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Don't be an Alarmist, But Don't be Overconfident: On The Prospects of Overturning Obergefell

ZAC KRAUSE

On August 1st of 2025, the Supreme Court of the United States was formally asked to hear a case explicitly calling for the overturning of *Obergefell v. Hodges* (2015), the Supreme Court case granting a constitutional right to same-sex marriage.[1] Shortly after the *Obergefell* ruling, plaintiff Kim Davis made national headlines for refusing to issue a marriage license to the defendants, David Moore and David Ermold. Davis refused on religious grounds and told the couple she was acting "under God's authority."[2] Moore and Ermold's lawsuit sought damages for the emotional distress caused by Davis' refusal to issue their marriage license in her position as former Kentucky County Clerk. In 2023, the United States District Court for the Eastern District of Kentucky decided Davis was liable, and a jury awarded the defendants $50,000 in damages apiece.[3]

Davis appealed to the Federal Court of Appeals for the Sixth Circuit, where she argued that she should not be held liable for refusing to issue the marriage licenses because she was adhering to her right to freely exercise her religion under the Free Exercise Clause of the First Amendment of the U.S. Constitution.[4] The Sixth Circuit rejected Davis' appeal, affirming that the First Amendment does not allow for or protect any state actions that violate constitutional rights.

Recently, however, Davis appealed to the Supreme Court. Davis is represented by Liberty Counsel, an evangelical Christian ministry that uses litigation to promote its views on "religious freedom, the sanctity of life, and

[1] Petition for Writ of Certiorari, *Davis v. Ermold*, No. 25-125 (U.S. docketed Aug. 1, 2025).
[2] Dylan Lovan, *Clerk Who Denied Same-Sex Marriage Licenses in 2015 Is Still Fighting Supreme Court's Ruling*, AP NEWS (June 23, 2025), https://apnews.com/article/kim-davis-clerk-samesex-marriage-supreme-court-8a914cc0563aeb5b7c360a9264ce50ce.
[3] Laurel Wamsley, *Kim Davis Is Ordered to Pay $100,000 to Same-Sex Couple She Denied Marriage License*, NPR, Sept. 14, 2023, https://www.npr.org/2023/09/14/1199477637/kim-davis-same-sex-marriage-license-ordered-to-pay-damages.
[4] *Ermold v. Davis*, 130 F.4th 553 (6th Cir. 2025).

the family."[5] The first two questions in the case are related to whether Davis can be found liable for the emotional distress inflicted upon Moore and Ermold. The third question presented asks "whether *Obergefell v. Hodges,* and the legal fiction of substantive due process, should be overturned."[6]

Since then, the media has been flush with alarmist content predicting the downfall of the right to same-sex marriage. Hillary Clinton urged same-sex couples to marry sooner rather than later because she believes the Supreme Court "will do to gay marriage what they did to abortion—they will send it back to the states."[7] Politico published an opinion piece titled "5 Reasons the Supreme Court Might Change Its Mind on Same-Sex Marriage."[8] Law firm Offit Kurman recently uploaded a blog guiding same-sex couples on how to navigate estate planning in a world without *Obergefell*.[9] Compounded by misleading information and misinformation on social media, the media landscape is leading many Americans to doubt whether the right to same-sex marriage is secure. This article analyzes whether there is any validity to the hysteria surrounding *Obergefell*, examining the context of the case itself and the current Court's willingness to overturn it.

I. HOW WAS *OBERGEFELL* DECIDED?

Although *Obergefell* consolidated 14 other lawsuits, it primarily revolved around James Obergefell and John Arthur.[10] The two were married in Maryland and returned to their home state of Ohio, which at the time did not allow for same-sex marriages to be performed, nor did it recognize same-sex marriages performed in any other state. Mr. Arthur was terminally ill, and Mr. Obergefell was merely seeking to be listed as his spouse on Mr. Arthur's death certificate.

There were two issues presented in the case: (1) whether states committed a constitutional violation by refusing to license a same-sex

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[5] Liberty Counsel, *About Liberty Counsel,* LIBERTY COUNSEL (last visited Oct. 23, 2025), https://www.lc.org/about.

[6] Petition for Writ of Certiorari, *Davis v. Ermold*, No. 25-125 (U.S. docketed Aug. 1, 2025).

[7] Brooke Migdon, *Hillary Clinton: Supreme Court 'will do to gay marriage what they did to abortion'*, THE HILL (Aug. 19, 2025), https://thehill.com/homenews/lgbtq/5459801-hillary-clinton-supreme-court-gay-marriage-abortion/.

[8] Kimberly Wehle, *5 Reasons the Supreme Court Might Change Its Mind on Same-Sex Marriage*, POLITICO (Sept. 22, 2025), https://www.politico.com/news/magazine/2025/09/22/same-sex-marriage-might-be-unsafe-00568474.

[9] Candace Dellacona, *Obergefell in Question: Estate Planning Risks for Same-Sex Spouses*, OFFIT KURMAN (Aug. 14, 2025), https://www.offitkurman.com/offit-kurman-blogs/estate-planning-risks-obergefell-overturned.

[10] *Obergefell v. Hodges*, 576 U.S. 644 (2015).

marriage and (2) whether states were required to acknowledge marriage licenses involving a same-sex marriage undertaken in other states. The plaintiffs argued that the state's refusal to recognize same-sex marriages amounted to a violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses. The Court ultimately decided in favor of the plaintiffs in a narrow 5-4 decision written by former Justice Anthony Kennedy. The decision required all U.S. states to recognize same-sex marriages performed within their state, as well as same-sex marriages performed in other states.

The Fourteenth Amendment Due Process Clause maintains that "No State shall… deprive any person of life, liberty, or property, without due process of law."[11] Justice Kennedy reasoned that there are four principles and traditions that demonstrate why same-sex marriage ought to be recognized as a fundamental right guaranteed within the "liberty" component of the Due Process Clause. To reach the Equal Protection Clause, Kennedy held that the Due Process Clause and the Equal Protection Clause are connected, and that "the challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality."[12] Chief Justice John Roberts, and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito found themselves in dissent.[13] The Chief Justice authored the main dissent that was joined on by all four dissenters, and Justices Scalia, Thomas, and Alito wrote separate dissenting opinions.

II. REASONS TO CONSIDER THE THREAT TO *OBERGEFELL* AS CREDIBLE

Ten years have passed since the landmark decision in *Obergefell v. Hodges* was decided in 2015. Ten years later, in a world where approximately 70% of Americans support a right to same-sex marriage, it is difficult to imagine such a strong movement in opposition to this right, or a world in which this right might be undermined.[14] But in reality, we might be living in that world. There are a few reasons that validate some of the online hysteria.

The first reason is that the current Court is demonstrably comfortable overturning precedent. Overturning *Obergefell* requires violating *stare decisis*,

[11] U.S. Const. amend. XIV.
[12] *Obergefell v. Hodges*, 576 U.S. 644, 686 (2015).
[13] *Obergefell v. Hodges*, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting).
[14] *LGBTQ+ Rights*, GALLUP (May 18, 2025), https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx.

the principle obligating courts to follow in the line of historical precedent.[15] There are a number of factors courts must consider when contemplating overturning precedent, most comprehensively outlined in *Planned Parenthood v. Casey* (1992), a case in which the Court considered the overturning of *Roe v. Wade* (1973) in 1992.[16] First, they consider the quality of the previous decision's reasoning. Second is the "workability" of a precedent. If they find that the precedential rule is too difficult for lower courts and interpreters to apply, the rule is not workable. Third, the Justices will consider how consistent the rule at hand is with other decisions and precedents. Fourth, courts analyze how society at large has changed since the rule was established. Lastly, and likely most importantly for *Obergefell*, is the reliance interest on the rule. Because same-sex couples have come to rely on it, overruling *Obergefell* would result in hardship for hundreds of thousands of people. There have been nearly 600,000 same-sex marriages since the decision was handed down.[17] Other people with a reliance interest would include the children of these couples and the government administrators handling marriage licenses, tax filings, and property. Stare decisis will undoubtedly serve as a bulwark against the overturning of *Obergefell*, but to what extent is subject to speculation.

In recent years, the current Supreme Court has shown it will casually overturn decades of precedent. Most prominently, *Dobbs v. Jackson Women's Health Organization (2022)* eliminated 50 years of federal abortion rights.[18] In *Students for Fair Admission v. Harvard* (2023), the Court effectively overturned 50 years of precedent that permitted race-conscious admissions in higher education.[19] In *Janus v. AFSCME* (2018), the Court overturned a case called *Abood v. Detroit Board of Education* (1977), which involved the collection of "agency fees" from public-sector unions.[20] Then in *Loper Bright Enterprises v. Raimondo* (2024), the Court overruled *Chevron U. S. A. Inc. v. Natural Resources Defense Council* (1984) and the Chevron doctrine, a principle that required courts to defer to a federal agency's interpretation of an ambiguous statute.[21] In each of these cases, the Court engaged in analysis derived from *Casey* (called Casey Factors), whether explicitly or implicitly, and decided to overrule an established precedent. The Roberts Court,

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[15] *Stare Decisis*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/stare_decisis (last visited Aug. 10, 2026).
[16] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).
[17] *Nearly 600,000 Same-Sex Couples Have Married since Obergefell v. Hodges*, WILLIAMS INSTITUTE, https://williamsinstitute.law.ucla.edu/press/ss-marriage-data-media-alert/ (last visited Aug. 10, 2026).
[18] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).
[19] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023).
[20] *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 585 U.S. 878 (2018).
[21] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

especially since 2018, has emphasized textual correctness and, as a result, precedent has taken a backseat.[22]

The second factor pointing toward the overturning of *Obergefell* as a possibility is the Roberts Court's gradual erosion of substantive due process. The Fourteenth Amendment Due Process Clause consists of vague guarantees and has been subject to speculation by legal analysts since it was ratified. While its plain text appears procedural—and it does contain a significant procedural component—courts have recognized a substantive component to the Due Process Clause over time. According to constitutional law Professor Erwin Chemerinsky, "there is no concept in American law that is more elusive or more controversial than substantive due process."[23]

Simply put, the Justices have found that the "liberty" component of the clause is eligible for expansive interpretation. This means that when a right is deemed fundamental, government action that infringes on that right must be sufficiently justified. To justify the infringement of a fundamental right, the government must have a compelling interest that is narrowly tailored to achieve that interest.[24]

Substantive due process has a somewhat dark past and was originally used to protect "economic liberties" from government interference. In *Lochner v. New York* (1905), the Supreme Court struck down a law that limited the number of hours that bakers were permitted to work to 10 hours a day.[25] Justice Peckham held that individuals have a liberty right to freely contract for labor and that New York's law violated such a right. From 1905 to 1937, the Court used the concept of economic substantive due process to strike down 200 other laws, until the Court put an end to the Lochner era and repudiated the concept of economic liberties in *West Coast Hotel v. Parrish (1937)*.[26]

Even before the "liberty of contract" framework became obsolete, the Court began using the Fourteenth Amendment Due Process Clause to secure civil liberties. This kind of substantive due process is still in use today and is relevant to the right to same-sex marriage. In *Meyer v. Nebraska* (1923), the Court struck down a Nebraska law that outlawed the teaching of non-English languages to children below eighth grade.[27] The Court ruled that parents have a fundamental right to parent their children as they see fit, marking substantive

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[22] Adam Feldman, *The Strength of Precedent is in the Justices' Actions, Not Words*, EMPIRICAL SCOTUS (Nov. 28, 2018), https://empiricalscotus.com/2018/11/28/strength-of-precedent/.
[23] Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501 (1999).
[24] *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny (last visited Aug. 10, 2026).
[25] *Lochner v. New York*, 198 U.S. 45 (1905).
[26] Chemerinsky, *supra* note 23.
[27] *Meyer v. Nebraska*, 262 U.S. 390 (1923).

due process' shift toward securing family and personal liberty rights. In another turning point for substantive due process, *Griswold v. Connecticut* (1965), the Court invalidated a state ban on contraceptives for married couples by recognizing a due process right to marital privacy.[28] Then, in the landmark *Roe v. Wade*, the Court used the privacy framework as put forth in *Griswold* to guarantee a constitutional right to abortion and strike down an abortion restriction from Texas.[29] Moving toward a right to same-sex marriage, the Court later invalidated a Texas law criminalizing homosexual sex in *Lawrence v. Texas* (2003).[30] Finally, in 2015, the Court mandated marriage equality in *Obergefell v. Hodges*.[31]

Although not at all formally discarded, the Court has been chipping away at substantive due process for years. Overturning *Obergefell* could be one of the last steps. In *Washington v. Glucksberg* (1997), the Court refused to create a substantive due process right to physician-assisted suicide, narrowing the doctrine of substantive due process considerably.[32] They held that fundamental rights must be "deeply rooted in this nation's history and tradition" in order to qualify for court-mandated protection, a characterization *Obergefell* could never uphold. Recently, in *Dobbs*, the Justices overturned *Roe v. Wade*, a quintessential substantive due process case, reiterating and reestablishing *Glucksberg* as the controlling framework when identifying unenumerated rights.[33] *Griswold*, *Lawrence,* and *Obergefell* remain intact as prime substantive due process cases, but in other recent litigation, the court has come to utilize the doctrine only when it "tracks personal preferences and political philosophies."[34] Davis' petition for a writ of certiorari directly calls for the "legal fiction" of substantive due process to be overturned.[35] Additionally, one of the amicus briefs (additional filings by interested parties to the court urging a certain outcome) filed in favor of the petitioner argues that *Obergefell* replicates the errors of *Roe* and thus should also be overturned.[36]

The third reason to expect that *Obergefell* will be overturned is much less theoretical and is grounded in the Supreme Court's administrative practices. Petitioner Davis filed her petition for writ of certiorari, asking the

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[28] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[29] *Roe v. Wade*, 410 U.S. 113 (1973).
[30] *Lawrence v. Texas*, 539 U.S. 558 (2003).
[31] *Obergefell v. Hodges*, 576 U.S. 644 (2015).
[32] *Washington v. Glucksberg*, 521 U.S. 702 (1997).
[33] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).
[34] Leah M. Litman, *The New Substantive Due Process*, 103 TEX. L. REV. 564 (2025).
[35] Petition for Writ of Certiorari, *Davis v. Ermold*, No. 25-125 (U.S. docketed Aug. 1, 2025).
[36] Brief of Amici Curiae National Organization for Marriage and the Claremont Institute Center for Constitutional Jurisprudence in Support of Petitioner, *Davis v. Ermold*, No. 25-125 (U.S. filed Sept. 8, 2025).

Supreme Court to hear and decide her case, on July 24 of 2025.[37] Respondents initially waived their right to file a brief in response, essentially signaling to the Justices that Davis' petition was not worth their time and that they were confident the litigation would end at the petition.[38] The Court could have left the matter alone; however, it requested a response from respondents Moore and Ermold on August 7th, 2025.[39] According to legal commentator Amy Howe, after Moore and Ermold waived their right to respond, the Court "could have simply let Davis' case move forward... and then denied review in the fall," but instead, at least one justice wanted to think about it, signaling Davis' petition may not face the near-automatic denial most petitions receive.[40]

The Supreme Court considers a number of factors when trying to decide whether to grant a petition for a writ of certiorari. In the case at issue, the petitioner asked the Court to take the case merely because *Obergefell* was "wrong when decided," as opposed to a more traditional justification such as a circuit split, when two or more circuit courts issue conflicting rulings on the same legal issue.[41] The notorious "rule of four" dictates that the votes of four Justices are required in order to decide to hear a case. The Justices may behave strategically and opt not to hear a case even if they have four votes if they are not confident they will have a fifth vote. When *Obergefell* was decided in 2015, it was decided on a 5-4 basis. Since then, the composition of the Court has changed drastically, which is one of the reasons we can find predictive insight in an analysis of each individual Justice.

III. JUSTICE-BY-JUSTICE ANALYSIS

A Justice-by-Justice analysis will be helpful in predicting the outcome of this petition or some future case seeking to overturn *Obergefell*. Of the four Justices who dissented in the Obergefell decision, three still remain on the Court—Chief Justice Roberts, and Justices Thomas and Alito.

Justice Thomas is the first guaranteed vote in favor of overturning *Obergefell*. In 2020, Davis similarly petitioned the Supreme Court, and the Court denied the petition.[42] Alongside the order denying Davis' petition for

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[37] Petition for Writ of Certiorari, *Davis v. Ermold*, No. 25-125 (U.S. filed July 24, 2025).
[38] Waiver of Right of Respondent to Respond, *Davis v. Ermold*, No. 25-125 (U.S. filed Aug. 4, 2025).
[39] Docket Entry, *Davis v. Ermold*, No. 25-125 (U.S. Aug. 7, 2025), https://www.supremecourt.gov/docket/docketfiles/html/public/25-125.html.
[40] Amy Howe, *Will the Supreme Court revisit its ruling on same-sex marriage?*, SCOTUSBLOG (Aug. 13, 2025), https://www.scotusblog.com/2025/08/will-the-supreme-court-revisit-its-ruling-on-same-sex-marriage/.
[41] Petition for Writ of Certiorari, *Davis v. Ermold*, No. 25-125 (U.S. filed July 24, 2025).
[42] *Davis v. Ermold*, 141 S. Ct. 3 (2020).

writ of certiorari in 2020, Justice Thomas wrote a statement respecting the denial, joined by Justice Alito. Thomas claimed that because of the 2015 decision, "by choosing to privilege a novel constitutional right over the religious liberty interests explicitly protected in the First Amendment, and by doing so undemocratically, the Court has created a problem that only it can fix."[43] Although he agreed that the Court made the right decision by rejecting the appeal because the petition "does not cleanly present" the relevant questions, he seemed eager to hear the appeal.[44]

In his dissent in Obergefell, he lamented "the dangerous fiction of treating the Due Process Clause as a font of substantive rights" and contended that "even if the doctrine of substantive due process were somehow defensible… petitioners still would not have a claim."[45] In his concurring opinion in *Dobbs v. Jackson Women's Health Organization* in 2022, Thomas railed against the theory of substantive due process and argued that the Court should revisit all of the cases relying on it. He then called out *Obergefell* by name as an example.[46]

Justice Alito is likely the second vote to overturn *Obergefell*. He also wrote his own dissenting opinion in *Obergefell*. With a heavy reliance on history and tradition, he critiqued the court for engaging in judicial activism. He further decried how the decision "will be used to vilify Americans who are unwilling to assent to the new orthodoxy" and predicted that those people who hold views in opposition to same-sex marriage "will risk being labeled as bigots and treated as such…"[47]

Yet, at an academic conference in Washington, D.C., Justice Alito reiterated some of his main criticisms of the *Obergefell* decision, but then clarified that "In commenting on *Obergefell*, I am not suggesting that the decision in that case should be overruled."[48] He continued, "as I said in my opinion for the Court in *Dobbs*, more than once, nothing in *Dobbs* was meant to disturb that decision." This reflects his writing in the *Dobbs* decision, in which he authored the majority opinion. In *Dobbs*, Alito reasoned that abortion is "fundamentally different" from other rights the Court has recognized under the Fourteenth Amendment because it, unlike those rights,

[43] *Davis v. Ermold*, 141 S. Ct. 3, 4 (2020) (Thomas, J., statement respecting denial of certiorari).
[44] *Id.*
[45] *Obergefell v. Hodges*, 576 U.S. 644, (2015) (Thomas, J., dissenting).
[46] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (Thomas, J., concurring).
[47] *Obergefell v. Hodges,* 576 U.S. 644 (2015) (Alito, J., dissenting).
[48] Lawrence Hurley, *Justice Samuel Alito Says He Is Not Calling for Same-Sex Marriage Ruling to Be Overturne*d, NBC NEWS (Oct. 3, 2025), https://www.nbcnews.com/politics/supreme-court/justice-samuel-alito-says-not-calling-sex-marriage-ruling-overturned-rcna235535.

"destroys" what the Court has called "fetal life," and thus overturning the right to abortion would not necessarily threaten those other rights.[49] Still, however, Alito was in dissent when *Obergefell* was decided. As mentioned in the discussion of Justice Thomas, although Alito also joined in Thomas' concurrence to the denial of the petition for a writ of certiorari when Davis initially appealed to the high court, both of the Justices appeared eager to overturn *Obergefell*.

Justice Neil Gorsuch replaced the fourth dissenting Justice in *Obergefell*, Justice Scalia, upon appointment by President Donald Trump in 2017. Justice Gorsuch has expressed deep skepticism toward the doctrine of substantive due process. Well before his appointment to the Supreme Court, Gorsuch wrote a book titled *The Future of Assisted Suicide and Euthanasia* in which he praised the Court's reasoning in *Glucksberg*—the case that sharply curtailed substantive due process.[50] As a proponent of the history and tradition test, we can assume that Gorsuch will vote to strike down *Obergefell*, as the right to same-sex marriage does not have much historical backing.

In the case of *Pavan v. Smith* (2017), the Supreme Court considered whether Arkansas's refusal to list a birth mother's same-sex spouse, alongside the birth mother, on their child's birth certificate violated the Constitution in light of *Obergefell*.[51] In a per curiam summary reversal, the Court held that Arkansas had violated *Obergefell*. A summary reversal means the Court resolved the case without granting full briefing and oral argument, in this case because it believed the legal question had already been clearly answered by existing precedent. Justice Gorsuch authored a dissent. He sharply criticized the Court for deciding the case summarily or without full oral argument, arguing that this mechanism should not be used when a legal issue is not free from doubt.[52]

Justice Kavanaugh was the second Trump appointee and has also shown relatively consistent skepticism toward substantive due process. Kavanaugh joined the majority to strike down a constitutional right to abortion in *Dobbs*, and in a concurring opinion, he emphasized that "the Constitution does not grant the nine unelected members of this Court the authority to decide important social and policy issues for the entire nation."[53] Kavanaugh has repeatedly praised former Justice Antonin Scalia and former Chief Justice William Rehnquist for tying liberty only to those rights "deeply rooted in our

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[49] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).
[50] Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia*, PRINCETON UNIVERSITY PRESS (2006).
[51] *Pavan v. Smith*, 582 U.S. 563 (2017).
[52] *Pavan v. Smith*, 582 U.S. 563, 574 (2017) (Gorsuch, J., dissenting).
[53] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (Kavanaugh, J., concurring).

nation's history and tradition."[54][55][56] In his Senate confirmation hearings, Kavanaugh reiterated his support for the "history and tradition" approach to defining civil liberties.[57] Although Kavanaugh has not authored a comprehensive opinion or paper outlining his theory of substantive due process, his voting record gives us a clear indication that he does not view it favorably, and he would likely represent the fourth vote to overturn *Obergefell*.

As for the Chief Justice, Roberts' opinion in *Obergefell* was the only dissent he has ever read from the bench.[58] In his dissent, he utilized "history and tradition" to argue that even when the Court had guaranteed rights related to marriage in the past using due process, it did not change the fundamental definition of marriage.[59] Roberts made it clear in 2015 that he was in opposition to a constitutional right to same-sex marriage, but it is important to recognize that his decision primarily relied on institutional legitimacy as opposed to moralistic objections. Roberts has consistently emphasized that *stare decisis* is integral to the court's legitimacy, so now that *Obergefell* is the decided law of the land and its upholding would further weaken the institutional legitimacy of the court, his ultimate vote remains unclear.[60][61] He could most definitely be the fifth vote to overturn *Obergefell*, but considering his concern with institutional legitimacy, it's difficult to say with any degree of certainty.

Justice Coney Barrett is likely the most critical vote in any prediction about *Obergefell*. She was the third Justice to be appointed by President Trump during his first term and has expressed disapproval of the doctrine of substantive due process. Barrett has written extensively about her ideas regarding the overturning of precedent. In a 2013 Texas Law Review article

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[54] Brett M. Kavanaugh, Remarks at 2017 Walter Berns Constitution Day Lecture (Sept. 18, 2017).

[55] Joel Dodge, *Kavanaugh's Confidential Emails Show He's a Threat to Individual Liberty*, AMERICAN CONSTITUTION SOCIETY (Sept. 14, 2018), https://www.acslaw.org/expertforum/kavanaughs-confidential-emails-show-hes-a-threat-to-individual-liberty/.

[56] Brett M. Kavanaugh, *Remarks at the Federal Courts, Practice & Procedure Symposium: Justice Scalia and the Federal Courts* (Feb. 3, 2017).

[57] *Roll Call Vote No. 223*, 115th Cong., 2d Sess. (Oct. 6, 2018), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1152/vote_115_2_00223.htm.

[58] Stephen Wermiel, *SCOTUS for law students (sponsored by Bloomberg Law): Dissenting from the bench*, SCOTUSBlog (July 2, 2013), https://www.scotusblog.com/2013/07/scotus-for-law-students-sponsored-by-bloomberg-law-dissenting-from-the-bench/#:~:text=These%20statistics%20are%20kept%20up,and%20Justice%20Ginsburg%20eight%20times.

[59] *Obergefell v. Hodges*, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting).

[60] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (Roberts, J., concurring).

[61] *June Medical Services L.L.C. v. Russo*, 591 U.S. ___ (2020) (Roberts, J., concurring).

titled "Precedent and Jurisprudential Disagreement," Barrett argued that the principle of stare decisis serves as a moderator between the contrary views of members of the Court and is thus important, but, crucially, not absolute.[62] She emphasizes the importance of the reliance interest when contemplating overturning precedent, writing that the reliance interest "forces a Justice to think carefully about whether she is sure enough about her rationale for overruling... If she is not sure enough, the preference for continuity trumps."

In her recent book titled *Listening to the Law*, Justice Barrett justified her decision in *Dobbs*.[63] She claimed that the moral debate over the issue of abortion set it apart from other unenumerated rights such as the "rights to marry, engage in sexual intimacy, use birth control and raise children," which she described as fundamental.[64] Describing a right as fundamental may be a hint that she is not willing to upend such a right. So while Barrett might claim that *Obergefell* was incorrectly decided, she will likely hesitate to overturn it because she considers it to be fundamental and because of the reliance interest at stake.

The three liberal Justices, Elena Kagan, Sonia Sotomayor, and Ketanji Brown-Jackson, are virtually certain to vote to uphold *Obergefell*. Justices Kagan and Sotomayor were a part of the original *Obergefell* majority, having already affirmed that the Constitution protects the right of same-sex couples to marry as an essential component of liberty and equality. The two of them were also dissenters in the *Dobbs* decision, in which they warned that overturning *Roe* endangered not only reproductive rights but also the entire line of substantive due process precedents that safeguard intimate personal choices.[65] Justice Sotomayor, in particular, emphasized that substantive due process protects the most personal decisions individuals can make—about "who to love and who to marry."

Although not on the Court when Obergefell was decided, we have strong evidence that Jackson will vote to uphold the right to marriage equality. Upon her appointment, the Human Rights Campaign, the largest LGBTQ+ civil rights organization, claimed that there was no question that Jackson would be a "fierce defender, champion and ally to marginalized communities,

[62] Amy C. Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 (2012-2013).
[63] Amy C. Barrett, *Listening to the Law: Reflections on the Court and Constitution*, SENTINEL (2025).
[64] Sonam Sheth, *Amy Coney Barrett Says 'Rights to Marry' Are Different From Abortion*, NEWSWEEK (Sept. 2, 2025), https://www.newsweek.com/amy-coney-barrett-abortion-supreme-court-decision-2123359.
[65] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

including the LGBTQ+ community."[66] Not to mention, in *303 Creative v. Elenis* (2023), they warned that the conservative majority was granting a "license to discriminate" against LGBTQ+ people.[67] Together, these three Justices represent a concrete bloc committed to preserving Obergefell's legacy and resisting efforts to curtail its reach.

IV. A WORLD WITHOUT OBERGEFELL

The Court has already released its docket for the October 2025 term without *Davis v. Ermold* listed, but that does not exclude the possibility that the case will appear later on.[68] Whether the Court will grant certiorari to Davis' petition is a very timely matter, but regardless, it's likely that the issue is likely to reappear time and time again, given Davis' petitioning history. If it isn't *this* case, another future case could easily serve as a vessel to overturn the precedent established in *Obergefell*, which is why this article has focused less on the willingness of the Justices to hear the case than it has on predicting how the Justices would vote if the case were in front of them. Four of the nine Justices are nearly guaranteed to vote to overturn *Obergefell*, while the other two conservative Justices—Barrett and Roberts—are less predictable. With two unpredictable Justices, but only a requirement of one additional vote, it seems that much of the online hysteria is justified. If it is not now, with Davis' petition as its occasion, it could most certainly happen anytime in the near future.

Although sounding quite alarmist, Hillary Clinton could have been correct in her warning to same-sex couples when she urged them to marry now before it is too late. We know that she was certainly correct in her claim that "American voters… don't understand how many years the Republicans have been working in order to get us to this point."[69]

Recently, Texas legislators sought to pass HB1738, "An Act relating to the repeal of the offense of homosexual conduct."[70] This would have repealed Section 21.06 of the Texas Penal Code, which makes it an offense to "engage

[66] Aryn Fields, *Human Rights Campaign Celebrates the Historic Confirmation of Ketanji Brown Jackson, the First Black Woman to Serve on the Supreme Court of the United States,* HUMAN RIGHTS CAMPAIGN (Apr. 7, 2022), https://www.hrc.org/press-releases/human-rights-campaign-celebrates-the-historic-confirmation-of-ketanji-brown-jackson-the-first-black-woman-to-serve-on-the-supreme-court-of-the-united-states.
[67] *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).
[68] Amy Howe, *Will the Supreme Court revisit its ruling on same-sex marriage?*, SCOTUSBLOG (Aug. 13, 2025).
[69] Brooke Migdon, *Hillary Clinton: Supreme Court 'will do to gay marriage what they did to abortion'*, THE HILL (Aug. 19, 2025).
[70] Tex. Penal Code Ann. § 21.06 (West 2015).

in deviate sexual intercourse with another individual of the same sex."[71] The act never passed. Since *Lawrence v. Texas* was decided in 2003, the state has been unable to enforce the law, yet 55 Republican members of the House of Representatives insisted upon maintaining the status quo in the penal code. If a law has no teeth, one must assume it exists merely as a symbolic gesture.

Unfortunately, the Texas Legislature's refusal to remove anti-sodomy language from the Texas Penal Code is only the tip of the iceberg when it comes to sentiments in opposition to same-sex couples. Resolutions calling on the Supreme Court to overturn *Obergefell* have been introduced in Idaho, Montana, North Dakota, and South Dakota, and Michigan has introduced a resolution condemning *Obergefell*.[72] Lawmakers in three states—Missouri, Texas, and Tennessee—have introduced legislation that does not seek to overturn *Obergefell*, but rather creates a new kind of marriage called a "Covenant marriage," which is restricted to marriages solely between a man and a woman.[73][74][75]

Although he has later made contradictory statements, in 2015, the day the *Obergefell* decision was handed down, President Donald Trump tweeted, "Once again the Bush appointed Supreme Court Justice John Roberts has let us down."[76] Until 2024, the Republican Party platform explicitly condemned the ruling in *Obergefell*.[77] Project 2025, the conservative Heritage Foundation's roadmap to governing the country upon the election of a Republican president, contains an explicit endorsement of a family as "a married mother, father, and their children."[78] Recently, United States Secretary of Defense and former Fox and Friends news host Pete Hegseth gave an endorsement to a video regarding Doug Wilson's "Crusade for Christian Domination in the Age of Trump."[79] In the video, Wilson states in no uncertain terms that he would like to see the United States go back to an era where homosexuality was a crime.

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[71] H.B. 1738, 89 Leg., Reg. Sess. (Tex. 2025).
[72] Khaleda Rahman, *Push for Supreme Court To Overturn Gay Marriage in Multiple States*, NEWSWEEK (Feb 26, 2025), https://www.newsweek.com/push-supreme-court-gay-marriage-states-2036390.
[73] S.B. 1117, 101st Gen. Assemb., Reg. Sess. (Mo. 2022).
[74] H.B. 547, 89 Leg., Reg. Sess. (Tex. 2025).
[75] H.B. 0315,114th Gen. Assemb.., Reg. Sess. (Tenn. 2025).
[76] Donald Trump (@realDonaldTrump), TWITTER (June 26, 2015, 9:06 AM), https://x.com/realDonaldTrump/status/614434531861512193.
[77] Republican National Convention, *The 2016 Republican Party Platform* (2016).
[78] Heritage Foundation, *Mandate for Leadership: The Conservative Promise*, HERITAGE FOUNDATION (2023).
[79] Pete Hegseth (@PeteHegseth), TWITTER (Aug. 7, 2025, 8:18 PM), https://x.com/PeteHegseth/status/1953626931234054558.

The aforementioned examples prove that there has been, and continues to be, an aggressive political movement to do away with protections for same-sex marriage. Now, as the Supreme Court is asked to revisit *Obergefell*, this movement has spilled over into the realm of real decision-making, and some speculators believe that it could actually come to fruition. Regardless of the timely reality of Davis' petition and regardless of whether the Justices decide to hear her case, the political and legal fight around the right to same-sex marriage is far from over. These efforts underscore that the struggle over marriage equality is no longer abstract—it is immediate and tangible.

Diesel Therapy: Have We Legalized Cruel and Unusual Punishment?

CALISTA KAYATTA

For almost a month, William Minnix endured an odyssey in chains as he was transported from Ohio to Colorado for a court appointment. What should have been a two-day trip became a harrowing ordeal covering twenty states in twenty days. Transported by TransCor America—a for-profit prison transport company—Minnix was subjected to inhumane conditions; he was denied regular food, showers, clean clothes, and adequate bedding. Minnix was forced to sleep on jail floors and left for hours in a facility contaminated with sewage. After a car accident during the trip, Minnix was briefly hospitalized, fitted with a neck brace, and returned to the van only to remain without rest for another 38 hours.[80] No police report was filed.

Minnix's story, while shocking, is hardly unique. Across the United States, countless incarcerated individuals—including those who have not yet been convicted—are cycled through the loosely-regulated private transportation system that routinely neglects their safety for profit.

As of 2023, the U.S. Bureau of Justice Statistics estimated that approximately 1.2 million individuals were incarcerated nationwide.[81] Managing such a vast population has led to increased privatization of correctional services, including transportation—something that, conveniently, absolves the government of direct responsibility. The transportation of prisoners is frequently outsourced to private companies that specialize in the extradition of the incarcerated. Although the prison transportation system has been around for a long time, large privatized corporations did not emerge until the 1990s, when the U.S. prison system nearly doubled. This change was largely due to 'tough on crime' laws that led to a rise in convictions and longer sentences. From there, a greater demand for prison transfers and extraditions was born, and a full-fledged industry created. Similar to for-profit prisons, these transportation companies frequently neglect the safety of the prisoners, their own guards, and the general public for monetary gain. Private companies

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[80] Alan Prendergast, *The Long and Winding Road: A Prisoner's Diary*, WESTWORD (Mar. 3, 1999), https://www.westword.com/news/the-long-and-winding-road-a-prisoners-diary-5058138/.

[81] Derek Mueller, *Prisons Report Series: Preliminary Data Release, 2023,* BUREAU OF JUSTICE STATISTICS (2024), https://bjs.ojp.gov/library/publications/prisons-report-series-preliminary-data-release-2023.

like TransCor, Prison Transport Services (PTS), and Inmate Services Corp. (ISC) are able to duck legal repercussions due to the lack of specific and uniform guidelines for proper transportation of incarcerated persons.[82]

However, perhaps the most alarming facet of the for-profit prison transport system is the very thing that William Minnix experienced: diesel therapy. Diesel therapy is an unofficial form of punishment in which prisoners are shackled and transported, from institution to institution, for days or weeks on end. Since companies are paid per prisoner per mile, they are heavily incentivized to take the longest, most convoluted routes, overcrowd vans with inmates, and take multiple unnecessary stops. These long, meandering routes last anywhere from a week to almost a month—as in Minnix's experience. They heighten the chance of a prisoner's escape, almost nil as they are, but crucially take a mental and physical toll on the prisoners themselves. Regulation of the private prison transport companies is largely left up to the states and, more often than not, the company itself. Currently, there is only one federally sanctioned act specifically outlining regulations for this industry—Jeanna's Act. Jeanna's Act was passed in response to the murder of an eleven-year-old girl, Jeanna North, who was killed by a prisoner who escaped during transport. The Act's intention is "provide protection against the risks to the public that are inherent in the interstate transportation of violent prisoners."[83] It is not to protect the prisoners. The act outlines a minimum requirement for drivers, including a background check and 100 hours of training, raising it from the original 40 hours. It also restricts the number of hours any one guard can be on duty. What this barely three-page document lacks is any minimum standard for the treatment of prisoners. No requirements for seat belts. No minimum bathroom stops. No maximum number of prisoners allowed in one van.[84] Jeanna's Act is a far cry from a protective legal standard. The Eighth Amendment of the Constitution states "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[85] The Amendment's Cruel and Unusual Punishment Clause "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."[86] The standard for extreme cruelty "itself remains the same, but its applicability must change as the basic mores of

[82] David M. Reutter, *Almost $950,000 Paid to Inmate Services Corp. for "Hellish" Prisoner Transports*, PRISON LEGAL NEWS (Feb. 1, 2024), https://www.prisonlegalnews.org/news/2024/feb/1/almost-950000-paid-inmate-services-corp-hellish-prisoner-transports/.
[83] Pub. L. No. 106-560, 114 Stat. 2784 (2000).
[84] INTERSTATE TRANSPORTATION OF DANGEROUS CRIMINALS ACT OF 2000, 34 U.S.C. §§ 60101–60104.
[85] U.S. Const. amend. VIII.
[86] *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

society change."[87] As the industry of private prison transport has emerged, the law must evolve its "standards of decency" to mark the progress of a maturing society.

In *Hope v. Pelzer* (2002), petitioner Larry Hope, an Alabama prison inmate, was involved in an altercation with a guard. He was subdued, handcuffed, and placed in leg irons. Hope was transported back to the prison, where he was made to take off his shirt. He spent seven hours tied to a hitching post, a horizontal metal bar used by the Alabama Department of Corrections in the 1990s to restrain prisoners for extended periods as punishment. While there, guards taunted Hope, denied him water, and did not allow bathroom breaks.[88] Petitioner Hope argued that this treatment violated his civil rights. Respondent Pelzer claimed that the prison guards nevertheless were entitled to qualified immunity, a legal doctrine that protects public officials from liability in civil lawsuits when performing their job duties. In a 6-3 decision, the Supreme Court found that the unnecessary and wanton infliction of pain—including prolonged restraint, deprivation of water, and denial of bathroom breaks—violated the Eighth Amendment. Hope was already subdued, handcuffed, and placed in leg irons, so there was no emergency or clear, present danger. Guards knowingly subjected him to "substantial risk of physical harm, unnecessary pain, unnecessary exposure to the sun, prolonged thirst and taunting, and a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation."[89] The Court concluded that the guards were not entitled to qualified immunity. In *Hope v. Pelzer*, the Supreme Court held that not only were hitching posts specifically a violation of the Eighth Amendment, but that a deprivation of water and adequate bathroom breaks was likewise in violation and representative of cruel and unusual punishment.

In *Estelle v. Gamble* (1976), the Supreme Court established that deliberate indifference to a prisoner's serious medical needs constitutes cruel and unusual punishment.[90] J. W. Gamble, an inmate in the Texas Department of Corrections, was injured while performing a prison work assignment in a textile mill. On November 9th, 1973, a 600-pound bale of cotton fell on Gamble and severely hurt his back. He complained of severe back pain repeatedly over the next few months. Guards frequently dismissed, inadequately treated, and even reprimanded Gamble for refusing to continue his work, placing him in solitary confinement until January of the next year. The Supreme Court held that "deliberate indifference" to medical illness or

[87] *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting).
[88] *Hope v. Pelzer*, 536 U.S. 730 (2002).
[89] *Id*. at 736–38.
[90] *Estelle v. Gamble*, 429 U.S. 97 (1976).

injury violated the Eighth Amendment, citing that the Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."[91] The Court concluded that these principles establish the government's obligation to provide medical care for even "those whom it is punishing by incarceration."[92] However, in the specific case of J.W. Gamble, the Court claimed that the neglect to provide additional treatment, such as an X-ray, was not in violation of the Eighth Amendment. Although the Court reaffirmed deliberate indifference to medical needs as cruel and unusual punishment, it failed to apply it to Gamble's mistreatment. It may not be deliberate indifference, but malicious compliance is nonetheless cruel and unusual. Despite the semi-frequent meetings, the prison's repeated denial of Gamble's medical needs and unusual methods of care (i.e., solitary confinement) were a clear Eighth Amendment violation. Despite the protections that exist and are upheld under the law protecting prisoners, they are sparingly applied.

Finally, in *Brown v. Plata* (2011), the Court held that severe overcrowding and denial of adequate medical and mental health care in California prisons amounted to unconstitutional conditions of confinement. This case represented two separate class actions petitioned by the inmates of California's prisons: one representing the mental health deterioration due to overcrowding, the other the physical health deterioration due to overcrowding. At the time of this decision, California correctional facilities had been operating at 200% of their intended capacity for years. Then-governor Arnold Schwarzenegger declared a state of emergency in the prisons as they were causing "increased, substantial risk for transmission of infectious illness and a suicide rate 'approaching an average of one per week.'"[93] Prisoners in California with serious mental illness were not receiving even minimal care. In some cases, suicidal inmates were held in telephone booth-style cages without toilets, sometimes up to 24 hours. Likewise, prisoners suffering physical illnesses received severely deficient care, with only half the space needed to sufficiently care for the current population. Patients would be housed in twelve-by-twenty-foot cages waiting anywhere from five to eight hours for treatment. This caused a substantial amount of unnecessary, preventable deaths. The Court ultimately concluded that, though prisoners may be deprived of certain rights due to their previous actions, the law and the Constitution demand recognition of certain other rights: "Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity

[91] *Id.* at 102 (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).
[92] *Id.* at 103.
[93] *Brown v. Plata*, 563 U.S. 493 (2011).

animates the Eighth Amendment prohibition against cruel and unusual punishment."[94] The overcrowding of the California prisons led to violent, unsanitary, and chaotic conditions that contributed to the constitutional violations, and the Court determined that "until the problem of overcrowding is overcome, it will be impossible to provide constitutionally compliant care to California's prison population."[95]

Together, these cases define a broad constitutional duty through the proper application of the Eighth Amendment as it relates to the prison system. Over these cases, the Court established that deprivation of basic human needs, such as bathroom breaks, food, and water, lack of attention or dismissal of medical care, and overcrowding or other conditions that lead to unsanitary, chaotic, and violent situations are all in violation of the Eighth Amendment and constitute cruel and unusual punishment. When applied to the practices of private prisoner transport companies, the standards established by the Supreme Court reveal a striking parallel between prior constitutional violations and the abuses inherent in diesel therapy.

In 2016, a class of pretrial detainees, while being transported by Inmate Services Corp. (ISC), were "shackled and unable to lie down, for eight continuous days across twelve states, with only momentary breaks for bathroom use."[96] Danzel Stearns was one of the inmates who later filed suit against ISC for their violation of his Eighth Amendment rights. The van diverted from Mississippi, where his trial for a minor drug charge would be held. Instead, ISC drivers headed the opposite direction, meandering through various states, sometimes twice, to pick up and drop off as many as seventeen prisoners, severely overcrowding the van. There were no bathrooms in the vehicle, and many inmates were pushed to urinate in cups, which frequently spilled on the floor. Stearns alleged that after multiple requests for a bathroom break, having been denied, one woman defecated in her pants. The transport van also made no overnight stops over the course of the eight days. Inmates were made to sit upright and thus were unable to sleep barely more than a few hours at a time. Stearns was ultimately left with a perianal irritation due to the lack of basic sanitation.[97] Subjected to severe overcrowding and an unnecessarily long route, Stearns and his fellow inmates were denied access to basic human needs like restroom stops, sleep, and clean clothes. These actions by the private prison transport company, I.S.C., directly reflect the precedents set by the Supreme Court. The U.S. Court of Appeals for the Eighth Circuit affirmed this notion and concluded that the conditions of Stearns's

[94] *Id*.
[95] *Id*. (quoting Juris. App. 141a.).
[96] *Stearns v. Inmate Servs. Corp.*, No. 18-3707, 2020 WL 2062180 (8th Cir. Apr. 29, 2020).
[97] *Id*.

confinement were "far from de minimis and a jury could reasonably conclude that, on this record, the conditions were arbitrary or excessive when compared to the government's perceived goal of securely transporting Stearns to his destination."[98] Since 2017, Arkansas law outlined the responsibility of private transport companies to insure the well being of their prisoners including but not limited to "necessary stops for restroom use and meals, proper heating and ventilation of the transport vehicle, climate-appropriate uniforms, and prohibitions on the use of tobacco, in any form, in the transport vehicle."[99] However, since the conclusion of this case, the law has not been updated or specified to outline specific protocols for prisoner care.

In November of 2000, thirty-nine Wisconsin prisoners filed suit against TransCor. Over the course of a thirty-hour bus ride, they were placed in a vehicle with no heat, no working toilet, and a broken muffler that repeatedly pumped exhaust fumes inside the vehicle. The prisoners alleged that they were frequently splashed with waste from the non-functioning toilet and vomited on each other due to the stench. On top of denied meals and medication, the prisoners were wearing only jump suits in sub-zero weather. Some prisoners contracted hypothermia and frostbite because of the conditions.[100] These prisoners were denied medical care, made to face extreme weather conditions, and left in squalor for thirty hours. In *Wine v. Wisconsin Department of Corrections et al* (2014), the U.S. District Court for the Western District of Wisconsin ruled that the prisoners could proceed with their claims of assault and battery; however, all other claims of the guards' misconduct were dismissed. Wisconsin law has not evolved since then, and currently, all the guidelines for private transport are left up to the department.[101]

In March of 2017, a group of pre-trial detainees was escorted by transport officer Buntyn, an employee of Prisoner Transport Services (PTS), a private prison transport company. Over the course of eight days, inmates W.Y., A.S., and S.K. (initialed for privacy reasons) were subjected to inhumane conditions and abuse. As in the previous case examples, detainees were denied frequent bathroom stops, once going 36 hours between bathroom stops.[102] Detainees were forced to urinate in empty bottles, which regularly spilled on

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[98] *Id.*
[99] *Standards for Private Entities Providing Prisoner or Detainee Services*, 28 C.F.R. pt. 97 (2002).
[100] *Wine v. Wisconsin Department of Corrections et al*, No. 2:14-cv-00838 (E.D. Wis. filed July 9, 2014).
[101] Wisconsin Admin Code § DOC 309.495 (1986).
[102] Press Release, U.S. Dep't of Just., *Former Prisoner Transport Officer Convicted of Civil Rights Offense for Abusing Detainees in His Care* (Dec. 15, 2015) https://www.justice.gov/archives/opa/pr/former-prisoner-transport-officer-convicted-civil-rights-offense-abusing-detainees-his-care.

the floor and the detainees themselves. W.Y., A.S., and S.K. were also restrained for long periods of time, cuffed behind their back (an uncomfortable practice already banned by PTS policy if cuffed for long periods), and placed extensively in the segregation cage—a small, secure, individual compartment (or a separate section of a larger compartment) used to isolate a prisoner from the general population of inmates being transported. Detainees were beaten and slammed against the side of the van for attempting to eat an abandoned McDonald's meal and adjusting shackles. One detainee, S.K., complained to Buntyn about the unsanitary van as he was recovering from being stabbed in the knees and feared his injury would get infected. Buntyn dismissed him and had him cleared by a jail nurse who had not examined him. This abuse continued throughout the trip until, at a stop, another officer noticed the poor treatment and pulled Buntyn off the van.[103] This dehumanizing, excessive abuse echoes that of *Hope v. Pelzer*. Buntyn's neglect of W.Y., A.S., and S.K.'s medical concerns and bodily needs is a blatant infringement of their Eighth Amendment rights.

The Supreme Court has consistently and clearly defined cruel and unusual punishment as an unnecessary and inhumane deprivation of bodily rights. These include overcrowding, denial of bathroom breaks, and lack of medical attention. Private prison transport companies, as proven, are guilty of this cruel and unusual punishment and much more. After such an established and clear precedent, one might expect policy reform. However, there is little incentive for politicians to propose bills protecting prisoners while keeping the favor of their voters. After all, how can people care about some criminals when they are struggling to pay for groceries? Upholding the Eighth Amendment needs to come from the court directly—specifically, the Supreme Court. The current state regulation of the transport system is outdated and ineffective. Not only will states always prioritize profit, but these vans are more than frequently crossing state borders, which blurs the lines of regulation and law.

This industry, like that of the incarcerated population, has grown exponentially and is on the rise. Jeanna's Act, in its three pages, primarily focuses on making it harder for prisoners to escape in transit and completely neglects the well-being of the prisoners themselves. Perhaps one would argue that this sort of issue would arise in federal transport of prisoners as well. However, because federal transport is not profit-driven, it does not incentivize cutting corners and mistreating prisoners. The true driving force behind this consistent abuse is the capitalization of the transport system. Companies are heavily incentivized to prioritize profit above all else. This profit-driven

[103] *Id.*

neglect has created the conditions for practices like diesel therapy. Without any regulation, the federal government is offloading the management of a rising incarcerated population and, in exchange, turns a blind eye to the perpetuated neglect and abuse. Ultimately, the private prison transportation system has led to a sustained pattern of inhumane treatment of the incarcerated in direct violation of the Eighth Amendment right to not be subjected to cruel and unusual punishment. Diesel therapy is a clear example of this legal blind spot. There can never be justice as long as revenue is on the line.

When Surrogacy Goes Wrong: The Law's Struggle to Keep Up with Modern Parenthood

PRISHA KAKLIYA

"I want the surrogate to be known for what she did, to be set as an example," Bi tells me. "I hope she goes to jail. Ideally, for murder."

—Emi Nietfeld[104]

In June 2024, Cindy Bi, a Silicon Valley venture capitalist, filed suit against the woman who served as the gestational surrogate for her child, alleging negligence related to the baby's stillbirth. Bi had entered into the arrangement with the gestational carrier (GC), pseudonymously known as "Rebecca Smith," in 2023. A gestational carrier is a woman who carries a pregnancy but is not genetically related to the child. In this case, Smith carried an embryo created in vitro using Bi's egg and Bi's husband's sperm. The arrangement was commercial in nature, with the GC set to be financially compensated. The parties accordingly signed confidentiality provisions and contracts. During the pregnancy, Smith experienced several complications, including early benign bleeding at 26 weeks, a premature rupture of membranes at 29 weeks, and ultimately a placental abruption at 32 weeks that deprived "Baby Leon" of oxygen, leading to his stillbirth, or medically, a subsequent death in utero.[105]

Although the doctors concluded that the stillbirth was due to an unpredictable medical complication, Bi contended that Smith was personally responsible for a preventable death and began to pursue what she viewed as justice for her child. She alleged serious wrongdoing by her surrogate, including alleged negligence during pregnancy and alleged surrogacy contract breach. Bi claimed that Smith failed to follow medical instructions and exercise due care during the late stages of pregnancy. She asserted that Smith ignored warning signs such as abdominal discomfort and fluid leakage, delayed seeking treatment, and failed to immediately notify Bi or her physicians of potential complications. Bi further alleged that Smith violated

[104] Emi Nietfeld, *The Baby Died. Whose Fault Is It?*, WIRED (Sept. 3, 2025), https://www.wired.com/story/the-baby-died-whose-fault-is-it-surrogate-pregnancy/.
[105] *Id.*

the terms of their surrogacy agreement by engaging in "unsafe or reckless behavior" like "rough sex," which Bi believed directly contributed to the death of the baby. Accordingly, Bi withheld the final contractual payments, hired a private investigator to examine Smith's actions, and launched a public campaign on social media targeting the alleged gross misconduct. She sought to hold both Smith and the involved agencies financially and legally accountable, suggesting that their actions—or inactions—were so negligent, it amounted to homicide.[106]

While no evidence substantiated Bi's claims, and medical professionals stressed that the stillbirth was not caused by any deliberate act of negligence, the situation left the erstwhile surrogate mother particularly vulnerable to "doxxing," or having one's location and person leaked online, leading to threats and harassment from strangers. Smith faced serious financial strain as she was left with unpaid medical expenses, lost wages, and legal bills. She was also left with severe emotional distress, including depression and suicidal ideation.[107]

The case of Baby Leon points to a growing problem in the United States' surrogacy landscape. The lack of adequate and sufficient regulatory legislation has become a double-edged sword that leaves both surrogate mothers and the intended parents (IPs) vulnerable, partly due to the fact that it is regulated largely at the state level, pursuant to the Tenth Amendment, which reserves powers not expressly granted to the federal government to the individual states.[108] The lack of federal uniformity has led to significant variations in how surrogacy is treated across states.

California, for example, permits both compensated and uncompensated gestational surrogacy and allows IPs to secure pre-birth orders establishing legal parentage under California Family Code § 7960, with protections extending to LGBTQ+ and unmarried couples. New York similarly allows compensated gestational surrogacy under the Child-Parent Security Act, providing for pre-birth parentage orders with defined medical and legal requirements. In contrast, Arizona prohibits all surrogacy contracts under A.R.S. § 25-218, recognizing the surrogate as the legal mother and limiting parentage options for intended parents. States like Louisiana and Nebraska impose severe restrictions on compensated surrogacy, effectively prohibiting

[106] *Id.*
[107] *Id.*
[108] *Id.*

it, while Washington supports both gestational and traditional surrogacy with enforceable contracts and pre-birth parentage orders under RCW 26.26A.[109]

These differences mean that IPs and GCs must carefully navigate state-specific laws as their rights, obligations, and the enforceability of contracts can vary dramatically depending on where the arrangement takes place. The lack of a uniform federal oversight exacerbates vulnerabilities of all parties, as surrogacy agencies operate in a largely self-regulated environment that often prioritizes profit over accountability. These agencies serve as intermediaries, matching IPs with GCs, drafting contracts, and managing funds for compensation and medical expenses. Yet, without mandatory licensing or standardized practices, these entities can—even inadvertently—expose both parties to significant risks. For instance, agencies may insufficiently conduct or entirely fail to conduct background checks on carriers or parents, leading to mismatched expectations or otherwise preventable health complications that go unaddressed. Recent data indicate that the U.S. surrogacy market has expanded to approximately $9 billion in 2025.[110] This growth has coincided with a rise in agency-related disputes, where mismanagement of funds or inadequate vetting results in financial abandonments.[111]

Agencies have a fiduciary duty to act with care and loyalty toward clients, as outlined in the Restatement (Third) of Agency § 8.01 and § 8.08.[112] This duty requires thorough vetting of surrogates' health histories, transparent handling of escrow funds, and enforcement of contract terms, such as medical compliance. Breaches of this duty can lead to negligence or contract claims.[113] For example, the Texas-based company Surrogacy Escrow Account Management (SEAM) allegedly misappropriated over $16 million from intended parents' escrow accounts, which were meant to cover surrogates' medical expenses, legal fees, and compensation. Instead, funds were

[109] Legal Professional Group, *Surrogacy Laws By State*, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, https://connect.asrm.org/lpg/resources/surrogacy-by-state?ssopc=1 (last visited Nov. 12, 2025).
[110] *Surrogacy Market Size, Share & Segmentation by Surrogacy Type, Compensation Type, Service Type, End User, and Region: Global Forecast 2026–2035*, SNS INSIDER (May 14, 2026), https://www.snsinsider.com/reports/surrogacy-market-9920 (last visited Aug. 5, 2026).
[111] Parham Zar, *Surrogacy Trends 2025: Costs, Laws, and Future Insights*, EGG DONOR & SURROGACY INSTITUTE BLOG (June 26, 2025), https://eggdonorandsurrogacy.com/surrogacy-trends-2025/.
[112] *Restatement (Third) of Agency* § 8.01 (Am. Law Inst. 2006); *Restatement (Third) of Agency* § 8.08 (Am. Law Inst. 2006).
[113] Rosa Flores, Emma Tucker & Sara Weisfeldt, *Nearly 2 Dozen Families Claim Owner of Houston Surrogacy Escrow Company Stole Millions to Fund Lavish Lifestyle*, CNN (July 19, 2024), https://www.cnn.com/2024/07/19/us/houston-surrogacy-escrow-company-fraud-scheme-lawsuit.

reportedly diverted to personal ventures, including to SEAM's owner Dominique Side's side businesses. In July 2025, a Harris County judge ordered Side to pay over $1 million in restitution to 37 affected families, though many are still awaiting full recovery. The FBI has also launched a federal investigation into the matter.[114] Other common clauses in surrogacy agreements that lead to disputes include the following:

> *(i) Parental Rights and Intent Clauses*. These clauses define who becomes the legal parent(s) and often require the surrogate to relinquish any claim to the child. Conflicts arise when surrogates assert emotional or legal rights, especially in states with unclear laws. For instance, in restrictive jurisdictions like Louisiana, same-sex couples face barriers to securing pre-birth parentage orders, as only married heterosexual couples using their own gametes qualify.[115] Ambiguities in these clauses can lead to costly litigation if not explicitly drafted to reflect all parties' intentions.
>
> *(ii) Lifestyle and Medical Compliance Clauses*. Surrogacy contracts often impose mandates to follow medical advice and strict rules on the surrogate's behavior, such as bans on smoking, alcohol, or drug use. Disputes occur when intended parents allege non-compliance, claiming it harmed the pregnancy. In the Bi case, the IPs accused the surrogate of ignoring warning signs like fluid leakage, alleging this caused a stillbirth, though medical evidence pointed to an unpredictable complication.[116] Such clauses can be difficult to enforce, especially if compliance is subjective or medical outcomes are uncertain, leading to breach-of-contract claims.
>
> *(iii) Termination Clauses.* These address whether a pregnancy can be terminated, typically in the case of fetal anomalies or health risks. Since *Dobbs v. Jackson Women's Health Organization* (2022) returned the authority to regulate or ban abortion entirely to individual state governments, state abortion laws can now conflict with each other. In states like Louisiana, where abortion is banned at all stages, such

[114] *Id.*
[115] Taylor Paige Mutavdzic, *Legal Challenges Across State Lines: A Look Into Surrogacy Law in the United States*, 16 J. CIV. L. STUD. (2024), https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1315&context=jcls.
[116] Nietfeld, *supra* note 104.

clauses are unenforceable, leaving parties without recourse if expectations differ.[117]

(iv) Compensation and Expense Clauses. These outline payments to the surrogate (typically $30,000–$50,000 for GCs) and coverage for medical or incidental costs. Disputes arise over unclear terms, such as what qualifies as a covered expense, or when payments are withheld, as in the Bi case, where the intended parents withheld funds after alleging negligence.[118] These clauses lack legal backing in states like Arizona, where all surrogacy contracts are void, which can increase financial risks for surrogates.[119] Clear definitions of expenses and escrow management are critical to avoid litigation.

(v) Jurisdiction and Choice-of-Law Clauses. These designate which state's laws govern the contract. Forum shopping (the act of seeking favorable jurisdictions, such as California) creates issues when parties return to restrictive states like Louisiana, where contracts may be voided.[120] The Sofia Vergara embryo case illustrates this issue, where the plaintiff filed in Louisiana to leverage its unique embryo laws, only for the case to be dismissed for improper venue.[121] These clauses often fail when courts prioritize local public policy over contractual intent.

While most surrogacy disputes center on breach-of-contract claims, the death of a fetus or newborn introduces questions of tort liability—a civil legal demand in which one party alleges that another has caused them harm, specifically through negligence and wrongful death. These claims often fall outside traditional contractual remedies, as they implicate medical professionals, clinics, and, in rare instances, the surrogate herself. As seen in *Bi v. Smith*, when tragedy occurs, IPs may seek justice not only as contracting parties but as grieving parents, pursuing recognition and justice of a potentially wrongful loss. Medical professionals have since concluded that Baby Leon's death resulted from adverse medical events, not negligence. However, should such a scenario arise of the latter, medical malpractice law may offer IPs pathways for recovery.

Wrongful death claims are civil actions brought by surviving relatives or legally recognized representatives when a person's death is caused by

[117] Zar, *supra* note 111.
[118] Nietfeld, *supra* note 104.
[119] Zar, *supra* note 111.
[120] Zar, *supra* note 111.
[121] Zar, *supra* note 111.

another's negligence, recklessness, or intentional act. Similar to surrogacy claims, wrongful death claims are codified by state statutes, not federal law, which leaves these claims similarly vulnerable to jurisdictional differences. Generally, wrongful death suits allow recovery for monetary losses, such as medical expenses, funeral costs, and loss of financial support, and other non-economic harms, including loss of companionship and emotional suffering. The key elements mirror those in negligence: a duty of care owed to the deceased, a breach of that duty, causation linking the breach to the death, and measurable damages.[122] The unique challenge in surrogacy-related wrongful death arises because the deceased is a fetus, whose legal personhood varies across jurisdictions, and the parents are the IPs, who may not yet be recognized as legal parents under state law. For example, while most states allow wrongful death suits for children born alive who later die from injuries sustained in utero, only a subset extends this right to fetuses that die before birth. Some states, like California, limit recovery to cases where the fetus was viable outside the womb, whereas others, such as Alabama and South Dakota, recognize fetal personhood from conception for wrongful death purposes.[123]

Under current laws, in the context of gestational surrogacy, IPs rarely have the standing to bring a wrongful death claim when a fetus dies in utero, even if the loss resulted from clear negligence by the surrogate, agency, or medical providers. Because legal parentage in gestational surrogacy typically vests upon the finalization of a pre-birth or post-birth order, intended parents may not yet be recognized as the "surviving family members" under state wrongful death statutes when fetal death occurs prior to that legal determination.[124] This gap leaves them without meaningful recourse when harm occurs. Expanding wrongful death protections to include IPs could thus create a new legal mechanism for contesting fetal loss in court. Recognizing IPs' standing would allow claims to be brought against negligent actors, such as fertility clinics that fail to monitor high-risk pregnancies, agencies that ignore medical warnings, or even surrogates who breach contractual medical obligations. Such recognition would not only align with the IPs' emotional and financial investment in the pregnancy but also reinforce accountability across a largely self-regulated industry. While this expansion must be carefully balanced to avoid criminalizing pregnancy outcomes or undermining GCs'

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[122] Alexandra W. Payne, *Navigating Wrongful Death Claims and Survival Action Claims in Texas,* ACCESSIBLE LAW (2023), https://www.accessiblelaw.untdallas.edu/post/navigating-wrongful-death-claims-and-survival-action-claims-in-texas.
[123] *Hamilton v. Scott*, 278 So. 3d 1180 (Ala. 2018).
[124] *Wrongful Death Of A Fetus: Complete 50 State Legal Guide*, THOMPSON LAW (Jan. 25, 2024), https://1800lionlaw.com/wrongful-death-of-a-fetus-or-unborn-child/.

autonomy, it could represent a significant step toward legal justice in assisted reproduction, providing IPs with the same wrongful death protections that biological parents already possess.

Critics may argue that extending wrongful death protections to IPs could raise significant ethical issues, most notably, criminalizing adverse pregnancy outcomes, particularly when medical complications are unavoidable rather than negligent. Furthermore, many GCs face economic pressures, and expanding these protections could increase monitoring of surrogates in ways that might deter them from participating in surrogacy altogether. Thus, while expanding wrongful death statutes may enforce greater accountability, they should be carefully designed to avoid weaponizing the law against the women it seeks to regulate.

In the broader landscape of current legislation surrounding surrogacy claims, the controversial case of Baby Leon reveals a need to ensure intended parents have an adequate pathway to pursue justice for their child while simultaneously safeguarding the rights and autonomy of gestational carriers. The absence of uniform federal oversight, coupled with inconsistent state laws, creates a precarious environment where neither party is fully shielded from financial, legal, or emotional damage. Expanding wrongful death protections to recognize intended parents' standing could offer a pathway to address fetal loss, affirming their emotional and financial stake while holding negligent actors accountable. However, these reforms must be carefully crafted to avoid overburdening surrogates, who already navigate significant risks. Developing a uniform model law could bridge the current patchwork system and ensure equitable protection for all parties involved in surrogacy arrangements.

The Academic Exception to Garcetti: First Amendment Protection for Faculty Speech

KADEN CARR

I. INTRODUCTION

"A people who mean to be their own governors must arm themselves with the power which knowledge gives."

— James Madison, Letter to W. T. Barry, August 4, 1822[125]

Issued during the early period of American public education, Madison's pronouncement underscores the importance of free expression as a foundation of democracy. Since their inception, public universities have embodied this principle by providing spaces for rigorous inquiry, debate, and free exchange of ideas. With these goals at heart, public universities play an essential role in equipping citizens with the knowledge to govern themselves thoughtfully and responsibly.

Public universities operate within a delicate balance. Because they rely heavily on state and federal funding, administrators must exercise independence to prevent government influence from interfering with or censoring the content of education.[126] Throughout history, this tenet continues to be tested by campus-based protests, critical scholarship, and social movements. The campaigns for civil rights, opposition to the Vietnam War, as well as the anti-apartheid movement, for example, all pushed the boundaries of free expression at public universities, demonstrating both the promise and the fragility of academic freedom and intellectual independence.[127]

This tension persists on public university campuses today. Initiatives such as the Department of Education's "Compact for Academic Excellence in Higher Education" illustrate the modern stakes: public universities are now facing incentives to impose ideological restrictions on speech in exchange for

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[125] James Madison, *Letter to W. T. Barry* (Aug. 4, 1822), in *9 The Writings of James Madison* 103, 103–09 (Gaillard Hunt ed., N.Y., G.P. Putnam's Sons 1910).
[126] Bellwether, *Dollars and Degrees: A Policy Roadmap for Strengthening College Value* (Apr. 2024), https://bellwether.org/wp-content/uploads/2024/04/DollarsAndDegrees_1_Bellwether_April2024.pdf
[127] Council on American-Islamic Relations (CAIR), *An American Tradition: The History of Student Movements in the U.S.*, https://ca.cair.com/updates/an-american-tradition-the-history-of-student-movements-in-the-u-s/.

preferred access to federal funding. By prohibiting "ideologically-driven activism" and demanding "institutional neutrality" on political issues—as defined by the politically elected executive—the compact exemplifies the persistent threat of governmental influence over academic expression.[128] Such pressures make it increasingly urgent to understand the constitutional protections that safeguard faculty speech, even when it challenges prevailing political or institutional agendas.

Academic speech has long been considered a "special concern of the First Amendment," deserving heightened protection in comparison to speech by other government employees.[129] Courts and scholars alike have historically acknowledged that universities serve a unique role in fostering inquiry, debate, and the pursuit of knowledge. Early Supreme Court decisions, such as *Sweezy v. New Hampshire* (1957) and *Keyishian v. Board of Regents* (1967), emphasized that attempts to regulate or punish faculty speech threaten the intellectual independence essential to the university's mission. Despite this substantial deference given to faculty speech, First Amendment precedent also recognizes universities' interest in orderly and efficient management, including the potential need to terminate professors on the basis of their speech. The Supreme Court's decision in *Pickering v. Board of Education* (1968) established a balancing test between these competing interests.[130] Under *Pickering*, the government may only restrict employee speech when the employer's interest in promoting workplace efficiency outweighs the employee's interest in commenting on matters of public concern. This balancing test required a substantial showing by the government to justify silencing academic speech and remained the landmark precedent regarding academic speech until a new threshold question was added in 2006.

The Court fundamentally reopened the question of academic speech protections in *Garcetti v. Ceballos* (2006), which considered whether a public employee's speech made pursuant to their official duties is protected by the First Amendment.[131] Writing for the majority, Justice Anthony Kennedy held that when public employees speak pursuant to their job responsibilities, they speak for the government, not as citizens, thereby leaving their speech unprotected. As Justice Kennedy concluded the Court's opinion, he acknowledged that "expression related to academic scholarship or classroom

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[128] Knight First Amendment Inst., *A Brief Legal Analysis of the Department of Education's Proposed Compact for Higher Education*, https://knightcolumbia.org/blog/a-brief-legal-analysis-of-the-department-of-educations-proposed-compact-for-higher-education
[129] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 590 (1967).
[130] *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).
[131] *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[132] He then drew an explicit reservation, stating, "We … do not decide whether the analysis we conduct today would apply … to a case involving speech related to scholarship or teaching."[133] With that single sentence, Justice Kennedy acknowledged that the logic of *Garcetti*—which treats public employee speech as government speech when made pursuant to official duties—might not fit within the distinctive context of the university.

Since *Garcetti*, lower courts have struggled to interpret that reservation. Some have created meaningful carve-outs which recognize additional constitutional interests in academic speech. Others have read *Garcetti* strictly, holding that professors are equivalent to other public employees and their scholarship is squarely within the scope of their "official duties," thus disqualifying their speech from First Amendment protection. These varied interpretations have created a growing circuit split—and with it, a deep uncertainty about the safeguards enjoyed by public faculty speech.

This uncertainty carries heavy consequences for public university faculty. Under circuits that have adopted a strict interpretation of *Garcetti*, professors risk discipline or termination for 'controversial' research, classroom discussions, or public commentary on their own university. When the boundaries of protection remain unclear, self-censorship may become the safest course for faculty across the country.

II. Constitutional Foundations of Academic Freedom

Academic freedom at public universities—the right for faculty to teach, speak, and produce scholarship on matters of public controversy and debate—plays a unique role in the proliferation of ideas. Beyond citizens' common interest in free expression, academic contexts often involve the most cutting-edge opinions, methods, and approaches to understanding complex social, scientific, and political questions.

The Court made this distinction clear in *Sweezy v. New Hampshire*.[134] Paul Sweezy, a Marxist economist and visiting lecturer at the University of New Hampshire, was questioned about the content of his lectures, beliefs, and political affiliations under the authority of the state's Subversive Activities Control Act—a piece of McCarthy-era legislation intended to aid

[132] *Id.* at 425.
[133] *Id.*
[134] *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

investigations into potential communist organizing.[135] Sweezy refused to answer questions regarding the content of his lectures and in-class instruction because he argued the state had no authority to demand disclosure of his academic instruction. The Court later formally decided 6-2, as Justice Whittaker did not take part in deciding this case, in favor of Sweezy on Fourteenth Amendment due process grounds. However, the plurality opinion discussed the implications for freedom of speech resulting from Sweezy's refusal to disclose the content of his lectures when questioned by investigators. In *dicta*, Justice Frankfurter emphasized that "political power must abstain from intrusion into this activity of freedom," explaining that the role of the university is to examine and question traditional ideas and beliefs.[136] In the face of Red Scare political persecution, the Court's decision in *Sweezy* affirmed that academic freedom outweighs the government's interest in efficient and orderly management of university education, even when the content of speech is highly controversial. While the holding in *Sweezy* did not itself create controlling First Amendment precedent, it provided future Courts a persuasive foundation for further protections.

The Supreme Court built upon this foundation a decade later in *Keyishian v. Board of Regents*, where it moved from broadly acknowledging academic freedom to constitutionalizing it.[137] In *Keyishian*, the Court confronted a New York loyalty-oath regime strikingly similar to the McCarthy-era investigations at issue in *Sweezy*, but this time decided the case squarely on First Amendment grounds. The case was brought by five faculty members of the State University of New York at Buffalo (SUNY Buffalo), including Harry Keyishian. The university offered Keyishian a promotion conditioned on signing a certificate affirming he had no communist affiliations. When he declined to sign the certificate, the university did not renew his contract. Several of his colleagues joined in a lawsuit, challenging both the loyalty-oath requirement and the broader statutory framework. Their claims argued that the laws punished mere membership without requiring proof of intent or illegal action; that the definition of "subversive" activity was unclear; and that conditioning academic employment on ideological conformity exerted a profound chilling effect on teaching and scholarship. SUNY Buffalo argued that as an employer, it had wide latitude to define the conditions of employment, including acting on its compelling interest in preventing "subversive" influences within higher education. In a 5-4 decision, the Supreme Court found in favor of Keyishian and his fellow faculty

[135] N.H. Laws 1953, ch. 307.
[136] *Sweezy*, 354 U.S. at 262.
[137] *Keyishian*, 385 U.S. 589.

members. The Court held that academic freedom is a "special concern of the First Amendment" that does not tolerate laws which cast a "pall of orthodoxy over the classroom," marking a doctrinal shift toward explicit constitutional protection for the free exchange of ideas in the university.[138]

Although the Court in *Sweezy* and *Keyishian* framed its analysis in terms of balancing national-security concerns against the university's interest in free intellectual inquiry, the enduring legacy of both decisions lies in their recognition of academic freedom as a constitutional value of the highest importance. This value came into the context of public employment in *Pickering v. Board of Education* (1968), where the Court considered the protections of public faculty's speech in their role as employees of a public institution.[139] Marvin Pickering, a high school teacher, was an employee of the Township High School District in Illinois. Pickering wrote a letter to the local newspaper criticizing the district's allocation of bond funds and their failure to properly fund school programs, which he viewed as essential. After learning about the publication of the letter, Township High School District terminated Pickering, asserting that his public criticism of the district was disruptive to the efficient operation of the schools. Pickering sued, claiming that his First Amendment right to express discontent with the district's policy had been violated. The Supreme Court eventually decided 8-1 in favor of Pickering, crafting a balancing test between (i) the government's interest in efficient and orderly operations and (ii) the public employee's interest in speech commenting on matters of public concern. The court applied this test to Pickering's alleged disruption and found there was no material effect on school operations. Instead, the Court ruled that Pickering's freedom to express his concerns outweighed the potential effects cited by the government. It is important to note that the Court's decision came from an educational context but applied its holding more broadly to all public employment. The Court's decision in *Pickering* established the key precedent that government employees—including university faculty, simply by virtue of their public employment—do not forfeit their right to free speech. Instead, a substantial showing is required by the public employer to demonstrate disruption to effective and orderly operations if they wish to terminate or otherwise punish an employee on the basis of the content of their speech.

III. THE DECISION IN *GARCETTI V. CEBALLOS*

[138] *Id.* at 603.
[139] *Pickering*, 391 U.S. 563.

The Court's decision in *Garcetti v. Ceballos* (2006) was the most consequential shift in public-employee speech doctrine since the establishment of its original balancing test in *Pickering*.[140] In *Garcetti*, the Court held that public employees' speech, when made pursuant to their official duties, is not protected as citizen speech by the First Amendment. This created a new threshold question before the *Pickering* test and, in many interpretations, acts as a categorical disqualification from First Amendment protection for public employees in contexts defined as within the "official duties" of their position. Although the holding now implicates public university employees, it was decided in a starkly different context.

Richard Ceballos, a Los Angeles County deputy district attorney, investigated a defense attorney's claim that a police affidavit used to obtain a search warrant contained misrepresentations. Concluding that the affidavit was indeed misleading in ways material to the warrant, Ceballos disclosed his findings and later testified for the defense about the inaccuracies. After several adverse employment actions, which Ceballos viewed as retaliation for his investigation and testimony, he filed a federal lawsuit alleging a violation of his First Amendment rights.[141]

The case reached the Supreme Court, which identified *Pickering* as the principal governing precedent. Rather than immediately applying the traditional balancing test, the Court focused on *Pickering*'s threshold requirement that a public employee speak "as a citizen, in commenting upon matters of public concern."[142] In this definitional determination, the Court held that when a public employee's speech is made "pursuant to [the employee's] official duties," the employee remains open to discipline because the speech is categorically different from citizen speech; instead, it is made on behalf of the government.[143] In Ceballos' case, this meant that because the creation of memorandums, such as the one he used to advise his supervisor about the alleged misconduct, was considered pursuant to his "official duties," he did not speak as a "citizen" as required by *Pickering*. The Court reasoned that limiting speech pursuant to "official duties" only regulates speech which the public employer has "commissioned or created" while still permitting public employees to speak in separate instances as citizens with full First Amendment protection. The Court declined to "articulate a comprehensive framework" to determine whether speech is within the bounds of a public

[140] *Garcetti*, 547 U.S. 410.
[141] Perry Grossman, *Op-Ed: Public Employee Speech in the Aftermath of Garcetti*, N.Y. L.J., https://www.nyclu.org/commentary/op-ed-public-employee-speech-aftermath-garcetti-new-york-law-journal.
[142] *Pickering*, 391 U.S. at 568.
[143] *Garcetti*, 547 U.S. at 421.

employee's "official duties."[144] Instead, the Court emphasized the need for a practical review in each case based on the particular job requirements and expectations. Despite this aversion to a specific framework, the Court did note that "official duties" often expand outside what is explicitly written in a job description as they "bear little resemblance to the duties an employee actually is expected to perform."[145] This led courts to consider *Garcetti* as a new threshold question in cases involving First Amendment protections for public employees. Courts would first analyze (a) whether or not speech was made pursuant to official duties before (b) applying the *Pickering* test, weighing the government's interest in efficient and orderly operations against the public employee's interest in speech commenting on matters of public concern.

In dissent, Justice Souter criticized the lack of nuance in the broad application of this holding to all public employees. He draws out the implication that this "ostensible domain beyond the pale of the First Amendment" could even include speech made by a public university professor.[146] Further, he warns that even limited interpretations of "official duties" in the context of academic speech would certainly include giving lectures, writing scholarly literature, and collaborating with academic peers on behalf of a university and therefore lose protection. Justice Souter cites *Sweezy* and *Keyishian* to suggest a strong deference toward academic freedom, which, in his view, the majority has overlooked in its broad application of *Garcetti*'s holding to all public employees.

Justice Kennedy's majority opinion in *Garcetti* addressed these concerns with an open question. With an acknowledgement that "academic scholarship" may "implicate additional constitutional interests," Justice Kennedy explicitly decided to reserve the opportunity for later courts to determine the applicability of *Garcetti*'s holding in a "case involving speech related to scholarship or teaching."[147] Given the brevity—only three sentences of the majority decision—addressing the unique context of academic speech, there have been wide variations in the applications of *Garcetti*.

IV. THE EVOLVING CIRCUIT SPLIT

Since *Garcetti* reshaped the landscape of academic freedom protections under the First Amendment, the federal circuit courts have generated a fragmented body of precedent, each developing its own approach to the question the Supreme Court abstained from resolving: How does

[144] *Id.* at 424.
[145] *Id.* at 424-425.
[146] *Garcetti,* 547 U.S. at 438.
[147] *Id.* at 425.

Garcetti apply to academic speech? The circuit courts have divided largely into two categories: those that apply *Garcetti* strictly, treating public university faculty as equivalent to other public employees, and those that recognize an exception to *Garcetti* grounded in the distinctive constitutional interests at stake in academic speech.

The Seventh Circuit's decision in *Renken v. Gregory* (2008) adopted a strict interpretation of *Garcetti* in the context of public university faculty.[148] The plaintiff, Dr. William Renken, was a professor at the University of Wisconsin-Milwaukee who complained to university administrators regarding the use of research funds. After Renken expressed these concerns, the university responded by reassigning him away from his research project and removing his administrative responsibilities related to the funds. Renken sued on the basis that these actions were retaliation against his First Amendment-protected speech. When the case reached the Seventh Circuit, the court concluded that Renken's speech—his complaints about the allocation of grant funds—was "pursuant to his official duties" as an administrator responsible for managing grant funds. In line with the holding of *Garcetti*, the circuit court concluded that because his speech fell within the "official duties" of his employment, his speech was not protected citizen speech under the First Amendment. The Seventh Circuit followed *Garcetti*'s reasoning that the "official duties" of an employee's position are not strictly limited to the responsibilities listed in a contract or job description. The circuit court interpreted Renken's faculty responsibilities to manage grants, conduct research, and oversee academic projects as "official duties," thus disqualifying his complaints from protection.

The Second Circuit adopted a similar approach in *Weintraub v. Board of Education* (2010).[149] Although David Weintraub was a public school teacher rather than a university professor, his claim still parallels precedent involving public employees who speak about matters tied to their academic speech. The analogy is imperfect, as the case implicates a distinct doctrinal line governing "grade school" speech—a body of precedent that treats K-12 educators differently from university faculty because of the unique managerial and pedagogical interests at play.[150] Regardless, *Garcetti* is still implicated as K-12 educators fall within the umbrella of "public employees." In *Weintraub*, the teacher complained through his union that the school district failed to discipline a disruptive student. He alleged that the district retaliated against him for his complaints, culminating in his termination. Weintraub sued,

[148] *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008).
[149] *Weintraub v. Bd. of Educ.*, 593 F.3d 196 (2d Cir. 2010).
[150] National Education Association, *The First Amendment – Protections for Educators*, NEA (Apr. 3, 2023), https://www.nea.org/resource-library/first-amendment-protections-educators

claiming the First Amendment protected his complaints. When the case arrived at the Second Circuit, the court applied *Garcetti* with a broad definition of "official duties." The court found that Weintraub's speech—his complaints to district administration and his union—"part-and-parcel" of his duties to maintain classroom discipline.[151] In response to *Garcetti*'s distinction between citizen and public employee speech, the Second Circuit emphasized the lack of a "civilian analogue" to Weintraub's speech.[152] The circuit court reasoned that because Weintraub's speech was through means only available to him as a result of his employment—internal communication with his administrators and union—it could not be in his capacity as a citizen. This significantly broadens the scope of "official duties" in *Garcetti* by inquiring into the form and forum of speech. Under this analysis, if an employee speaks through a mechanism unavailable to the general population, regardless of its content, their speech is disqualified from First Amendment protections. This creates a unique tension with academic speech, which often has no civilian analogue. Common practices like peer review, in-class instruction, and any other role specific to teaching could justify separating a public faculty member's speech from that of the general population.

Both *Renken* and *Weintraub* illustrate the expansive restrictions resulting from a strict application of *Garcetti*. By broadly defining "official duties," both circuits leave little room for First Amendment protection in academic settings. This interpretation threatens to collapse the entirety of academic speech into the definition of employee speech generally, disqualifying it entirely from First Amendment protection. Yet not all circuits have embraced this approach. Several courts have rejected a strict reading of *Garcetti* in favor of an exception for academic speech founded in the Supreme Court's recognition that additional constitutional interests may be of concern in the context of academic freedom.

The Fourth Circuit took this approach in *Adams v. Trustees of the University of North Carolina–Wilmington* (2011).[153] Mike Adams, a criminology professor, was denied a promotion allegedly due to his public commentary in columns, books, and speaking engagements regarding controversial political issues. Adams sued, claiming a violation of his First Amendment rights. When the case reached the Fourth Circuit, the court opted for a narrow definition of "official duties," which did not include general applications of professional expertise. The court emphasized that teaching and commentary on topics within one's area of professional expertise do not

[151] *Weintraub*, 593 F.3d at 203.
[152] *Id.* at 204.
[153] *Adams v. The Trustees of the University of North Carolina–Wilmington*, 640 F.3d 550 (4th Cir. 2011).

immediately qualify as "official duties" in *Garcetti*'s terms. Instead, the Fourth Circuit deferred heavily in favor of preserving academic freedom based on the Supreme Court's reservation of the issue in combination with Justice Souter's explicit reference to the elevated status of academic speech. After refusing to apply the categorical disqualification presented in *Garcetti*, the Fourth Circuit proceeded to a *Pickering* balance test. While Adams showed deference in principle to academic freedom, it did not take the step of crafting a new doctrinal exception.

The Ninth Circuit was more willing than other courts to formalize an academic exception in *Demers v. Austin* (2014).[154] David Demers, a tenured professor at Washington State University, circulated a proposed "Seven-Step Plan" pamphlet—outlining a substantial restructuring of his college's Communications program. The plan addressed issues of curricular design, departmental governance, and allocation of academic resources—speech at the core of faculty participation in university decision-making. Demers alleged that university administrators responded with a pattern of retaliation, including negative performance evaluations and impediments to his academic progress, prompting him to file a First Amendment retaliation suit.

Unlike the Seventh and Second Circuits, the Ninth Circuit took this opportunity to confront the applicability of *Garcetti* directly in the academic context and to evaluate it against the Supreme Court's academic freedom jurisprudence. The court's analysis was explicit: *Garcetti* could not be mechanically extended to university faculty without undermining constitutional principles the Supreme Court had long recognized. As the Ninth Circuit explained, "if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court."[155] In particular, the court drew on *Sweezy* and *Keyishian*, emphasizing that the Supreme Court had repeatedly characterized academic freedom as essential to the university's constitutional role in fostering knowledge and democratic inquiry.

The Ninth Circuit reasoned that academic speech is categorically different from other forms of public employee speech because the "official duties" of university faculty are themselves expressive. Scholarship, teaching, internal curricular proposals, and professional governance are not merely workplace tasks—they are the mechanisms by which faculty contribute to the creation and dissemination of knowledge. The court found that faculty speech was of particular First Amendment importance and applying *Garcetti* would

[154] *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014).
[155] *Demers*, 746 F.3d at 411.

impose the kind of "strait jacket" contemplated in *Sweezy*.[156] This would be incompatible with the Supreme Court's insistence that universities serve as centers for free inquiry, where ideas may be expressed without fear of reprisal.

Recognizing this incompatibility, the Ninth Circuit announced a formal doctrinal carve-out: "there is an exception to *Garcetti* for teaching and academic writing."[157] In place of *Garcetti*, the court applied the *Pickering* balancing test to determine whether Demers's speech addressed matters of public concern and whether his interest in that speech outweighed the university's administrative interests. In doing so, the Ninth Circuit not only protected Demers's speech but also articulated the clearest judicial recognition to date that academic speech occupies a constitutionally distinct category—one that cannot be assimilated to ordinary public employee expression without eroding the First Amendment's "special concern" for academic freedom. *Demers* effectively re-centered academic freedom as a constitutional category in its own right and remains the only circuit-level doctrinal exception in force.

V. PROPOSED ACADEMIC EXEMPTION

The enduring lesson of the Supreme Court's academic freedom jurisprudence is that universities occupy a constitutionally distinctive place in American life. From *Sweezy* to *Keyishian*, the Court has recognized that the free exchange of ideas within institutions of higher learning is not merely an individual entitlement, but a structural prerequisite for democratic self-governance. This recognition rested on the principle that intellectual inquiry thrives only when insulated from the coercive influence of the state—particularly when faculty speech challenges prevailing political, social, or institutional norms. *Pickering* later extended this constitutional protection into the public-employment context, permitting discipline only when the government demonstrates that its managerial interests outweigh the employee's interest in contributing to public discourse.

This constitutional concern is no longer theoretical. As contemporary political actors increasingly condition public funding on ideological conformity, the unresolved scope of *Garcetti* poses an acute threat to academic independence. When legislatures or executive agencies may reward or penalize universities, or their professors, based on perceived political neutrality, the question of whether faculty speech is protected as citizen expression becomes dispositive. In this environment, the doctrinal ambiguity

[156] *Sweezy*, 354 U.S. at 250 (Frankfurter, J., concurring).
[157] *Demers*, 746 F.3d at 418.

surrounding *Garcetti* determines whether public universities remain sites of independent inquiry or become instruments of state-sanctioned orthodoxy.

The stability created by *Pickering* was disrupted when *Garcetti v. Ceballos* introduced a categorical rule excluding speech made pursuant to an employee's "official duties" from First Amendment protection. In many interpretations, *Garcetti* acts as a prior threshold test for courts to consider before proceeding to the *Pickering* analysis. Although the Court expressly declined to decide whether this rule applied to "speech related to scholarship or teaching," the uncertainty created by that unresolved question has fractured the circuits. Some courts, treating faculty as indistinguishable from other public employees, have held that the everyday work of professors—teaching, writing, and participating in academic governance—is categorically unprotected. Other circuits, relying on the Supreme Court's repeated acknowledgment of the constitutional interests uniquely implicated in academic expression, have rejected this approach and preserved meaningful space for faculty speech outside *Garcetti*'s reach.

Under such an interpretation, the state's leverage over public universities expands dramatically. Because teaching, research, and curricular design may be construed to constitute a professor's "official duties," the government may effectively regulate the substance of academic knowledge by threatening discipline or funding withdrawal. In periods of political polarization, this authority enables precisely the form of ideological supervision the Supreme Court warned against in *Keyishian*—not through overt loyalty oaths, but through administrative retaliation justified as routine employment oversight.

The divergence unveils a deeper tension in the doctrine: academic speech cannot be treated as routine workplace output without erasing the very freedoms the First Amendment has long regarded as indispensable to the university's mission. Because a professor's "official duties" consist precisely of generating, evaluating, and disseminating ideas, applying *Garcetti* in this domain would invert the constitutional design by giving the state comprehensive authority over the content of knowledge production. The modern governance of higher education amplifies this danger. Unlike in earlier eras, governmental influence over universities today is frequently exercised through indirect mechanisms—funding formulas, accreditation standards, performance metrics, and speech-based compliance regimes.[158] When faculty expression falls within *Garcetti*'s categorical exclusion, these mechanisms

[158] Jerry C. Edwards, *Federal Funding Restrictions, Academic Research, and the First Amendment*, 114 GEO. L.J. 32 (2025), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2025/10/federal_funding_restrictions.pdf

operate without constitutional constraint. The result is not merely individual retaliation but structural self-censorship as scholars avoid inquiry that may jeopardize political favorability.

A coherent doctrine requires an exception aligned with both history and principle. Academic speech—whether expressed in teaching, scholarship, or participation in academic governance—should be categorically exempt from *Garcetti* and evaluated under the *Pickering* balancing test. This rule best harmonizes the government's interest in managing its institutions with the First Amendment's special concern for cultivating spaces where ideas may be pursued without fear of retaliation. By restoring *Pickering* as the governing standard for academic expression, courts can preserve the intellectual independence essential to the functioning of public universities and, by extension, to the health of democratic society.

Sovereign Wealth Funds and Sovereign Influence: National Security, Transparency, and the Limits of U.S. Investment Law

SAANVI SIDDHI

A sovereign wealth fund (SWF) is a government-owned investment vehicle established for long-term macroeconomic purposes.[159] SWFs typically invest in equities and debt, both internationally and domestically, and differ from central banks in that they manage excess reserves for long-term investments rather than prioritizing short-term monetary stability. Unlike official reserves, SWF portfolios typically include higher-risk, higher-return assets. Once viewed merely as fiscal safety nets, the SWFs of today have evolved into instruments of both economic management and geopolitical influence. Their reach now extends beyond stabilizing budgets—shaping industries, markets, and political relationships worldwide. However, this evolution far outpaces the current governing legal framework, which is more concerned with capital rather than ensuring market transparency and national security. The current U.S. regulatory regime fails to provide a coherent, transparent, and forward-looking framework for managing sovereign wealth fund activity. Moreover, proposals to establish a federal U.S. SWF confront not only fiscal impracticalities but also substantial constitutional and statutory hurdles that the current framework is ill-equipped to resolve.

I. WHAT ARE SOVEREIGN WEALTH FUNDS?

SWFs are heterogeneous in nature; however, they can be sorted into two major categories based on their source of funding and purpose of establishment. Commodity funds are primarily funded by oil and gas revenues, whereas non-commodity funds are mainly funded through asset transfers from official foreign exchange reserves.[160] Within those two funding denominations, there are three main types of sovereign wealth funds differing from one another based on their primary reason for operation. First, stabilization funds

[159] *Appendix 3: Sovereign Wealth Funds*, (2007), https://home.treasury.gov/system/files/206/2007_Appendix-3.pdf.
[160] Kevin Brennan, Gautam Jain & Sagatom Saha, *Structuring a US Sovereign Wealth Fund*, CENTER ON GLOBAL ENERGY POLICY AT COLUMBIA UNIVERSITY SIPA (May 1, 2025), https://www.energypolicy.columbia.edu/structuring-a-us-sovereign-wealth-fund/.

are common in countries that have large amounts of commodity exports or natural resource-driven industries. For example, Mexico and Chile maintain their stabilization funds through their holdings in the oil and copper industries, respectively. Their sovereign wealth funds serve as fiscal stabilizers, reducing commodity price volatility, and allowing governments to maintain budgetary stability during economic downturns as commodities typically face less fluctuation than market equities.[161] Savings funds, meanwhile, are primarily used to create long-term wealth. Norway, for example, invests its oil and gas revenue to benefit "both current and future generations."[162] Finally, strategic investment funds, the most politically driven of the bunch, advance national policy goals. China's SWF, the China Investment Corporation, has financed the Belt and Road Initiative (BRI)—a global development strategy spanning across Europe, Africa, and Asia. The BRI aims to improve infrastructure in developing economies, urbanize less developed countries, and invest in global energy markets. The initiative is likely targeting increasing levels of alliance of influence within the regions.[163] Beyond economic development, these investments also advance broader geopolitical objectives by expanding China's control over strategic infrastructure such as ports and energy corridors, establishing alternative financial networks that reduce reliance on Western-led institutions, and securing long-term access to critical supply chains, ultimately increasing Chinese influence within participating regions.[164] Overall, while the classifications for SWFs (stabilization, savings, and strategic) are useful descriptors that reflect primary purposes, they are neither rigid nor mutually exclusive. In practice, many sovereign wealth funds pursue overlapping objectives, and their priorities may shift over time in response to domestic economic pressures or evolving geopolitical strategies.

Sovereign wealth funds are not merely passive repositories of national savings; in practice, the largest of them operate as influential economic and political actors of their own with the capacity to shape global markets through their governance models and investment strategies. Norway's SWF, the Government Pension Fund Global, is the largest in the world, valued at over

[161] *Sovereign Wealth Funds: Global Trends and the UK's Role in the Evolving Landscape for Sovereign Investment Vehicles*, (2024), https://www.thecityuk.com/media/2lkb5g5y/sovereign-wealth-funds-global-trends-and-the-uk-s-role-in-the-evolving-landscape-for-sovereign-investment-vehicles.pdf.
[162] *The Fund*, NORGES BANK INVESTMENT MANAGEMENT (Apr. 28, 2017), https://www.nbim.no/en/.
[163] Julian Freyre, *The Economic Influence of the Chinese Government's Sovereign Wealth Fund*, MICHIGAN JOURNAL OF ECONOMICS (2025), https://sites.lsa.umich.edu/mje/2025/01/08/the-economic-influence-of-the-chinese-governments-sovereign-wealth-fund/.
[164] *China's Massive Belt and Road Initiative*, COUNCIL ON FOREIGN RELATIONS (Feb. 2, 2023), https://www.cfr.org/backgrounders/chinas-massive-belt-and-road-initiative.

$2 trillion U.S. dollars.[165] Regarded as the global benchmark for transparency and ethical investment, it has recently made headlines for rejecting Elon Musk's proposed $1 trillion compensation package at Tesla as well as for divesting from firms connected to Israel's military (the Israel Defense Forces). By contrast, China's sovereign fund, the China Investment Corporation (CIC), is a fund that was established with more strategic geopolitical purposes in mind; the CIC trails behind Norway with assets of roughly $1.3 trillion.[166] Funded through decades of trade surpluses and massive foreign exchange reserves, the CIC operates primarily as a strategic investment fund. Its energy portfolio, estimated in the hundreds of billions of dollars, has increasingly shifted toward renewable energy ventures that advance domestic clean-energy goals while maintaining control over critical supply chains abroad.[167] These investments align closely with the BRI, which now includes infrastructure agreements with over 150 countries and is designed not only to construct global infrastructure but also complements the CIC's broader use of financial diplomacy to strengthen China's global economic and political influence.

Many SWFs are specifically found amongst resource-rich states, where SWFs derive their capital from commodity exports. As such, a majority of these types of funds are often found in oil-producing countries. An example of this is the Abu Dhabi Investment Authority of the United Arab Emirates (UAE), valued at a little over $1.1 trillion.[168] Together, these purpose-based classifications (stabilization, savings, and strategic) demonstrate the different policy objectives sovereign wealth funds are designed to advance, while commodity and non-commodity distinctions reflect how those objectives are financed. This structural diversity illustrates the numerous ways that SWFs can be organized in order to pursue the values-driven, strategic, or resource-driven objectives of the respective countries. Critically, SWFs differ from traditional investment vehicles, such as hedge funds or private equity groups, in that their purpose and mission derive from foreign governments, not individual actors, and their investment strategies may shift in response to geopolitical priorities. Even when structured as savings or stabilization funds, SWFs remain instruments of state power, highlighting why their growing scale and influence raise regulatory questions for recipient countries like the United States.

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165 *The Fund, supra* note 162.

166 *Top 100 Largest Sovereign Wealth Fund Rankings by Total Assets*, SOVEREIGN WEALTH FUND INSTITUTE, https://www.swfinstitute.org/fund-rankings/sovereign-wealth-fund (last visited Aug. 9, 2026).

167 Freyre, *supra* note 163.

168 *Top 100 Largest Sovereign Wealth Fund Rankings by Total Assets, supra* note 166.

II. HOW HAVE SOVEREIGN WEALTH FUNDS OPERATED WITHIN THE UNITED STATES?

During the global financial crisis of 2008, many SWFs under management from countries in the Middle East and Asia invested billions of dollars into American and European-owned financial institutions.[169] For example, the Abu Dhabi Investment Authority invested $7.5 billion into Citigroup; Singapore invested $10 billion into Merrill Lynch; and China invested a total of $10 billion into Morgan Stanley and Blackstone. While these companies still incurred great losses, foreign investment was critical in keeping them afloat. These investments into, at the time, struggling financial institutions acted as a stabilizing force for the global economy and fostered a degree of confidence among the U.S. government and domestic financial institutions in SWFs as long-term market participants.[170] While the overall positive impact of SWF investment during this time cannot be denied, it is also true that said funds incurred substantial losses from these investments, complicating the presumption that their motives were purely commercial. This is especially important given that the U.S. financial sector occupies a central position in U.S. national security and underpins the country's ability to project economic and foreign policy power. These past examples underscore one of the key controversies surrounding SWFs and how they can simultaneously benefit economies by providing critical liquidity and market stability during periods of financial distress, and at the same time, sow distrust by embedding foreign state-owned actors into key American institutions that control American finances.

Since the 2008 crisis, foreign investment has only grown. In 2025, the UAE pledged to invest $1.4 trillion across the U.S. economy, significantly increasing existing investments across key sectors like AI, manufacturing, and semiconductors, as well as directly investing in companies like Energy Capital Partners, Nvidia, and Microsoft.[171] The economic significance of these investments, however, extends beyond capital inflows. Investments by sovereign wealth funds in strategically sensitive sectors create opportunities for foreign states to acquire control over corporate or public assets. SWFs

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[169] Victorino Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, 25 U. MIA BUS. L. REV. 1 (2016), https://repository.law.miami.edu/umblr/vol25/iss1/3.
[170] Natalie Coffin, *Assessing and Addressing Threats to the US from Sovereign Wealth Funds: Case Studies on the Russian, Chinese, and Saudi Arabian Funds*, CMC SENIOR THESES (2019), https://scholarship.claremont.edu/cmc_theses/2173.
[171] *Thanks to President Trump, UAE Announces Significant Investments in U.S. Economy*, U.S. EMBASSY & CONSULATE IN THE UNITED ARAB EMIRATES (Mar. 21, 2025), https://ae.usembassy.gov/thanks-to-president-trump-uae-announces-significant-investments-in-u-s-economy/.

stand to benefit from such informational advantages, which can be leveraged to advance their state-owned enterprises in related industries.[172] For example, investments in the semiconductor or artificial intelligence sectors can provide foreign state actors with access to proprietary research directly linked to U.S. defense and military research and development. The United States' defense infrastructure relies heavily on private-sector innovation; any potential foreign-state insight into related industries risks compromising not only commercial competitiveness but also national security readiness. As such, these kinds of investments run the risk of eroding U.S. industrial competitiveness and strengthening rival states' economic and geopolitical power. Taken together, these examples demonstrate why SWFs can not just be counted as cross-border international investors. Their vast resources, rival-state affiliations, and habit of targeting key sectors raise heightened regulatory concerns about economic security, strategic influence, and national security.

III. REGULATORY CONCERNS AND EXISTING OPERATING PRECEDENT

At present, traditional warfare has taken a backseat to economic leveraging and financial statecraft as the primary tools for global statecraft and power projection. SWFs sit at the center of this shift as they represent a great source of economic risk to the United States. The most compelling economic concerns surrounding sovereign wealth funds stem not from their foreign ownership, but from their scale, concentration, and capacity to alter global capital flows in ways that threaten U.S. financial stability. Hedge funds were widely identified as one of the leading contributors to the 2008 financial crisis, yet today, even while numbering in the thousands, they collectively manage fewer assets than SWFs, which number at a fraction of that.[173] Given that hedge funds were heavily criticized for their role in that crisis, the fact that SWF assets are both larger in scale and far more concentrated in number raises concerns about systemic risk (the risk of a collapse of an entire industry or economy, rather than a single component), since a single sovereign wealth fund has greater capacity to influence markets than any individual hedge fund. Additionally, because these funds are capable of rapidly reallocating or withdrawing large amounts of capital, they pose an unparalleled potential risk of causing destabilization and volatility in the market.

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172 Coffin, *supra* note 170.
173 *Id*.

In addition, SWFs have grown exponentially over the past two decades, growing from roughly $1.2 trillion to over $15 trillion in total assets.[174] The U.S., in particular, remains the world's largest recipient of foreign investment, and while many American companies benefit from these investments, the rise of various state-controlled investors introduces significant national security concerns. In particular, SWFs can pursue investment strategies that conflict with U.S. policy objectives, using financial influence as a tool of foreign policy. These concerns have intensified with the emergence of powerful funds from non-democratic countries like China, Russia, and Saudi Arabia—and they are not without reason. In 2008, China conducted a secret agreement with Costa Rica to purchase $300 million in Costa Rican bonds. In exchange, Costa Rica would sever diplomatic ties with Taiwan, demonstrating SWFs' use in coercing political action.[175] To mitigate these risks domestically, the United States subjects foreign government-controlled investments to rigorous review under the Committee on Foreign Investment in the United States (CFIUS), which works to balance open investment with national security. Established under section 721 of the Defense Production Act, CFIUS takes action to prevent "foreign control over any United States business."[176] Additional regulations, including the Bank Holding Company Act and the Securities Exchange Act of 1934, may apply when an entity acquires a significant ownership interest in a U.S. bank or financial institution. Under the Securities Exchange Act, investors who acquire more than five percent of a company's securities generally must disclose their holdings.[177] However, many SWFs employ loopholes, structuring their investments to avoid triggering these thresholds, often by taking minority, non-controlling stakes, or refusing seats on company boards.

Beyond security, SWFs present significant transparency concerns that complicate regulatory oversight. Many SWFs do not disclose their holdings or strategies, making it difficult to evaluate whether their investments are driven solely by commercial considerations or broader geopolitical objectives.[178] This

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[174] Riddhima Talwani, *Global Sovereign Wealth Fund Assets Grow to $15tn*, FINANCIAL STANDARD (Jan. 5, 2026), https://www.financialstandard.com.au/news/global-sovereign-wealth-fund-assets-grow-to-15tn-179811087; Desmond Lachman, *The Reality of Sovereign Wealth Funds*, AMERICAN ENTERPRISE INSTITUTE (Mar. 12, 2008), https://www.aei.org/commentary/the-reality-of-sovereign-wealth-funds-2/.

[175] Anna L. Paulson, *Raising Capital: The Role of Sovereign Wealth Funds*, Chi. Fed. Letter, no. 258, Jan. 2009, https://www.chicagofed.org/publications/chicago-fed-letter/2009/january-258.

[176] DEFENSE PRODUCTION ACT OF 1950 § 721, 50 U.S.C. § 4565.

[177] SECURITIES EXCHANGE ACT OF 1934 § 13(d)(1), 15 U.S.C. § 78m(d)(1).

[178] Paulson, *supra* note 175.

opacity introduces instability into financial markets by obscuring when and why SWFs enter or exit investments, leaving firms and regulators unable to anticipate capital movements or assess potential leverage threats. While such fiscal uncertainty poses meaningful risks to market efficiency, the more serious threat lies in the potential for the political instability that may accompany it. Sudden capital withdrawals or reallocations can generate volatility, pricing distortions, and liquidity shocks—economic harms that become even more consequential when they intersect with geopolitical influence. In essence, the concern is not merely that markets may fluctuate, but that fiscal unpredictability may be used as an instrument of political influence. Because SWFs rarely publish clear policy objectives, market participants cannot reliably track investment patterns, creating conditions in which even rumors of investment or divestment may trigger disproportionate market reactions.[179]

This paradigm is driven by the combination of obscure foreign state ownership as well as the extensive scale of sovereign wealth funds. SWFs can manage trillions of dollars in assets, ensuring that even marginal portfolio adjustments have the ability to move markets. At the same time, their immense liquidity and long-term investment horizons can generate investor confidence during periods of distress, as seen during the 2008 financial crisis. This creates a paradox in which the very scale that stabilizes markets in crises also magnifies systemic risk when the intentions of the foreign government involved are in question. This lack of clarity also affects investor confidence. One study by the Federal Reserve Board indicated that while announcements of investments from SWFs are usually associated with positive market reactions, investments from less transparent funds experience smaller increases in stock prices than investments from more transparent funds.[180] The rapid growth of foreign state-owned investment has also placed increasing pressure on the CFIUS's ability to monitor and enforce mitigation efforts. These efforts usually include measures that reduce or eliminate national security risks of foreign transactions.

According to the U.S. Government Accountability Office's (GAO) 2024 audit report, submitted by congressional request, the number of active mitigation agreements between CFIUS and foreign investors has nearly quadrupled in the past decade.[181] However, the GAO also found that CFIUS

[179] Coffin, *supra* note 170.
[180] Jason Kotter & Ugur Lel, *Friends or Foes? Target Selection Decisions of Sovereign Wealth Funds and Their Consequences*, 101 JOURNAL OF FINANCIAL ECONOMICS 360 (2011), https://linkinghub.elsevier.com/retrieve/pii/S0304405X11000729.
[181] U.S. GOV'T ACCOUNTABILITY OFF., *Foreign Investment in the U.S.: Efforts to Mitigate National Security Risks Can Be Strengthened*, GAO-24-107358 (2024).

lacks the framework and the staffing required to adequately review said agreements, leading to delays in enforcement and inconsistent oversight. This deficiency is particularly consequential in modern financial markets, where decisions are executed in seconds and where millions of dollars can turn based on the speed and accuracy of information. In a financial environment in which capital can be reallocated instantaneously across borders, regulatory lag is not a neutral delay; it can materially alter market outcomes and allow investors to capitalize on information discrepancies before oversight mechanisms can respond.

Additionally, CFIUS's oversight effectiveness is inherently constrained by its narrow mandate, which limits review to national security concerns and provides little precedent for addressing broader market-integrity or transparency risks.[182] Market integrity and disclosure obligations fall instead under the jurisdiction of the U.S. Securities and Exchange Commission (SEC). Yet, the limited transparency of SWFs significantly hampers the SEC's ability to enforce securities regulations effectively. As a result, both CFIUS and the SEC face structural and informational limitations that prevent them from meaningfully monitoring and regulating sovereign wealth fund activity. These findings reinforce broader concerns that SWFs require far stronger transparency and enforcement mechanisms in order to properly alleviate national security concerns, not just because regulatory agencies may be under-resourced, but because transparency itself is a prerequisite for effective oversight. Unless there is adequate disclosure regarding ownership structures, investment objectives, and portfolio concentration, regulators cannot accurately assess risk exposure or distinguish ordinary commercial behavior from strategically motivated activity. Greater transparency would allow both CFIUS and the SEC to intervene earlier and more precisely where genuine national security or market-integrity risks arise. Without standardized review and disclosure processes, the U.S. risks being reactive rather than proactive in addressing foreign influence in its markets.

In February 2025, Trump signed an executive order that called to "maximize the stewardship of our national wealth" and ordered the creation of a U.S. SWF to "promote fiscal responsibility" and "establish economic security for future generations."[183] Specifically, the order gave the Secretary of the Treasury and the Secretary of Commerce 90 days to come up with a plan for the creation of a national SWF. However, over a year has passed, and

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[182] Coffin, *supra* note 170.
[183] *A Plan for Establishing a United States Sovereign Wealth Fund*, THE WHITE HOUSE (Feb. 4, 2025), https://www.whitehouse.gov/presidential-actions/2025/02/a-plan-for-establishing-a-united-states-sovereign-wealth-fund/.

nothing has been released to the public, making it unclear whether the creation of a fund is still under construction. Regardless of the pseudo-continued executive order, there are several reasons why the establishment of a U.S.-owned SWF is considered improbable. First, it would be difficult for the U.S. to secure the seed funding needed to start such a fund. In other countries, SWFs are funded through surpluses gained from exports or commodity revenues. However, in the U.S., such excesses resulting from natural resources like oil and gas are, when government-owned, typically managed at the state level. If the federal government were to try to insert itself into an already functioning system like this, then states would surely challenge this potential overreach and encroachment into their fiscal autonomy.[184]

Additionally, the U.S. runs the largest global deficit economy, with an economy that spends more than it earns and has over 30 trillion dollars of debt, which severely limits the federal government's ability to capitalize a liquid sovereign wealth fund without relying on additional borrowing or reallocating existing public resources.[185] Finally, a national SWF would offer limited marginal benefit given the existing structure of the U.S. economy. American capital markets are already the largest and most liquid in the world, capable of efficiently financing infrastructure, innovation, and long-term growth through existing private investment mechanisms. In the absence of surplus revenues to manage or systemic market failures to correct—the core purposes SWFs serve in most other countries—a federal SWF would likely be redundant rather than meaningfully enhance economic performance.[186]

While the U.S. may not have a Federal SWF, several states have long-established their own SWFs. These wealth funds are typically used to fund education systems and state operations, allowing said states to maintain lower state taxes.[187] Currently, there are over 20 state-level funds in the country. Among them, the Alaska Permanent Fund (APF) stands out as the largest and most recognizable, with an estimated value of $84 billion. The APF was created in 1976 via a state constitutional amendment. The fund is run by the Alaska Permanent Fund Corporation, a state-owned corporation, with fiduciaries granted full authority over investment decisions to insulate the fund from short-term political interference and preserve its long-term viability. The APF itself is divided into two different funds: the Principal Fund, which is

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[184] William L. Megginson, Xin Yue Zhou & Robert Gholson, *The Case Against a U.S. Sovereign Wealth Fund*, 60 FIN. REV. 1, 5 (2025).
[185] *Sovereign Wealth Funds: Global Trends and the UK's Role in the Evolving Landscape for Sovereign Investment Vehicles, supra* note 161.
[186] Megginson, Zhou & Gholson, *supra* note 184.
[187] Richard E. Caroll, *U.S. Domestic Sovereign Wealth Funds*, MODERN DIPLOMACY (Nov. 14, 2024), https://moderndiplomacy.eu/2024/11/14/u-s-domestic-sovereign-wealth-funds/.

permanent and non-spendable, and the Earnings Reserve Account (ERA), which is spendable via legislative allocation.[188] Money in the ERA makes up a portion of a yearly dividend issued to all Alaskan Citizens. Aside from Alaska, Texas is the second most recognizable state on this topic, with two unique SWFs. The Texas Permanent School Fund (PSF), created in 1854, is one of the oldest SWFs in the world and finances the state's public school system as well as manages the sale and mineral leasing of PSF lands.[189]

The Texas PSF is valued at $57.3 billion and is managed by a combination of members of the state board of education, gubernatorial appointees, and elected officials. Texas's second SWF, the Public University Fund (PUF), exclusively benefits the University of Texas and Texas A&M school systems.[190] The PUF derives its income primarily from oil, gas, and mineral leases on state-owned lands in West Texas. The fund's constitutional charter forbids the sale of PUF lands, ensuring that all income from mineral extraction is retained and reinvested. These state-level sovereign wealth funds can be used as the basis of a federal SWF, illustrating both the possibilities and limitations of a successful long-term fund. If established, the national SWF would need to be similarly constitutionally grounded, narrowly purposed, and insulated from short-term political pressures—conditions that would be much harder to meet on the federal level.

IV. CURRENT REGULATION FRAMEWORKS

Though SWFs are used by some of the largest governments in the world, there are minimal international regulations for them. In an effort to do so, the Santiago Principles were created in early 2008 by a group of 26 countries, notably including countries like the US, China, and Norway. Said countries, under the coordination of the International Monetary Fund (the international institution that ensures the stability of the international financial system), came up with a set of widely accepted principles of good practice for the governance of SWFs.[191] These principles mainly encouraged countries to invest based on risk and return considerations, while also trying to contribute to financial stability.[192] However, the principles are hard-pressed to be

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[188] *Fund Structure*, ALASKA PERMANENT FUND CORPORATION, https://apfc.org/fund-structure/ (last visited Aug. 10, 2026).
[189] *Our History*, TEXAS PERMANENT SCHOOL FUND CORPORATION, https://texaspsf.org/ (last visited Aug. 6, 2026).
[190] *The Permanent University Fund (PUF)*, THE UNIVERSITY OF TEXAS SYSTEM, (Feb. 23, 2026), https://www.utsystem.edu/puf.
[191] Tejera, *supra* note 169.
[192] Joonkyu Park & Han Van Der Hoorn, *Financial Crisis, SWF Investing, and Implications for Financial Stability,* 3 GLOBAL POLICY 211 (Feb. 06, 2012), https://onlinelibrary.wiley.com/doi/10.1111/j.1758-5899.2011.00151.x.

enforced and, as such, tend to be more of a suggestive framework rather than a legally binding one.

As far as domestic regulations go, U.S. law grants the executive branch broad discretion to regulate foreign investment.[193] However, this discretion is still subject to constitutional constraints. In the case *Ralls Corp. v. Committee on Foreign Investments* (2014), Ralls, a corporation owned by Chinese Nationals, bought four American LLCs, all specifically formed to develop wind farms.[194] CFIUS thought the acquisitions posed a national security risk because the wind farm sites were located near a Navy training facility in Oregon. The committee ordered Ralls to divest its ownership interests, and President Obama later issued an executive order formally blocking the transaction. Ralls challenged the order, arguing that they were denied their due process rights. The United States Court of Appeals for the District of Columbia Circuit partially ruled in Ralls's favor, holding that the government was required to provide greater procedural transparency, including prior notice and sufficient time to contest the determination. This case was the first successful challenge to a CFIUS decision and showed that constitutional protections apply even in national security decisions regarding foreign investors, and caused more fairness and transparency for CFIUS decisions.

However, while *Ralls* provides additional procedural protections for foreign investors, most other legal safeguards remain limited under federal statute. For example, Section 4565 of Title 50 of the United States Code (U.S.C.), commonly known as the Defense Production Act, grants the executive branch broad discretionary authority to block transactions deemed a threat to national security.[195] Additionally, the courts are unable to contest the President's final decision. In *Ralls*, the court only mandated more transparency in regards to giving prior warning and enough time to contest. Under the Freedom of Information Act, CFIUS proceedings are confidential, which prevents public scrutiny and blocks evidence and reasoning from meaningful review, further limiting accountability.

While *Ralls* pertains to executive discretion through procedural due process, the broader U.S. legal structure governing sovereign wealth funds remains defined by the laws of sovereign immunity. Under U.S. law, the primary framework governing litigation against foreign states and their state-controlled entities is the Foreign Sovereign Immunities Act (FSIA). Because of SWFs' nature as state-owned enterprises, U.S. courts primarily

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[193] S. Rep. No. 110-82 (2007). https://www.congress.gov/committee-report/110th-congress/senate-report/82.
[194] *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 296 (D.C. Cir. 2014).
[195] 50 U.S.C. § 4565.

evaluate SWFs through the FSIA, treating them as extensions of the foreign state when they qualify as an "agency" or "instrumentality" under 28 U.S.C. Section 1603(b). Unless certain statutory exceptions apply, foreign states are "immune from the jurisdiction" of U.S. courts.[196] When it comes to the commercial character of SWFs' investments, as they operate as active participants in global financial markets, it is taken on a case-by-case basis, referencing "the nature of the course of conduct … rather than by reference to its purpose."[197]

SWFs are typically analyzed through this immunity-first lens, often qualifying as state instrumentalities under Section 1603(b) and retaining immunity even when their conduct closely resembles that of private investors. This means that conduct which would expose a hedge fund or private investor to immediate civil litigation may instead trigger a threshold immunity inquiry when undertaken by a SWF. In general, sovereign immunity is characterized not only as immunity from liability, but also from lawsuits. Plaintiffs must first overcome statutory exceptions before being able to reach the crux of their claims. While SWFs are not categorically exempt from U.S. law and cannot freely violate federal statutes without consequence, the procedural protections afforded by sovereign status can delay, complicate, or in some cases prevent judicial scrutiny in ways not afforded to purely private actors. The result is a system in which foreign state-controlled investors may participate extensively in U.S. financial markets while remaining insulated from judicial scrutiny, even when their conduct closely resembles that of private market actors.[198] However, recent case law that explores the cross-section between SWFs and sovereign immunity illustrates the emerging limits of this framework. In the case *Türkiye Halk Bankasi A.S. v. United States* (2023), the Supreme Court ruled that the FSIA does not extend sovereign immunity to criminal prosecutions and rejected the notion that state ownership alone insulates an entity from U.S. law.[199] In this case, Halkbank, a majority state-owned Turkish bank, was accused of participating in a scheme to evade U.S. sanctions on Iran by funneling billions of dollars through the U.S. financial system. SCOTUS's unanimous dismissal of their claim of immunity under the FSIA marked a significant doctrinal boundary. Although *Halkbank* involved a state-owned bank rather than an SWF, its reasoning underscores a growing judicial recognition that sovereign control cannot serve as a categorical shield when state-controlled entities operate as market participants.

[196] 28 U.S.C. § 1604.
[197] 28 U.S.C. § 1604.
[198] Tejera, *supra* note 169.
[199] *Turkiye Halk Bankasi A.S. v. United States,* 598 U.S. 264 (2023).

Although the previous case illustrates a strict judicial limit on the scope of sovereign immunity imposed on state-owned entities, other cases exemplify a passivity that allows foreign sovereign investors to avoid meaningful legal consequences. In the case of *Atlantica Holdings, Inc. v. Sovereign Wealth Fund* (2016), a U.S. investment entity bought civil claims against a Kazakhstan-owned SWF, the SK fund.[200] In this case, the plaintiffs alleged that the SK fund purposefully misrepresented the value of debt securities that were issued by a majority-owned Kazakhstani bank that were then subsequently bought by U.S. investors, resulting in domestic financial loss. Applying the FSIA's commercial activity exception, the district court held that SK Fund was not entitled to immunity because even though the claims were based on acts taken abroad, they had a direct impact within the US. In reaching this conclusion, the court treated SK Fund not as a sovereign regulator, but as a market participant whose investment-related communications bore the same legal consequences as those of private actors. The SK Fund promptly appealed this decision, challenging both the denial of sovereign immunity and the court's exercise of personal jurisdiction.

In the first part of their ruling, the United States Court of Appeals for the Second Circuit upheld the lower court's guilt ruling under the commercial exception clause, which emanated from the SK funds' activities having a direct domestic impact in the U.S. However, the appellate court also clarified that overcoming immunity under the FSIA does not automatically resolve the separate constitutional requirement of personal jurisdiction, meaning the court's authority, under the due process clause, to issue a binding decision against the defendant.[201] Subsequently, the SK Fund argued that even if immunity did not apply, the district court could not exercise jurisdiction over it because it lacked sufficient minimum contacts with the United States, meaning that it had not established deliberate, meaningful connections with the United States such that exercising jurisdiction would be reasonable.[202] The SK Fund, therefore, sought dismissal on constitutional grounds, asserting that the exercise of jurisdiction would violate due process. Shortly after the Second Circuit's handling of *Atlantica Holdings*, the U.S. Supreme Court clarified in *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.* (2025) that, under the FSIA's text, personal jurisdiction over a foreign state or state-owned entity exists whenever an immunity exception applies and service of process is proper—and that the statute does not itself require a separate

[200] *Atlantica Holdings, Inc. v. Sovereign Wealth Fund,* 813 F.3d 98 (2d Cir. 2016).
[201] *Personal Jurisdiction*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/personal_jurisdiction (last visited Aug. 10, 2026).
[202] *Minimum Contact Requirements for Personal Jurisdiction*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-7-1-4/ALDE_00013035/.

minimum-contacts analysis—while leaving open whether the Constitution independently requires such contacts.[203]

Ultimately, the appellate court did not resolve the question of personal jurisdiction, deeming it unnecessary to do so.[204] Instead, after affirming the district court's ruling that sovereign immunity does not apply, the Second Circuit explicitly declined to exercise pendent appellate jurisdiction (the discretionary doctrine that allows appellate courts to review additional issues that are closely related to an issue already before it) over the personal jurisdiction challenge.[205] Therefore, the court dismissed that portion of the appeal without deciding whether the minimum contact threshold was satisfied. In doing so, the Second Circuit left the personal jurisdiction issue to be addressed at a later stage in the legal proceedings. The litigation process of this case took years before it was able to reach a final verdict in 2022, in which the courts ruled in favor of the defendants, and ultimately no liability was found.[206] This outcome highlights a deeper structural problem: while courts may pierce sovereign immunity in theory, the combination of FSIA protections, procedural hurdles, and jurisdictional ambiguity creates a legal environment in which foreign state-controlled investors retain substantial insulation from judicial scrutiny. This multi-step barrier illustrates how sovereign wealth funds, even when acting indistinguishably from private market actors, continue to benefit from an immunity-first framework that complicates accountability.

While CFIUS addresses prospective national security risks through executive review, and FSIA governs litigation through immunity doctrines, neither framework fully resolves the structural problem of state-controlled capital operating within U.S. markets. The result is a system that oscillates between expansive executive discretion (as seen in CFIUS confidentiality and limited judicial review) and judicial ambiguity (as seen in FSIA and personal jurisdiction disputes). Rather than providing a coherent framework for addressing the growing influence of sovereign wealth funds in U.S. markets, the existing legal regime forces courts to navigate solitary immunity exceptions and jurisdictional technicalities, creating a fragmented and reactive system that lacks clear standards for regulating state-owned investment actors.

The legal framework governing both foreign and domestic U.S. SWFs (and potentially a national one) remains underdeveloped and unable to handle

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[203] *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, 605 U.S. 223 (2025).
[204] *Atlantica Holdings, Inc. v. Sovereign Wealth Fund,* 813 F.3d 98 (2d Cir. 2016).
[205] *Pendent Jurisdiction*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/pendent_jurisdiction (last visited Aug. 10, 2026).
[206] *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna,* No. 20-2805-cv (2d Cir. Jan. 18, 2022).

the rising influx and complexities of a modern, geopolitically sensitive investment environment. As it stands, U.S. law does not adequately regulate SWF activity within the country, nor does it provide a clear or coherent structure that could support the creation of a national SWF without raising significant governance and accountability issues. If the United States intends to establish its own SWF and, in turn, directly invest into foreign markets, it needs to first clarify and legitimize the standards that apply to foreign state-owned investors operating in the country. This is necessary not only to ensure fairness but also to strengthen investor confidence and avoid arbitrary enforcement. To achieve this, CFIUS should adopt codified due process protections and more transparent, consistent decision-making standards, as the current framework, characterized by strict confidentiality requirements, limited public rationales, and presidential decisions insulated from judicial review, creates a substantial accountability gap. These deficiencies underscore broader concerns about the risks associated with a national SWF, including potential political interference, reduced transparency, and challenges in maintaining market neutrality.

Beyond A Reasonable Doubt? A Look Into The Death Penalty System

ABIRAAMI ELANGOVAN

On September 21, 2011, Troy Davis was executed after being convicted of killing a police officer in Savannah, Georgia, with mountains of evidence suggesting his innocence left untouched.[207] His case is not an isolated incident. Rather, it serves as a searing indictment of a death penalty system that executes the possibly innocent and challenges the constitutional boundaries upon which this nation was built. In fact, using survival analysis—a statistical method that models the likelihood of an event happening over time—the Proceedings of the National Academy of Sciences (PNAS) predicts that "if all death-sentenced defendants remained under sentence of death indefinitely, at least 4.1% would be exonerated."[208] In a nation with one of the largest number of executions, such a statistic raises an important ethical and constitutional dilemma: should a system with such a high probability of killing the innocent be allowed to last?

The death penalty has been a long-standing part of the United States justice system, dating back to colonial times and stemming from the influence of the British criminal justice system. Since 1608, over 15,000 executions have been recorded in the United States—more than any other Western nation.[209] Its global usage began waning in the twentieth century as other Western countries stopped using the system on ethical and practical grounds since it was deemed to not deter crime enough to justify the potential loss of innocent lives. Following this pattern, the United States Supreme Court also briefly banned the death penalty under *Furman v. Georgia* (1972) in a 5-4 decision. The per curiam decision held that the death penalty is unconstitutional under the Eighth Amendment prohibition against cruel and unusual punishment, especially when imposed in an arbitrary and capricious manner that leads to discriminatory results.[210] The decision made in *Furman*

[207] *How Our Law Executed Troy Davis*, CORNELL JOURNAL OF LAW AND PUBLIC POLICY, https://publications.lawschool.cornell.edu/jlpp/2011/10/20/how-our-law-executed-troy-davis/.
[208] Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC NATL ACAD SCI U S A 7230 (2014), https://pmc.ncbi.nlm.nih.gov/articles/PMC4034186/.
[209] Emily Gill, *The Evolution of the Death Penalty in the United States*, IV CORNELL UNDERGRADUATE LAW & SOCIETY REVIEW (2024), https://www.culsr.org/articles/the-evolution-of-the-death-penalty-in-the-united-states-4wen7.
[210] *Furman v. Georgia*, 408 U.S. 238 (1972).

was a result of increased critical discourse around the constitutionality and ethicality of the death penalty over several decades prior. The case reflected changing attitudes in the United States at the time towards procedural fairness and human rights in the justice system.[211]

However, the victories that came with *Furman* were short-lived. A mere four years later, *Furman* was undermined by *Gregg v. Georgia* (1976), as states changed their laws regarding the death penalty to find loopholes around what *Furman* declared to be arbitrary and capricious. *Gregg* allowed the death penalty to be reintroduced in Georgia, Texas, and Florida, stating that the state laws concerning capital punishment in these states had "sufficient clarity and objectivity in defining which defendants could be eligible for capital punishment and gave juries sufficient discretion in choosing whether to apply it."[212] This established a new precedent regarding the death penalty by essentially returning the issue back to the states and addressing the arbitrariness of the death penalty, one of the key reasons why *Furman* found the death penalty to be unconstitutional in 1972. The precedent established by *Gregg* still remains today. But scientific advancements and studies have, over time, established a convincing case for the significant failures of the death penalty system, including the rise of DNA testing and knowledge about the unreliability of eyewitness testimony throughout the late twentieth century.[213] The proliferation of these new methods of collecting evidence slowly began to undermine the ethicality and constitutionality of capital punishment as increasingly more details came to light regarding incorrect rulings and the execution of innocent people.

A key factor in the executions of innocent people has been the systemic failure of judicial decision-making based on flawed or unreliable evidence. The repercussions of such oversight in the justice system are not merely theoretical; they have been proven to contribute to wrongful executions time and time again. In April of 2012, the Washington Post reported on a nine-year investigation in which the Federal Bureau of Investigation (FBI) ran a review of hair samples in suspect cases, many of which resulted in death row sentences. Despite finding significant anomalies that severely undermined the credibility of the hair samples used to convict the defendants, the Department of Justice (DOJ) did nothing to inform the defendants of this newfound

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[211] Elaine McArdle, *The End of the Death Penalty?*, HARVARD LAW SCHOOL, https://hls.harvard.edu/today/the-end-of-the-death-penalty/.
[212] *Gregg v. Georgia*, 428 U.S. 153 (1976).
[213] Joseph Hoffmann, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 INDIANA LAW JOURNAL 817 (1993), https://www.repository.law.indiana.edu/ilj/vol68/iss3/13.

evidence or investigate their possible innocence.[214] Under current disclosure law, state and federal authorities are not required to disclose potentially exonerating evidence after the defendant has already been convicted.[215] Such laws raise the question: does our legal system really only sentence defendants when the evidence against them proves their guilt beyond a reasonable doubt, or simply when it is most convenient for legal efficacy?

One of the most well-known examples of flawed evidence leading to a wrongful conviction is that of Claude Jones. Jones was convicted and sentenced to execution in 1990 for the alleged murder of a liquor store owner based on unreliable testimony and a hair found at the crime scene. Although Jones repeatedly maintained his innocence and requested a stay of execution to test the hair for DNA evidence, this stay was denied, as then-governor George Bush was busy with pre-election initiatives and was not even informed of the stay request by his clemency advisors.[216] Jones was put to death in December of 2000. The Innocence Project brought up his case as a potential wrongful conviction in 2007, and the hair that sentenced Jones was obtained and tested in 2010 after a three-year legal battle—only to find that it did not belong to Jones at all. This decisively exonerated him, as the eyewitness who testified against Jones also later recanted their testimony.[217] Jones' case sparked public outrage and serves as a testament to how the justice system has failed to save innocent people from execution.

While Jones' case gained public scrutiny for highlighting the catastrophes of flawed forensic evidence, both his and Troy Davis' cases underscore another type of faulty evidence: unreliable eyewitness testimony. Eyewitness testimonies as a whole are known for their unreliability, with "over three-quarters of known erroneous convictions [being], in part, the result of mistaken eyewitness identifications."[218] The incredibly high percentage of eyewitness testimonies in erroneous convictions is a result of various factors, including reconstructive memory, coercion, and suggestive questioning, and casts doubt on the reliability of judgments that are made on these testimonies alone.[219] Davis was convicted of murder almost wholly based on nine eyewitness testimonies. However, in the years between his sentencing and his

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[214] Jessica Dwyer-Moss, *Flawed Forensics and the Death Penalty: Junk Science and Potentially Wrongful Executions*, 11 SEATTLE J. SOC. JUST. (2013), https://digitalcommons.law.seattleu.edu/sjsj/vol11/iss2/10.
[215] *District Attorney's Office v. Osborne*, 557 U.S. 52 (2009).
[216] Dwyer-Moss, *supra* note 214.
[217] Dwyer-Moss, *supra* note 214.
[218] Jon Gould et al., *Predicting Erroneous Convictions: A Social Science Approach to Miscarriages of Justice*, https://www.ojp.gov/library/publications/predicting-erroneous-convictions-social-science-approach-miscarriages-justice.
[219] Gould et al., *supra* note 218.

execution, seven of nine eyewitnesses came forward and either recanted or changed their statements, with some stating that they had either not read their original statement before signing it or, frighteningly, had been coerced or pressured by police to give their statement.[220] Tragically, although this evidence likely would have exonerated him and potentially prevented his death, it never came to light in the original trial. Davis was executed in 2011.

Davis' Sisyphean hurdles in presenting this evidence in court sparked widespread public indignation, but his case is merely a symptom of the deeper, longstanding legal barriers that impede proving one's innocence post-conviction. When a defendant is sentenced to the death penalty, as Davis was, the first step in appealing their conviction is typically to directly appeal to the state's highest court for criminal appeals. The issue with state appellate courts, however, is that "appeals are limited to allegations of procedural errors by the trial court."[221] This means that direct appeals generally only review if the law was applied correctly in the lower court's decision, not re-evaluate their decision based on new evidence, even if the evidence would exonerate the defendant. Thus, after Davis appealed to the Supreme Court of Georgia and his convictions were confirmed on the basis that there were no procedural errors with the trial court that convicted him, the United States Supreme Court declined to hear his appeal.[222]

The next step for many defendants who wish to appeal their conviction on the basis of evidence, and not procedural errors, is to file a petition for a writ of habeas corpus, which allows them more freedom in introducing new evidence and re-interviewing witnesses. Davis thus filed and was approved for his first state habeas corpus appeal. However, his legal counsel failed to re-interview witnesses as they were supposed to and thus completely missed the witness testimony recantations that could have rightfully exonerated him. Without this crucial evidence, the petition was denied.[223] Since Davis' counsel missed the evidence due to evidence failing to be uncovered during initial proceedings and not because their key evidence— the eyewitness testimonies—were inaccessible, he did not qualify for a second habeas appeal under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and, leaving him condemned to his existing death sentence. AEDPA was introduced following the Oklahoma City bombings in an attempt to increase the efficiency of the death penalty appeals process and restrict abuse of habeas appeals. The law put rigid barriers in place regarding habeas appeals. Unless the defendant's claim relies on a new Supreme Court ruling to be

[220] Dwyer-Moss, *supra* note 214.
[221] *How Our Law Executed Troy Davis*, *supra* note 207.
[222] *How Our Law Executed Troy Davis*, *supra* note 207.
[223] *How Our Law Executed Troy Davis*, *supra* note 207.

applied retroactively, or new evidence comes to light that the defense could not have possibly accessed during the first petition through the exercise of due diligence, a second petition would not be approved.[224] Davis' inability to appeal despite overwhelming evidence of his innocence, as well as institutional legal barriers such as the AEDPA, highlights an alarming intention of prioritizing procedural efficacy over achieving justice.

Even when appeals are approved and new evidence can be introduced, the system continues to fail defendants because of a lack of guaranteed legal representation to make their case. The right to counsel is a constitutional right that has long been enshrined in the Sixth Amendment, which states that "in all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defence."[225] However, this right does not extend to death penalty convicts seeking habeas relief, justified under the assumption that sufficient counsel was already granted in the direct appeals process, leading to a lack of the legal safeguards that were intended to protect defendants and ensure equal treatment under the law.[226] Defendants cannot contest a habeas decision on the basis of ineffective assistance of post-conviction counsel, even if it is evident that the representation they received was inadequate. In Davis' case, the nonprofit that was representing him had lost much of its funding and as a result failed to re-interview the witnesses as it should have. By failing to re-interview witnesses, they were unaware of new, crucial evidence that could have granted Davis' petition for habeas relief. Instead, it was denied. Since his right to counsel was not protected as a death penalty convict, Davis could not file for a habeas appeal on the grounds that the nonprofit's mistake constituted inadequate counsel, as adequate counsel was never guaranteed to him in the first place. This is an issue that has been reemphasized in the executions of countless innocent Americans under the death penalty, and Troy Davis' case once again serves as a crucial example.

While the negligence of Davis's lawyers stemmed from his counsel being understaffed and underfunded, other cases of attorney negligence arise out of conflicts of interest or even inebriation. Such was the case of Ledell Lee, a man convicted of the brutal murder of Debra Reese, his 18-year-old neighbor. Throughout his trial, his counsel was compromised in several ways, the first of which was his lawyer's inebriation during his post-conviction proceedings. Lee was born with fetal alcohol syndrome disorder, found to have significant brain damage, and showed evidence of intellectual disability.

[224] *How Our Law Executed Troy Davis*, supra note 207.
[225] U.S. Const. amend. VI.
[226] *How Our Law Executed Troy Davis*, supra note 207.

Thus, if deemed intellectually disabled, he would have been protected under *Atkins v. Virginia* (2002), which ruled that sentencing mentally compromised defendants to death constituted cruel and unusual punishment and thus was unconstitutional.[227] Lee's lawyer's failure to prove this crucial point—in part due to his inebriation—was an ultimately fatal oversight that impeded Lee from accessing the representation that he constitutionally deserved and likely resulted in his capital sentencing.[228] The second manner in which his right to counsel and a fair trial was compromised was through the judge presiding over the proceedings of his case. Judge John W. Langston was reportedly having an affair with the assistant prosecutor, severely compromising the integrity of the ruling and raising questions about the constitutionality of the trial.[229] This affair violated the foundational requirement of the courtroom that the judge can be a neutral arbiter, making it likely that the judge was more deferential to the prosecution, or conversely biased against the defendant, due to personal interests. Both the affair and the intoxication of Lee's lawyer raised questions about the fairness of his proceedings, and important evidence, like DNA testing of the murder weapon, was not presented to help prove Lee's innocence. Despite overwhelming evidence of inadequate legal counsel and significant grounds for an unfair trial, Lee was not granted a stay of execution because this evidence was not presented in earlier proceedings.[230] Thus, it was dismissed as procedurally defaulted, meaning a legal claim cannot be reviewed because the party presenting the claim failed to follow proper court procedures. Without a stay of execution, Lee was executed by lethal injection in 2017.

The systemic failures of the death penalty system are not merely procedural defects of an otherwise functional justice system; they expose stark ethical and constitutional concerns that undermine the foundation upon which this nation was built. The role of the Eighth Amendment in particular has been a central point of debate, from the overarching issue of the justice system's ability to arbitrarily take away a human life, to more specific issues such as the application of the death penalty to the intellectually disabled.[231] As new laws are passed and public opinion has shifted over time, the constitutionality of the death penalty has served as a consistent issue of contention, from Supreme Court cases *Furman v. Georgia* in 1972 to *Herrera v. Collins* in 1993 to *Hamm v. Smith* as recently as 2024.

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[227] *Ledell Lee v. State of Arkansas*, 2009 Ark. 158 (unpublished).
[228] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[229] *Ledell Lee v. State of Arkansas*, ACLU, https://www.aclu.org/cases/ledell-lee-v-state-arkansas (last visited Oct. 28, 2025).
[230] *Ledell Lee v. State of Arkansas, supra* note 229.
[231] *Hamm v. Smith*, 604 U.S. 1, 1 (2024); *Herrera v. Collins*, 506 U.S. 390 (1993).

Herrera, in particular, established a powerful precedent that a defendant's freestanding "claim of actual innocence does not entitle him to federal habeas relief" under the Eighth Amendment in death penalty cases.[232] In 1981, Leonel Torres Herrera was charged with the murder of Texas police officer Enrique Carrisalez and DPS officer David Rucker on the basis of a written letter by Herrera implying guilt, Carrisalez's testimony before his death, and the presence of the victims' blood in Herrera's car. He was sentenced to death shortly thereafter. Later, when multiple pieces of evidence came to light suggesting that his late brother had committed the crime, Herrera's lawyers filed a second federal habeas petition and sought a temporary stay of execution in order to present the evidence. They argued the defendant was to be guaranteed habeas relief under the Eighth Amendment due to overwhelming proof of innocence. This petition was denied, with the Court holding that in "criminal cases, the trial is the paramount event for determining the defendant's guilt or innocence."[233] After a defendant is offered a fair trial and convicted, "the constitutional presumption of innocence disappears" and the court is no longer obligated to grant habeas relief when the defendant does not identify an independent constitutional violation, and refusing to do so does not violate the Eighth Amendment.[234] *Herrera* was thus a pivotal case in defining legal safeguards and constitutional protections—or rather, the lack thereof—in death penalty cases across the United States.

While *Herrera* established that habeas relief—even with significant proof of innocence—is not protected under the Eighth Amendment, the decision did not absolve itself from ethical concerns for a system that arbitrarily hands out death sentences and denies defendants the right to contest them. If anything, *Herrera* played a role in further exacerbating moral concerns and eroding public trust in the justice system. According to recent Gallup polling, "public support for the death penalty remains at a five-decade low" of 53 percent, and "more than half of young U.S. adults ages 18 through 43 now oppose the death penalty."[235] This rising opposition to capital punishment comes as a result of centuries of systemic injustices within the death penalty system, such as those detailed throughout Davis, Jones, and Lee's cases, alongside an increasing awareness of the human rights violations and cruelty of capital punishment. In an investigation into the conditions faced by those on death row, studies found that subjecting convicts to decades on

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[232] *Herrera v. Collins*, *supra* note 231.
[233] *Herrera v. Collins*, *supra* note 231.
[234] *Herrera v. Collins, supra* note 231.
[235] *The Death Penalty in 2024*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/research/analysis/reports/year-end-reports/the-death-penalty-in-2024 (last visited Aug. 6, 2026).

death row tends to induce psychological illnesses and, in some cases, even "cause inmates to regress to a state of psychic numbness that produces psychological death."[236] The undeniably cruel conditions of death row, such as decades of extreme solitary confinement and immobility, raise concerns once more about the human rights of these inmates in a justice system that does not seem to respect their constitutional rights post-conviction.

There are reasons for the continued, although waning, support for the death penalty in the United States. According to a survey taken in 1991, "most Americans who favor the death penalty do so primarily for retributive reasons," meaning their primary reason is the justification of a "life for a life."[237] This distinction is important to make, for while many Americans believe that the death penalty deters crime, they do not believe that it is the best deterrent for crime. Thus, hard-on-crime stances are more likely to be based on a desire for retribution than a belief in the deterrent power of the death penalty. This stance, while understandable considering the severity of crimes that must be committed to warrant the death penalty, is a dangerous basis for a legal framework such as the death penalty to be established on. To dole out capital punishment on the basis of retribution creates an arbitrary—and thus inherently unjust—system that is more likely to ignore procedural fairness or overlook evidentiary standards in the trial process, as established in *Furman*.[238]

Deterrence, on the other hand, is a legally recognized standard that many states in the U.S. still use to justify the death penalty. The idea is that the threat of receiving capital punishment for a crime will make potential offenders less likely to commit it, thus deterring heinous crimes such as first-degree murder. However, the supposed effectiveness of the death penalty as a deterrent has been disproven several times. According to a 2004 study conducted by Amnesty International the average murder rate for states that used the death penalty was actually higher compared to states that did not use it, demonstrating that the death penalty does not effectively deter violent crime.[239] Further evidence that points to the inefficacy of the death penalty as a deterrent is proven through Canada's murder rate falling 44 percent since the

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[236] Jane Paden, *The Sword of Damocles in American Law: The Cruel and Unusual Nature of the Death Penalty*, 2 WASHINGTON UNIVERSITY UNDERGRADUATE LAW REVIEW (2024), https://journals.library.wustl.edu/wuulr/article/id/8962/.
[237] Samuel Gross, *Update: American Public Opinion on the Death Penalty-It's Getting Personal*, 83 CORNELL LAW REVIEW 1448 (1998), https://scholarship.law.cornell.edu/clr/vol83/iss6/2.
[238] *Furman v. Georgia, supra* note 210.
[239] *Does the Death Penalty Deter Crime?*, AMNESTY INTERNATIONAL, https://www.amnesty.org/fr/wp-content/uploads/2021/06/act500062008en.pdf.

abolition of the death penalty in 1975.[240] This is not an individual statistic, but rather one of many across several decades that may imply a troubling reality: societies that normalize the death penalty, through either convictions or support for it, seem to be the same ones that are already predisposed to violence and heinous crimes. Thus, the death penalty does not seem to deter crime, but rather brutalize it through a state-sanctioned cycle of violence.

Finally, the death penalty as a whole raises ethical concerns due to the inherent finality of this punishment. Cases such as those of Jones or Lee testify to changing standards of evidence as technology and information continue to develop every day. This ever-shifting standard of evidence—and simultaneously, exposure of past imprecise sentencing methodology—starkly contrasts the finality of a death sentence that cannot be revoked post-execution, and usually will not be revoked even when the defendant is still alive. These cases of executions despite strong evidence of innocence make up a series of alarming ethical transgressions that value legal closure over human life, eroding the moral and constitutional legitimacy of the criminal justice system itself and disrespecting the foundations of due process and justice upon which this nation was built.

The persistence of wrongful convictions, and the role of the justice system in carrying out these convictions to executions despite evidence that overwhelmingly suggests innocence and consistent procedural mistakes, reveals a profound and ongoing failure in the American death penalty construct. These injustices are so deeply entrenched in the American justice system, from the historic usage of unreliable evidence to precedents enforcing habeas appeal barriers to the denial of the constitutional right to counsel for death penalty convicts. The preeminence that the United States's judicial system gives to procedural efficacy over fairness cannot be justified when it is the lives of innocent Americans that are on the line. Bringing more robust habeas corpus protections, removing barriers to introducing evidence post-conviction, and guaranteeing legal counsel for all defendants is essential.

Habeas corpus protections would allow for federal courts to fully consider claims of actual innocence by permitting the federal judiciary to review state convictions and lowering procedural barriers to proving actual innocence, such as AEDPA. Seeing the EDPA was intended to strengthen the death penalty appeals process, breaking down the current barriers would not only save lives and better serve justice, but also deter crime in the long run. Had Davis had these protections, a life would not have been lost meaninglessly due to procedural errors in the face of possible innocence, or at least non-guilt.

[240] *Id.*

The blockage of post-conviction evidence in courts, which many states allow their prosecutors to do, is a gross misuse of government power and a direct obstruction to the unveiling of evidence, which is especially paramount when this evidence is the determining factor of whether or not someone is sentenced to death. Jones's needless death, as well as posthumous DNA evidence, serve as a testament to the dangers of blocking forensic evidence at any stage of the judicial process. Guaranteeing the right to test forensic evidence at any time and lowering the threshold so that courts can admit evidence that casts reasonable doubt over a conviction will only further the accuracy of court decisions and save lives.

Finally, the last essential reform that must be made to help build a fair death penalty system lies in guaranteeing competent legal counsel for all defendants, including those on death row, at all stages in the legal process. Many death row defendants have underfunded or otherwise compromised representation, as seen in Davis and Lee's cases, and many more lose their counsel after conviction. Guaranteeing a right to counsel for death row convicts, and further implementing mandatory standards for capital defense competency, would therefore reduce errors in cases with ineffective representation and ensure cases with wrongful convictions such as Jones do not slip through the cracks of the justice system.

Cases such as those of Davis, Lee, and Jones are not isolated instances of the failures of this system, but rather one of many such cases that have built the death penalty system into the machine of wrongful convictions that it is today. With an estimated four percent of death row convicts sentenced incorrectly, it is imperative that reforms are made to prevent further bloodshed. Although there may be no immediate solution to fixing a fundamentally broken system, it is crucial that the United States justice system improves to deliver the equity in trial that so many Americans so whole heartedly believe in.

These reforms, however necessary, will take quite some time, sustained advocacy, and structural overhaul to realistically implement. For now, the death penalty system serves as a mere echo of the promises it has voiced to the American people. Beyond a reasonable doubt? Maybe in theory, but certainly not in practice.

The ADVANCE Act's Implementation in a New Regulatory Climate

MICHAEL HREN

I. INTRODUCTION

Microsoft and Constellation announced a deal in September 2024 to reopen the Three Mile Island Unit 1 nuclear reactor, which had been shut down since 2019. Largely driven by a growing need for energy, the reopening of Three Mile Island exemplifies the recent renaissance of the United States' nuclear sector. Earlier in 2024, Congress passed the ADVANCE (Accelerating Deployment of Versatile, Advanced Nuclear for Clean Energy) Act with bipartisan support, hailing the end of the American nuclear industry's quarter-century moratorium on the construction of new nuclear power plants.[241] For decades, while public fear over the proliferation of nuclear energy—fueled by major disasters, including the Three Mile Island Unit 2 meltdown, Chernobyl, and Fukushima Daiichi—stalled the industry's growth, the American nuclear industry's development moratorium stemmed primarily from "the negative learning curve" of nuclear energy.[242] Whereas the cost of other forms of renewable energy, such as solar, decreases with increased manufacturing, nuclear energy has the inverse relationship; as more traditional nuclear power plants are built, it becomes more expensive to build more.[243] Additionally, before the ADVANCE Act passed, developing a nuclear power plant could take up to a decade. The act reduced the otherwise expensive licensing and construction burdens upon applicants, ameliorating concerns for previously disincentivized companies to build new nuclear plants and increase industry innovation.[244]

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[241] *About the ADVANCE Act*, U.S. NUCLEAR REGULATORY COMMISSION, https://www.nrc.gov/about-nrc/governing-laws/advance-act/about-advance-act (last visited Oct. 30, 2025).
[242] Thomas Hochman and Nate Hochman, *A Nuclear Renaissance?*, THE NEW ATLANTIS (2022), https://www.thenewatlantis.com/publications/a-nuclear-renaissance.
[243] *About the ADVANCE Act*, *supra* note 241; Max Roser, *Why Did Renewables Become So Cheap So Fast?*, OUR WORLD IN DATA (Dec. 1, 2020), https://ourworldindata.org/cheap-renewables-growth.
[244] John Martin Weed, *ADVANCE Act Strikes Right Balance for Nuclear Energy Regulation*, HARV. L. REV. BLOG (July 11, 2024), https://harvardlawreview.org/blog/2024/07/advance-act-strikes-right-balance-for-nuclear-energy-regulation/.

So, after a quarter-century of nuclear development stagnation, why is the U.S. now interested in revitalizing nuclear development? Firstly, as addressed in the ADVANCE Act's first provision, "American Nuclear Leadership," the U.S. now considers the nuclear industry paramount to national security. Moreover, the global nuclear development market is booming due to the need for clean, scalable power, where 30 countries have already invested in developing nuclear infrastructure.[245] The U.S.'s major adversaries, China and Russia, are at the forefront of nuclear technology and have exported their nuclear expertise to interested countries, thereby positioning them to dominate this valuable international market.[246] Overall, the ADVANCE Act is Congress's signal to the Nuclear Regulatory Commission (NRC), the federal agency overseeing nuclear regulatory matters, that it's time to reenter the global nuclear energy market and reposition the United States as a global leader. This paper examines the landscape of administrative law surrounding the ADVANCE Act, the mechanisms it introduces, and the potential challenges it poses for the NRC.

II. CURRENT STATE OF ADMINISTRATIVE LAW

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court overturned the *Chevron* deference—a long-standing doctrine of administrative law—effectively creating a new era of administrative law where the Judicial branch, rather than (expert) federal agencies, has the primary role in interpreting congressional statutes.[247] *Chevron* deference, established in *Chevron v. NRDC*, required courts to defer to an agency's interpretation of ambiguous statutes. In comparison, *Loper Bright* reaffirmed the courts' authority, emerging from a dispute surrounding the National Marine Fisheries Service's (NMFS) authority under the Magnuson Stevens Act to force ships to pay for government-mandated compliance agents. The Supreme Court justified its decision based on *Chevron* deference's incompatibility with the Administrative Procedure Act (APA), Section 706, which mandates that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or

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[245] Sarah Sobalvarro, *US Inaction Is Ceding the Global Nuclear Market to China and Russia*, WILSON CENTER (Apr. 2, 2025), https://www.wilsoncenter.org/article/us-inaction-ceding-global-nuclear-market-china-and-russia.

[246] Kyle Sallee, *Regaining American Competitiveness in the Global Nuclear Power Market*, AM. UNIV.: SCH. OF INT'L SERV. (Feb. 5, 2021), https://www.american.edu/sis/centers/security-technology/regaining-competitiveness-global-nuclear-power-market.cfm.

[247] *Loper Bright Enterprises v. Raimondo,* 603 U.S. 369 (2024).

applicability of the terms of an agency action."[248] More broadly, however, *Loper Bright* is part of a response to perceived agency overstep caused by *Chevron* deference, and thus establishes a narrower scope of deference to federal agencies' interpretations of congressional statutes.[249] As Professor Hammond of George Washington University Law expressed in an NRC-facilitated panel on the impact of new administrative law on the NRC, "the Supreme Court's recent actions, including the *Loper Bright* decision, are driven by a fundamental shift in judicial attitudes: a distrust of the administrative state and its perceived threat to liberty."[250]

Importantly, *Loper Bright* does not get rid of court deference to agencies. Instead, it recognizes deference as outlined in *Skidmore v. Swift & Company,* in which the weight given to an agency's interpretation is determined through a four-part test: the agency's thoroughness, the validity of its reasoning, the agency's consistency in its positions, and other factors such as the degree of agency expertise and the matter's technical nature.[251] As Professor Dru Stevensen of South Texas College of Law outlines, there are ways in which courts consider an agency's interpretation or opinion.[252] Firstly, in contemplating questions of law, the Court decides itself without any agency deference, as this would be a violation of the Administrative Procedures Act. Secondly, while contemplating questions of law and fact, the Court considers if Congress had entrusted authority to the agency in the statute. If the agency was entrusted with decision-making, the Court will respect the agency's use of authority if it reasonably acts within Congress' delegated discretion. Alternatively, if the Court rules that the statute was either too ambiguous or that Congress did not grant the agency decision-making powers, then it will give the agency's interpretation consideration, the degree of which will be determined by the interpretation's adherence to *Skidmore's* factors.

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[248] Jonathan Remy Nash, Chevron *Stare Decisis in a Post-*Loper *Bright World*, 110 IOWA L. REV. ONLINE 180 (2025), https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2025-05/ILROnline-110-Nash.pdf; *The U.S. Supreme Court Trifecta: How* Loper Bright*,* Corner Post*, and* Jarkesy *Are Redefining Administrative Law Post* Chevron, PUB. HEALTH L. CTR. AT MITCHELL HAMLINE SCH. OF L. (2024), https://www.publichealthlawcenter.org/resources/us-supreme-court-trifecta-how-loper-bright-corner-post-and-jarkesy-are-redefining.

[249] U.S. Nuclear Regulatory Commission, *TH 22 - Legal Impacts of the ADVANCE Act and Recent Supreme Court Administrative Law Decisions*, YOUTUBE (Apr. 29, 2025), https://www.youtube.com/watch?v=jS9kSYloVtA (last visited Oct. 30, 2025).

[250] *Id.*

[251] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

[252] Dru Stevenson, *Skidmore v. Swift & Co. - Judicial Review & Agency Interpretation of Statutes*, YOUTUBE (July 22, 2024), https://www.youtube.com/watch?v=N-jOCEaAoPM (last visited Oct. 30, 2025).

The stage for *Loper Bright* was set by the Court's earlier ruling in *West Virginia v. Environmental Protection Agency* that established that the Court retains primary authority if an agency's interpretation of a congressional statute touches upon a question of major economic or political significance.[253] While originally framed as an exception, the 'major questions doctrine' must also be considered alongside *Skidmore* deference. The major questions doctrine requires that Congress explicitly delegate authority to an agency on issues of vast economic and political significance.[254] This doctrine was pivotal in key contemporary cases like *Biden v. Nebraska*, where the Supreme Court struck down the U.S. Department of Education's student loan forgiveness, as justifying such enormous government spending triggered a major question, and thus required clear congressional authorization.[255] Overall, this new era of administrative law greatly reduces agency power, creating a climate in which agencies face an increased burden to justify their statutory interpretations.

This all begs the question of how the major questions doctrine will influence court decisions in conjunction with *Skidmore* deference taking precedence. As the major questions doctrine imposes a higher burden on an agency's claim to authority, an agency's interpretation that may have previously been valid under *Skidmore* would not achieve deference under the major questions doctrine if the act touches on major economic or legal questions.[256]

III. THE ADVANCE ACT

The ADVANCE Act, officially codified into law on July 9, 2024, aims to revitalize the U.S.'s global nuclear leadership and expand domestic nuclear production. Before Congress passed the ADVANCE Act, the NRC mainly focused on the radiological and safety regulation of nuclear power plants.[257] More broadly, however, the ADVANCE Act revises the NRC's official mission statement to "protect public health and safety and advance the nation's common defense and security…" established exchange programs and reduced barriers for friendly foreign nations to invest in the U.S.'s domestic nuclear production to re-cement its role as a global nuclear leader.[258]

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253 *West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022).
254 Bernard Bell, *The New Era of Skidmore Deference*, YALE J. ON REG.: Notice & Comment (June 24, 2025), https://www.yalejreg.com/nc/the-new-era-of-skidmore-deference/.
255 *Biden v. Nebraska*, 600 U.S. 477 (2023).
256 *Id.*
257 *About the ADVANCE Act*, *supra* note 241.
258 *Id.*

Additionally, Congress included several key economic incentives to spur nuclear development. First and foremost, the ADVANCE Act reduces review costs by 50 percent, capping the amount of money companies must pay for their licensing review. Second, it provides a free licensing fee for five different types of nuclear reactors, encouraging developers to innovate new reactor designs. Third, it creates shorter timelines for reviewing licenses of micro-reactors, which are portable and produce less power. Lastly, it accelerates the timeline for licensing projects on pre-existing nuclear sites, to prevent closed reactors from remaining ghost plants.[259] Notably, two of the provisions shortening timelines for nuclear reactor plans review correspond with Google and Microsoft's deals for nuclear energy with Kairos Power and Constellation, respectively.

The passage of the ADVANCE Act coincides with the Executive Branch's recent push to expand nuclear power under both the Biden and Trump administrations.[260] Even though Trump is pro-coal, his energy strategy purports to maximize the U.S.'s full energy potential, including natural gas, coal, and nuclear, encapsulated through his motto "drill, baby, drill!"[261]

Overall, the ADVANCE Act is a landmark piece of legislation that transforms the NRC from another regulatory commission into an agency driving development and global leadership.

IV. TRIGGERING MAJOR QUESTIONS: ECONOMICS

The NRC's expanded regulations are projected to create thousands of jobs and drive billions of dollars into major players in the nuclear industry. Within the ADVANCE Act, two key sections are particularly likely to trigger a major economic question: Sections 207 and 301.

In Section 207, Congress entrusts the NRC to expedite the licensing for nuclear reactors that have "a design that is substantially similar to a design of a nuclear reactor for which the Commission has issued a combined license." The term "substantially similar" is subjective and open to interpretation. Given

[259] Grant William Eskelsen & Jeffry M. Sharkey, *The ADVANCE Act – One Year Later: The ADVANCEs Are Real in Nuclear Energy*, BALCH & BINGHAM LLP (Aug. 27, 2025), https://www.balch.com/insights/publications/2025/08/advance-act-one-year-later; Joanne Katsantonis et al., *Executive Orders Seek Resurgence of Nuclear Power in U.S.*, MCGUIREWOODS (May 27, 2025), https://www.mcguirewoods.com/client-resources/alerts/2025/5/executive-orders-seek-resurgence-of-nuclear-power-in-u-s/.
[260] *Id.*
[261] Stephen V. Arbogast, *Trump's "Drill Baby Drill" Is Not What It Seems*, UNC KENAN-FLAGLER BUS. SCH.: ENERGY CTR. (Dec. 6, 2024), https://www.kenan-flagler.unc.edu/perspectives/drill-baby-drill-by-stephen-v-arbogast/ (last visited Dec. 21, 2025).

that the timeliness for Nuclear review can be worth tens of millions of dollars, the NRC's interpretation of "subjectively similar" could result in hundreds of millions of dollars in licensing fees, increasing developers' costs, raising a question of major economic significance. Moreover, as Congress has designated the nuclear industry as central to national security, Courts may apply the major questions doctrine even to smaller amounts of money if they believe the economic impact intersects with significant national security implications.

Section 301 of the ADVANCE Act touches on the component of American global nuclear leadership and allows the NRC to issue a license to a foreign developer, "if the Commission determines that issuance of the applicable license to that entity is not inimical to—(1) the common defense and security."[262] Since there is no standardized congressional definition of what constitutes an inimical proposal to national security, the NRC's interpretation of this section could trigger a major question not only economically but also in the national security scope. However, under the major questions doctrine, if courts find that NRC interpretations of the ADVANCE Act have caused significant change to the economy without proper congressional authorization, then courts will not give any deference to the NRC's interpretations.

V. TRIGGERING MAJOR QUESTIONS: FEDERALISM

Before the ADVANCE Act, the NRC primarily focused on concerns of radiological safety of nuclear power plant design.[263] Matters of economic importance were typically left to state purview. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission* stated that the NRC would regulate the radiological impacts of nuclear plants, but that states would regulate economic factors.[264] Congress's expanded purview of the NRC into economic territory, while not directly challenging the Pacific Gas ruling, creates an area of overlap that could result in legal challenges. This could therefore trigger a major question.

However, as safety and economic concerns in building nuclear reactors are inherently intertwined, the ADVANCE Act does not result in a complete shift in regulatory authority to the Federal government. In the scenario that a hostile court rules that the NRC was not explicitly entrusted with the authority

[262] ADVANCE Act, Pub. L. No. 118-67, div. B, § 301(a)(1), 138 Stat. 1447, 1465–66 (2024).
[263] *About the ADVANCE Act*, *supra* note 241.
[264] *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983).

to regulate, the NRC could contend that recent pro-nuclear development executive orders and the unanimous passing of the ADVANCE Act demonstrate that the legislative and executive branches have entrusted authority to the NRC.[265]

Moreover, the NRC's greatest asset in curtailing potential threats to its actions is the ADVANCE Act itself, which incorporates explicit Congressional support for expanding its purview. In creating the major questions doctrine, the Supreme Court based its decision on the EPA's reliance on ancillary evidence from a general provision. By contrast, the ADVANCE Act's provisions are new, statutory, and have clear congressional support, differentiating it from the EPA. Thus, the NRC could challenge the Supreme Court on whether the major questions doctrine would apply to it, arguing that the NRC is firstly applying the ADVANCE Act in line with Congress's direction. Therefore, the NRC is not deciding policy matters, ultimately Congress is. As the NRC is simply enforcing Congress's wishes, the Supreme Court would need to find that the NRC failed to act within the authority detailed under the ADVANCE Act to overturn the NRC's regulations. Secondly, the NRC is not enforcing provisions outside its realm of expertise; nuclear power plant regulation has been the NRC's primary function, and incorporating economic factors into its decision does not change the realm it functions in.

VI. *SKIDMORE* IN THE NRC

Skidmore deference shifts the judicial review process from asking whether an agency's interpretation of a statute is reasonable to review to whether it is persuasive. While the NRC's expansive technical expertise helps make its judgments persuasive, its newfound mission presents a situation where it could fail *Skidmore's* deference test. Section 208 of the ADVANCE Act relates to the NRC's micro-reactor licensing: "The Commission shall, (1) not later than 18 months after the date of enactment of this Act, develop risk-informed and performance-based strategies and guidance to license and regulate micro-reactors."[266] Courts will heavily weigh the NRC's interpretation of the Atomic Energy Act in Section 208 of the ADVANCE Act due to its technical expertise. This interpretation is not problematic for the NRC; however, Congress's 18-month deadline is extremely tight, especially when

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[265] Bruce White, *From Power Plants to the Moon: The U.S. Nuclear Revival in 2025*, NAT'L L. REV. (Aug. 11, 2025), https://natlawreview.com/article/power-plants-moon-us-nuclear-revival-2025.
[266] ADVANCE Act § 208(a)(1), 138 Stat. at 1464.

looking at the ADVANCE Act's predecessor, the Part 53 rulemaking, which took five years.[267] This creates a speed versus safety paradox, which has opposing pressures. Therefore, courts could find NRC's interpretation unpersuasive because the NRC's rushed timeline could result in a tangible lack of thoroughness—a *Skidmore* factor—when considering the new safety challenges of micro-reactors.

Furthermore, Section 507 is at the heart of the ADVANCE Act's deregulatory spirit, in which it mandates that "The Commission shall develop and submit to the appropriate committees of Congress a report that identifies specific improvements to the nuclear reactor and materials oversight and inspection programs."[268] However, Section 507 could damage the NRC's rules consistency on safety and inspection quality. If Section 507 forsakes the NRC's long-standing quality and rigor level to reduce licensing and build times, the court could find that the NRC's interpretation is unpersuasive because it opposes its long-standing practices.

VII. IMPLICATIONS FOR THE NRC

Even though the ADVANCE Act has clear bipartisan Congressional support and was written with relatively unambiguous language, the Judicial Branch's diminishment of agency power limits the NRC's complete effectiveness. Firstly, the recognition of *Skidmore* deference is one of the NRC's biggest challenges because while *Skidmore* is a form of deference, it is not very deferential, increasing the burden of proof on the NRC. Beyond the pure legal implications of *Skidmore's* recognition, this new Court has signaled its willingness to overturn long-standing precedent(s) related to agency power. Therefore, this could potentially increase the number of potential legal challenges the NRC faces. These challenges are likely to come from two major groups. Firstly, anti-nuclear groups could argue that the NRC is too broad in its interpretation and application of ADVANCE. In particular, how NRC's expanded official purview beyond safety standards could be a conflict of interest, as regulations appear to become more influenced by large corporations. Paradoxically, nuclear technology developers could, and already are, arguing that the NRC is not following exactly the direction outlined in ADVANCE, particularly relating to the licensing of "de minimis" reactors,

[267] *Part 53 – Risk-Informed, Technology-Inclusive Regulatory Framework for Advanced Reactors*, U.S. NUCLEAR REGULATORY COMMISSION, https://www.nrc.gov/reactors/new-reactors/advanced/modernizing/rulemaking/part-53 (last visited Dec. 21, 2025).
[268] ADVANCE Act § 507(b), 138 Stat. at 1480.

reactors meeting "de minimis" standards on waste.[269] The re-institution of *Skidmore* Deference leads to two critical potential problems for the NRC, both resting on the Court's subjective interpretations. Chiefly, the Supreme Court will have to determine whether Congress entrusted the NRC to make interpretations of ADVANCE. Additionally, if the court decides in the NRC's favor, it will then need to determine if the NRC's interpretations are reasonable: a subjective interpretation that rests on very technical knowledge.

In response to court cases, the NRC could make two major arguments. Principally, the NRC could assert that it is focusing on how it can abide by the Legislative Branch's directives. Secondly, the NRC will benefit from a long chain of favorable Supreme Court rulings relating to its statutory interpretations. This allows the NRC's defense to incorporate the statutory stare decisis doctrine, which ensures strong adherence to judicial precedent when interpreting statutes. Through this doctrine, which Justice Kagan highlighted as a doctrine of "judicial modesty" in her dissent in *Loper Bright*, the NRC would contend that the Supreme Court must have exceptional justification for overturning its practices, which would create a higher burden for the court to rule against the NRC.[270] Beyond implementing the statutory stare decisis doctrine, The NRC could further rely on nuclear development's national security importance to bolster its argument on why overturning its interpretations could harm American interests. Additionally, as both the Legislative and Executive branches have endorsed the ADVANCE Act, the NRC could claim the Supreme Court's overturning on the grounds of the major questions doctrine would put it at odds with the other two branches. Given that both the major questions doctrine and *Skidmore* were instituted to safeguard the Legislative Branch, this defense would frame the NRC actions under the guise of following the wishes of a united Legislative and Executive branches.

VIII. CONCLUSION

Overall, the ADVANCE Act is a landmark piece of legislation that cements a U.S. nuclear resurgence, transforming the NRC's mission from solely focusing on safety to one that actively promotes nuclear development and global leadership. Yet, this new, expanded role places the NRC in the crosshairs of a newly empowered and skeptical Judicial Branch. Despite

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[269] Ellen M. Conley, Michael J. Mazzone & Sam Richards, *Let My Nuclear Reactors Go: Texas, Utah and Last Energy, Inc. Challenge the NRC*, HAYNES BOONE (Jan. 17, 2025), https://www.haynesboone.com/news/alerts/let-my-nuclear-reactors-go.
[270] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) (Kagan, J., dissenting).

bipartisan congressional passage, recent developments in administrative law create significant vulnerabilities for the NRC's interpretations of the ADVANCE Act. Especially considering how courts now must independently evaluate agencies' statutory interpretations instead of giving them deference.

The importance of *Skidmore* deference requires the NRC to convince courts of its thoroughness, reasoning, and expertise on a case-by-case basis. Critically for the NRC, as the major questions doctrine supersedes the *Skidmore* deference, it imposes a much higher burden of proof that the NRC must overcome. Additionally, as the ADVANCE Act intersects with questions of vast economic and political significance, it could trigger major questions. This happens especially through Congress's expansion of the NRC's regulatory scope. It aligns the NRC with an industry that Congress itself describes as important to national security. Moreover, it transfers economic purview directly to the federal government and away from the states.

The NRC will most likely argue that the ADVANCE Act's clear and explicit congressional direction, compounded with executive support and national security concerns, constitutes the unequivocal authorization that is required to survive scrutiny. Its potential defense could position itself as the executor of the Legislative Branch's wishes, not an over-reaching agency. However, in a judicial climate that presumes executive overreach at Congress's expense, the burden remains on the NRC to prove that its interpretations are explicitly authorized within the ADVANCE Act. Ultimately, while the ADVANCE Act signals a major commitment to reinvigorating the American nuclear sector, the NRC's path forward could face severe legal challenges.

Taking Down Project NOLA: The Carpenter Test and The Third-Party Doctrine

KAYDEN GREEN

In May 2025, *The Washington Post* published an exclusive report documenting the first-known widespread facial recognition program utilized by law enforcement in the United States.[271] Project NOLA, a nationwide crime-prevention nonprofit, built a private network of over 200 facial recognition cameras that scan the public around the clock, and, until April 2025, automatically alerted New Orleans police via a mobile app with names and real-time locations of suspected matches.[272] According to Project NOLA, the facial recognition surveillance network has contributed to at least 34 arrests since 2023.[273] New Orleans police officers have not disclosed their reliance on the facial recognition matches for most of the arrests linked to Project NOLA, and no public data is available on which of Project NOLA's 5,000 cameras in New Orleans contain the nonprofit's facial recognition technology.[274]

The publicization of Project NOLA sparked outcry, as many Americans learned for the first time that the United States has no federal law regulating the use of artificial intelligence (AI) and facial recognition technology (FRT) for law enforcement purposes, allowing police-monitoring surveillance networks, like Project NOLA's, to thrive.[275] Not only can these third-party surveillance companies exist and provide their data to government agencies without restriction, but current federal law does not require governments to publicly disclose their use of facial recognition or AI.[276]

[271] Douglas MacMillan & Aaron Schaffer, *Police Secretly Monitored New Orleans with Facial Recognition Cameras*, WASH. POST (May 19, 2025), https://www.washingtonpost.com/business/2025/05/19/live-facial-recognition-police-new-orleans/.
[272] *Id.*; Aliana Mediratta, *Is the NOPD Breaking the Law by Using Tips From Project NOLA? Depends Who You Ask*, VERITE NEWS (Nov. 5, 2025), https://veritenews.org/2025/11/05/project-nola-nopd-local-attorneys/.
[273] MacMillan & Schaffer, *supra* note 271.
[274] *Project NOLA Blocks NOPD's Remote Access to over 5,000 Crime Cameras amid Privacy Dispute*, FOX 8 (Sept. 29, 2025), https://www.fox8live.com/2025/09/29/project-nola-blocks-nopds-remote-access-over-5000-crime-cameras-amid-privacy-dispute/; Mediratta, *supra* note 272.
[275] MacMillan & Schaffer, *supra* note 271.
[276] Daniel Weatherholt, *Facing Carpenter: Facial Recognition Technology and the Fourth Amendment*, 56 TULSA L. REV. 339 (2021), https://digitalcommons.law.utulsa.edu/tlr/vol56/iss2/9.

Recent advances in machine learning, cloud computing, and condensed data storage have revolutionized security camera monitoring, enabling FRT-equipped organizations to increasingly (and often secretly) operate across realms of private American life.[277] As law enforcement agencies begin adopting FRT cameras, such as those in Project NOLA's automated policing, Fourth Amendment-based privacy concerns are increasingly asking: when does FRT surveillance data constitute an unreasonable search?[278] The lack of federal statute enables organizations like Project NOLA to enjoy unchecked authority to pursue around-the-clock public monitoring without federal oversight. The Carpenter Test for emerging technologies, established in *Carpenter v. United States* (2018), provides a federal precedent for limiting law enforcement applications of digital surveillance technologies such as FRT. Extension of the Carpenter Test's restrictions on the Fourth Amendment's Third-Party Doctrine would severely curtail Project NOLA's policing activities, restoring Fourth Amendment privacy to Americans and preventing the emergence of an oppressive, unregulated police state. The Carpenter Test is not only critical for protecting Fourth Amendment privacy rights amid the rapid integration of surveillance technology in everyday life, but also for terminating the legal ambiguity that much of Project NOLA's collaboration with law enforcement operates under.

I. *CARPENTER V. UNITED STATES* (2018)

In 2018, the Supreme Court broke precedent in *Carpenter v. United States* by expanding what constitutes a "search" under the Fourth Amendment.[279] The 5-4 majority concluded that modern technologies can violate the basic purpose of the Fourth Amendment, which is "to safeguard the privacy and security of individuals against arbitrary invasions by government officials."[280] This conclusion led the Justices to place the first limitations on the Fourth Amendment's Third-Party Doctrine, which previously held that individuals have no right to privacy over information they voluntarily share with a non-government third party, and no control over how the third party uses or distributes such information once provided.[281] In *Carpenter*, the Court established the Carpenter Test as a framework for evaluating how emerging technology can infringe on citizens' Fourth Amendment protection of a

[277] *Id.*
[278] *Id.*
[279] *Carpenter v. United States*, 585 U.S. 296 (2018).
[280] *Id.* at 303.
[281] Dmitry Gorin, *The Third-Party Doctrine and the Fourth Amendment*, EISNER GORIN LLP (Dec. 8, 2023), https://www.thefederalcriminalattorneys.com/third-party-doctrine..

reasonable expectation of privacy. The Court held that the test applies even when the technology is operated by a third party or when data is voluntarily provided, noting that the exception is necessary as surveillance-capable tools become increasingly normalized in daily American life. *Carpenter's* establishment of the first limitations on voluntarily provided data, during the last decade's exponential integration of emerging technology that collects personal, often understood as private information, suggests that the Supreme Court believes Americans do have a right to the information given to a third party in cases of surveillance-oriented private innovations.[282] These limitations also suggest that the Supreme Court recognizes a constitutional interest in data shared with third parties. In the context of surveillance-oriented private innovations, Americans can therefore retain Fourth Amendment protections over such information collected by FRT if the Carpenter Test and Third-Party Doctrine is extended, ultimately undermining the backbone of surveillance programs like Project NOLA.

In *Carpenter*, the Justice Department charged Detroit resident Timothy Carpenter with aiding and abetting a robbery in April 2011.[283] His arrest hinged on evidence authorities found from his cell phone location data. Carpenter argued that the government violated the Fourth Amendment by collecting his cell-site location information (CSLI) records under the Stored Communications Act rather than through a search warrant supported by probable cause. CSLI records provide location-specific cell-site location information that is routinely submitted to a mobile phone's wireless carrier as long as the mobile phone is charged, regardless of whether it is powered "on."[284] As cell phone usage has grown and cell sites have become increasingly concentrated, time-stamped CSLI maps have become increasingly comprehensive and accurate, providing data on a cell phone and its user's location through constant, seconds-long updates.

The government obtained Carpenter's records without a warrant because CSLI is treated as a non-content business record under the Stored Communications Act's §2703(d), which allows law enforcement to compel disclosure merely by showing the records "might be pertinent to an ongoing investigation." This standard is far below probable cause, and it applies

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[282] *Expectation of Privacy*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/expectation_of_privacy (last visited Nov. 19, 2025).
[283] *Carpenter*, 585 U.S. at 302.
[284] Stephanie Lacambra, *Cell Phone Location Tracking or CSLI: A Guide for Criminal Defense Attorneys*, ELECTRONIC FRONTIER FOUNDATION (2017), https://www.defendyouthrights.org/wp-content/uploads/2017/10/Cell-Phone-Location-Tracking-or-CSLI-A-Guide-for-Criminal-Defense-Attorneys.pdf (last visited Nov. 19, 2025).

regardless of how many days of data are sought.[285] Under this lower standard, the government obtained 127 days' worth of CSLI covering Carpenter's movements without ever needing to establish probable cause. To obtain a search warrant that meets probable cause, the government would have needed to demonstrate "some quantum of individualized suspicion" before the CSLI data could be seized, which the government did not seek to establish before collecting the Stored Communications Act data.[286]

The Justices recognized, however, that these CSLI advancements, as well as the near-inescapable reliance people have on cellphones for daily life, create a new privacy concern.[287] They described the lower evidentiary burden of the Stored Communications Act for data requests under 180 days to be a "'gigantic' departure from probable cause rule."[288] In the 127 days' worth of CSLI data collected by the government prosecution, 12,898 location points were generated by Carpenter's cell phone.[289] For an average of 101 location points per day, the Court majority found that the breadth of CSLI data collection violated Carpenter's reasonable expectation of privacy in his physical movements and location.[290] The decision relied on a finding by the Court in *United States v. Jones* (2012), where the warrantless GPS tracking of a suspect's vehicle for twenty-eight consecutive days constituted a search under the Fourth Amendment.[291] While police only used seven of the 127 days worth of CSLI to locate Carpenter, the near perfect and routine location tracking provided by the seven days worth of CSLI data followed the precedent established by *Jones*.[292] In *Jones*, a reasonable expectation of privacy is defined as one where an individual "demonstrated an actual expectation of privacy" and is a scenario with which "society is prepared to recognize as reasonable" to expect privacy.[293] The concurring opinions in *Jones* argued that a warrant is necessary when law enforcement seeks data related to "collective public monitoring over time," such as data collected by generalized, routine surveillance.[294]

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[285] Jimmy Balser, CONG. RSCH. SERV., LSB10801, Overview of Governmental Action Under the Stored Communications Act (SCA) (Aug. 3, 2022), https://www.congress.gov/crs-product/LSB10801; *Carpenter*, 585 U.S. 296 (2018); Lacambra, *supra* note 284.
[286] *Carpenter*, 585 U.S. at 318.
[287] Weatherholt, *supra* note 276, at 361–362.
[288] *Carpenter*, 585 U.S. at 318.
[289] *Id*. at 296.
[290] Weatherholt, *supra* note 276, at 343.
[291] *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *aff'd sub nom. United States v. Jones*, 565 U.S. 400 (2012).
[292] *Carpenter*, 585 U.S. at 297, 307.
[293] *Id*. at 304.
[294] *United States v. Jones*, 565 U.S. 400, 414 (2012) (Sotomayor, J., concurring); *id.* at 420 (Alito, J., concurring in the judgment).

After extending Fourth Amendment protection to CSLI data, the Court in *Carpenter* turned to the Third-Party Doctrine, which holds that an individual has no reasonable expectation of privacy in information voluntarily shared with a third party—a doctrine Justice Sotomayor's concurrence in *Jones* had already signaled skepticism toward.[295] The Third-Party Doctrine, however, only applies when the individual's participation in the data sharing is optional and consented to.[296] Breaking from past Third-Party Doctrine cases that upheld that data provided to a Third Party does not give the individual any reasonable expectation of privacy, the Court distinguished CSLI data from previous cases due to the "qualitatively different category" that cell phone provider data exists in.[297] The different category was created by the Court due to the greater intrusion into individual privacy that government access to CSLI data presents, which exceeds the personal-information threshold considered by case law up until *Carpenter v. United States*.[298] The Supreme Court found that CSLI data opens a "window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations'" to a greater degree than previous third-party data turned over to the government, such as GPS data or bank records, had previously revealed about the individual's life.[299] Not only did the Court recognize CSLI data as more invasive than past data obtained through the Stored Communications Act, but they recognized the extent to which mobile devices enable near-perfect tracking of a cell phone's operator, as they have practically become a "feature of the human anatomy."[300]

The Justices further emphasized that the expansive historical record and "retrospective quality" of CSLI location data enable law enforcement to significantly broaden the reach of police authority.[301] They noted that law enforcement is historically limited by time during investigations, "the dearth of records," and "the fragility of recollection."[302] These limitations are a check on police's investigative options that years of receipts of near-perfect locational CSLI data all but eliminates. Considering the location-tracking nature of the technology, the routineness of time-stamped cell tower pings, and the expansion of investigative power CSLI data creates, the Court agreed with Carpenter that law enforcement "invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements" and a reasonable

[295] *Carpenter v. United States*, 585 U.S. 296 (2018).
[296] *Id*. at 298.
[297] *Id*. at 310.
[298] *Id*.
[299] *Id*. at 311.
[300] *Id*. at 312.
[301] *Id*.
[302] *Id*.

expectation of privacy by obtaining CSLI without a probable cause search warrant.[303] Chief Justice Roberts summarized the break in precedent by stating "[in] light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it [private information] any less deserving of Fourth Amendment protection."[304] Justice Roberts' focus on "depth," "breadth," " reach," and "inescapable and automatic" makes clear that the Court is concerned with privacy intrusions by general systems of digital surveillance.

In the eyes of the Court, the nature of what CSLI reveals is simply too broad in scope and too personal in nature to be acquired by the government without probable cause. The Court observed that CSLI is inescapable since there is no way to opt out of "leaving behind a trail of location data" unless the device is not charged.[305] Therefore, the Court concluded that cell phone users can not assume the risk of voluntarily turning over CSLI.[306] Ultimately, the Supreme Court found that the "government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment" and required a warrant issued with probable cause, establishing precedent for limiting the Third-Party Doctrine for government use of privately managed surveillance technologies.[307]

II. PROJECT NOLA'S FACIAL RECOGNITION AND THE CARPENTER TEST

Carpenter v. United States was based on 2011 CSLI capabilities.[308] Now, consider 2025's facial recognition technology and AI biometric facial recognition systems. The new decade has brought with it another "seismic shift in digital technology" in AI-enabled FRT cameras that generate real-time, precise location data that goes far beyond CSLI's location-estimating capabilities. Even in 2020, standard FRT had an over 99% "near infallible" accuracy rate, with FRT cameras creating an "exhaustive list of location information" as FRT pings an individual's identity across its camera networks as they cross camera locations throughout the surveilled region.[309] Therefore,

[303] *Id*. at 314.
[304] *Id*. at 321.
[305] *Id*. at 316.
[306] *Id*. at 310–312.
[307] *Id*. at 316.
[308] *Id*. at 301.
[309] William Crumpler, *How Accurate Are Facial Recognition Systems – and Why Does It Matter?*, CSIS: STRATEGIC TECHNOLOGIES BLOG. (Apr. 14, 2020),

it seems obvious that facial recognition meets the pattern established by the Supreme Court in *Carpenter v. United States* for its data use by law enforcement—requiring a probable cause warrant to obtain—regardless of the data's holder (third party or government entity).

CSLI was held to be protected under the Fourth Amendment because the technology met three elements that in conjunction violate the Fourth Amendment's right to freedom from unwanted searches: the deeply revealing nature of the data determined from the technology; technology's "depth, breath, and comprehensive reach,"; and "inescapable and automatic nature of its collection."[310]

To solidify the legal linkage between *Carpenter's* check on CSLI and FRT, the following explores how CSLI established the threshold for each element of the Carpenter Test, why the Third-Party Doctrine is irrelevant to technology that passes the test, and how FRT meets or exceeds each requirement, demonstrating that the Court should also necessitate a probable cause warrant for FRT.

First, the data collected must be "'deeply revealing' of some private quality of the person under surveillance."[311]. The Carpenter Test breaks precedent by establishing a framework for exceptions to the Third-Party Doctrine that considers the nature of what the collected information reveals, rather than simply the manner in which it was collected. To be "deeply revealing," the data collected must "hold for many Americans the 'privacies of life'" and show "familial, political, professional, religious, and sexual associations."[312] Camera feeds reveal these privacies of life and personal associations by going beyond the implied behavior of CSLI's location data, since they provide footage of a person's location and physical movements, rather than simply the individual's general location. Whether going to a church, visiting a health clinic, or entering a voting station during an election, surveillance cameras capture these intimate, often deeply personal activities that the public expects to be treated, by a democratic government, with a degree of privacy (religion, health, elections). The capture, catalog, and searchable storage of day-to-day activities posed by FRT-equipped cameras constitutes a "deeply revealing nature" as defined by the Carpenter Test because it enables law enforcement to track the routine movements of all people under a camera network.[313] The biometric 'face maps' created by FRT

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https://www.csis.org/blogs/strategic-technologies-blog/how-accurate-are-facial-recognition-systems-and-why-does-it.

[310] *Carpenter*, 585 U.S. at 321.

[311] *Jones*, 565 U.S. 400.

[312] *Carpenter*, 585 U.S. at 311; Weatherholt, *supra* note 276, at 359.

[313] *Carpenter*, 585 U.S. at 321.

allow authorities to search for a specific person's identity within stored video-recorded data and images.[314] Regardless of whether one's identity is targeted for search, such as with suspected criminals or intelligence operations, across the camera network's data, all people who are captured by the FRT-enabled cameras can have their biometrics entered and stored in the searchable biometric database operated by the third party.[315] With FRT, police can search for any FRT-recorded identity within the camera network's biometric database and determine that specific person's location and activities for as long as the video recordings are stored. Because the FRT data contains the camera's precise location and is nearly infallible in capturing identities, this 'find any person any time' technology reaches beyond the Supreme Court's threshold of the CSLI data that revealed near-perfect location data. Therefore, FRT meets the first element of the Carpenter Test.

The second element addresses the quantity of the information stored. The "depth, breadth, and reach" threshold can be understood as "time, frequency, and how many people."[316] In *Carpenter*, the Court observed that "accessing seven days of CSLI constitutes a Fourth Amendment search" and would require a probable cause warrant to obtain.[317] While the Court's timeline referred specifically to CSLI, the heightened scope and locational information that can be deduced from FRT identity matches across camera footage would likely lead a court to apply a similar, if not shorter, "depth" timeline for FRT.[318] "Breadth," as defined in *Carpenter*, refers to the frequency of the data points, such as the daily average of 101 cell phone pings stored in Carpenter's CSLI.[319] Both "breadth" and "depth" refer to the quantity of information collected, as more frequent data over a longer period of time progressively reveals more private details of a person's daily life. When FRT data is collected over several hours or days within and across a network of cameras, the technology would likely be determined to meet the frequency and time threshold presented by the seven-day standard in *Carpenter*.[320] Finally, "comprehensive reach" is met by a large population being affected nondiscriminately by facial recognition. In *Carpenter*, the Court recognized this because CSLI is "location information … continually logged for all of the 400 million devices in the United States" equipped with "this newfound

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[314] Jennifer Lynch, *Face Off: Law Enforcement Use of Face Recognition Technology*, ELECTRONIC FRONTIER FOUNDATION (last updated Apr. 20, 2020), https://www.eff.org/files/2020/04/20/face-off-report-2020_1.pdf.
[315] *Id.*
[316] *Carpenter*, 585 U.S. at 321.
[317] *Id*. at 310.
[318] *Id.*
[319] *Id*. at 296.
[320] *Id*. at 310.

tracking capacity [that] runs against everyone."[321] FRT is indiscriminate as it creates a biometric profile for every person it identifies a match with within a still image database (which typically contains a combination of mugshots, social media photos, passports, licenses, and other photographed identities).[322] These surveillance systems also collect data on every person who walks within the capture range of a camera that feeds into a facial recognition network. In large cities like New Orleans, where Project NOLA operates 5,000 cameras, the affected group constitutes a significant enough population to make FRT a privacy concern.[323] Like CSLI, FRT passes the threshold for the "breadth, depth, and reach" element and its subparts.

The final element of the Carpenter Test is the "inescapable and automatic nature of its [the data's] collection."[324] This element considers what the individual did, or failed to do, that ultimately led to the third-party obtaining the data.[325] In *Carpenter*, "inescapable" referred to an individual's choice to use a cell phone, which the Court ultimately considered is not truly a choice for participation in modern society.[326] A person who lives in an area like New Orleans that is near-constantly surveilled by a 5,000-camera network similarly does not have a "choice" about being surveilled, given the demands of daily life that require moving through the high foot-traffic public areas monitored by FRT-enabled cameras.[327] If carrying a cell phone is not considered a real "choice" by the Supreme Court, then participating in daily life within a city likely would not be considered much of a "choice" either. While a person could attempt to avoid surveillance by moving cities, courts have consistently rejected the notion that individuals must alter fundamental aspects of daily life to preserve constitutional protections, rendering such relocation an unreasonable burden.[328] Compounding this concern, federal law does not require cities or private entities to disclose the use of FRT-enabled camera networks, leaving individuals unaware that they are being surveilled

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[321] Bennett Cyphers, Adam Schwartz & Nathan Sheard, *Face Recognition Isn't Just Face Identification and Verification: It's Also Photo Clustering, Race Analysis, Real-Time Tracking, and More*, ELECTRONIC FRONTIER FOUNDATION: DEEPLINKS BLOG (Oct. 7, 2021), https://www.eff.org/deeplinks/2021/10/face-recognition-isnt-just-face-identification-and-verification.
[322] MacMillan & Schaffer, *supra* note 271.
[323] *Carpenter*, 585 U.S. at 307.
[324] Weatherholt, *supra* note 276, at 361.
[325] *Carpenter*, 585 U.S. at 321.
[326] MacMillan & Schaffer, *supra* note 271.
[327] *Id.*
[328] *United States v. Moore-Bush*, 963 F.3d 29, 43 (1st Cir. 2020); *Katz v. United States*, 389 U.S. 347, 354 (1967).

and unable to meaningfully consent.[329] The “automatic collection” aspect refers to the digital process that creates a data point, such as a cell phone connecting to the nearest cell tower without an affirmative act by the phone’s carrier in *Carpenter*.[330] FRT-enabled cameras meet this burden by using training software that automatically scans people’s biometric ’face maps’ as long as they are in frame, and then compares these ’face maps’ against a biometric database to look for matches.[331] These matches under Project NOLA are typically suspected criminals.[332] However, the lack of any federal regulation for the use of FRT raises privacy concerns that individuals targeted for their protest behavior, religious associations, or speech can be instantly identified by FRT systems that can automatically alert law enforcement.[333] While CSLI met the “inescapable and automatic nature” requirement because the Court ruled cell phones are “almost a ’feature of human anatomy,’” FRT automatically tracks literal human anatomy, and therefore fulfills the third and final element of the *Carpenter* Test.[334]

Facial recognition technology meets the three elements of the *Carpenter* Test, making the technology eligible for the warrant-necessitating exception to Third-Party Doctrine established in *Carpenter v. United States*.[335] The Court acknowledged during its creation of the Carpenter Test that the rule the Court would ultimately adopt “must take account of more sophisticated systems that are already in use or in development.”[336] AI-enabled, large-scale surveillance camera networks enhanced by FRT databases and in-camera capabilities are one of these more ’sophisticated systems’ the Court alluded to. *Carpenter* was decided in 2018 and evaluated the privacy concern posed by 2011 capabilities.[337] The Supreme Court likely understood how rapidly technology has innovated and become increasingly integrated into modern society during the seven-year gap between the events and the ruling, motivating the majority to establish a safeguard within the Carpenter Test for emerging surveillance technologies like FRT.[338] Therefore, the legal idea that

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[329] U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-621, *Facial Recognition Technology: Commercial Uses, Privacy Issues, and Applicable Federal Law* (2015), https://www.gao.gov/assets/gao-15-621.pdf.
[330] *Carpenter*, 585 U.S. at 296.
[331] MacMillan & Schaffer, *supra* note 271.
[332] Weatherholt, *supra* note 276.
[333] *Facial Recognition Request by Civilian*, PROJECT NOLA, https://www.projectnola.org/facial-recognition-search-request-by-civilian.html (last visited Nov. 19, 2025); *Carpenter*, 585 U.S. at 311.
[334] *Carpenter*, 585 U.S. at 312.
[335] *Id*. at 311–321.
[336] *Id*. at 297–298.
[337] Weatherholt, *supra* note 276, at 349.
[338] *Carpenter*, 585 U.S. at 321.

exceptions to the Third-Party Doctrine under the Carpenter Test cannot simply be limited to CSLI is already established and should not be of large debate if a case challenging FRT data collection without a warrant were to come to trial.

The Carpenter Test presently serves as one of the only legal frameworks and precedents through which the threat of emerging technology to American privacy is regulated. However, the Justices declined to apply the Carpenter Test logic to other specific technologies, leaving the decision short of creating a tangible, specific framework for the continued integration of contemporary surveillance innovations into civil society.[339] This failure, alongside the lack of federal regulation for facial recognition and artificial intelligence, fosters the legal conditions for organizations such as Project NOLA to proliferate beyond reasonable Fourth Amendment protection.[340]

III. How the Carpenter Test Could Kill Project NOLA

Facial Recognition Technology, as deployed throughout a camera network covering an entire region, presents an adjacent, if not more severe, threat to individual privacy than that of CSLI in *Carpenter v. United States*. Project NOLA's FRT-aided wide area camera network raises the same constitutional privacy concerns that CSLI did in *Carpenter*. Not only does FRT fulfill each element of the Carpenter Test, but Project NOLA's use of its facial recognition cameras and biometric databases inherently disqualifies it from the Third-Party Doctrine.

Initially, it would appear that Project NOLA, as a 501(c)3 nonprofit, can provide its digital data to law enforcement without police providing a warrant supported by probable cause due to the Stored Communications Act, as was demonstrated in *Carpenter v. United States*.[341] However, Third-Party Doctrine holds that there is no reasonable expectation of privacy when information that is voluntarily provided to others.[342] While Project NOLA is a third party due to its nonprofit status, the people who are surveilled by its citywide network of cameras in New Orleans did not vote on the cameras being installed.[343] The program was unannounced and largely secret until May 2025, when *The Washington Post* reported on Project NOLA in a report titled, "Police secretly monitored New Orleans with facial recognition cameras."[344] Without any federal or local New Orleans law requiring the disclosure of

[339] Weatherholt, *supra* note 276, at 341.
[340] *Project N.O.L.A.*, https://www.projectnola.org (last visited Nov. 19, 2025).
[341] Gorin, *supra* note 281.
[342] Weatherholt, *supra* note 276, at 344–346.
[343] MacMillan & Schaffer, *supra* note 271.
[344] *Id*.

which cameras are enabled with facial recognition technology, and with the people surveilled by the secret cameras having never consented to them, the "voluntarily provided" factor to qualify for the Third-Party Doctrine exception is not met by Project NOLA—unless simply living in New Orleans is considered voluntary disclosure.[345] While courts have recognized that a person does not have a reasonable expectation of privacy in a public space, such as the areas where Project NOLA cameras are typically installed, the scope of Project NOLA's 5,000 camera network and the intimate personal movement data that is automatically collected and stored by cameras goes beyond the invasive nature of CSLI in Carpenter.[346] Because FRT passes the Carpenter Test, Project NOLA's data provisions to law enforcement without presenting a probable cause warrant put the organization's current FRT police operations at risk of probable cause limitation.

Before backlash following *The Washington Post* report, Project NOLA constantly monitored New Orleans streets for wanted suspects, with the facial recognition technology automatically pinging New Orleans police officers' mobile phones through an app when FRT cameras located a potential suspect match.[347] The app provided the name and current location of the person the camera scanned the biometric 'face map' of, and it could track their movements throughout the city as other FRT cameras pinged the suspect.[348] The app automated the FRT law enforcement relationship by directly providing FRT location data unrequested and unwarranted to the New Orleans Police Department (NOPD).[349]

Project NOLA also accepts requests to run pictures through their Facial Recognition Analysis 'face-mapping' software and biometric database online from anyone who submits a request.[350] Project NOLA claims this technology "routinely allows Project NOLA staff to identify suspects in just seconds, then transmit a subject's probable name and date of birth to detectives."[351] While their website clarifies that the NOPD is prohibited from directly accessing FRT, it notes that New Orleans City Law does permit NOPD detectives to accept and use FRT match results from Project NOLA when the FRT search

[345] *Id.*
[346] *Id.*
[347] *Id.*
[348] *Id.*
[349] Tsion Agaro, *Project Dystopia: How a Little-Known Non-Profit Has New Orleans Considering Mass, Real-Time Facial Recognition Surveillance*, ELECTRONIC PRIVACY INFO. CTR. (July 31, 2025), https://epic.org/project-dystopia-how-a-little-known-non-profit-has-new-orleans-considering-mass-real-time-facial-recognition-surveillance/.
[350] *Id.*
[351] *Id.*

was initiated by Project NOLA staff or a private citizen.[352] This creates a legal loophole for NOPD to bypass security arrangements aimed at protecting anyone NOPD decides to search from being scanned in an FRT database by putting the search initiation on the third party itself. In these cases the third party could be Project NOLA staff, a private citizen, or most dangerously a police officer in their 'individual capacity.'[353] All FRT match results, regardless of who initiated the search request, are then provided to NOPD detectives investigating particular incidents.[354] The ability for NOPD to access FRT data without a probable cause search warrant, as long as someone fills out the online form on Project NOLA's website, violates the additional protections *Carpenter* found are necessary for emerging technology data provided to law enforcement. The deeply personal nature, inescapable data provision, automated data collection, and breadth, depth, and scope of Project NOLA's FRT put it at risk of needing to halt its unwarranted, in some municipalities automatic provision of FRT data to law enforcement.[355]

Necessitating a probable cause search warrant for law enforcement access to FRT and some form of public disclosure of where FRT-enhanced surveillance cameras are located would resolve the disparities between Project NOLA's current operations and *Carpenter's* Fourth Amendment protections for emerging technologies. While this would simply be an operational shift for Project NOLA that reduces their ability to disclose their data to law enforcement without a warrant, Fourth Amendment protections at the federal level would receive enhanced protection while setting a limitational precedent on law enforcement use of increasingly revealing AI-enhanced data collection technology. With the need for a warrant established, it is expected that Project NOLA would be limited to the operations outlined by a New Orleans FRT City Ordinance limiting the relationship between Project NOLA and the NOPD from 2022, which Project NOLA violated from 2023 to 2025 by sending automated alerts to law enforcement.[356]

Recent local actions demonstrate that FRT is already facing public and governmental pushback that may limit its future scope beyond Project NOLA's operations. After ordinance violations in New Orleans and the NOPD's decision to de-automate alerts from Project NOLA's FRT network, other cities

[352] *Facial Recognition Request by Civilian*, *supra* note 333.
[353] *Id.*; *Law Enforcement Video Request Form*, PROJECT N.O.L.A., https://www.projectnola.org/video-request-by-law-enforcement-officer.html (last visited Nov. 19, 2025).
[354] *Project N.O.L.A*, *supra* note 340.
[355] New Orleans, La., Ordinance No. 33,809 (July 21, 2022).
[356] MacMillan & Schaffer, *supra* note 271.

have begun watching closely as they consider their own policies.[357] Some municipalities, such as Austin, explored adopting FRT but ultimately abandoned the proposal after community protests; others, including twenty-three states and twenty-one cities, have enacted bans or strict limits due to concerns about constitutional privacy rights and Fourth Amendment protections.[358] These responses reflect growing public unease with commercial, private, and government surveillance as city-wide surveillance networks become increasingly equipped with FRT and AI data management.

This growing patchwork of local and state regulations does not resolve the core constitutional issues posed by FRT. While some jurisdictions require warrants or restrict use to serious crimes, the use of FRT over long periods of time violates the Fourth Amendment no matter the application under *Carpenter* (although a Supreme Court case regarding FRT specifically could establish different limitations).[359] In the absence of comprehensive federal standards, government agencies face no uniform obligation to disclose or meaningfully limit their use of FRT, creating significant gaps in transparency and civil liberties protections. As personal technologies and third party surveillance systems become increasingly embedded in jobs, homes, and daily life, meaningful privacy choice is being eroded, rendering fragmented local regulation inadequate and reinforcing the need for federal FRT limitations.

While Project NOLA specifically came under scrutiny in the Washington Post for their FRT-enabled cameras in greater New Orleans violating local statute, the nonprofit operates nationwide, making the extension of the Carpenter Test to FRT critical for Fourth Amendment protection nationally.[360] Project NOLA uses its own funds to supply cameras to individuals and businesses that request them, only charging a $300-1900 annual cloud fee, with an additional $350 annual fee to "upgrade any Project

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[357] Luz Moreno-Lozano, *Austin Drops AI Surveillance Cameras From Consideration as Residents Raise Privacy Concerns*, AUSTIN MONITOR (Sept. 25, 2025), https://austinmonitor.com/stories/2025/09/austin-drops-ai-surveillance-cameras-from-consideration-as-residents-raise-privacy-concerns/.

[358] Douglas Macmillan, *These cities bar facial recognition tech. Police still found ways to access it.*, THE WASHINGTON POST, (May 18, 2024), https://www.washingtonpost.com/business/2024/05/18/facial-recognition-law-enforcement-austin-san-francisco/; Luz Moreno-Lozano, *supra* note 357; Bobby Allyn, *With no federal facial recognition law, states rush to fill void*, NPR (Aug. 28, 2025), https://www.npr.org/2025/08/28/nx-s1-5519756/biometrics-facial-recognition-laws-privacy; *Guide to State and Local Laws on Facial Recognition Technology*, SECURITY INDUSTRY ASSOCIATION (December 2025), https://www.securityindustry.org/report/guide-to-state-local-laws-on-facial-recognition-technology/.

[359] Gorin, *supra* note 281.

[360] MacMillan & Schaffer, *supra* note 271.

NOLA Crime Camera to automatically search" with FRT, using "powerful AI driven automated alerts" to alert government entities of targeted activity. This means that any U.S. private entity can sign up to purchase a Project NOLA camera, with the biometric and personal data collected by the surveillance network being automatically monitored by Project NOLA's Real Time Crime Center (RTCC) and available to the third party who hosts the camera.[361] Despite Project NOLA's RTCC managing this national camera network in its own capacity, the "crime camera initiative" was created by criminologist and former police officer Bryan Lagarde to "reduce crime by dramatically increasing police efficiency," demonstrating the third party's intention to aid law enforcement.[362] In making crime detection more efficient, Project NOLA's existence is rooted in its ability to circumvent requirements for police to establish probable cause. Even when the FRT data is processed by a third party, Project NOLA's collusion and intent to aid law enforcement makes Big Brother fears a reality in the Big Easy and beyond. Allowing Project NOLA and third-party FRT surveillance to operate nationwide by not federally restricting its use by law enforcement creates a legal loophole that enables the U.S. to operate as an unrestrained police surveillance state, a reality inherently in tension with constitutional protections against unreasonable search & seizure and civil liberties.

IV. CONCLUSION

Regardless of the specific regulations a Supreme Court decision directly addressing FRT would provide, any Fourth Amendment privacy case challenging FRT collection without a warrant under circumstances similar to *Carpenter* is essential to preventing unconstitutional search violations by law enforcement. While some municipal and state laws have addressed the privacy law innovation gap highlighted by 2011's *Carpenter* relative to 2025's scaled FRT deployment, this patchwork system does not protect all Americans from the constitutional inadequacies posed by automated facial recognition. The sheer volume and scope of data collected by mobile phones, surveillance cameras, and digital platforms render opting out of passive data sharing incompatible with participation in modern society, exemplifying the undue burden Third-Party Doctrine imposes when not extended to technology like FRT. Conditioning access to such information on a probable cause search warrant is fundamental to enforcing constitutional limits on government power and protecting the privacy and First Amendment civil liberties that depend on

[361] *Project N.O.L.A*, *supra* note 340.
[362] *Id.*

those limits. To solve the FRT privacy loophole, a court case that directly acknowledges the issue of law enforcement's FRT data collection without probable cause search warrants would need to come to trial, meaning the Fourth Amendment protection gap could take several years to become legally institutionalized.

While Fourth Amendment search protections do not extend to areas where information is in plain view (public spaces) or is voluntarily provided to a third party, the scope of daily physical movements collected by FRT and inescapability for New Orleans residents to avoid the 5,000 cameras placed in public spaces makes FRT qualify for the Carpenter Test exemption.[363] As emerging technologies become increasingly equipped with basic law-enforcement capabilities, such as AI's ability to analyze video footage and compare a videoed person's likeness to still images to determine an identity during a search, these technologies automate the search process to the point of violating the individual's Fourth Amendment right to privacy.

Project NOLA's use of facial recognition technology fails both the Carpenter Test and the consent foundation of the Third-Party Doctrine, placing its FRT law enforcement activities squarely outside of the Fourth Amendment's constitutional protections. Therefore, FRT-enhanced surveillance without the need for a probable cause warrant constitutes an unlawful expansion of police power—one that federal courts must curtail before it becomes a normalized feature of American policing.

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[363] MacMillan & Schaffer, *supra* note 271; Weatherholt, *supra* note 276, at 361.