. CIV. P. 60(b)(6).

138. *Gonzales*, 545 U.S. at 528.

139. *Id*. *See also* 28 U.S.C. § 2244(b)(1) (requiring the court to dismiss any habeas corpus application that has already been presented in a prior application).

motion under Rule 60(b) is a second or successive habeas corpus petition.[140]

Gonzalez then appealed to the United States Supreme Court, which granted certiorari to determine if a Rule 60(b) motion is subject to the restrictions of AEDPA.[141] The Court held that in this particular case, Gonzalez's Rule 60(b) motion was not barred by AEDPA as a second or successive petition.[142] The Court reasoned that a Rule 60(b) motion is a second or successive habeas petition when that motion advances a petitioner's claim by attacking the trial court's decision on the merits.[143] The Court explained that Gonzalez's Rule 60(b) motion did not advance a claim that attacked the substance of the district court's decision on the merits, but rather attacked a defect in the habeas proceeding itself.[144] Because Gonzalez's Rule 60(b) motion did not reassert the claim he made to the district court, the Court held that Gonzalez's Rule 60(b) motion should not be considered a second or successive petition.[145]

To determine if a Rule 60(b) motion is barred as a second or successive petition under AEDPA, the Court set out to define *claim* as it is used in the habeas corpus context.[146] The Court explained that a claim, when used in the habeas corpus context, is any asserted federal basis for habeas relief from a prior judgment of conviction.[147] The Court further clarified that a motion can also be a claim when a petitioner utilizes that motion to attack a previous decision made by a federal court on the merits.[148]

Next, the Court described the proper analysis used to determine if a motion, or a claim, is second or successive and thus proscribed by

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140. *Gonzalez*, 545 U.S. at 528. The Eleventh Circuit noted that a Rule 60(b) motion is not barred from review by the district court under AEDPA when the movant alleges fraud upon the court. *Id*.

141. *Id*. at 530.

142. *Id*. at 538.

143. *Id*. at 532. The Court explained its definition of a claim as follows:

> A motion can also be said to bring a 'claim' if it attacks the federal court's previous resolution on the merits, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief.

Id at 532-33.

144. *Id*. at 532. The Court explained that because Gonzalez's Rule 60(b) motion attacked the district court's ruling on the AEDPA statute of limitations and not the reasoning of the district court, his motion was an attack on the integrity of the process he received, not an attack on the court's decision, and therefore not a second or successive petition. *Id*.

145. *Id*. at 538.

146. *Id*. at 530.

147. *Id*. "[A] 'claim' as used in § 2244(b) is an asserted federal basis for relief from a state court's judgment of conviction." *Id*.

148. *Id*. at 532.

AEDPA.[149] The Court explained that if a motion, or a claim, has been presented in a prior application, then that claim must be dismissed.[150] If the motion or claim was not included in the applicant's prior application, it must also be dismissed unless that motion or claim fits within at least one of the two narrow exceptions provided for in AEDPA.[151]

The Court ruled that Gonzalez's Rule 60(b) motion was not a claim in the habeas corpus context and thus not subject to the restrictions of AEDPA.[152] The Court reasoned that Rule 60(b) motions, as do all of the Federal Rules of Civil Procedure, apply in habeas corpus proceedings, but only to the extent that they are not contrary to applicable federal statutes.[153] Gonzalez's Rule 60(b) motion was not a claim in the habeas corpus context because it hinged on the premise that a petition for state post-conviction relief can be properly filed even if the petition had been dismissed as procedurally barred.[154] Gonzalez's Rule 60(b) motion did not allege that the district court denied his motion on the merits or substance, but rather that there was a defect in the integrity of the district court proceedings.[155] Therefore, Gonzalez's Rule 60(b) motion was not a claim in the habeas corpus context, not contrary to any federal statute, and thus not proscribed by the restrictions of AEDPA.[156]

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149. *Id*. at 530.

150. *Id*. at 529-30. *See also* 28 U.S.C. § 2244(b)(1) (requiring the court to dismiss any habeas corpus application that has already been presented in a prior application).

151. *Gonzalez*, 545 U.S. at 530. 28 U.S.C. § 2244 provides:

> (b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless— (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244.

152. *Gonzalez*, 545 U.S. at 535-36.

153. *Id*. at 529.

154. *Id*. at 527. *See Artuz*, 531 U.S. at 10 (holding that even though a state court dismisses a petitioner's application for state post-conviction relief as procedurally barred, a habeas petition may still be properly filed).

155. *Gonzalez*, 645 U.S. at 535. Because Gonzalez had not attempted to advance his original underlying claim of constitutional error alleging that he had not knowingly and voluntarily entered his guilty plea at his original trial, but rather Gonzalez's Rule 60(b) motion moved for relief questioning an error in the district court's proceedings, it was not a claim that advanced an attack on the district court's decision based on the merits. *Id*.

156. *Id*. at 535-36. The structure of Gonzalez's individual Rule 60(b) motion was not a second or successive petition. *Id*. That is not to say that a Rule 60(b) motion could not be a second or successive petition according to the *Gonzalez* Court. *See id*. at 532 ("[A]

D. *Ward v. Norris*: The Eighth Circuit Concluded that when a Rule 59(e) Motion Seeks to Have the Merits of a Habeas Corpus Petition Reviewed and Determined Favorably that Motion is a Second or Successive Petition and Thus Jurisdictionally Barred From Review by the District Court

In *Ward v. Norris*,[157] the United States Court of Appeals for the Eighth Circuit adopted a comparable approach to the ones taken by the United States Courts of Appeal for the Fourth, Fifth, and Tenth Circuits when it concluded that Rule 60(b) and Rule 59(e) motions are subject to AEDPA restrictions on second or successive petitions when those motions seek the opportunity to have the merits of a habeas corpus petition reviewed and subsequently determined favorably.[158] In *Ward*, convict-petitioner Ward sued for federal habeas corpus relief from his state conviction in Arkansas claiming that his trial counsel had provided constitutionally ineffective assistance.[159] The United States District Court for the Eastern District of Arkansas denied Ward relief.[160] The district court reasoned that Ward had failed to meet the burdens placed on him by AEDPA and failed to show he suffered any prejudice as a result of the alleged ineffective assistance of counsel.[161]

Ward then appealed to the Eighth Circuit, again claiming that he had received ineffective assistance of counsel at his trial.[162] Prior to the Eighth Circuit's hearing that considered Ward's appeal, Ward filed a motion for relief under Rule 60(b) and a motion to alter or amend the judgment of the district court denying his habeas corpus relief under Rule 59(e).[163] The Eighth Circuit stayed the briefing schedule for Ward's appeal and held the proceedings in abeyance pending the district court's ruling on Ward's Rule 59(e) and Rule 60(b)

Rule 60(b) motion that seeks to revisit the federal court's denial on the merits of a claim for relief should be treated as a successive habeas petition.").

157. 577 F.3d 925 (8th Cir. 2009).

158. Williams v. Thaler, 602 F.3d 291, 303-05 (5th Cir. 2010); Ward v. Norris, 577 F.3d 925, 935 (8th Cir. 2009); United States v. Pedraza, 466 F.3d 932, 934 (10th Cir. 2006); United States v. Martin, 132 F. App'x 450, 451 (4th Cir. 2005).

159. *Ward*, 577 F.3d at 930.

160. *Id*. at 931.

161. *See id*. (explaining Ward failed to meet his burden under 28 U.S.C. § 2254 because he had "failed to develop any meaningful argument or provide any substantive claim to support his assertion that prejudice occurred," referring to the Prosecutor's conduct during his original trial); *see also* 28 U.S.C. § 2254(e)(1) (establishing the presumption that a state court's findings of fact are correct and a habeas corpus petitioner has the burden of rebutting that presumption by clear and convincing evidence).

162. *Ward*, 577 F.3d at 931.

163. *Id*.

motions.[164] The district court denied Ward review of his Rule 60(b) and Rule 59(e) motions.[165] The district court reasoned that Ward's Rule 60(b) and Rule 59(e) motions were second or successive habeas corpus petitions and were barred from review by the district court pursuant to AEDPA.[166]

Ward appealed to the Eighth Circuit once again, this time claiming that his Rule 60(b) and Rule 59(e) motions were not second or successive habeas corpus petitions.[167] The Eighth Circuit held that Ward's Rule 60(b) and Rule 59(e) motions were effectively second or successive habeas corpus petitions and thus barred from review by the district court under AEDPA.[168] The Eighth Circuit reasoned that Ward essentially sought to assert or reassert his substantive claim that he had received ineffective assistance of counsel at his trial by using Rule 60(b) and Rule 59(e) motions.[169]

The Eighth Circuit looked to the United States Supreme Court's decision in *Gonzalez v. Crosby*[170] to determine what a claim is in the habeas corpus context under AEDPA.[171] The Eighth Circuit noted that, according to United States Supreme Court precedent, a claim in the habeas corpus context under AEDPA is any asserted federal basis for relief from a judgment of conviction or an attack on a court's decision on the merits.[172] The Eighth Circuit further noted that a Rule 60(b) or Rule 59(e) motion that attacks a defect in the integrity of the federal habeas corpus proceedings is not a claim in the habeas corpus context.[173] The Eighth Circuit concluded that Ward's Rule 60(b) and 59(e) motions were claims in the habeas corpus context because each motion sought to reassert Ward's attack on the district court's ruling on the merits of his ineffective assistance of counsel claim.[174]

The Eighth Circuit also considered the plain statutory language of AEDPA.[175] The Eighth Circuit explained that under AEDPA, when a petitioner files a claim already adjudicated in a previous proceeding, the claim must be dismissed.[176] Further, any claim that has not been

164. *Id*.
165. *Id*. at 932.
166. *Id*. *See also* 28 U.S.C. § 2244(b)(1) (requiring the court to dismiss any habeas corpus application that has already been presented in a prior application).
167. *Ward*, 577 F.3d at 932.
168. *Id*.
169. *Id*.
170. 545 U.S. 524 (2005).
171. *Ward*, 577 F.3d at 933.
172. *Id*.
173. *Id.*
174. *Id*. at 935.
175. *Id*. at 932-33.
176. *Id*. at 933. *See also* 28 U.S.C. § 2244(b)(1) (requiring the court to dismiss any habeas corpus application that has already been presented in a prior application).

adjudicated must also be dismissed unless that claim depends on of the two narrow exceptions provided for in AEDPA.[177]

The Eighth Circuit held that Ward's Rule 60(b) and 59(e) motions did not attack a defect in the habeas proceedings and were, in fact, claims in the habeas corpus context under AEDPA.[178] Because Ward had already asserted in his first habeas petition that he had received ineffective assistance of counsel at his trial, the Eighth Circuit further held that his Rule 60(b) and Rule 59(e) motions reasserting the same claims were essentially second or successive claims.[179] The Eighth Circuit concluded that because these claims had already been asserted by Ward and subsequently dismissed, they were barred as second or successive habeas corpus petitions under the restrictions of AEDPA.[180]

E. *Blystone v. Horn*: The Third Circuit Held that Rule 59(e) Motions Are Part and Parcel of a Single Collateral Attack on the Merits of a Conviction and Are Not Subject to the Jurisdictional Limits Imposed by AEDPA

In *Blystone v. Horn*,[181] the United States Court of Appeals for the Third Circuit adopted a comparable approach to the United States Courts of Appeal for the Sixth and Seventh Circuits when it held that a Rule 59(e) motion to amend or alter a judgment is not, and cannot be, considered a second or successive petition within the context of habeas corpus and is therefore not subject to the restrictions of AEDPA governing second or successive petitions.[182] In *Blystone*, convict-petitioner Blystone sued for federal habeas corpus relief from his state conviction and death sentence.[183] Blystone alleged various con-

177. *Ward*, 577 F.3d at 933. 28 U.S.C. § 2244 provides:

> (b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless— (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244.

178. *Ward*, 577 F.3d at 935.

179. *Id.*

180. *Id.*

181. 664 F.3d 397 (3d Cir. 2011).

182. Blystone v. Horn, 664 F.3d 397, 415 (3d Cir. 2011); Howard v. United States, 533 F.3d 472, 475-76 (6th Cir. 2008); Curry v. United States 307 F.3d 664, 665 (7th Cir. 2002).

183. *Blystone*, 664 F.3d at 409.

stitutional defects existed in his trial at the state level, but primarily he alleged that he had received ineffective assistance of counsel.[184] The United States District Court for the Western District of Pennsylvania granted Blystone relief on his claim pertaining to the sentencing phase of his trial and denied Blystone relief on his guilt-phase claims.[185]

Blystone then filed a Rule 59(e) motion in the district court to alter or amend the district court's decision that denied Blystone habeas relief on his guilt phase claims.[186] Blystone's Rule 59(e) motion claimed that Blystone had obtained newly discovered evidence of prosecutorial misconduct relevant to his guilt-phase habeas corpus claims.[187] Blystone's Rule 59(e) motion requested the district court grant Blystone leave to further investigate the alleged prosecutorial misconduct.[188] Further, the Rule 59(e) motion requested that the district court allow Blystone to amend his original petition if his investigation was fruitful in producing additional evidence of prosecutorial misconduct.[189] The district court denied Blystone's Rule 59(e) motion.[190] The district court explained that the newly discovered evidence that Blystone proclaimed to have was available to him six months prior to his original habeas corpus petition, and he could have included that evidence in his habeas petition at that time.[191] Furthermore, the evidence that Blystone presented to prove prosecutorial misconduct was not substantial enough to outweigh the overwhelming evidence of his guilt that had been offered in his trial, according to the district court.[192]

In addition to Blystone's appeal, the Commonwealth of Pennsylvania cross appealed the district court's grant of relief regarding

184. *Id*.
185. *Id.*
186. *Id*. The court explained that Blystone's original application for habeas corpus relief included multiple claims, including Blystone's claim of innocence and claims that he was subjected to unconstitutional prosecutorial misconduct during his trial. *Id*.
187. *Id*. The phrase "guilt-phase claim" was used by the court referred to the habeas claim made by Blystone to the district court, where Blystone requested habeas relief from his conviction pertaining to his underlying offenses of murder, robbery, conspiracy to commit murder, and conspiracy to commit robbery where he was found guilty by the Pennsylvania state trial court. *Id*.
188. *Id*. at 410.
189. *Id*.
190. *Id*.
191. *Id*. Blystone's allegation that there had been prosecutorial misconduct in his proceedings at the state level was based on an unrelated decision from October 1, 2004, decision in the Fayette County Court of Common Pleas, where the court in that case granted another defendant a new trial because of prosecutorial misconduct by the same investigators and prosecutor who investigated the alleged crimes committed by Blystone. *Id*. Blystone's petition to the district court for his habeas corpus application occurred on March 31, 2005. *Id*.
192. *Id*.

Blystone's sentencing phase arguing that the district court abused its discretion because it did not have jurisdiction to review the Rule 59(e) motion.[193] The Third Circuit held that the district court had not abused its discretion in reviewing Blystone's Rule 59(e) motion.[194] The Third Circuit reasoned that even if a Rule 59(e) motion advances a claim, as defined in the habeas corpus context, it is not a second or successive claim because Rule 59(e) motions are part of the original habeas corpus petition and thus outside of the jurisdictional limitations of AEDPA.[195]

The Third Circuit began its analysis as the United States Supreme Court in *Gonzalez v. Crossby*,[196] and the United States Court of Appeals for the Eighth Circuit in *Ward v. Norris*,[197] by looking at the plain language of the AEDPA statutes.[198] The Third Circuit noted that under AEDPA, federal courts act in a gatekeeping capacity by denying all second or successive habeas corpus petitions that have already been presented to the district court.[199] Further, if a petitioner presents a new claim not previously adjudicated, the claim must also be denied unless it falls within one of the two narrow exceptions provided for in AEDPA.[200]

Next, the Third Circuit turned to the United States Supreme Court's decision in *Gonzalez* to determine what a claim is in the habeas corpus context.[201] The Third Circuit noted that according to *Gonzalez*, when a motion advances a petitioners attack on a court's previous decision on the merits, that motion is a claim in the habeas corpus context.[202] The court explained that Blystone's Rule 59(e) mo-

193. *Id*. at 411.

194. *Id*. at 415.

195. *Id*.

196. 545 U.S. 524 (2005).

197. 577 F.3d 925 (8th Cir. 2009).

198. *Blystone*, 664 F.3d at 411-12.

199. *Id*. at 411.

200. *Id*. 28 U.S.C. § 2244 provides the rules governing successive petitions as follows:

> (b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless— (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244.

201. *Blystone*, 664 F.3d at 412.

202. *Id*.

tion did not present any new claims.[203] Instead, Blystone's Rule 59(e) motion requested permission to seek discovery of new evidence that would allow him to subsequently add new claims if such evidence was available.[204] Nevertheless, the Third Circuit conceded that Blystone's Rule 59(e) motion was a claim in the habeas corpus context because the motion sought to attack a prior judgment of the federal district court on the merits.[205] Finally, the Third Circuit concluded that because Blystone's Rule 59(e) motion advanced a claim, it was undoubtedly a habeas corpus petition.[206]

Instead of ending its analysis by determining that Blystone's Rule 59(e) motion was a second or successive petition and barred by AEDPA, the Third Circuit continued its analysis.[207] The Third Circuit noted that the United States Supreme Court in *Gonzalez* only considered how a Rule 60(b) motion operated under AEDPA rather than how a Rule 59(e) motion operated in the habeas corpus context.[208] The Third Circuit continued its analysis by comparing the differences between a Rule 60(b) motion and a Rule 59(e) motion.[209] The Third Circuit first noted that a Rule 60(b) motion only comes into effect after a petitioner's time for appeal has expired.[210] Thus, according to the Third Circuit, any Rule 60(b) motion that raises a claim intended to attack the court's previous decision on the merits must be a second or successive petition because of when it occurs in the procedural process.[211]

The Third Circuit then compared how a Rule 59(e) motion operated in the procedural process.[212] The Third Circuit distinguished Rule 59(e) motions from Rule 60(b) motions by noting that the former

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203. *Id*. at 413.

204. *Id*. The Third Circuit quoted the United States Supreme Court, stating, "a motion 'seeking leave to present newly discovered evidence in support of a claim previously decided' advances a claim and is, therefore, a habeas corpus petition." *Id*. (quoting Gonzalez v. Crosby, 545 U.S. 524, 531 (2005)).

205. *Id.* The court conceded that Blystone's Rule 59(e) motion was a claim in the habeas corpus context in light of the United States Supreme Court's holding in *Gonzalez*, where the Court explained a petitioner is making a second or successive petition when he or she makes a motion requesting leave to discover new evidence to support a claim that has already been denied essentially advances a claim and is thus a habeas corpus petition. *Id.*

206. *Id*.

207. *Id*.

208. *Id. But see Gonzalez*, 545 U.S. at 529 ("The new habeas restrictions introduced by AEDPA are made indirectly relevant, however, by the fact that Rule 60(b), *like the rest of the Rules of Civil Procedure*, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only 'to the extent that [it is] not inconsistent with' applicable federal statutory provisions and rules.") (emphasis added).

209. *Blystone*, 664 F.3d at 413.

210. *Id*.

211. *Id*.

212. *Id*. at 414.

suspends the finality of a judgment through tolling the time for appeal.[213] The Third Circuit explained that a Rule 59(e) motion in the habeas corpus context was not a collateral attack on the previous habeas judgment made by the court or a new attack on the original judgment made at the state level.[214] Rather, the Third Circuit reasoned that a Rule 59(e) motion was instead part of the petitioner's initial opportunity to seek collateral review.[215] The court further reasoned that it was Congress's intention for federal district courts to be able to correct their own errors upon the filing of a Rule 59(e) motion to alter or amend a judgment.[216]

Despite the United States Supreme Court holding in *Gonzalez*, the Third Circuit held that Rule 59(e) motions were not subject to the same limitations as Rule 60(b) motions because of the innate procedural difference between the two motions; therefore, the holding in *Gonzalez* should not apply to Rule 59(e) motions.[217] Furthermore, because the Third Circuit rejected the notion that it was Congress's intent for AEDPA to prevent federal district courts from correcting their own errors when Rule 59(e) motions were filed, the Third Circuit held that Rule 59(e) motions should not be subject to the jurisdictional limitations of AEDPA.[218] For these reasons, the Third Circuit held that the district court did not abuse its discretion in reviewing Blystone's Rule 59(e) motion even though the motion was considered a claim in the habeas corpus context pursuant to the holding in *Gonzalez*.[219]

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213. *Id*.

214. *Id*.

215. *Id*.

216. *Id*. *See also* Osterneck v. Ernst & Whinney, 489 U.S. 169, 177 (1989) (explaining that Rule 59(e) motions are important in the avoidance of piecemeal appellate litigation); Howard v. United States, 533 F.3d 472, 475 (6th Cir. 2008) (explaining that it was not Congress's intent for AEDPA to remove a district court's jurisdiction to repair its own errors upon the filing of a Rule 59(e) motion by a convict petitioner). *But see* 28 U.S.C. § 2072 (permitting the United States Supreme Court to prescribe the rules of the federal judiciary); FED. R. CIV. P. 81(a)(4)(A) (providing that the Federal Rules of Civil Procedure are applicable to habeas corpus proceedings but only when the rules do not contradict 28 U.S.C. § 2254).

217. *Blystone*, 664 F.3d at 415.

218. *Id*. *See* Barnett v. Roper, 541 F.3d 804, 807 (8th Cir. 2008) (explaining that habeas corpus proceedings are governed by the Federal Rules of Civil Procedure); *see also* FED. R. CIV. P. 81(a)(4) (explaining that the Federal Rules of Civil Procedure apply to habeas corpus proceedings); TEPLY, WHITTEN & MCLAUGHLIN, *supra* note 117, at 20 (explaining that, pursuant to the Rules Enabling Act of 1934, codified as amended at 28 U.S.C. § 2072 (2012), Congress granted the United States Supreme Court the power to prescribe the rules of the federal judiciary and that those rules would later become known as the Federal Rules of Civil Procedure).

219. *Blystone*, 664 F.3d at 415.

IV. ANALYSIS

In *Rishor v. Ferguson*,[220] the United States Court of Appeals for the Ninth Circuit failed to correctly apply the analysis used by the United States Supreme Court in *Gonzalez v. Crosby*[221] to determine if a post-judgment motion is a second or successive habeas corpus petition.[222] In *Rishor*, convict-petitioner Rishor filed a Rule 59(e) motion asking the federal district court to reconsider his case and ultimately determine if the state trial court erred in not providing him with a pretrial hearing to ensure that he was proceeding as a pro se litigant knowingly, intelligently, and was aware of the risks involved in pro se representation prior to the trial for his underlying offense.[223] The State of Washington appealed the district court's decision claiming that Rishor's Rule 59(e) motion was a second or successive petition and thus barred by AEDPA.[224] The Ninth Circuit declined to apply the analytical approach used by the United States Supreme Court in *Gonzalez* to determine if Rishor's Rule 59(e) motion was a second or successive habeas corpus petition.[225] Instead, the Ninth Circuit chose to adopt a hybridized analysis of the approaches taken by the United States Courts of Appeal for the Fourth, Fifth, Eighth, and Tenth Circuits combined with the approach taken by the United States Courts of Appeal for the Third, Sixth, and Seventh Circuits.[226] Ultimately, the Ninth Circuit held that a Rule 59(e) motion, when timely filed, which asks the district court to consider an already adjudicated habeas corpus claim on the same grounds that were previously raised, is not barred by AEDPA as a second or successive habeas corpus petition.[227]

First, this Analysis will show that second and or successive habeas corpus petitions are barred from judicial review under AEDPA.[228] Then, this Analysis will show that post-judgment motions

220. 822 F.3d 482 (9th Cir. 2016).

221. 545 U.S. 524 (2005).

222. *Compare* Rishor v. Ferguson, 822 F.3d 482, 492 (9th Cir. 2016) (holding that a post-judgment motion is only subject to the restrictions of AEDPA when that motion raises a new claim for relief), *with* Gonzalez v. Crosby, 545 U.S. 524, 538 (2005) (holding that a Rule 60(b) motion, or any other motion, filed subsequently to a petition for habeas corpus relief, is considered a second or successive petition when that petition asserts or reasserts claims of errors in the petitioner's state conviction).

223. *Rishor*, 822 F.3d at 488-89. *See* Faretta v. California, 422 U.S. 806, 834 (1975) (ruling that a trial court must provide a hearing to ensure that a defendant who chooses to proceed pro se in his or her trial is doing so knowingly, intelligently, and is aware of the risks involved in pro se representation).

224. *Rishor*, 822 F.3d at 489.

225. *Id*. at 492.

226. *Id*. at 492-93.

227. *Id*. at 494.

228. *See infra* 235-246 and accompanying text.

advancing a petitioner's claim for relief are essentially second or successive habeas corpus petitions.[229] Finally, this Analysis will argue that the Ninth Circuit erred when it failed to appropriately apply the analysis used by the United States Supreme Court in *Gonzalez* for determining when a post-judgment motion is a second or successive habeas corpus petition.[230]

A. Second or Successive Habeas Corpus Petitions are Barred by the Antiterrorism and Effective Death Penalty Act of 1996

There are three restrictions on a petitioner's second or successive habeas petition contained in 28 U.S.C. § 2244(b)(1)-(3).[231] First, a claim presented in a second or successive petition that has already been presented in a prior petition must be dismissed.[232] Second, any claim that has not been presented in a prior petition must also be dismissed, unless that claim relies on a newly created rule of constitutional law that has been made retroactive to cases on collateral review or relies on new facts that would show a likely prospect of genuine innocence.[233] Third, before a federal district court is permitted to review a second or successive petition, a federal court of appeals must first determine that the petition qualifies under the two above restrictions.[234] Furthermore, Congress noted that 28 U.S.C. § 2244 was intended to curb the abuse of the writ of habeas corpus by limiting frivolous claims by petitioners and requiring successive claims to undergo a review and approval of the federal court of appeals prior to review by the federal district court.[235]

Additionally, the United States Supreme Court has interpreted AEDPA as barring second and successive petitions.[236] The Court has explained that AEDPA was designed with certain gatekeeping features that prevent petitioners from presenting second or successive habeas corpus petitions.[237] The Court in *Gonzalez v. Crosby*[238] explained in a habeas corpus case, the first step of analysis is to determine if a petitioner's claim was presented in a prior habeas

229. *See infra* 247-257 and accompanying text.
230. *See infra* 258-285 and accompanying text.
231. 28 U.S.C. § 2244(b).
232. *Id.* § 2244(b)(1).
233. *Id.* § 2244(b)(2)(A)-(B)(ii).
234. *Id*. § 2244(b)(3).
235. H.R. Rep. No. 104-518, at 111 (1996) (Conf. Rep.).
236. *See generally* Boumediene v. Bush, 553 U.S. 723 (2008) (explaining the history and policy rationales behind habeas corpus jurisprudence, including Congress's intent to prevent the abuse of the writ of habeas corpus by enacting AEDPA).
237. *Boumediene*, 553 U.S. at 773-74.
238. 545 U.S. 524 (2005).

application.[239] If so, the petitioner's claim is second or successive and must be dismissed unless the claim fits within the two narrow exceptions enumerated in 28 U.S.C. § 2244(b)(2)(A) or (B).[240] The Court's decision in *Gonzalez* left no question that a second or successive petition is barred under AEDPA in the absence of one of these two narrow exceptions.[241]

B. Post-Judgment Motions that Advance a Petitioner's Claim for Relief are Second or Successive Petitions

In *Gonzalez v. Crosby*,[242] the United States Supreme Court painstakingly explained when a Rule 60(b) motion is considered to be a second or successive habeas petition.[243] In *Gonzalez*, the Court placed substantial weight on the meaning of a claim in the habeas context.[244] The Court elucidated that a claim is the basis for a petitioner's request for federal relief when that petitioner is being held in custody subject to a state court's conviction.[245] The Court further explained that a motion may also be considered a claim because of the undeniable similarities between post-conviction motions and habeas corpus petitions.[246] If a motion attacks the reasoning or merits of a federal decision, then that motion is itself a claim in the habeas corpus con-

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239. *See* Gonzalez v. Crosby, 545 U.S. 524, 530 (2005) (explaining that this step of the analysis is necessary because in the event that a petitioner has already presented his claim to the district court in a prior application, that claim is statutorily barred according to AEDPA). The *Gonzalez* Court provided:

> Under § 2244(b), the first step of analysis is to determine whether a claim presented in a second or successive habeas corpus application was also presented in a prior application. If so, the claim must be dismissed; if not, the analysis proceeds to whether the claim satisfies one of the two narrow exceptions.

Gonzalez, 545 U.S. at 530.

240. *Id*.

241. *Id*. at 529-30. "Under §2244(b), the first step of analysis is to determine whether a 'claim presented in second or successive habeas corpus application' was also presented in a prior application." *Id.* at 530. "If so the claim must be dismissed . . . ." *Id*.

242. 545 U.S. 524 (2005).

243. *See* Gonzalez v. Crosby, 545 U.S. 524, 530-31 (2005) (providing several examples of when a Rule 60(b) motion is considered a second or successive habeas petition, including: an assertion of excusable neglect when the petition was filed and a claim of constitutional error was incidentally omitted; a motion to seek leave to present newly discovered evidence in support of a claim already denied; and a motion arguing that a change in substantive law reasonably justifies relief).

244. *Gonzalez*, 545 U.S. at 530-31. *See also id*. at 538-39 (Breyer, J., concurring) (explaining that some misinterpretation may arise from the emphasis the majority placed on the word "claim").

245. *See id*. at 530 (majority opinion). The Court explained that "[t]hese statutes[, 28 U.S.C. § 2244(b) and 28 U.S.C. § 2254(d),] . . . make clear that a 'claim' as used in § 2244(b) is an asserted federal basis for relief from a state court's judgment of conviction." *Id*.

246. *Id*. at 531. "A habeas petitioner's filing that seeks vindication for such a claim is, if not in substance a 'habeas corpus application,' at least similar enough that failing

text.[247] If that claim has already been presented in a prior application, the district court must dismiss that claim as a second or successive petition.[248]

Since the decision in *Gonzalez*, there has been much contention between the lower courts as to how that analysis, which only concerned a Rule 60(b) motion, should apply to a Rule 59(e) motion made by a habeas petitioner.[249] This contention is misplaced, however, because the Court left no room for interpretation.[250] The Court explicitly stated that all Federal Rules of Civil Procedure apply in the habeas corpus context so long as they are not inconsistent with AEDPA.[251] This is evidenced by lower court decisions, which found Rule 59(e) motions to be second or successive habeas petitions when they attack a federal district court's ruling on the merits.[252]

C. Rishor's Rule 59(e) Motion was a Claim in the Habeas Corpus Context and Therefore the Ninth Circuit Erred in Ruling that Rishor's Rule 59(e) Motion Was Not Barred by the Restrictions of AEDPA

In *Rishor v. Ferguson*,[253] the United States Court of Appeals for the Ninth Circuit failed to properly identify when a post-judgment mo-

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to subject it to the same requirements would be 'inconsistent with' the statute [28 U.S.C. § 2254]." *Id*.

247. *Id*. at 532. The Court explained that motions made by the petitioner that question the basis, reasoning, or determination of fact by the district court in its prior decision are claims in the habeas context. *Id*.

248. *Id*. at 530-31.

249. *Compare* Ward v. Norris, 577 F.3d 925, 935 (8th Cir. 2009) (concluding that Rule 59(e) motions amount to a second habeas corpus petition because by the very nature of a Rule 59(e) motion attacks a previously adjudicated issue on its merits), *with* Blystone v. Horn, 664 F.3d 397, 415 (3d Cir. 2011) (holding that Rule 59(e) motions are not second or successive habeas corpus petitions because they are part and parcel of the original habeas petition and therefore not second or successive).

250. *Gonzalez*, 545 U.S. at 529. The Court stated that "[R]ule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only 'to the extent that it is not inconsistent' with applicable federal statutory provisions and rules." *Id*.

251. *Id*. The Court explained:

> The new habeas restrictions introduced by AEDPA are made indirectly relevant, however, by the fact that Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only to the extent that [it is] not inconsistent with applicable federal statutory provisions and rules.

Id.

252. *Compare* Williams v. Thaler, 602 F.3d 291 (5th Cir. 2010) (holding that Rule 59(e) motions are subject to the restrictions of AEDPA when they meet the criteria set out in *Gonzalez*), *with Ward*, 577 F.3d at 935 (concluding that the Rule 59(e) motion was improper because it amounted to a second habeas corpus petition), *and* United States v. Pedraza, 466 F.3d 932 (10th Cir. 2006) (denying petitioner's Rule 59(e) motion as a successive petition because the motion was subject to the restrictions of AEDPA).

253. 822 F.3d 482 (9th Cir. 2016).

tion is considered a second or successive petition in the habeas corpus context.[254] Instead of applying the same analysis to Rule 59(e) motions, as the United States Supreme Court did in *Gonzalez v. Crosby*[255] to a Rule 60(b) motion, the Ninth Circuit chose to hybridize the approaches taken by the United States Court of Appeals for the Third Circuit in *Blystone v. Horn*[256] and the United States Court of Appeals for the Eighth Circuit's approach in *Ward v. Norris*,[257] creating a new approach altogether.[258]

In *Rishor*, petitioner filed a Rule 59(e) motion requesting that the district court review its decision to dismiss his habeas corpus application on the merits.[259] Because Rishor's Rule 59(e) motion attacked the reasoning of the district court's prior decision to dismiss his habeas corpus application, his Rule 59(e) motion was substantively a claim.[260] Notwithstanding the holding in *Gonzalez*, the Ninth Circuit held that a Rule 59(e) motion is considered a second or successive petition only when that motion raises an entirely new issue that has not been reviewed in prior proceedings.[261] However, if a Rule 59(e) motion is timely filed and raises the same issue as had been raised in a prior proceeding, regardless of whether the motion attacks the federal court's decision on the merits, the motion should not be interpreted to be a second or successive habeas petition.[262]

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254. *Compare* Rishor v. Ferguson, 822 F.3d 482, 492 (9th Cir. 2016) (holding only when a Rule 59(e) motion raises an entirely new claim is it to be construed as a second or successive motion under AEDPA, even though allowing the petitioner to make such a motion may inadvertently permit the petitioner to attack the merits of the federal court's decision), *with* Gonzalez v. Crosby, 545 U.S. 524, 532 (2005) (explaining that when a habeas petitioner makes a claim or a motion attacking a federal court's previous resolution on the merits, that claim or motion is a second or successive claim in the habeas corpus context under AEDPA).

255. 545 U.S. 524 (2005).

256. 664 F.3d 397 (3d Cir. 2011).

257. 577 F.3d 925 (8th Cir. 2009).

258. *Rishor*, 822 F.3d at 492. The Ninth Circuit noted it created its own analysis for Rule 59(e) motions, stating "[t]he approach we adopt today is, in essence, a hybrid of the approaches adopted by our sister circuits thus far." *Id*.

259. *Rishor*, 822 F.3d at 488-89.

260. *Compare Gonzalez*, 545 U.S. at 532 ("A motion can also be said to bring a 'claim' if it attacks the federal court's previous resolution of the claim on the merits . . . ."), *with Rishor*, 822 F.3d at 488-89 (explaining that Rishor was filing a Rule 59(e) motion requesting the district court to reconsider its prior resolution on his claim and state whether he was entitled to habeas relief).

261. *Rishor*, 822 F.3d at 492. *But see* 28 U.S.C. §2244(b)(2) ("A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed . . . .").

262. *Rishor*, 822 F.3d at 492. *But see* 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."); *Gonzalez*, 545 U.S. at 532 ("A motion can also be said to bring a 'claim' if it attacks the federal court's previous resolution of the claim on the merits . . . .").

The approach taken by the Ninth Circuit is fundamentally incorrect in light of both judicial precedent and the plain language of AEDPA.[263] AEDPA clearly bars second or successive petitions.[264] If a petition has been made in a prior habeas corpus application, that application is second or successive and a district court is required to dismiss it as such.[265] If a petitioner files any post-judgment motion that advances a claim not previously considered by a federal court, then that motion is a second or successive claim.[266] Rishor previously presented his claim to the district court, and the court dismissed that claim.[267] Rishor's Rule 59(e) motion further advanced that claim and therefore was a per se second or successive petition.[268] Because the Ninth Circuit allowed Rishor's Rule 59(e) motion to advance a claim already considered by a federal court, the Ninth Circuit erred in not finding that the motion was a second or successive petition and thus barred by AEDPA.[269] There is no question that second and/or successive habeas corpus petitions are statutorily barred under AEDPA.[270] Furthermore, precedent in *Gonzalez* indicates that post-judgment motions advancing a petitioner's claim for relief are second or successive habeas corpus petitions.[271] The Ninth Circuit ruled that the district court did not act outside of its jurisdictional grant when it reviewed

263. *Compare Rishor*, 822 F.3d at 492 (holding that a post-judgment motion requesting the court to reconsider a previously adjudicated habeas corpus petition is not a second or successive petition subject to the restrictions of AEDPA), *with Gonzalez*, 545 U.S. at 530-31 (stating any habeas corpus claim previously adjudicated must be dismissed as second or successive unless that claim falls within one of two narrow exceptions provided in AEDPA), *and* 28 U.S.C. § 2244(b) (requiring a federal court to dismiss any habeas corpus application that has already been presented in a prior application).

264. *See* 28 U.S.C. § 2244(b)(1) (barring second or successive habeas corpus petitions from review by federal court judges).

265. *See id*. ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.").

266. *See Gonzalez*, 545 U.S. at 532 (stating any Federal Rule of Civil Procedure motion that advances a habeas corpus claim is considered a second or successive claim, thus barred from review, unless that motion falls within one of the two provided exceptions in AEDPA).

267. *Rishor*, 822 F.3d at 492.

268. *Cf. Gonzalez*, 545 U.S. at 532 (reasoning any post-judgment motion that advances a previously adjudicated habeas corpus claim is considered a second or successive claim, thus barred from judicial review).

269. *Compare Rishor*, 822 F.3d at 492 (permitting the federal district court's decision to allow Rishor to present a Rule 59(e) motion, even though the motion advanced a habeas claim that had already been presented to a federal court), *with Gonzalez*, 545 U.S. at 530-32 (explaining that when a post-judgment motion attacks a federal court's previous resolution, that motion is a second or successive claim in the habeas context and thus barred by AEDPA).

270. *See* 28 U.S.C. § 2244(b) (prohibiting federal judges from reviewing second or successive habeas corpus petitions made by state prisoners).

271. *Gonzalez*, 545 U.S. at 532. "[A] 'claim' as used in § 2244(b) is an asserted federal basis for relief from a state court's judgment of conviction." *Id*. at 530.

Rishor's Rule 59(e) motion.[272] Thus, the Ninth Circuit failed to accurately follow the plain language of AEDPA and Court precedent set out in *Gonzalez* when it allowed Rishor to present a motion that advanced a habeas corpus claim attacking the district court's previous ruling on the merits.[273]

V. CONCLUSION

In *Rishor v. Ferguson*,[274] the United States Court of Appeals for the Ninth Circuit held that a Rule 59(e) motion should be considered a second or successive habeas petition only when that motion presents a new claim not previously adjudicated.[275] The plain language of AEDPA and the extensive guidance provided by the United States Supreme Court in *Gonzalez v. Crosby*,[276] make clear that second or successive habeas claims are statutorily barred from review by federal courts.[277] According to *Gonzalez*, a post-judgment motion is a second or successive habeas corpus claim when it attacks the merits of a federal court's decision to deny a petitioner habeas corpus relief.[278] Therefore, because Rishor filed a Rule 59(e) motion in federal district court asking the court to reconsider its prior decision, Rishor's Rule 59(e) motion was a second or successive habeas claim and thus barred by AEDPA.[279]

The Ninth Circuit's approach in Rishor was incorrect, not merely because it was contrary to the plain statutory language of AEDPA and the guidance of the United States Supreme Court in *Gonzalez*, but also because the Ninth Circuit's approach was deleterious to the purpose of AEDPA as a whole. AEDPA was designed to mitigate the abuse of the writ of habeas corpus by preventing state petitioners from filing multiple and, in some cases, frivolous habeas corpus petitions. The approach taken by the Ninth Circuit allows a habeas corpus petitioner to do just that, as long as the petitioner timely files the post-judgment motion, and that motion reasserts a claim already presented to the district court. This reasoning does not hold water because

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272. *Rishor*, 822 F.3d at 492.

273. *Compare id*. at 492-93 (applying a new, hybridized approach, which allows timely filed Rule 59(e) motions that advance petitioners' habeas corpus claims so long as those motions were included in a previous habeas petition), *with Gonzalez*, 545 U.S. at 532 (holding that a post-judgment motion is a second or successive habeas claim when it advances an attack of the district court's previous decision on the merits), *and* 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.").

274. 822 F.3d 482 (9th Cir. 2016).

275. Rishor v. Ferguson, 822 F.3d 482, 492 (9th Cir. 2016).

276. 545 U.S. 524 (2005).

277. *See supra* notes 235-246 and accompanying text.

278. *See supra* notes 247-257 and accompanying text.

279. *See supra* notes 258-285 and accompanying text.

AEDPA already addresses this issue in 28 U.S.C. § 2244(b)(3). In 28 U.S.C. § 2244(b)(3) a state prisoner is permitted to file a second or successive petition, but only if the prisoner files with the appropriate court of appeals, which will then direct state prisoner's petition back to the district court if it is not frivolous. So long as AEDPA reads as it does today, federal district courts should apply the same analysis used by the Court in *Gonzalez* to Rule 59(e) motions made by habeas corpus petitioners who have already received judgment on their claim. When determining justiciability of a post-judgment motion filed by a state prisoner, the federal district court should take the approach utilized in *Ward v. Norris*,[280] dismissing the motion as a second or successive motion if it attacks a federal district court's previous decision to deny habeas corpus relief on the merits because such dismissal is required by both the plain language of AEDPA and the holding of *Gonzalez*.

Cory Wilson—'18

280. 577 F.3d 925 (2009).